

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2010 AUG 18 AM 10:28

Docket No. CAA-08-2010-0017

FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:)

METAL MANAGEMENT WEST, INC.)
3260 WEST 500 SOUTH)
SALT LAKE CITY, UTAH 84104)

Respondent.)

COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING

INTRODUCTION (JURISDICTION)

1. This civil administrative enforcement action is authorized by section 113(d)(1)(B) of the Clean Air Act (CAA), 42 U.S.C. § 7413(d) (1)(B). The rules governing this proceeding are the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits" (*Rules of Practice*), 40 C.F.R. part 22, a copy of which is enclosed (attached hereto as Exhibit 1).
2. The undersigned EPA officials have been properly delegated the authority to issue this action. *See* Regional Delegation 7-6-A, dated 12/20/1996 (attached hereto as Exhibit 2).
3. In this matter, the EPA's Administrator and the Attorney General of the United States, through authorized delegation, have jointly determined that this matter is appropriate for administrative penalty action. 42 U.S.C. § 7413(d)(1). (*See* Letter dated March 23, 2010 from Phillip A. Brooks, Director, Air Enforcement Division, U.S. EPA to Ignacia S. Moreno, Assistant Attorney General, U.S. Department of Justice, attached hereto as Exhibit 3; and Letter dated March 9, 2010 from Robert D. Brook, Assistant Chief, Environmental Enforcement Section, U.S. Department of Justice, to Andrew M. Gaydosh, Assistant Regional Administrator, U.S. EPA, Region 8, attached hereto as Exhibit 4).
4. Generally, and as set out and alleged specifically below, EPA alleges that Metal Management West, Inc., ("Respondent" or "MMWT") violated rules promulgated under subchapter VI, Stratospheric Ozone Protection, of the Clean Air Act (CAA). These rules are authorized by Section 608 of the CAA which is the National Recycling and Emission Reduction Program. Section 608 of the CAA is codified at 42 U.S.C. § 7671. The rules implementing the National Recycling and Emission Reduction Program are codified at 40 C.F.R. Part 82, Subpart F.

5. Generally, EPA alleges Respondent violated the CAA by failing to meet “required practices” with respect to the disposal of appliances and small appliances by either performing or verifying prior refrigerant recovery from such appliances and small appliances. The CAA authorizes the assessment of a civil penalty for violations of subchapter VI the CAA and any rule promulgated under subchapter VI. Section 113(d)(1)(B) of the CAA, 42 U.S.C. § 7413(d)(1)(B), and 40 C.F.R. Part 19.

NOTICE OF OPPORTUNITY FOR A HEARING

6. Respondent has the right to a public hearing before an administrative law judge (ALJ) to disagree with (1) any fact stated (alleged) by EPA in the complaint, or (2) the appropriateness of the proposed penalty.
7. To disagree with the complaint and assert your right to a hearing, Respondent must file a written answer (and one copy) with the Regional Hearing Clerk (1595 Wynkoop Street; Denver, Colorado 80202-1129) within 30 days of receiving this complaint. The answer must clearly admit, deny or explain the factual allegations of the complaint, the grounds for any defense, the facts you may dispute, and your specific request for a public hearing. *See* section 22.15 of the *Rules of Practice* for a complete description of what must be in your answer.

FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS MAY WAIVE RESPONDENT’S RIGHT TO DISAGREE WITH THE ALLEGATIONS OR PROPOSED PENALTY, AND RESULT IN A DEFAULT JUDGMENT AND ASSESSMENT OF THE PENALTY PROPOSED IN THE COMPLAINT.

QUICK RESOLUTION

8. Respondent may resolve this proceeding at any time by paying the specific penalty of **\$616,305.00** proposed in this complaint. Such payment need not contain any response to, or admission of, the allegations in the Complaint. Such payment constitutes a waiver of respondent’s right to contest the allegations and to appeal the final order. *See* section 22.18 of the *Rules of Practice* for a full explanation of the quick resolution process. This payment shall be made by remitting a cashier’s or certified check for that amount, payable to “Treasurer, United States of America,” to:

Regular Mail

U. S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P. O. Box 979077
St. Louis, MO 63197-9000

or

Federal Express, Airborne, or other commercial carrier:

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101.

A copy of the check must be sent to the Regional Hearing Clerk and also to Dana J. Stotsky, Senior Enforcement Attorney, at the addresses provided below.

SETTLEMENT NEGOTIATIONS

9. EPA encourages discussing whether cases can be settled through informal settlement conferences. If you want to pursue the possibility of settling this matter, or have any other questions, contact Dana J. Stotsky, Esq., at 1-800-227-8917; extension 6905, or 303-312-6905, or the address below. *Please note that calling the attorney or requesting a settlement conference does NOT stay or extend the running of the 30 day period for filing an answer and requesting a hearing.*

DEFINITIONS AND REGULATORY EXCERPTS

10. The federal regulations provide in part as noted:
- i) The term “*appliance*” is defined by 40 C.F.R. § 82.152.3(a) as “any device which contains and uses a refrigerant and which is used for household or commercial purposes, including any air conditioner, refrigerator, chiller, or freezer.”
 - ii) The term “*small appliance*” is defined by 40 C.F.R. § 82.152.3(v) as any appliance that is fully manufactured, charged, and hermetically sealed in a factory with five (5) pounds or less of a class I or class II substance used as a refrigerant, including, but not limited to, refrigerators and freezers (designed for home, commercial, or consumer use), medical or industrial research refrigeration equipment, room air conditioners (including window air conditioners and packaged terminal air heat pumps), dehumidifiers, under-the-counter ice makers, vending machines, and drinking water coolers.
 - iii) The term “*disposal*” is defined by 40 C.F.R. § 82.152.3(e)(1) as the process leading to and including the discharge, deposit, dumping or placing of any discarded appliance into or on any land or water.
 - iv) The regulations specify “*Prohibitions*” for various activities associated with disposal:

(a)(1) Effective June 13, 2005, no person maintaining, servicing, repairing, or disposing of appliances may knowingly vent or otherwise release into the environment any refrigerant or substitute from such appliances, with the exception of the following substitutes in the following end-uses:

(2) The knowing release of a refrigerant or non-exempt substitute subsequent to its recovery from an appliance shall be considered a violation of this prohibition. De minimis releases associated with good faith attempts to recycle or recover refrigerants or non-exempt substitutes are not subject to this prohibition. Refrigerant releases shall be considered de minimis only if they occur when:

(i) The required practices set forth in § 82.156 are observed, recovery or recycling machines that meet the requirements set forth in § 82.158 are used, and the technician certification provisions set forth in § 82.161 are observed; or

(ii) The requirements set forth in subpart B of this part are observed. 40 C.F.R. § 82.154(a).

v) The regulations specify “*Required Practices*” for activities associated with disposal of appliances and small appliances:

(b) All persons opening appliances except for small appliances, MVACs, and MVAC-like appliances for maintenance, service, or repair and all persons disposing of appliances except small appliances, MVACs, and MVAC-like appliances must have at least one piece of certified, self-contained recovery or recycling equipment available at their place of business. Persons who maintain, service, repair, or dispose of only appliances that they own and that contain pump-out units are exempt from this requirement. This exemption does not relieve such persons from other applicable requirements of this section. 40 C.F.R. § 82.156(b).

.....

(f) Effective July 13, 1993, persons who take the final step in the disposal process (including but not limited to scrap recyclers and landfill operators) of a small appliance, room air conditioning, MVACs, or MVAC-like appliances must either:

(1) Recover any remaining refrigerant from the appliance in accordance with paragraph (g) or (h) of this section, as applicable; or

(2) Verify that the refrigerant has been evacuated from the

appliance or shipment of appliances previously. Such verification must include a signed statement from the person from whom the appliance or shipment of appliances is obtained that all refrigerant that had not leaked previously has been recovered from the appliance or shipment of appliances in accordance with paragraph (g) or (h) of this section, as applicable. This statement must include the name and address of the person who recovered the refrigerant and the date the refrigerant was recovered or a contract that refrigerant will be removed prior to delivery.

(3) Persons complying with paragraph (f)(2) of this section must notify suppliers of appliances that refrigerant must be properly removed before delivery of the items to the facility. The form of this notification may be warning signs, letters to suppliers, or other equivalent means. 40 C.F.R. § 82.156(b) and (f).

GENERAL ALLEGATIONS

At all times pertinent to this complaint, the following general allegations apply and are incorporated by this reference into Counts 1 through 180 of this Complaint:

11. EPA has jurisdiction of this matter under section 113 of the Clean Air Act, 42 U.S.C. section 7413 (FEDERAL ENFORCEMENT).
12. Respondent Metal Management West, Inc., is a Colorado corporation, registered on August 31, 1982 with the Colorado Secretary of State, who authorized it to do business for a perpetual term in the State of Colorado as a Colorado corporation. Respondent currently possesses the status of good standing with the Colorado Secretary of State.
13. Respondent registered on July 21, 1998 with the Utah Secretary of State, to operate as a foreign for-profit corporation in the State of Utah. Respondent currently possesses the status of good standing with the Utah Secretary of State.
14. Respondent, Metal Management West, Inc., located at 3260 West 500 South, Salt Lake City, UT 84104, is a "person" within the meaning of Section 302(e) of the CAA, 42 U.S.C. § 7602(e), and is therefore subject to regulation.
15. On September 13, 2006, EPA sent a CAA §114 Request for Information to Respondent. EPA received Respondent's Response on October 19, 2006. EPA then sent a Second Request on November 16, 2006. EPA received Respondent's second Response on January 16, 2006. EPA sent a Third Request on April 10, 2007. EPA received Respondent's Third Response on May 23, 2007.

Counts 1-20
(REFRIGERANT DISPOSAL WITHOUT
PRIOR RECOVERY OF REFRIGERANT OR
WITHOUT VERIFYING PRIOR RECOVERY)

16. On or about January 11, 2006, a shipment of approximately 32 relatively undamaged household or commercial refrigerators was received by Respondent from Wasatch Integrated Waste Management District.
17. The refrigerators identified in the preceding paragraph are either 'appliances' or 'small appliances' as those terms are defined in 40 C.F.R. § 82.152.3.
18. Respondent, as a person taking the final step in disposal, is required by rule to either perform or verify prior refrigerant removal before taking the final step in disposal.
19. On or about January 11, 2006, Respondent, without performing or verifying refrigerant removal, took the final step in disposal and disposed of or destroyed the 32 refrigerators identified in Paragraph 16 above.
20. Respondent, by failing to either perform or verify prior refrigerant removal before taking the final step in disposal as required by 40 C.F.R. § 82.156, and then disposing, or destroying, the 32 refrigerators identified in Paragraph 16 above, has engaged in conduct prohibited by regulation at least twenty times. 40 C.F.R. § 82.154(a).

Counts 21-180
(FAILURE TO PROPERLY VERIFY REFRIGERANT EVACUATION
FROM APPLIANCES AND MVACS DISPOSED OF
BETWEEN SEPTEMBER 14, 2005 AND SEPTEMBER 14, 2006.)

21. Under National Recycling and Emission Reduction Program (Program), a disposer who does not physically recover refrigerant from appliances must verify such refrigerant has been previously recovered before disposal. 40 C.F.R. § 82.156(f).
22. The required verification described in Paragraph 21 above must be accomplished by execution of a verification form which must include: 1) a signed statement from the person from whom the appliance(s) is/are obtained that all refrigerant has been recovered; 2) the name and address of person who performed the evacuation, and 3) the date the refrigerant was recovered. 40 C.F.R. § 82.156(f)(2).
23. Respondent used Purchase Records for the purpose of demonstrating compliance with Program requirements set out in Paragraphs 21 and 22 above, and concerning the period September 14, 2005 to September 14, 2006.

24. Respondent's Purchase Records form, referenced in Paragraph 23 above, failed to record required information, including the name and address of the person who performed the refrigerant removal and the date such removal was performed.
25. Respondent certified in its CAA Section 114 First Response letter: "it is estimated that the weekly volume (number) of appliances received and/or picked up by MMW is 180...The above figure does not include crushed hulks or crushed appliances".
26. Respondent certified in its first CAA Section 114 response letter: "...the vast majority of our suppliers (approximately 98%) are repeat customers".
27. Approximately 2% of Respondent's customers for the period September 14, 2005 to September 14, 2006 were one-time customers who used or executed Respondent's Purchase Records form, referenced in Paragraph 23 above.
28. On a weekly basis, for the period September 14, 2005 to September 14, 2006, Respondent received and/or picked up three to four appliances from one-time customers.
29. For the period September 14, 2005 to September 14, 2006, Respondent received and/or picked up approximately 160 appliances or small appliances from one-time customers, and then disposed of or destroyed these appliances or small appliances.
30. Respondent, by failing to verify prior refrigerant removal before taking the final step in disposal as required by 40 C.F.R. § 82.156, and then disposing, or destroying, at least 160 appliances or small appliances, has engaged in conduct prohibited by regulation at least one hundred sixty times. 40 C.F.R. § 82.154(a).

PROPOSED CIVIL PENALTY ASSESSMENT

The proposed civil penalty has been determined in accordance with Section 113(d)(1)(B) of the CAA, 42 U.S.C. § 7413(d)(1)(B). This section and 40 C.F.R. Part 19 authorize the assessment of a civil penalty of up to \$25,000 per day for each violation occurring on or before January 30, 1997; \$27,500 per day for each violation occurring between January 31, 1997, and March 15, 2004; \$32,500 per day for each violation occurring between March 16, 2004, and January 12, 2009; and \$37,500 per day for each violation occurring after January 12, 2009, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, § 4, 104 Stat. 890 (1990), 28 U.S.C. § 2461 (as amended) for each violation of the implementing regulations associated with the "Stratospheric Ozone Protection" requirements of Subchapter VI, Section 608 of the CAA, 42 U.S.C. § 7671g, occurring after March 15, 2004.

For purposes of determining the amount of any civil penalty to be assessed, Section 113(e)(1) of the CAA, 42 U.S.C. § 7413(e)(1), requires EPA to consider, in addition to such other factors as justice may require, the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply,

the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

To develop the proposed penalty in this Complaint, Complainant has considered the particular facts and circumstances of this case with specific reference to EPA's "Clean Air Act Stationary Source Civil Penalty Policy" dated October 25, 1991 ("General Penalty Policy" and attached hereto as Exhibit 5). EPA also considered Appendix X¹ to the General Penalty Policy (attached hereto as Exhibit 6). The General Penalty Policy provides guidance for determining the amount of civil penalties EPA will seek in pre-trial settlement of civil administrative actions under Section 113(d) of the CAA. Appendix X takes into account certain unique aspects of stratospheric ozone enforcement cases and provides separate guidance for determining "economic benefit" and "gravity" components of the proposed penalty. Adjustment factors are treated in accordance with the General Penalty Policy. The General Penalty Policy and Appendix X provide a rational, consistent and equitable calculation methodology for applying the statutory factors enumerated above to particular cases.

Based upon the facts alleged in this Complaint and upon the statutory factors enumerated above, as known to Complainant at this time, Complainant proposes that Respondent be assessed a penalty of **\$616,305** for the violations alleged in this Complaint. The Clean Air Act Penalty Policy and Complainant's Air Civil Penalty Worksheet are enclosed with this Complaint and incorporated herein. Complainant's Air Civil Penalty Worksheet is attached hereto as Exhibit 7. A summary of the proposed penalties per count in table form:

Count 1	\$32,500
Counts 2-20	\$133,642
Counts 21-180	\$450,163
TOTAL PENALTY	\$616,305

31. The ALJ is not bound by EPA's penalty policy or the penalty proposed by Complainant, and may assess a penalty greater than the proposed amount, up to the maximum amount authorized in the statute. In this case, the maximum would be substantially in excess of the proposed penalty assessment.

To discuss settlement or ask any questions you may have about this process, please contact Dana J. Stotsky, Senior Enforcement Attorney, at 1-800-227-8917; ext. 312-6905, or at the address below.

¹Appendix X is entitled "Clean Air Act Civil Penalty Policy for Violations of 40 C.F.R. Part 82, Subpart F: Maintenance, Service, Repair and Disposal of Appliances Containing Refrigerant" and dated June 1, 1994.

LIST OF EXHIBITS

1. *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits*, 40 C.F.R. part 22.
2. Regional Delegation 7-6-A, dated 12/20/1996.
3. Letter dated March 23, 2010 from Phillip A. Brooks, Director, Air Enforcement Division, U.S. EPA, to Ignacia S. Moreno, Assistant Attorney General, U.S. Department of Justice.
4. Letter dated March 9, 2010 from Robert D. Brook, Assistant Chief, Environmental Enforcement Section, U.S. Department of Justice, to Andrew M. Gaydosh, Assistant Regional Administrator, U.S. EPA, Region 8.
5. "Clean Air Act Stationary Source Civil Penalty Policy" dated October 25, 1991.
6. "Clean Air Act Civil Penalty Policy for Violations of 40 C.F.R. Part 82, Subpart F: Maintenance, Service, Repair and Disposal of Appliances Containing Refrigerant" dated June 1, 1994 (also known as "Appendix X").
7. Penalty Calculation Work Sheet

United States Environmental Protection Agency
Region 8, Office of Enforcement, Compliance
and Environmental Justice, Complainant
1595 Wynkoop Street (ENF-L)
Denver, CO 80202-1129

Date: 17 August 2010

By: Sharon J Kecker
for Andrew Michael Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice

Date: August 16, 2010

By: David Palko for DS
Dana J. Stotsky, Senior Enforcement Attorney
Legal Enforcement Program,
Office of Enforcement, Compliance and
Environmental Justice
Mail Code: 8ENF-L
U.S. EPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202-1146
Colorado Bar # 14717
Phone: (303) 312-6905
FAX: (303) 312-6953
stotsky.dana@epa.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of this COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING along with EXHIBITS 1 through 7, were hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wynkoop Street; Denver, Colorado 80202-1129, and that a true copy of the same was sent via Certified Mail, Postage Pre-Paid, to:

(Utah Registered Agent for Metal Management West, Inc.):

CT Corporation System
Registered Agent for
Metal Management West, Inc.
136 East South Temple, Suite 2100
Salt Lake City, Utah 84111

Date: 8/18/2010

By: Judith McTernan
Judith McTernan

Part 22: Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits

Subpart A_General

§ 22.01 Scope of these rules.

§ 22.02 Use of number and gender.

§ 22.03 Definitions.

§ 22.04 Powers and duties of the Environmental Appeals Board, the Regional Administrator, the Regional Judicial Officer, and the Presiding Officer; disqualification.

§ 22.05 Filing, service, and form of pleadings and documents.

§ 22.06 Filing and service of rulings, orders and decisions.

§ 22.07 Computation and extension of time.

§ 22.08 Ex parte discussion of proceeding.

§ 22.09 Examination of documents filed.

22.01 Scope of these rules.

(a) These rules of practice govern all adjudicatory proceedings for:

- (1) The assessment of any civil penalty conducted under section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act as amended (7 U.S.C. 1361(a));
- (2) The assessment of any administrative penalty under sections 113(d)(1), 205(c), 211(d) and 213(d) of the Clean Air Act, as amended (CAA) (42 U.S.C. 7413(d)(1), 7524(c),

CLEAN AIR ACT7-6-A. Administrative Enforcement Actions: Issuance of Complaints and Orders, and Signing of Consent Agreements, etc.1. AUTHORITY.

a. To make findings of violation, to issue notices of violation, to issue orders, to issue or withdraw complaints, to issue penalty orders, to issue administrative compliance orders, to give written notice of a proposed administrative penalty, to issue field citations, and to negotiate and confer with the alleged violator pursuant to the Clean Air Act (CAA), to sign consent agreements memorializing settlements between the Agency and respondents, and to compromise, modify or remit administrative penalties, except for new source review orders.

b. To determine jointly with the Attorney General in accordance with the CAA the circumstances under which a matter involving a larger penalty or longer period of violation is appropriate for administrative penalty action.

2. TO WHOM DELEGATED. Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice (ECEJ).

3. LIMITATIONS.

a. Once the alleged violator files an answer or fails to file an answer in the specified time period, the Regional Counsels or their designees will conduct all negotiations.

c. The Assistant Regional Administrator; Office of Enforcement, Compliance and Environmental Justice (ECEJ) or his/her designee must obtain the concurrence of the Assistant Administrator for Enforcement and Compliance Assurance or his/her designee before issuing the first three complaints and before signing the first three consent agreements in the administrative penalty program. In addition, the Assistant Regional Administrator or their designees must submit copies of all administrative complaints, all signed consent agreements and all penalty justification documentation to the Assistant Administrators for Enforcement and Compliance Assurance within 20 days from their issuance or signing. The Assistant Administrator for Enforcement and Compliance Assurance or his/her designees may issue guidance concerning headquarters oversight of the administrative penalty program.

d. The Assistant Administrator for Enforcement and Compliance Assurance may waive his/her consultation and concurrence requirements by memorandum.

CLEAN AIR ACT7-6-A. Administrative Enforcement Actions: Issuance of Complaints and Orders, and Signing of Consent Agreements, etc. (Cont'd)

e. The Assistant Administrator for Enforcement and Compliance Assurance must concur in any determination regarding the authority delegated under paragraph 1.b.

f. The Deputy Administrator may, based on the recommendation of the Assistant Administrator for Enforcement and Compliance Assurance or his/her designee, withdraw any authority delegated to the Regional Administrator or impose additional concurrence or consultation requirements on a case-by-case basis, based on a determination that a Region has failed to adequately follow or implement guidance and policies concerning the administrative penalty program.

4. REDELEGATION AUTHORITY. This authority may not be redelegated.

5. ADDITIONAL REFERENCES.

a. Sections 113(a), 113(d), 113(e) and 205(c) of the Clean Air Act.

b. Emergency administrative orders are covered by the Delegation 7-49, "Emergency Administrative Powers."

c. Section 113(a)(5) new source review orders are covered by the Delegation 7-37, "Administrative Enforcement Actions: New Source Review Orders."

d. The Agency official who signed the complaint should sign the consent agreements.

J. McGowan

Regional Administrator

DEC 20 1996

Date



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Exhibit 3

MAR 23 2009

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

The Honorable Ignacia S. Moreno
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7415
Washington, DC 20044-7415

Attn: Peggy Fenlon-Gore, Chief
Case Management Unit - ENRD/EES
Room 6009

RE: Section 113(d)(1) of the Clean Air Act, for a waiver of the twelve-month and monetary limitations on EPA's authority to initiate an administrative case (Region 8, Metal Management, Inc., Salt Lake City, Utah)

Dear Ms. Moreno:

By this letter, the Air Enforcement Division of the United States Environmental Protection Agency's (EPA) Office of Enforcement and Compliance Assurance concurs with, and joins, EPA Region 8 in its request that a waiver of the twelve-month and monetary limitations on EPA's authority to issue an administrative penalty order be granted in the above-referenced matter. EPA's authority to issue administrative penalty orders is limited to matters in which the total penalty sought does not exceed \$295,000 and the first alleged date of violation occurred no more than twelve months prior to the initiation of the administrative action.¹

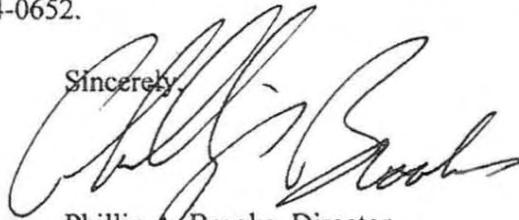
¹See CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1) (limiting the Administrator's authority to \$200,000 in penalties and no more than 12 months); Civil Monetary Penalty Inflation Adjustment Rule, 73 Fed. Reg. 75340, 75345 (Dec. 11, 2008) (increasing administrative penalty cap to \$295,000 effective Jan. 12, 2009, pursuant to Federal Civil Penalties Inflation Adjustment Act, 28 U.S.C. § 2461 note (2004), and Debt Collection Improvement Act, 31 U.S.C. § 3701 note (2004)).

However, these limitations may be waived "where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action." Clean Air Act § 113(d)(1), 42 U.S.C. § 7413(d)(1).

For the reasons set forth in the enclosed enforcement sensitive memorandum, EPA believes that an administrative penalty order would be an appropriate enforcement response in this case. We would very much appreciate your expeditious handling of this matter.

If you have any questions or need further information regarding this matter, please do not hesitate to contact me at 202-564-0652.

Sincerely,

A handwritten signature in black ink, appearing to read "Phillip A. Brooks". The signature is fluid and cursive, with a large initial "P" and "B".

Phillip A. Brooks, Director
Air Enforcement Division

Enclosure

cc: Matthew Dehart, R8
Cynthia Reynolds, R8
Mike Risner, R8
Dana Stotsky, R8
Robert Brook, DOJ

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

1595 Wynkoop Street
DENVER, CO 80202-1129
Phone 800-227-8917
<http://www.epa.gov/region08>

Ref: 8FNF-L

Ignacia S. Moreno
Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division
P.O. Box 7611
Washington D.C. 20044-7611

Re: Withdrawal of Metal Management, Inc.
Civil Judicial Referral *and* Request for a
Waiver on Limitation of Administrative
Actions under Section 113(d)(1)(C) of the
Clean Air Act, 42 U.S.C. Section
7413(d)(1)(C).

Dear Ms. Moreno:

The United States Environmental Protection Agency Region 8 (Region 8) respectfully withdraws its request to the Department of Justice to initiate a civil action against the Metal Management, Inc., located in Salt Lake City, Utah. Relatedly, Region 8 requests a waiver from the Department, as required by Section 113(d)(1)(C) of the Clean Air Act, to pursue claims through an administrative action against Metal Management Inc. Region 8 referred the matter in December, 2007, against Metal Management, Inc., for violations of the National Recycling and Emission Reduction Program, found in Section 608 of the Clean Air Act, 42 U.S.C. § 7671, (implementing regulations codified at 40 C.F.R. Part 82, Subpart F). The enforcement team prepared to litigate these violations and engaged in ultimately unproductive settlement negotiations with the Defendant. Since then, given changes in Agency personnel assigned to the matter and additional resource demands, Region 8 has determined not to pursue this matter through the civil judicial process.

Region 8 proposes to pursue the general corpus of claims contained in the referral through administrative action should the Department grant the requested waiver. This administrative action should result in government resource efficiencies, while protecting the environment and obtaining compliance with stratospheric ozone protection requirements.

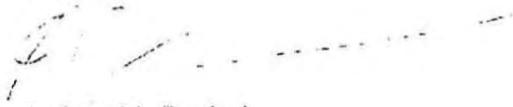
Section 113(d)(1)(C) of the Act states, in relevant part:

Regarding the requested waiver, the Administrator's authority under this paragraph shall be limited to matters where the total penalty sought does not

exceed \$200,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action. Any such determination by the Administrator and the Attorney General shall not be subject to judicial review.

Therefore, Region 8 requests a waiver of the 12-month statutory limitation on the Environmental Protection Agency's (EPA's) authority to initiate an administrative action pursuant to the Clean Air Act, 42 U.S.C. Section 7413(d). The violations observed involve failure to properly verify refrigerant removal by Defendant, as required by 40 C.F.R. Part 82, Subpart F. This proposed administrative action is penalty only; no injunctive relief is being contemplated or sought. EPA considers this case suitable for administrative action since the entire matter consists of a penalty action. While this relief is vital to the regulatory scheme, it may not justify the additional resources required to pursue the cases judicially. Also, Region 8 requests a waiver of the penalty limitation of \$295,000.

Sincerely,


Andrew M. Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice

cc:

Bob Brook, U.S. Department of Justice
Robert Homiak, U.S. Department of Justice
Cynthia Giles, EPA Office of Enforcement and Compliance Assurance
Pam Mazakas, Acting Division Director, Air Enforcement Division, OECA
Mike Risner, EPA Region 8
Dana Stotsky, EPA Region 8
Cindy Reynolds, EPA Region 8
Matthew Dehart, EPA Region 8
Jeffrey Kimes, EPA Region 8





U.S. Department of Justice

Environment and Natural Resources Division

90-7-1-09391/1

Environmental Enforcement Section
P.O. Box 7611
Washington, D.C. 20044

Telephone (202)514-2738
Facsimile (202)616-6583

March 9, 2010

Andrew M. ("Mike") Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice
U.S. EPA, Region 8
1595 Wynkoop St.
Denver, CO. 80202

Re: Authorization to Proceed Administratively Against Metal
Metal Management, Inc. (Salt Lake City, Utah)

Dear Mike:

This is in response to your letter of December 10, 2009, in which you request waivers pursuant to Section 113(d) of the Clean Air Act of the 12 month limitation on commencement of administrative enforcement proceedings and the administrative penalty limitation of \$200,000. The Department of Justice agrees that this matter is appropriate for administrative enforcement, and it concurs with the requested waivers.

If you have any questions, please call Bob Homiak or myself.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Brook", written over a horizontal line.

Robert D. Brook
Assistant Chief

cc: Pam Mazakas, EPA OECA

1st Page only

Exhibit 5

CLEAN AIR ACT
STATIONARY SOURCE CIVIL PENALTY POLICY
OCTOBER 25, 1991

APPENDIX X

CLEAN AIR ACT CIVIL PENALTY POLICY FOR VIOLATIONS OF
40 C.F.R. PART 82, SUBPART F: MAINTENANCE, SERVICE,
REPAIR, AND DISPOSAL OF APPLIANCES CONTAINING REFRIGERANT
June 1, 1994

INTRODUCTION

Purpose

This appendix provides guidance for calculating the civil penalties EPA will require in pre-trial settlement of judicial enforcement actions, as well as the pleading and settlement of administrative enforcement actions.

Scope

This appendix is to be used pursuant to Sections 113(b) and (d) for violations of Section 608 of the Clean Air Act ("Act" or "CAA"), as amended, and 40 C.F.R. Part 82, Subpart F.

Usage

This appendix should be used in conjunction with the Stationary Source Civil Penalty Policy to determine a preliminary deterrence amount, which is the sum of the economic benefit accruing from noncompliance and the gravity component reflecting the seriousness of the violation.

This appendix is to be used for settlement purposes in civil judicial cases involving violations of Section 608, but EPA retains the discretion to seek the full statutory maximum penalty in all civil judicial cases that do not settle. In addition, for administrative penalty cases, the appendix is to be used in conjunction with the Stationary Source Civil Penalty Policy to determine an appropriate penalty to be pled in the administrative complaint, as well as serving as guidance for settlement amounts in such cases. As the Stationary Source Civil Penalty Policy indicates, for administrative penalty cases under Section 113(d)(1), the Region should plead the penalty calculated under this policy, using the most aggressive assumptions supportable, in its complaint.

Persons Liable

Any "person" as defined in the Act and in the Section 608 regulations may be held liable for violations of Section 608. For example, all "persons" owning and/or operating a facility subject to the provisions of the Act, and any employees of such a facility, are legally responsible for complying with Section 608

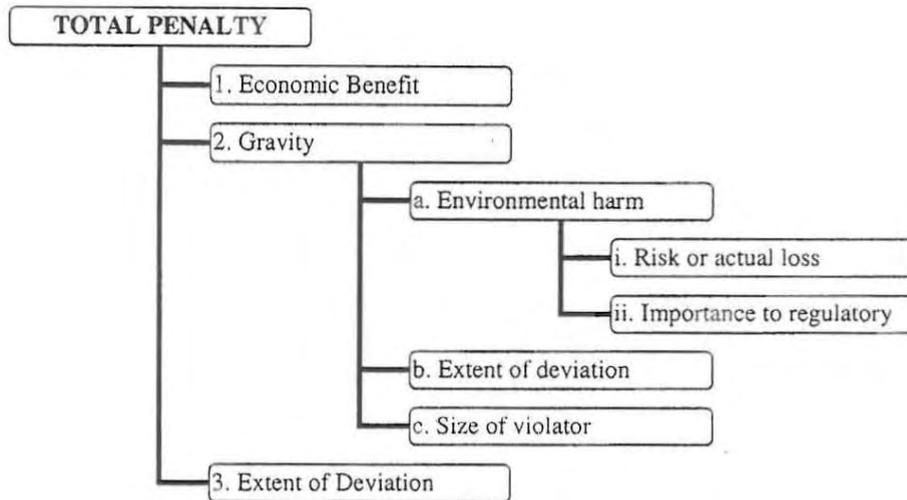
COMPLAINANT'S STATEMENT
AS TO DETERMINATION OF PROPOSED PENALTY,
IN THE MATTER OF: Metal Management West, Inc.

Proposed Penalty = \$616,305

Economic Benefit = \$0
Count 1 (40 C.F.R. § 82.156(f)) = \$32,500
Count 2-20 (40 C.F.R. § 82.156(f)) = \$133,642
Count 21-180 (40 C.F.R. § 82.156(f)) = \$450,163

1. **Consistency:** To ensure uniform and consistent enforcement response and application of the statutory penalty criteria in the Clean Air Act ("CAA"), EPA developed the "Clean Air Act Stationary Civil Penalty Policy" (the "General Penalty Policy"), dated October 25, 1991. The General Penalty Policy provides guidance for determining the amount of civil penalties EPA will seek in pre-trial settlement of civil administrative actions under Section 113(d) of the CAA. Appendix X to the General Penalty Policy, entitled "Clean Air Act Civil Penalty Policy for Violations of 40 C.F.R. Part 82, Subpart F: Maintenance, Service, Repair and Disposal of Appliances Containing Refrigerant" June 1, 1994 ("Appendix X"), takes into account certain unique aspects of stratospheric ozone enforcement cases and provides separate guidance for determining Economic Benefit and Gravity components of the penalty. Adjustment factors are to be treated in accordance with the General Penalty Policy.
2. **DCIA Factor:** For violations occurring after March 15, 2004, Section 113(d)(1)(B) of the CAA, 42 U.S.C. § 7413(d)(1)(B), and 40 C.F.R. Part 19 authorize the assessment of a civil administrative penalty up to thirty-two thousand five hundred dollars (\$32,500) per day for each violation of the "Stratospheric Ozone Protection" provisions of the CAA. Based on the September 21, 2004 memo from Thomas Skinner, Acting Assistant Administrator, EPA Office of Enforcement, violations occurring after March 15, 2004 should be adjusted for inflation according to the Debt Collection Improvement Act of 1996. For those violations occurring after this date an upward adjustment of 17.23% should be applied to the gravity component of the penalty.
3. **Violations:** In the complaint in this matter, EPA alleges 180 counts:
 - a. 180 counts are determined based on:
 - i. MMW in its first 114 response letter stated "it is estimated that the weekly volume (number) of appliances received and/or picked up by MMW is 180...The above figure does not include crushed hulks or crushed appliances".

1. 180 appliances/week x 50 weeks/year = 9,000 (appl./yr.)
 - a. Assuming facility is closed for two weeks each year for holidays.
 - ii. MMW in its first 114 response stated "...the vast majority of our suppliers (approximately 98%) are repeat customers" therefore the remaining 2% were one time suppliers.
 1. 9,000 (appl./yr) x 0.02 = 180 (appl./yr.) supplied by one time customers.
 - b. MMW accepted 20 appliances from Wasatch Waste Management District before they were properly evacuated. MMW disposed of the appliances without recovering the refrigerant or verifying that it had been removed.
 - c. MMW's one time customer purchase records fail to comply with the regulatory requirements set out in § 608 of the Clean Air Act. First, the statement intended to certify the refrigerant has been recovered is embedded in a paragraph of size 5 font with a title that seems to apply only to the weight master. What is more, the statement itself defies logic: the statement asks the customer to verify that it has recovered the refrigerant that already leaked into the atmosphere. Second, the form does not have any place to put name and address of the person who performed the evacuation. Third, although there is a date on the form, it is the date of shipment or drop-off of the scrap metal, not the date the refrigerant was evacuated.
 - d. From the information above it is determined that 180 appliances per year were accepted from one time suppliers, and therefore were accepted without proper refrigerant recovery, or recovery verification.
 - e. **Counts 1-180:** Respondent took the final step in the disposal process (including but not limited to scrap recyclers and landfill operators) of small appliances (refrigerators) without either:
 - i. Recovering any remaining refrigerant from the appliance; or
 - ii. Verifying that the refrigerant had been evacuated from the appliance or shipment of appliances previously.
4. **Penalty Calculation:** The penalty calculated in the Complaint was calculated as follows:



Economic Benefit:

The Penalty Policy recommends including any economic benefit over \$500 for penalties involving violations of 40 C.F.R. Part 82 subpart F.

Total Economic Benefit: \$0

Gravity Component:

The gravity component is comprised of three elements: (1) the potential environmental harm resulting from the violations, (2) the extent of deviation from the statutory or regulatory scheme, and (3) the size of violator.

a. Potential for Environmental Harm

Potential for environmental harm is based on two factors: (1) the risk of or actual loss of refrigerant to the environment; (2) the importance of compliance to the statutory or regulatory scheme.

In Counts 1-20 there was a failure to follow the required practices in 40 C.F.R. § 82.156(f). The information provided by Wasatch and MMW provide substantial evidence of MMW accepting and disposing of 20 appliances containing refrigerant. Appendix X in the CAA Penalty Policy categorizes this as a “substantial risk of actual loss of refrigerant to the environment”, and is therefore determined to be a Major potential for environmental harm. The Penalty Policy lists “Failure to follow required practices in § 82.156” as Major.

Potential for Environmental Harm (counts 1-20) = Major

In Counts 21-180 the violations pose a “significant risk of actual loss of refrigerant to the environment”. This reduced potential for environmental harm is determined because the condition and type of appliances are not as well known, and are therefore determined to be a reduced risk of venting.

Potential for Environmental Harm (21-180) = Moderate

b. Extent of Deviation

The extent of deviation from the statute and implementing regulations relates to the degree to which the violation defeats the requirement violated.

For **Counts 1-20** the Penalty Policy states if the Respondent “deviates from the requirements of 40 C.F.R. § 82.156(f) to such an extent that most of the requirements are not met”. Then the extent of the deviation is considered major. **Extent of Deviation = Major**

In **Counts 21-180** the Respondent deviated significantly from the requirements. This determination is based on the Respondent adhering to some of the requirements when it had the appliance suppliers sign an inadequate verification statement.

Extent of Deviation = Moderate

Count 1 = \$15,000

(Potential Environmental Harm = Major; Deviation = Major)

Matrix 1:

Extent of Deviation from Requirement

	Major	Moderate	Minor
Potential for Harm			
Major	\$15,000	\$12,000	\$10,000
Moderate	\$9,000	\$7,000	\$4,000
Minor	\$3,000	\$1,500	\$750

Count 2-20 = \$3,000

(Potential Environmental Harm = Major; Deviation = Major)

Matrix 2:

Extent of Deviation from Requirement

	Major	Moderate	Minor
Potential for Harm			
Major	\$3,000	\$2,500	\$2,000
Moderate	\$1,800	\$1,200	\$800
Minor	\$600	\$300	\$100

Counts 21-180 = \$1,200

(Potential Environmental Harm = Moderate; Deviation = Moderate)

Matrix 2:

		Extent of Deviation from Requirement		
		Major	Moderate	Minor
Potential for Harm	Major	\$3,000	\$2,500	\$2,000
	Moderate	\$1,800	\$1,200	\$800
	Minor	\$600	\$300	\$100

Size of Violator Adjustment = 2:

EPA will scale the penalty to the size of the violator's net worth. If the net worth is equal to \$300,000 (or gross revenues of \$1,000,000) the multiplier would equal 1. If the net worth of the company is less than or greater than \$300,000 (or gross revenues of less than or greater than \$1,000,000) EPA will divide the net worth by \$300,000 (or the gross revenues by \$1,000,000) to determine the multiplier not exceeding a multiplier of 2. (If EPA is unable to determine net worth, gross revenues from all revenue sources may be used from the prior calendar year.)

Estimated Gross Revenues (Reference USA) = \$20,000,000 - \$50,000,000
 $\$20,000,000 \div 1,000,000 = 20 \rightarrow$ (not to exceed 2) = 2

DCIA Adjustment = 17.23%:

DCIA Adjustment = Gravity x 1.1723

- Count 1 = $(\$15,000 \times 2) \times 1.1723 =$ \$32,500
- Count 2-20 = $(\$3,000 \times 19 \times 2) \times 1.1723 =$ \$133,642
- Count 21-180 = $(\$1,200 \times 160 \times 2) \times 1.1723 =$ \$450,163

TOTAL \$616,305