

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION I**

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ENV. PROG.
CLERK OF
HEARING

In the Matter of:

Cytec Industries Inc.
South Cherry Street
Wallingford, CT 06492

Respondent.

Docket No. CAA-01-2009-0024

**COMPLAINT and NOTICE OF
OPPORTUNITY FOR HEARING**

I. STATEMENT OF AUTHORITY

1. The United States Environmental Protection Agency ("EPA") issues this Administrative Complaint and Notice of Opportunity for Hearing to Cytec Industries Inc. ("Cytec" or "Respondent") under Section 113(d) of the Clean Air Act ("CAA"), 42 U.S.C. §7413(d), and 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 ("Consolidated Rules"), 40 C.F.R. Part 22.
2. This Complaint notifies Respondent that EPA intends to assess penalties for violations of Sections 111, 112, 114, and Title V of the CAA, and EPA's regulations at 40 Code of Federal Regulations ("C.F.R.") Part 60, Subpart Kb, and 40 C.F.R. Part 63, Subpart OOO. The Notice of Opportunity for Hearing describes Respondent's option to file an Answer to the Complaint and to request a formal hearing.

II. STATUTORY AND REGULATORY BASIS

3. Sections 113(a) and (d) of the CAA, 42 U.S.C. §§7413(a) and (d), provide for the assessment of penalties for violations of Sections 111, 112, 114, and Title V of the CAA, and of any regulations promulgated thereunder.

A. Subpart Kb Storage Vessel Regulations

4. Section 111 of the CAA, 42 U.S.C. §§7411, requires that EPA establish standards of performance for new sources of certain categories of stationary sources.

5. Pursuant to 40 C.F.R. §60.1, such standards of performance apply to the owner or operator of any stationary source that contains an affected facility, the construction or modification of which is commenced after the date of publication of any standard applicable to that facility.

6. Pursuant to Section 111 of the CAA, EPA promulgated *Standards of Performance for Volatile Organic Liquid Storage Vessels (Including Petroleum Liquid Storage Vessels) for Which Construction, Reconstruction, or Modification Commenced After July 23, 1984*, found at 40 C.F.R. Part 60, Subpart Kb (“NSPS Kb”).

7. The NSPS Kb regulations apply to the owner or operator of each storage vessel used to store volatile organic liquids that has a capacity greater than or equal to 40,000 gallons, a vapor pressure greater than or equal to 0.75 pounds per square inch (“ppsi”), but less than 11.1 ppsi, and was constructed, reconstructed or modified after July 23, 1984.

B. Federal Hazardous Air Pollutant Regulations

8. Section 112 of the CAA, 42 U.S.C. §7412, lists a number of hazardous air pollutants (“HAP” or “HAPs”) and requires EPA to establish national emissions standards for such pollutants.

9. Pursuant to 40 C.F.R. §63.1, the national emissions standards for HAPs apply to specific categories of stationary sources that emit or have the potential to emit one or more listed HAP.
10. Pursuant to Section 112 of the CAA, EPA promulgated the *National Emission Standards for Hazardous Air Pollutant Emissions: Manufacture of Amino/Phenolic Resins* (“Amino/Phenolic Resins NESHAP”), set forth in 40 C.F.R. Part 63, Subpart OOO (40 C.F.R. §§63.1400-63.1419).
11. The Amino/Phenolic Resins NESHAP establishes, among other things, requirements pertaining to the manufacturing operations for the production of amino/phenolic resins located at a plant site that is a major source of HAPs as defined in 40 C.F.R. §63.2.

C. Section 114 Reporting Requirements

12. Section 114(a)(1) of the Act, 42 U.S.C. §7414(a)(1), authorizes EPA to require any person who owns or operates any emission source to establish and maintain records, make reports, sample emissions, and provide such other information as may reasonably be required to enable EPA to determine compliance with the Act or any state implementation plan.

D. Title V Operating Permit

13. The CAA Amendments of 1990 require that each state develop a Title V operating permit program to permit major stationary sources of air pollution and other sources subject to federal CAA requirements.
14. The Connecticut Department of Environmental Protection (“CT DEP”) has established a Title V operating permit program to meet the federal requirement.
15. On January 4, 2005, the CT DEP issued a Title V Operating Permit (Permit No. 189-0139-TV) (the “Permit”) to Cytec’s facility located at South Cherry Street, Wallingford, CT (the “Facility”).

16. Under Section 502(a) of the CAA and 40 C.F.R. §70.7(b), it is unlawful to violate any requirement of a Title V operating permit. Further, the Permit provides that, unless otherwise specified, the conditions in Section III through VII of the Permit are enforceable by the Administrator of the EPA.

III. GENERAL ALLEGATIONS

17. Respondent is a Delaware corporation, with its principal place of business at Five Garret Mountain Plaza, West Paterson, New Jersey.

18. Respondent is a "person," as that term is defined in Section 302(e) of the CAA, 42 U.S.C. §7602(e).

19. Respondent owns and/or operates the Facility.

20. The Facility contains storage vessels that store methanol and n-Butanol distillate, which are volatile organic liquids. Such vessels have a capacity greater than or equal to 40,000 gallons, a vapor pressure greater than or equal to 0.75 ppsi, but less than 11.1 ppsi, and were constructed, reconstructed or modified after July 23, 1984.

21. The Facility is a "stationary source" that contains an "affected facility," as those terms are defined in 40 C.F.R. §60.2.

22. Respondent is subject to the requirements of NSPS Kb.

23. Among other things, the Facility contains or contained a batch process chemical manufacturing facility with two production lines that produce spray dried resins. These two production lines use and emit formaldehyde and methanol.

24. Formaldehyde and methanol are "hazardous air pollutants," as that term is defined in Section 112(a)(6) of the CAA, 42 U.S.C. §7412(a)(6).

25. The Facility is a “major source,” as that term is defined in Section 112(a)(1) of the CAA, 42 U.S.C. §7412(a)(1), and in 40 C.F.R. §63.2.
26. Respondent is the “owner or operator” of a “stationary source” as those terms are defined in Sections 112(a)(9) and (3) of the CAA, 42 U.S.C. §§7412(a)(9) and (3).
27. Respondent is the “owner or operator” of an “affected source,” as those terms are defined in 40 C.F.R. §63.2 and in 40 C.F.R. §63.1400(b).
28. Respondent is and/or was subject to the requirements of Amino/Phenolic Resins NESHAP.
29. The Facility is a “major stationary source,” as that term is defined in Section 302(j) of the CAA, 42 U.S.C. §7602(j).
30. The Facility is a “major source,” as that term is defined in Section 501(2) of the CAA, 42 U.S.C. §7661(2).
31. The Facility is subject to the Permit.
32. On June 12, 2007, EPA and CT DEP conducted a joint inspection of the Facility (the “Inspection”).
33. On December 5, 2007, EPA issued an Administrative Order and Reporting Requirement to Cytec to which Cytec responded on February 15, 2008.
34. On April 21, 2008, EPA issued a second Reporting Requirement to Cytec to which Cytec responded on May 6, 2008.
35. Based on the Inspection, Respondent’s responses to EPA’s Reporting Requirements, and other information, Complainant has identified the following violations at the Facility.

IV. VIOLATIONS

36. The foregoing paragraphs 1 through 35 are incorporated by reference, as if fully set forth herein.

COUNT I

37. Section III.I.3.a.x of the Permit and 40 C.F.R. §63.1410, which incorporates by reference the provisions of 40 C.F.R. §63.1033(b), require Respondent to equip each open-ended line with a cap, blind flange, plug, or second valve. Further, Permit Section III.I.3.a.x and 40 C.F.R. §63.1410 require that each cap, blind flange, plug, or second valve seal the open-end at all times, except during operations requiring process flow or during maintenance.

38. During the period from at least June 12, 2007 through approximately July 19, 2007, Respondent failed to keep at least one open-ended line closed at emission unit GEU-005 (as described in the Permit).

39. Accordingly, Respondent violated Section III.I.3 of the Permit, thereby violating Section 502(a) of the CAA and 40 C.F.R. §§70.7(b) and 63.1410.

COUNT II

40. Section III.I.3.b.vi of the Permit requires Respondent to maintain a list of open-ended valves or lines along with identification of the capping method employed.

41. During the period from at least June 12, 2007 through approximately July 19, 2007, Respondent failed to keep a list of open-ended valves or lines along with identification of the capping method employed.

42. Accordingly, Respondent violated Section III.I.3.b.vi of the Permit, thereby violating Section 502(a) of the CAA and 40 C.F.R. §70.7(b).

COUNT III

43. Section III.I.2 of the Permit and 40 C.F.R. §63.1406(a)(2) require Cytec to reduce total HAP emissions by at least 83%, or limit the total HAP emissions to less than 0.0000057 pounds per pound of

product for non-solvent based products or 0.0000567 pounds per pound of product for solvent based products, for each batch produced.

44. On at least 39 days between July 2005 and May 2007, Respondent's HAP emissions exceeded the applicable emissions limitation.

45. Accordingly, Respondent violated Section III.I.2 of the Permit, thereby violating Section 502(a) of the CAA and 40 C.F.R. §§70.7(b) and 63.1406(a)(2).

COUNT IV

46. Section III.I.2.a.i of the Permit and 40 C.F.R §§63.1415(a)(2) and (b)(3), for Kettles 63 and 64 (EU-R14-3 and R14-4, respectively), require Respondent to monitor condenser exit temperatures and verify proper operation of the condensers each day of use.

47. Section III.I.2.b.i of the Permit and 40 C.F.R §§63.1415(a)(2) and (b)(3), require Respondent to record condenser exit temperatures at Kettles 63 and 64 during kettle use once per day.

48. On at least eight days between August 2004 and May 2006, Respondent did not monitor, verify proper operation of the condenser, and/or did not record condenser exit temperatures for the condensers for Kettles 63 and 64.

49. Accordingly, Respondent violated Section III.I.2 of the Permit, thereby violating Section 502(a) of the CAA and 40 C.F.R §§70.7(b) and 63.1415(a)(2) and (b)(3).

COUNT V

50. Section 114(a)(1) of the Act, 42 U.S.C. §7414(a)(1), authorizes EPA to require any person who owns or operates any emission source to establish and maintain records, make reports, sample emissions, and provide such other information as may reasonably be required to enable EPA to determine compliance with the Act or any state implementation plan.

51. The December 5, 2007 Administrative Order and Reporting Requirement required Respondent to provide records of “Cytec’s initial and annual inspection of each storage vessel and closed vent system...from January 1, 2003 to the [date of response].”

52. By letter dated February 15, 2008, Respondent responded to EPA’s Reporting Requirement.

53. Pursuant to Section 114(a)(1) of the Act, 42 U.S.C. §7414(a)(1), EPA issued Cytec a Reporting Requirement letter dated April 21, 2008 (the “Reporting Requirement”). Cytec received the letter on or about April 23, 2008.

54. Paragraph 2.b.v of the Reporting Requirement required Respondent to provide “any other records for the past five years that relate to compliance with 40 CFR 60, Subpart Kb and Section IIIA of the Operating Permit.”

55. By letter dated May 6, 2008, Respondent provided a written response to EPA’s Reporting Requirement.

56. On November 12, 2008, in response to a written request from EPA dated November 6, 2008, Respondent submitted copies of preventative maintenance work order sheets that detail the maintenance of the scrubbers that control emissions from storage vessels number 511, 512, 551 and 561, which vessels are subject to NSPS Kb.

57. The work order sheets that Respondent provided on November 12, 2008 were not provided in Respondent’s February 15, 2008 response to EPA’s AO and Reporting Requirement, nor were such work order sheets provided in Respondent’s May 6, 2008 response to EPA’s Reporting Requirement.

58. Accordingly, Respondent failed to comply with EPA’s Reporting Requirements issued under Section 114(a)(1) of the CAA.

COUNT VI

59. The NSPS Kb regulations require that the owner or operation of each source equipped with a closed vent system and control device submit an operating plan to EPA for approval (the “Operating Plan”).

60. Pursuant to 40 C.F.R. §60.113b(c)(1)(i), the Operating Plan must contain documentation that the control device will achieve the required control efficiency. Pursuant to 40 C.F.R. §60.113b(c)(1)(ii), the Operating Plan also must describe the parameters to be monitored to ensure that the control device will be operated in conformance with its design and an explanation of the criteria used for selection of those parameters.

61. By letter dated February 15, 2008, Cytec provided a copy of its Operating Plan. Such Operating Plan failed to describe the parameters that Respondent actually monitored for several storage vessels subject to NSPS Kb. Such Operating Plan also lacked documentation demonstrating that the control device for such storage vessels will achieve the required control efficiency.

62. Accordingly, Respondent violated 40 C.F.R. §60.113b(c)(1)(i) and (ii) of the NSPS Kb regulations.

V. PROPOSED CIVIL PENALTY

63. Section 113(d)(1)(B) of the CAA, together with the Debt Collection and Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996), (“DCIA”) and the regulations promulgated thereunder at 40 C.F.R. Part 19, authorize the assessment of a civil administrative penalty of up to \$37,500 per day for each violation of the CAA. Section 113(e) of the CAA, 42 U.S.C. §7413(e), requires EPA to take into consideration various penalty assessment criteria, including 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, payment of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation. To apply these criteria, where applicable, EPA has used the “Clean Air Act Stationary Source Civil Penalty Policy,” dated October 25, 1991 (“Penalty Policy”), a copy of which is enclosed with this Complaint as Attachment 1.

64. Section 113(d) of the CAA limits EPA’s authority to issue administrative complaints to matters where the total penalty sought does not exceed \$200,000 and the first alleged date of violation occurred no more than twelve months prior to the initiation of the action, unless the EPA Administrator and the Attorney General for the U.S. Department of Justice (“DOJ”) jointly determine that a matter involving a larger penalty or occurring more than twelve months ago is appropriate for administrative action. Pursuant to the DCIA and its implementing regulations, the above-described penalty cap has been raised to \$270,000 for violations occurring after March 15, 2004, but before January 12, 2009.

65. This Complaint alleges violations that occurred more than twelve months ago and seeks a penalty that exceeds \$270,000. EPA and DOJ have jointly determined that this matter is appropriate for administrative action.

66. Based on the allegations above, and taking into consideration the penalty assessment criteria of Section 113(e), the Regional Administrator of EPA Region I proposes to assess Respondent a civil penalty of \$437,204. The calculation of the proposed penalty is described more fully in Attachment 2 to this Complaint.

67. Payment of the penalty may be made by cashier’s or certified check, payable to the “Treasurer, United States of America,” and mailed to:

U.S. EPA
Fines and Penalties

In re: Cytec Industries Inc./CAA Docket No. CAA-01-2009-0024

Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

The Complaint docket number (CAA-01-2009-0024) should be written on the check.

68. At the time of payment, Respondent shall send notice of such payment and copies of the checks to:

Ms. Wanda Santiago
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 1
One Congress Street, Suite 1100 (RAA)
Boston, Massachusetts 02114-2023

and

John W. Kilborn
Senior Enforcement Counsel
U.S. Environmental Protection Agency, Region 1
One Congress Street, Suite 1100 (RAA)
Boston, Massachusetts 02114-2023

VI. OPPORTUNITY TO REQUEST A HEARING

69. As provided by Section 113(d) of the CAA, Respondent has the right to request a formal hearing to contest any material fact set forth in this Complaint or to contest the appropriateness of the proposed penalty. Any such hearing will be conducted in accordance with the Consolidated Rules, 40 C.F.R. Part 22, a copy of which is enclosed with this Complaint, as Attachment 3.

70. To avoid being found in default, which constitutes an admission of all facts alleged in the Complaint and a waiver of the right to a hearing, and having the above-cited penalty assessed without further proceedings, Respondent must file a written Answer within thirty (30) days of Respondent's receipt of this Complaint. The Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with regard to which Respondent has any knowledge. If

In re: Cytec Industries Inc./CAA Docket No. CAA-01-2009-0024

Respondent has no knowledge of a particular fact and so states, the allegation is considered denied.

Failure to admit, deny, or explain an allegation constitutes an admission of that allegation. Respondent's

Answer must also state all arguments or circumstances that are alleged to constitute grounds for a

defense, as well as the facts that Respondent intends to place at issue. Further, the Answer must

specifically request an administrative hearing if such a hearing is desired. If Respondent denies any

material fact or raises any affirmative defense, Respondent will be considered to have requested a

hearing. The Answer must be sent to:

Ms. Wanda Santiago
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 1
One Congress Street, Suite 1100 (RAA)
Boston, Massachusetts 02114-2023

71. Respondent should also send a copy of the Answer and all other documents that Respondent files in this action to John W. Kilborn, who has been authorized to accept service on behalf of the Complainant, at:

John W. Kilborn
Senior Enforcement Counsel
U.S. Environmental Protection Agency, Region 1
One Congress Street, Suite 1100 (RAA)
Boston, MA 02114-2023

72. Instead of filing an Answer, Respondent may choose to pay the proposed penalty within 30 days after receiving the Complaint, or may file a statement with the Regional Hearing Clerk within 30 days of receiving the Complaint, stating that it agrees to pay the proposed penalty within 60 days of receipt of the Complaint. See 40 C.F.R. § 22.18(a).

VII. SETTLEMENT CONFERENCE

73. Whether or not Respondent requests a hearing, it may confer informally with EPA concerning the alleged violations or the amount of the proposed penalty. Respondent may wish to be represented by counsel at the informal settlement conference. If a settlement is reached, it will be finalized by the issuance of a written Consent Agreement and Final Order by the Regional Judicial Officer of EPA Region I. To explore the possibility of settlement in this matter, please contact John W. Kilborn, Senior Enforcement Counsel, at (617) 918-1893. Please note that a request for an informal settlement conference does not enlarge the 30-day period for the submission of a written Answer.

Susan Studlien
Susan Studlien
Director, Office of Environmental Stewardship
EPA Region I

Date: 02/13/09

Attachment 1: CAA Penalty Policy
Attachment 2: Calculation of Proposed Penalty
Attachment 3: Part 22 Consolidated Rules

Penalty Calculation Summary: for Cytec Industries, Inc.

(Docket No: CAA-01-2009-0024)

Proposed Penalty: \$437,204

Gravity w/o violator size	\$206,102
Violator Size	\$206,102
Violator Size	\$0
Inflation	\$412,204
Total Gravity	\$412,204
History of Noncompliance*	\$25,000
Proposed Penalty	\$437,204

Estimated Date of Filing	2/28/09
5 years back from date of Filing	2/28/04

Count	Violation Description Summary	Regulation(s)	Violation				Penalty				Inflation	Total	Comments
			Begin Date of Violation	Effective Begin Date of Violation (accounts for 5-year statute of limitations)	End Date of Violation	Total Duration of Violation (months)	Actual or Possible Harm (includes level of sensitivity to environment / toxicity of pollutant)	Importance to Regulatory Scheme	Duration Penalty	Pre-Inflation Total			
1	Failure to equip each open-ended line with a cap, blind flange, plug, or second valve. Failure to keep each cap, blind flange, plug, or second valve sealed at all times, except during operations requiring process flow or during maintenance.	Section III.1.3.a.x of the Operating Permit and 40 C.F.R. §63.1410, which incorporates by reference §63.1033(b)	1/20/03	2/28/04	7/19/07	41		\$15,000	\$5,000	\$20,000	\$5,741	\$25,741	Importance to Regulatory Scheme = \$15k Duration - Treat as a one month violation = \$5k
2	Failure to maintain a list of open-ended valves or lines along with identification of the capping method employed.	Section III.1.3.b.vi of the Operating Permit	1/20/03	2/28/04	7/19/07	41		\$15,000	\$5,000	\$20,000	\$5,741	\$25,741	Importance to Regulatory Scheme = \$15k Duration - Treat as a one month violation = \$5k
3	Failure to reduce total HAP emissions from Kettles 63 and 64 by at least 83%, or limit the total HAP emissions to less than 0.0057 kg of organic HAP per Mg of product for non-solvent based products or 0.0567 Kg of organic HAP per Mg of product for solvent based products for each batch produced.	Section III.1.2 of the Operating Permit and 40 C.F.R. §63.1406(a)(2)	7/19/05	7/19/05	5/14/07	22	\$20,000	\$15,000	\$15,000	\$50,000	\$14,475	\$64,475	Importance to Regulatory Scheme = \$15k Toxicity of Pollutant = \$15k Level of Violation = Cytex was at least 1-30% above the standard = \$5k Duration - 8 months of excess emissions between July 2005 and May 2007 = \$15k
4	Failure to Monitor the Kettle 63 and 64 condensers' exit temperatures and verify proper operation of the condensers each day of use. Failure to record Kettle 63 and 64 condenser temperatures during kettle use once per day.	Section III.1.2.a.i of the Operating Permit and 40 C.F.R. §63.1415(a)(2) and (b)(3) Section III.1.2.b.i of the Operating Permit and 40 C.F.R. §63.1415(a)(2)	3/12/03	2/28/04	5/25/06	27		\$15,000	\$8,000	\$23,000	\$6,573	\$29,573	Importance to Regulatory Scheme = \$15k Duration - 3 months of violations between August 2004 and May 2006 = \$8k
5	Failure to provide all records that relate to compliance with 40 C.F.R. Part 60, Subpart Kb as required by EPA's April 21, 2008 Reporting Requirement.	Section 114 of the Clean Air Act	5/10/08	5/10/08	11/12/08	6		\$15,000	\$12,000	\$27,000	\$7,817	\$34,817	Importance to the regulatory scheme = \$15k Duration - 6 month violation = \$12k
6	Failure of the Operating Plan for the NSPS Kb subject tanks 511, 512, and 551 to contain documentation that the control device will achieve the required control efficiency. Failure of the Operating Plan for the NSPS Kb subject tanks 511, 512, and 551 to contain the parameters to be monitored to ensure that the control device will be operated in conformance with its design and an explanation of the criteria used for selection of those parameters.	40 C.F.R. §60.113b(c)(1)(i) 40 C.F.R. §60.113b(c)(1)(ii)	7/23/84	2/28/04	12/17/08	58		\$15,000	\$5,000	\$20,000	\$5,755	\$25,755	Importance to the regulatory scheme = \$15k Duration - Treat as a one month violation = \$5k
												\$206,102	

Violence, all violations, estimates, all calculations are based on the data provided in the violation report. Source: CAA Section 114, October 25, 2008

Unless otherwise footnoted, all calculations are based on the Clean Air Act Stationary Source Civil Penalty Policy - October 25, 1991

*History of Noncompliance includes the following violations at the Wallingford facility: failure to conduct a boiler stack test (CT DEP NOV #15835); failure to comply with various financial assurance requirements regarding hazardous waste management (CT DEP Notice of Violation #NOVWSWDH06085), and violations of NPOES effluent limitations under the Clean Water Act.

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



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

OCT 25 1991

MEMORANDUM

SUBJECT: Clean Air Act Stationary Source Civil Penalty Policy

FROM: William G. Rosenberg *WGR*
Assistant Administrator for Air and Radiation

Edward E. Reich *EE*
Acting Assistant Administrator for Enforcement

TO: Addressees

Attached is the final revised Clean Air Act Stationary Source Civil Penalty Policy. This policy is immediately effective in all civil enforcement actions, administrative and judicial, in which a penalty offer has not yet been made to the defendant. Thank you for your comments on the draft policy.

Many Regions commented that some mitigation of the penalty amount pled in an administrative complaint should be allowed in appropriate circumstances. The policy now authorizes the gravity component of the penalty pled in administrative complaints to be mitigated by up to ten percent for degree of cooperation where consistent with the discussion of that factor at Section II.B.4.b. In all cases, administrative or judicial, total mitigation for degree of cooperation may not exceed thirty percent.

Many Regions commented that the increases in several of the gravity component factors (specifically, the size of the violator, the length of violation, and level of violation figures) were not appropriate and could prevent cases from being pursued administratively because the resulting penalty would be over the \$200,000 statutory cap. The penalty increases proposed in the draft revision have been retained because it was felt that an increase in penalty amounts was necessary due to inflation since 1987.

Several commenters suggested that the method for calculating multiple violations of the same reporting requirement discussed on page 14 was inappropriate and a separate penalty should be assessed for each violation. This comment was not incorporated out of concern that this approach would lead to unrealistically high penalties for notice violations.

A section describing the Agency's policy regarding apportionment of the penalty among multiple defendants was added in response to a comment. It is based on the position reflected in the Asbestos Demolition and Renovation Penalty Policy, Appendix III.

Most commenters were supportive of developing a new appendix for calculating the economic benefit of noncompliance for notice, recordkeeping, reporting, testing and compliance certification violations. OAR and OE will be developing such an appendix in the near future.

One commenter suggested that the adjustment factor for history of noncompliance should consider violations of all environmental statutes enforced by the Agency. The policy has been revised to require the litigation team to investigate and consider violations of all environmental statutes enforced by the Agency. Investigation of this multi-media compliance history may be done through Integrated Data for Enforcement Analysis developed by OE. OE has trained staff in all ten Regional Counsel offices on how to use this capability.

A suggestion was made that the policy allow offsets for penalties paid in state or local enforcement actions and in citizen suits for the same violations. This comment has been incorporated and the policy now gives the litigation team discretion to offset these penalties from the preliminary deterrence amount.

Several commenters suggested the policy should deal more specifically with the situation of defendants which are municipalities or government-owned, contractor-operated facilities. These are both issues which affect all media and will be considered by the Office of Enforcement for media-wide guidance.

This policy replaces the March 25, 1987 revision to the Clean Air Act Stationary Source Civil Penalty Policy and should be filed at Part E, Document # 30 of the Clean Air Act Compliance/Enforcement Policy Compendium. All appendixes to the policy remain in effect. If you have any questions regarding this policy, contact Scott Throwe, Stationary Source Compliance Division of OAR, FTS 398-8699 or (703) 308-8699, or Elise Hoerath, Air Enforcement Division of OE, FTS or (202) 260-2843.

Attachment

Addressees: Regional Administrators, Regions I - X
Regional Counsels, Regions I - X

Air Management Division Director
Region I

Air and Waste Management Division Director
Region II

Air, Toxics and Radiation Management Division
Director
Region III

Air, Pesticides and Toxics Management Division
Director
Region IV

Air and Radiation Division Director
Region V

Air, Pesticides and Toxics Division Director
Region VI

Air and Toxics Division Director
Regions VII, VIII, IX and X

Scott C. Fulton, Director
Office of Civil Enforcement

Michael S. Alushin, Enforcement Counsel
Air Enforcement Division

Frank M. Covington, Director
NEIC

John S. Seitz, Director
Office of Air Quality Planning and Standards

John Rasnic, Director
Stationary Source Compliance Division

Bruce Rothrock, OCAPO

Robert Heiss, OCAPO

Jonathan Libber, OCAPO

John Cruden, Chief
Environmental Enforcement Section
U.S. Department of Justice

Bill Becker, STAPPA-ALAPCO

CLEAN AIR ACT
STATIONARY SOURCE
CIVIL PENALTY POLICY

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CLEAN AIR ACT STATIONARY SOURCE CIVIL PENALTY POLICY

I. INTRODUCTION

Section 113(b) of the Clean Air Act, 42 U.S.C. § 7413(b), provides the Administrator of EPA with the authority to commence a civil action against certain violators to recover a civil penalty of up to \$25,000 per day per violation. Since July 8, 1980, EPA has sought the assessment of civil penalties for Clean Air Act violations under Section 113(b) based on the considerations listed in the statute and the guidance provided in the Civil Penalty Policy issued on that date.

On February 16, 1984, EPA issued the Policy on Civil Penalties (GM-21) and a Framework for Statute-Specific Approaches to Penalty Assessments (GM-22). The Policy focuses on the general philosophy behind the penalty program. The Framework provides guidance to each program on how to develop medium-specific penalty policies. The Air Enforcement program followed the Policy and the Framework in drafting the Clean Air Act Stationary Source Civil Penalty Policy, which was issued on September 12, 1984, and revised March 25, 1987. This policy amends the March 25, 1987 revision, incorporating EPA's further experience in calculating and negotiating penalties. This guidance document governs only stationary source violations of the Clean Air Act. All violations of Title II of the Act are governed by separate guidance.

The Act was amended on November 15, 1990, providing the Administrator with the authority to issue administrative penalty orders in Section 113(d), 42 U.S.C. § 7413(d). These penalty orders may assess penalties of up to \$25,000 per day of violation and are generally authorized in cases where the penalty sought is not over \$200,000 and the first alleged date of violation occurred no more than 12 months prior to initiation of the administrative action. In an effort to provide consistent application of the Agency's civil penalty authorities, this penalty policy will serve as the civil penalty guidance used in calculating administrative penalties under Section 113(d) of the Act and will be used in calculating a minimum settlement amount in civil judicial cases brought under Section 113(b) of the Act.

In calculating the penalty amount which should be sought in an administrative complaint, the economic benefit of noncompliance and a gravity component should be calculated under this penalty policy using the most aggressive assumptions supportable. Pleadings will always include the full economy benefit component. As a general rule, the gravity component of the penalty plead in administrative complaints may not be mitigated. However, the gravity component portion of the plead penalty may be mitigated by up to ten per cent solely for degree of cooperation. Any mitigation for this factor must be justified under Section II.B.4.b. of this Policy. The total mitigation for good faith efforts to comply for purpose of

determining a settlement amount may never exceed thirty per cent. Applicable adjustment factors which aggravate the penalty must be included in the amount plead in the administrative complaint. Where key financial or cost figures are not available, for example those costs involved in calculating the BEN calculation, the highest figures supportable should be used.

This policy will ensure the penalty plead in the complaint is never lower than any revised penalty calculated later based on more detailed information. It will also encourage sources to provide the litigation team with the more accurate cost or financial information. The penalty may then be recalculated during negotiations where justified under this policy to reflect any appropriate adjustment factors. In administrative cases, where the penalty is recalculated based upon information received in negotiations or the prehearing exchange, the administrative complaint must be amended to reflect the new amount if the case is going to or expected to go to hearing. This will ensure the complaint reflects the amount the government is prepared to justify at the hearing. This pleading policy also fulfills the obligation of 40 C.F.R. § 22.14(a)(5) that all administrative complaints include "a statement explaining the reasoning behind the proposed penalty."

This policy reflects the factors enumerated in Section 113(e) that the court (in Section 113(b) actions) and the Administrator (in Section 113(d) actions) shall take into consideration in the assessment of any penalty. These factors include: 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, payment by the violator of penalties assessed for the same violation, the economic benefit of noncompliance, the seriousness of the violation and such other factors as justice may require.

This document is not meant to control the penalty amount requested in judicial actions to enforce existing consent decrees.¹ In judicial cases, the use of this guidance is limited to pre-trial settlement of enforcement actions. In a trial, government attorneys may find it relevant and helpful to introduce a penalty calculated under this policy, as a point of reference in a demand for penalties. However, once a case goes to trial, government attorneys should demand a larger penalty than the minimum settlement figure as calculated under the policy.

¹ In these actions, EPA will normally seek the penalty amount dictated by the stipulated penalty provisions of the consent decree. If a consent decree contains no stipulated penalty provisions, the case development team should propose penalties suitable to vindicate the authority of the Court.

The general policy applies to most Clean Air Act violations. There are some types of violations, however, that have characteristics which make the use of the general policy inappropriate. These are treated in separate guidance, included as appendices. Appendix I covers violations of PSD/NSR permit requirements. Appendix II deals with the gravity component for vinyl chloride NESHAP violations. Appendix III covers the economic benefit and gravity components for asbestos NESHAP demolition and renovation violations. The general policy applies to violations of volatile organic compound regulations where the method of compliance involves installation of control equipment. Separate guidance is provided for VOC violators which comply through reformulation (Appendix IV). Appendix VI deals with the gravity component for volatile hazardous air pollutants violations. Appendix VII covers violations of the residential wood heaters NSPS regulations. Violations of the regulations to protect stratospheric ozone are covered in Appendix VIII. These appendices specify how the gravity component and/or economic benefit components will be calculated for these types of violations. Adjustment, aggravation or mitigation, of penalties calculated under any of the appendices is governed by this general penalty policy.

This penalty policy contains two components. First, it describes how to achieve the goal of deterrence through a penalty that removes the economic benefit of noncompliance and reflects the gravity of the violation. Second, it discusses adjustment factors applied so that a fair and equitable penalty will result. The litigation team² should calculate the full economic benefit and gravity components and then decide whether any of the adjustment factors applicable to either component are appropriate. The final penalty obtained should never be lower than the penalty calculated under this policy taking into account all appropriate adjustment factors including litigation risk and inability to pay.

All consent agreements should state that penalties paid pursuant to this penalty policy are not deductible for federal tax purposes under 28 U.S.C. § 162(f).

² With respect to civil judicial cases, the litigation team will consist of the Assistant Regional Counsel, the Office of Enforcement attorney, the Assistant United States Attorney, the Department of Justice attorney from the Environmental Enforcement Section, and EPA technical professionals assigned to the case. With respect to administrative cases, the litigation team will generally consist of the EPA technical professional and Assistant Regional Counsel assigned to the case. The recommendation of the litigation team must be unanimous. If a unanimous position cannot be reached, the matter should be escalated and a decision made by EPA and the Department of Justice managers, as required.

The procedures set out in this document are intended solely for the guidance of government personnel. They are not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with this policy and to change it at any time without public notice.

This penalty policy is effective immediately with respect to all cases in which the first penalty offer has not yet been transmitted to the opposing party.

II. THE PRELIMINARY DETERRENCE AMOUNT

The February 16, 1984, Policy on Civil Penalties establishes deterrence as an important goal of penalty assessment. More specifically, it says that any penalty should, at a minimum, remove any significant economic benefit resulting from noncompliance. In addition, it should include an amount beyond recovery of the economic benefit to reflect the seriousness of the violation. That portion of the penalty which recovers the economic benefit of noncompliance is referred to as the "economic benefit component;" that part of the penalty which reflects the seriousness of the violation is referred to as the "gravity component." When combined, these two components yield the "preliminary deterrence amount."

This section provides guidelines for calculating the economic benefit component and the gravity component. It will also discuss the limited circumstances which justify adjusting either component.

A. THE ECONOMIC BENEFIT COMPONENT

In order to ensure that penalties recover any significant economic benefit of noncompliance, it is necessary to have reliable methods to calculate that benefit. The existence of reliable methods also strengthens the Agency's position in both litigation and negotiation. This section sets out guidelines for computing the economic benefit component. It first addresses costs which are delayed by noncompliance. Then it addresses costs which are avoided completely by noncompliance. It also identifies issues to be considered when computing the economic benefit component for those violations where the benefit of noncompliance results from factors other than cost savings. The section concludes with a discussion of the limited circumstances where the economic benefit component may be mitigated.

1. Benefit from delayed costs

In many instances, the economic advantage to be derived from noncompliance is the ability to delay making the expenditures necessary to achieve compliance. For example, a facility which

fails to install a scrubber will eventually have to spend the money needed to install the scrubber in order to achieve compliance. But, by deferring these capital costs until EPA or a State takes an enforcement action, that facility has achieved an economic benefit. Among the types of violations which may result in savings from deferred cost are the following:

- Failure to install equipment needed to meet emission control standards.
- Failure to effect process changes needed to reduce pollution.
- Failure to test where the test still must be performed.
- Failure to install required monitoring equipment.

The economic benefit of delayed compliance should be computed using the "Methodology for Computing the Economic Benefit of Noncompliance," which is Technical Appendix A of the BEN User's Manual. This document provides a method for computing the economic benefit of noncompliance based on a detailed economic analysis. The method is a refined version of the method used in the previous Civil Penalty Policy issued July 8, 1980, for the Clean Water Act and the Clean Air Act. BEN is a computer program available to the Regions for performing the analysis. Questions concerning the BEN model should be directed to the Program Development and Training Branch in the Office of Enforcement, FTS 475-6777.

2. Benefit from avoided costs

Many types of violations enable a violator to avoid permanently certain costs associated with compliance. These include cost savings for:

- Disconnecting or failing to properly operate and maintain existing pollution control equipment (or other equipment if it affects pollution control).
- Failure to employ a sufficient number of adequately trained staff.
- Failure to establish or follow precautionary methods required by regulations or permits.
- Removal of pollution equipment resulting in process, operational, or maintenance savings.
- Failure to conduct a test which is no longer required.

- Disconnecting or failing to properly operate and maintain required monitoring equipment.
- Operation and maintenance of equipment that the violator failed to install.

The benefit from avoided costs must also be computed using methodology in Technical Appendix A of the BEN User's Manual.

The benefit from delayed and avoided costs is calculated together, using the BEN computer program, to arrive at an amount equal to the economic benefit of noncompliance for the period from the first provable date of violation until the date of compliance.

As noted above, the BEN model may be used to calculate only the economic benefit accruing to a violator through delay or avoidance of the costs of complying with applicable requirements of the Clean Air Act and its implementing regulations. There are instances in which the BEN methodology either cannot compute or will fail to capture the actual economic benefit of noncompliance. In those instances, it will be appropriate for the Agency to include in its penalty analysis a calculation of the economic benefit in a manner other than that provided for in the BEN methodology.

In some instances this may include calculating and including in the economic benefit component profits from illegal activities. An example would be a source operating without a preconstruction review permit under PSD/NSR regulations or without an operating permit under Title V. In such a case, an additional calculation would be performed to determine the present value of these illegal profits which would be added to the BEN calculation for the total economic benefit component. Care must be taken to account for the preassessed delayed or avoided costs included in the BEN calculation when calculating illegal profits. Otherwise, these costs could be assessed twice. The delayed or avoided costs already accounted for in the BEN calculation should be subtracted from any calculation of illegal profits.

3. Adjusting the Economic Benefit Component

As noted above, settling for an amount which does not recover the economic benefit of noncompliance can encourage people to wait until EPA or the State begins an enforcement action before complying. For this reason, it is general Agency policy not to adjust or mitigate this amount. There are three general circumstances (described below) in which mitigating the economic benefit component may be appropriate. However, in any individual case where the Agency decides to mitigate the economic benefit component, the litigation team must detail those reasons in the case file and in any memoranda accompanying the settlement.

Following are the limited circumstances in which EPA can mitigate the economic benefit component of the penalty:

- a. Economic benefit component involves insignificant amount

Assessing the economic benefit component and subsequent negotiations will often represent a substantial commitment of resources. Such a commitment may not be warranted in cases where the magnitude of the economic benefit component is not likely to be significant because it is not likely to have substantial financial impact on the violator. For this reason, the litigation team has the discretion not to seek the economic benefit component where it is less than \$5,000. In exercising that discretion, the litigation team should consider the following factors:

- Impact on violator: The likelihood that assessing the economic benefit component as part of the penalty will have a noticeable effect on the violator's competitive position or overall profits. If no such effect appears likely, the benefit component should probably not be pursued.
- The size of the gravity component: If the gravity component is relatively small, it may not provide a sufficient deterrent, by itself, to achieve the goals of this policy. In situations like this, the litigation team should insist on including the economic benefit component in order to develop an adequate penalty.

- b. Compelling public concerns

The Agency recognizes that there may be some instances where there are compelling public concerns that would not be served by taking a case to trial. In such instances, it may become necessary to consider mitigating the economic benefit component. This may be done only if it is absolutely necessary to preserve the countervailing public interests. Such settlement might be appropriate where the following circumstances occur:

- The economic benefit component may be mitigated where recovery would result in plant closings, bankruptcy, or other extreme financial burden, and there is an important public interest in allowing the firm to continue in business. Alternative payment plans, such as installment payments with interest, should be fully explored before resorting to this option. Otherwise, the Agency will give the perception that shirking one's environmental responsibilities is a way to keep a failing enterprise afloat. This exemption does not apply to situations where the plant was likely to close anyway, or where

there is a likelihood of continued harmful noncompliance.

The economic benefit component may also be mitigated in enforcement actions against nonprofit public entities, such as municipalities and publicly-owned utilities, where assessment threatens to disrupt continued provision of essential public services.

c. Concurrent Section 120 administrative action

EPA will not usually seek to recover the economic benefit of noncompliance from one violation under both a Section 113(b) civil judicial action or 113(d) civil administrative action and a Section 120 action. Therefore, if a Section 120 administrative action is pending or has been concluded against a source for a particular violation and an administrative or judicial penalty settlement amount is being calculated for the same violation, the economic benefit component need not include the period of noncompliance covered by the Section 120 administrative action.

In these cases, although the Agency will not usually seek double recovery, the litigation team should not automatically mitigate the economic benefit component by the amount assessed in the Section 120 administrative action. The Clean Air Act allows dual recovery of the economic benefit, and so each case must be considered on its individual merits. The Agency may mitigate the economic benefit component in the administrative or judicial action if the litigation team determines such a settlement is equitable and justifiable. The litigation team should consider in making this decision primarily whether the penalty calculated without the Section 120 noncompliance penalty is a sufficient deterrent.

B. THE GRAVITY COMPONENT

As noted above, the Policy on Civil Penalties specifies that a penalty, to achieve deterrence, should recover any economic benefit of noncompliance, and should also include an amount reflecting the seriousness of the violation. Section 113(e) instructs courts to take into consideration in setting the appropriate penalty amount several factors including the size of the business, the duration of the violation, and the seriousness of the violation. These factors are reflected in the "gravity component." This section of the policy establishes an approach to quantifying the gravity component.

Assigning a dollar figure to represent the gravity of the violation is a process which must, of necessity, involve the consideration of a variety of factors and circumstances. Linking the dollar amount of the gravity component to these objective factors is a useful way of insuring that violations of approximately equal seriousness are treated the same way. These

objective factors are designed to reflect those listed in Section 113(e) of the Act.

The specific objective factors in this civil penalty policy designed to measure the seriousness of the violation and reflect the considerations listed in the Clean Air Act are as follows:

- Actual or possible harm: This factor focuses on whether (and to what extent) the activity of the defendant actually resulted or was likely to result in the emission of a pollutant in violation of the level allowed by an applicable State Implementation Plan, federal regulation or permit.
- Importance to the regulatory scheme: This factor focuses on the importance of the requirement to achieving the goals of the Clean Air Act and its implementing regulations. For example, the NSPS regulations require owners and operators of new sources to conduct emissions testing and report the results within a certain time after start-up. If a source owner or operator does not report the test results, EPA would have no way of knowing whether that source is complying with NSPS emissions limits.
- Size of violator: The gravity component should be increased, in proportion to the size of the violator's business.

The assessment of the first gravity component factor listed above, actual or possible harm arising from a violation, is a complex matter. For purposes of determining how serious a given violation is, it is possible to distinguish violations based on certain considerations, including the following:

- Amount of pollutant: Adjustments based on the amount of the pollutant emitted are appropriate.
- Sensitivity of the environment: This factor focuses on where the violation occurred. For example, excessive emissions in a nonattainment area are usually more serious than excessive emissions in an attainment area.
- Toxicity of the pollutant: Violations involving toxic pollutants regulated by a National Emissions Standard for Hazardous Air Pollutants (NESHAP) or listed under Section 112(b)(1) of the Act are more serious and should result in larger penalties.

- The length of time a violation continues: Generally, the longer a violation continues uncorrected, the greater the risk of harm.
- Size of violator: A corporation's size is indicated by its stockholders' equity or "net worth." This value, which is calculated by adding the value of capital stock, capital surplus, and accumulated retained earnings, corresponds to the entry for "worth" in the Dun and Bradstreet reports for publicly traded corporations. The simpler bookkeeping methods employed by sole proprietorships and partnerships allow determination of their size on the basis of net current assets. Net current assets are calculated by subtracting current liabilities from current assets.

The following dollar amounts assigned to each factor should be added together to arrive at the total gravity component:

1. Actual or possible harm

a. Level of violation

<u>Percent Above Standard³</u>	<u>Dollar Amount</u>
1 - 30%	\$ 5,000
31 - 60%	10,000
61 - 90%	15,000
91 - 120%	20,000
121 - 150%	25,000
151 - 180%	30,000
181 - 210%	35,000
211 - 240%	40,000
241 - 270%	45,000
271 - 300%	50,000
over 300%	50,000 + \$5,000 for each 30% or fraction of 30% increment above the standard

This factor should be used only for violations of emissions standards. Ordinarily the highest documented level of violation should be used. If that level, in the opinion of the litigation team, is not representative of the period of violation, then a more representative level of violation may be used. This figure should be assessed for each emissions violation. For example, if a source which emits particulate matter is subject to both an opacity standard and a mass emission standard and is in violation of both standards, this figure should be assessed for both violations.

³ Compliance is equivalent to 0% above the emission standard.

b. Toxicity of the pollutant

Violations of NESHAPs emission standards not handled by a separate appendix and non-NESHAP emission violations involving pollutants listed in Section 112(b)(1) of the Clean Air Act Amendments of 1990*: \$15,000 for each hazardous air pollutant for which there is a violation.

c. Sensitivity of environment (for SIP and NSPS cases only).

The penalty amount selected should be based on the status of the air quality control district in question with respect to the pollutant involved in the violation.

1. Nonattainment Areas

i. Ozone:

Extreme	\$18,000
Severe	16,000
Serious	14,000
Moderate	12,000
Marginal	10,000

ii. Carbon Monoxide and Particulate Matter:

Serious	\$14,000
Moderate	12,000

iii. All Other Criteria Pollutants: \$10,000

2. Attainment area PSD Class I: \$ 10,000

3. Attainment area PSD Class II or III: \$ 5,000

d. Length of time of violation

To determine the length of time of violation for purposes of calculating a penalty under this policy, violations should be assumed to be continuous from the first provable date of violation until the source demonstrates compliance if there have been no significant process or operational changes. If the source has affirmative evidence, such as continuous emission monitoring data,

* An example of a non-NESHAP violation involving a hazardous air pollutant would be a violation of a volatile organic compound (VOC) standard in a State Implementation Plan involving a VOC contained in the Section 112(b)(1) list of pollutants for which no NESHAP has yet been promulgated.

to show that the violation was not continuous, appropriate adjustments should be made. In determining the length of violation, the litigation team should take full advantage of the presumption regarding continuous violation in Section 113(e)(2). This figure should be assessed separately for each violation, including procedural violations such as monitoring, recordkeeping and reporting violations. For example, if a source violated an emissions standard, a testing requirement, and a reporting requirement, three separate length of violation figures should be assessed, one for each of the three violations based on how long each was violated.

<u>Months</u>	<u>Dollars</u>
0 - 1	\$ 5,000
2 - 3	8,000
4 - 6	12,000
7 - 12	15,000
13 - 18	20,000
19 - 24	25,000
25 - 30	30,000
31 - 36	35,000
37 - 42	40,000
43 - 48	45,000
49 - 54	50,000
55 - 60	55,000

2. Importance to the regulatory scheme

The following violations are also very significant in the regulatory scheme and therefore require the assessment of the following penalties:

Work Practice Standard Violations:

- failure to perform a work practice requirement:
\$10,000-15,000
(See Appendix III for Asbestos NESHAP violations.)

Reporting and Notification Violations:

- failure to report or notify: \$15,000
- late report or notice: \$5,000
- incomplete report or notice: \$5,000 - \$15,000
(See Appendix III for Asbestos NESHAP violations.)

Recordkeeping Violations:

- failure to keep required records: \$15,000
- incomplete records: \$5,000 - \$15,000

Testing Violations:

- failure to conduct required performance testing or testing using an improper test method: \$15,000
- late performance test or performing a required test method using an incorrect procedure: \$5,000

Permitting Violations:

- failure to obtain an operating permit: \$15,000
- failure to pay permit fee: See Section 502(b)(3)(C)(ii) of the Act

Emission Control Equipment Violations:

- failure to operate and maintain control equipment required by the Clean Air Act, its implementing regulations or a permit: \$15,000
- intermittent or improper operation or maintenance of control equipment: \$5,000-15,000

Monitoring Violations:

- failure to install monitoring equipment required by the Clean Air Act, its implementing regulations or a permit: \$15,000
- late installation of required monitoring equipment: \$5,000
- failure to operate and maintain required monitoring equipment: \$15,000

Violations of Administrative Orders^a: \$15,000

Section 114 Requests for Information Violations:

- failure to respond: \$15,000
- incomplete response: \$5,000 - \$15,000

Compliance Certification Violations:

- failure to submit a certification: \$15,000
- late certifications: \$5,000
- incomplete certifications: \$5,000 - \$15,000

Violations of Permit Schedules of Compliance:

- failure to meet interim deadlines: \$5,000
- failure to submit progress reports: \$15,000
- incomplete progress reports: \$5,000 - \$15,000
- late progress reports: \$5,000

^a This figure should be assessed even if the violation of the administrative order is also a violation of another requirement of the Act, for example a NESHAP or NSPS requirement. In this situation, the figure for violation of the administrative order is in addition to appropriate penalties for violating the other requirement of the Act.

A penalty range is provided for work practice violations to allow Regions some discretion depending on the severity of the violation. Complete disregard of work practice requirements should be assessed the full \$15,000 penalty. Penalty ranges are provided for incomplete notices, reports, and recordkeeping to allow the Regions some discretion depending on the seriousness of the omissions and how critical they are to the regulatory program. If the source omits information in notices, reports or records which document the source's compliance status, this omission should be treated as a failure to meet the requirement and assessed \$15,000.

A late notice, report or test should be considered a failure to notify, report or test if the notice or report is submitted or the test is performed after the objective of the requirement is no longer served. For example, if a source is required to submit a notice of a test so that EPA may observe the test, a notice received after the test is performed would be considered a failure to notify.

Each separate violation under this section should be assessed the corresponding penalty. For example, a NSPS source may be required to notify EPA at startup and be subject to a separate quarterly reporting requirement thereafter. If the source fails to submit the initial start-up notice and violates the subsequent reporting requirement, then the source should be assessed \$15,000 under this section for each violation. In addition, a length of violation figure should be assessed for each violation based on how long each has been violated. Also, a figure reflecting the size of the violator should be assessed once for the case as a whole. If, however, the source violates the same reporting requirement over a period of time, for example by failing to submit quarterly reports for one year, the source should be assessed one \$15,000 penalty under this section for failure to submit a report. In addition, a length of violation figure of \$15,000 for 12 months of violation and a size of the violator figure should be assessed.

3. Size of the violator

Net worth (corporations); or net current assets (partnerships and sole proprietorships):

Under \$100,000	\$2,000
\$100,001 - \$1,000,000	5,000
1,000,001 - 5,000,000	10,000
5,000,001 - 20,000,000	20,000
20,000,001 - 40,000,000	35,000
40,000,001 - 70,000,000	50,000
70,000,001 - 100,000,000	70,000
Over 100,000,000	70,000 + \$25,000 for every additional \$30,000,000 or fraction thereof

In the case of a company with more than one facility, the size of the violator is determined based on the company's entire operation, not just the violating facility. With regard to parent and subsidiary corporations, only the size of the entity sued should be considered. Where the size of the violator figure represents over 50% of the total preliminary deterrence amount, the litigation team may reduce the size of the violator figure to 50% of the preliminary deterrence amount.

The process by which the gravity component was computed must be memorialized in the case file. Combining the economic benefit component with the gravity component yields the preliminary deterrence amount.

4. Adjusting the Gravity Component

The second goal of the Policy on Civil Penalties is the equitable treatment of the regulated community. One important mechanism for promoting equitable treatment is to include the economic benefit component discussed above in a civil penalty assessment. This approach prevents violators from benefitting economically from their noncompliance relative to parties which have complied with environmental requirements.

In addition, in order to promote equity, the system for penalty assessment must have enough flexibility to account for the unique facts of each case. Yet it still must produce consistent enough results to ensure similarly-situated violators are treated similarly. This is accomplished by identifying many of the legitimate differences between cases and providing guidelines for how to adjust the gravity component amount when those facts occur. The application of these adjustments to the gravity component prior to the commencement of negotiation yields the initial minimum settlement amount. During the course of negotiation, the litigation team may further adjust this figure based on new information learned during negotiations and discovery to yield the adjusted minimum settlement amount.

The purpose of this section is to establish adjustment factors which promote flexibility while maintaining national consistency. It sets guidelines for adjusting the gravity component which account for some factors that frequently distinguish different cases. Those factors are: degree of willfulness or negligence, degree of cooperation, history of noncompliance, and environmental damage. These adjustment factors apply only to the gravity component and not to the economic benefit component. Violators bear the burden of justifying mitigation adjustments they propose. The gravity component may be mitigated only for degree of

cooperation as specified in II.B.4.b. The gravity component may be aggravated by as much as 100% for the other factors discussed below: degree of willfulness or negligence, history of noncompliance, and environmental damage.

The litigation team is required to base any adjustment of the gravity component on the factors mentioned and to carefully document the reasons justifying its application in the particular case. The entire litigation team must agree to any adjustments to the preliminary deterrence amount. Members of the litigation team are responsible for ensuring their management also agrees with any adjustments to the penalty proposed by the litigation team.

a. Degree of Willfulness or Negligence

This factor may be used only to raise a penalty. The Clean Air Act is a strict liability statute for civil actions, so that willfulness, or lack thereof, is irrelevant to the determination of legal liability. However, this does not render the violator's willfulness or negligence irrelevant in assessing an appropriate penalty. Knowing or willful violations can give rise to criminal liability, and the lack of any negligence or willfulness would indicate that no addition to the penalty based on this factor is appropriate. Between these two extremes, the willfulness or negligence of the violator should be reflected in the amount of the penalty.

In assessing the degree of willfulness or negligence, all of the following points should be considered:

- The degree of control the violator had over the events constituting the violation.
- The foreseeability of the events constituting the violation.
- The level of sophistication within the industry in dealing with compliance issues or the accessibility of appropriate control technology (if this information is readily available). This should be balanced against the technology-forcing nature of the statute, where applicable.
- The extent to which the violator in fact knew of the legal requirement which was violated.

b. Degree of Cooperation

The degree of cooperation of the violator in remedying the violation is an appropriate factor to consider in adjusting the penalty. In some cases, this factor may justify aggravation of the

gravity component because the source is not making efforts to come into compliance and is negotiating with the agency in bad faith or refusing to negotiate. This factor may justify mitigation of the gravity component in the circumstances specified below where the violator institutes comprehensive corrective action after discovery of the violation. Prompt correction of violations will be encouraged if the violator clearly sees that it will be financially disadvantageous to litigate without remedying noncompliance. EPA expects all sources in violation to come into compliance expeditiously and to negotiate in good faith. Therefore, mitigation based on this factor is limited to no more than 30% of the gravity component and is allowed only in the following three situations:

1. Prompt reporting of noncompliance

The gravity component may be mitigated when a source promptly reports its noncompliance to EPA or the state or local air pollution control agency where there is no legal obligation to do so.

2. Prompt correction of environmental problems

The gravity component may also be mitigated where a source makes extraordinary efforts to avoid violating an imminent requirement or to come into compliance after learning of a violation. Such efforts may include paying for extra work shifts or a premium on a contract to have control equipment installed sooner or shutting down the facility until it is operating in compliance.

3. Cooperation during pre-filing investigation

Some mitigation may also be appropriate in instances where the defendant is cooperative during EPA's pre-filing investigation of the source's compliance status or a particular incident.

c. History of Noncompliance

This factor may be used only to raise a penalty. Evidence that a party has violated an environmental requirement before clearly indicates that the party was not deterred by a previous governmental enforcement response. Unless one of the violations was caused by factors entirely out of the control of the violator, the penalty should be increased. The litigation team should check for and consider prior violations under all environmental statutes enforced by the Agency in determining the amount of the adjustment to be made under this factor.

In determining the size of this adjustment, the litigation team should consider the following points:

- Similarity of the violation in question to prior violations.

- Time elapsed since the prior violation.
- The number of prior violations.
- Violator's response to prior violation(s) with regard to correcting the previous problem and attempts to avoid future violations.
- The extent to which the gravity component has already been increased due to a repeat violation. (For example, under the Asbestos Demolition and Renovation Penalty Policy in Appendix III.)

A violation should generally be considered "similar" if a previous enforcement response should have alerted the party to a particular type of compliance problem. Some facts indicating a "similar violation" are:

- Violation of the same permit.
- Violation of the same emissions standard.
- Violation at the same process points of a source.
- Violation of the same statutory or regulatory provision.
- A similar act or omission.

For purposes of this section, a "prior violation" includes any act or omission resulting in a State, local, or federal enforcement response (e.g., notice of violation, warning letter, administrative order, field citation, complaint, consent decree, consent agreement, or administrative and judicial order) under any environmental statute enforced by the Agency unless subsequently dismissed or withdrawn on the grounds that the party was not liable. It also includes any act or omission for which the violator has previously been given written notification, however informal, that the regulating agency believes a violation exists. In researching a defendant's compliance history, the litigation team should check to see if the defendant has been listed pursuant to Section 306 of the Act.

In the case of large corporations with many divisions or wholly-owned subsidiaries, it is sometimes difficult to determine whether a prior violation by the parent corporation should trigger the adjustments described in this section. New ownership often raises similar problems. In making this determination, the litigation team should ascertain who in the organization exercised or had authority to exercise control or oversight responsibility over the violative conduct. Where the parent corporation exercised or had authority to exercise control over the violative conduct,

the parent corporation's prior violations should be considered part of the subsidiary or division's compliance history.

In general, the litigation team should begin with the assumption that if the same corporation was involved, the adjustment for history of noncompliance should apply. In addition, the team should be wary of a party changing operations or shifting responsibility for compliance to different groups as a way of avoiding increased penalties. The Agency may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects, at best, a corporate-wide indifference to environmental protection. Consequently, the adjustment for history of noncompliance should apply unless the violator can demonstrate that the other violating corporate facilities are under totally independent control.

d. Environmental Damage

Although the gravity component already reflects the amount of environmental damage a violation causes, the litigation team may further increase the gravity component based on severe environmental damage. As calculated, the gravity component takes into account such factors as the toxicity of the pollutant, the attainment status of the area of violation, the length of time the violation continues, and the degree to which the source has exceeded an emission limit. However, there may be cases where the environmental damage caused by the violation is so severe that the gravity component alone is not a sufficient deterrent, for example, a significant release of a toxic air pollutant in a populated area. In these cases, aggravation of the gravity component may be warranted.

III. LITIGATION RISK

The preliminary deterrence amount, both economic benefit and gravity components, may be mitigated in appropriate circumstances based on litigation risk. Several types of litigation risk may be considered. For example, regardless of the type of violations a defendant has committed or a particular defendant's reprehensible conduct, EPA can never demand more in civil penalties than the statutory maximum (twenty-five thousand dollars per day per violation). In calculating the statutory maximum, the litigation team should assume continuous noncompliance from the first date of provable violation (taking into account the five year statute of limitations) to the final date of compliance where appropriate, fully utilizing the presumption of Section 113(e)(2). When the penalty policy yields an amount over the statutory maximum, the litigation team should propose an alternative penalty which must be concurred on by their respective management just like any other penalty.

Other examples of litigation risks would be evidentiary problems, or an indication from the court, mediator, or Administrative Law Judge during settlement negotiations that he or she is prepared to recommend a penalty below the minimum settlement amount. Mitigation based on these concerns should consider the specific facts, equities, evidentiary issues or legal problems pertaining to a particular case as well as the credibility of government witnesses.

Adverse legal precedent which the defendant argues is indistinguishable from the current enforcement action is also a valid litigation risk. Cases raising legal issues of first impression should be carefully chosen to present the issue fairly in a factual context the Agency is prepared to litigate. Consequently in such cases, penalties should generally not be mitigated due to the risk the court may rule against EPA. If an issue of first impression is litigated and EPA's position is upheld by the court, the mitigation was not justified. If EPA's position is not upheld, it is generally better that the issue be decided than to avoid resolution by accepting a low penalty. Mitigation based on litigation risk should be carefully documented and explained in particular detail. In judicial cases this should be done in coordination with the Department of Justice.

IV. ABILITY TO PAY

The Agency will generally not request penalties that are clearly beyond the means of the violator. Therefore, EPA should consider the ability to pay a penalty in adjusting the preliminary deterrence amount, both gravity component and economic benefit component. At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially-troubled business. EPA reserves the option, in appropriate circumstances, of seeking a penalty that might contribute to a company going out of business.

For example, it is unlikely that EPA would reduce a penalty where a facility refuses to correct a serious violation. The same could be said for a violator with a long history of previous violations. That long history would demonstrate that less severe measures are ineffective.

The litigation team should assess this factor after commencement of negotiations only if the source raises it as an issue and only if the source provides the necessary financial information to evaluate the source's claim. The source's ability to pay should be determined according to the December 16, 1986 Guidance on Determining a Violator's Ability to Pay a Civil Penalty (GM-56) along with any other appropriate means.

The burden to demonstrate inability to pay, as with the burden of demonstrating the presence of any other mitigating circumstances, rests on the defendant. If the violator fails to provide sufficient information, then the litigation team should disregard this factor in adjusting the penalty. The Office of Enforcement Policy has developed the capability to assist the Regions in determining a firm's ability to pay. This is done through the computer program, ABEL. If ABEL indicates that the source may have an inability to pay, a more detailed financial analysis verifying the ABEL results should be done prior to mitigating the penalty.

Consider delayed payment schedule with interest: When EPA determines that a violator cannot afford the penalty prescribed by this policy, the next step is to consider a delayed payment schedule with interest. Such a schedule might even be contingent upon an increase in sales or some other indicator of improved business. EPA's computer program, ABEL, can calculate a delayed payment amount for up to five years.

Consider straight penalty reductions as a last recourse: If this approach is necessary, the reasons for the litigation team's conclusion as to the size of the necessary reduction should be carefully documented in the case file.*

Consider joinder of a corporate violator's individual owners: This is appropriate if joinder is legally possible and justified under the circumstances. Joinder is not legally possible for SIP cases unless the prerequisite of Section 113 of the Clean Air Act has been met -- issuance of an NOV to the person.

Regardless of the Agency's determination of an appropriate penalty amount to pursue based on ability to pay considerations, the violator is always expected to comply with the law.

V. OFFSETTING PENALTIES PAID TO STATE AND LOCAL GOVERNMENTS OR CITIZEN GROUPS FOR THE SAME VIOLATIONS

Under Section 113(e)(1), the court in a civil judicial action or the Administrator in a civil administrative action must consider in assessing a penalty "payment by the violator of penalties previously assessed for the same violation." While EPA will not automatically subtract any penalty amount paid by a source to a State or local agency in an enforcement action or to a citizen

* If a firm fails to pay the agreed to penalty in a final administrative or judicial order, then the Agency must follow the procedures outlined in the February 6, 1990 Manual on Monitoring and Enforcing Administrative and Judicial Orders for collecting the penalty amount.

group in a citizen suit for the same violation that is the basis for EPA's enforcement action, the litigation team may do so if circumstances suggest that it is appropriate. The litigation team should consider primarily whether the remaining penalty is a sufficient deterrent.

VI. SUPPLEMENTAL ENVIRONMENTAL PROJECTS

The February 12, 1991 Policy on the Use of Supplemental Environmental Projects in EPA Settlements must be followed when reducing a penalty for such a project in any Clean Air Act settlement.

VII. CALCULATING A PENALTY IN CASES WITH MORE THAN ONE TYPE OF VIOLATION

EPA often takes an enforcement action against a stationary source for more than one type of violation of the Clean Air Act. The economic benefit of noncompliance with all requirements violated should be calculated. Next, the gravity component factors under actual or possible harm and importance to the regulatory scheme which are applicable should be calculated separately for each violation. The size of the violator factor should be figured only once for all violations.

For example, consider the case of a plant which makes laminated particle board. The particle board plant is found to emit particulates in violation of the SIP particulate emission limit and the laminating line which laminates the particle board with a vinyl covering is found to emit volatile organic compounds in violation of the SIP VOC emission limit. The penalty for the particulate violation should be calculated figuring the economic benefit of not complying with that limit (capital cost of particulate control, etc., determined by running the BEN computer model), and then the gravity component for this violation should be calculated using all the factors in the penalty policy. After the particulate violation penalty is determined, the VOC violation should be calculated as follows: the economic benefit should be calculated if additional measures need to be taken to comply with the VOC limit. In addition, a gravity component should be calculated for the VOC violation using all the applicable factors under actual or possible harm and importance to the regulatory scheme. The size of the violator factor should be figured only once for both violations.

Another example would be a case where, pursuant to Section 114, EPA issues a request for information to a source which emits SO₂, such as a coal-burning boiler. The source does not respond. Two months later, EPA issues an order under Section 113(a) requiring the source to comply with the Section 114 letter. The source does not respond. Three months later, EPA inspects the source and determines that the source is violating the SIP SO₂ emission limit.

In this case, separate economic benefits should be calculated, if applicable. Thus, if the source obtained any economic benefit from not responding to the Section 114 letter or obeying the Section 113(a) order, that should be calculated. If not, only the economic benefit from the SO₂ emission violation should be calculated using the BEN computer model. In determining the gravity component, the penalty should be calculated as follows:

1. Actual or possible harm
 - a. level of violation - calculate for the emission violation only
 - b. toxicity of pollutant - applicable to the emission violation only
 - c. sensitivity of environment - applicable to the emission violation only
 - d. length of time of violation - separately calculate the time for all three violations. Note the Section 114 violation continues to run even after the Section 113(a) order is issued until the Section 114 requirements are satisfied.
2. Importance to regulatory scheme
 - Section 114 request for information violation - \$15,000
 - Section 113 administrative order violation - \$15,000
3. Size of violator
 - a. One figure based on the source's assets.

VIII. APPORTIONMENT OF THE PENALTY AMONG MULTIPLE DEFENDANTS

This policy is intended to yield a minimum settlement penalty figure for the case as a whole. In many cases, there may be more than one defendant. In such instances, the Government should generally take the position of seeking a sum for the case as a whole, which the defendants allocate among themselves. Civil

violations of the Clean Air Act are strict liability violations and it is generally not in the government's interest to get into discussions of the relative fault of the individual defendants. The government should therefore adopt a single settlement figure for the case and should not reject a settlement consistent with the bottom line settlement figure because of the way the penalty is allocated.

Apportionment of the penalty in a multi-defendant case may be required if one party is willing to settle and others are not. In such circumstances, the government should take the position that if certain portions of the penalty are attributable to such party (such as economic benefit or aggravation due to prior violations), that party should pay those amounts and a reasonable portion of the amounts not directly assigned to any single party. If the case is settled as to one defendant, a penalty not less than the balance of the settlement figure for the case as a whole must be obtained from the remaining defendants.

There are limited circumstances where the Government may try to influence apportionment of the penalty. For example, if one party has a history of prior violations, the Government may try to assure that party pays the amount the gravity component has been aggravated due to the prior violations. Also, if one party is known to have realized all or most of the economic benefit, that party may be asked to pay that amount.

IX. EXAMPLES

Example 1

I. Facts:

Company A runs its manufacturing operations with power produced by its own coal-fired boilers⁷. The boilers are major sources of sulfur dioxide. The State Implementation Plan has a sulfur dioxide emission limitation for each boiler of .68 lbs. per million B.T.U. The boilers were inspected by EPA on March 19, 1989, and the SO₂ emission rate was 3.15 lbs. per million B.T.U for each boiler. A NOV was issued for the SO₂ violations on April 10, 1989. EPA again inspected Company A on June 2, 1989 and found the

⁷ Note that a penalty is assessed for the entire facility and not for each emission unit. In this example, the source has several boilers. However, the penalty figures are not multiplied by the number of boilers. The penalty is based on the violations at the facility as a whole, specifically the amount of pollutant factor and length of violation factor are assessed once based on the amount of excess emissions at the facility from all the boilers.

SO₂ emission rate to be unchanged. Company A had never installed any pollution control equipment on its boilers, even though personnel from the state pollution control agency had contacted Company A and informed it that the company was subject to state air pollution regulations. The state had issued an administrative order on September 1, 1988 for SO₂ emission violations at the same boilers. The order required compliance with applicable regulations, but Company A had never complied with the state order. Company A is located in a nonattainment area for sulfur oxides. Company A has net current assets of \$760,000. Company A's response to an EPA Section 114 request for information documented the first provable day of violation of the emission standard as July 1, 1988.

II. Computation of penalty

A. Economic benefit component

EPA used the BEN computer model in the standard mode to calculate the economic benefit component. The economic benefit component calculated by the computer model was \$243,500.

B. Gravity component

1. Actual or possible harm

- a. Amount of pollutant: between 360-390% above standard - \$65,000
- b. Toxicity of pollutant: not applicable.
- c. Sensitivity of the environment: nonattainment - \$10,000
- d. Length of time of violation: Measured from the date of first provable violation, July 1, 1988 to the date of final compliance under a consent decree, hypothetically December 1, 1991. (If consent decree or judgment order is filed at a later date, this element, as well as elements in the economic benefit component must be recalculated.) 41 mos. - \$40,000

2. Importance to regulatory scheme.

No applicable violations.

3. Size of violator: net assets of \$760,000 - \$5,000.

\$243,500 economic benefit component
+120,000 gravity component
\$363,500 preliminary deterrence amount

C. Adjustment Factors

1. Degree of willfulness/negligence

Because Company A was on notice of its violations and, moreover, disregarded the state administrative order to comply with applicable regulations, the gravity component in this example should be aggravated by some percentage based on this factor.

2. Degree of Cooperation

No adjustments were made in the category because Company A did not meet the criteria.

3. History of noncompliance

The gravity component should be aggravated by some percentage for this factor because Company A violated the state order issued for the same violation.

Initial penalty figure: \$353,500 preliminary deterrence amount plus adjustments for history of noncompliance and degree of willfulness or negligence.

Example 2:

I. Facts:

Company C, located in a serious nonattainment area for particulate matter, commenced construction in January 1988. It began its operations in April 1989. It runs a hot mix asphalt plant subject to the NSPS regulations at 40 C.F.R. Part 60, Subpart I. Subpart I requires that emissions of particulates not exceed 90 mg/dscm (.04 gr/dscf) nor exhibit 20% opacity or greater. General NSPS regulations require that a source owner or operator subject to a NSPS fulfill certain notification and recordkeeping functions (40 C.F.R. § 60.7), and conduct performance tests and submit a report of the test results (40 C.F.R. § 60.8).

Company C failed to notify EPA of: the date it commenced construction within 30 days after such date (February 1988)(40

C.F.R. § 60.7(a)(1)); the date of anticipated start-up between 30-60 days prior to such date (March, 1989)(40 C.F.R. § 60.7(a)(2)); or the date of actual start-up within 15 days after such date (April, 1989) (40 C.F.R. § 60.7(a)(3)). Company C was required under 40 C.F.R. § 60.8(a) to test within 180 days of start-up, or by October 1989. The company finally conducted the required performance test in September 1990. The test showed the plant to be emitting 120 mg/dscm of particulates and to exhibit 30% opacity.

Company C did submit the required notices in November 1989 in response to a letter from EPA informing it that it was subject to NSPS requirements. It did negotiate with EPA after the complaint was filed in September 1991, and agreed to a consent decree requiring compliance by December 1, 1991. Company C has assets of \$7,000,000.

II. Computation of penalty

A. Benefit component

The Region determined after calculation that the economic benefit component was \$90,000 for violation of the emissions standard according to the BEN computer calculation. The litigation team determined that the economic benefit from the notice and testing requirement was less than \$5,000. Therefore, the litigation team has discretion not to include this amount in the penalty consistent with the discussion at II.A.3.a.

B. Gravity component

1. Actual or possible harm

a. Amount of pollutant:

i. mass emission standard:

33% above standard - \$10,000

ii. opacity standard:

50% over standard - \$10,000

b. Toxicity of pollutant: not applicable

c. Sensitivity of the environment: serious nonattainment - \$14,000

d. Length of time of violation

- 1) Performance testing: October, 1989 -
September 1990: 12 months - \$15,000

- 2) Failure to report commencement of construction: February 1988 - November 1989: 21 months (date of EPA's first letter to Company) - \$25,000
- 3) Failure to report actual start-up: April, 1989 - November 1989: 7 months - \$15,000
- 4) Failure to report date of anticipated startup between 30-60 days prior to such date: March, 1989 - November 1989: 8 months - \$15,000
- 5) Mass Emission Standard Violation: September 1990 - December 1991: 15 months - \$20,000
- 6) Opacity Violation: September 1990 - December 1991: 15 months - \$20,000

2. Importance to regulatory scheme:

Failure to notify 40 C.F.R. § 60.7(a)(1) - \$15,000
Failure to notify 40 C.F.R. § 60.7(a)(2) - \$15,000
Failure to notify 40 C.F.R. § 60.7(a)(3) - \$15,000
Failure to conduct required performance test 40 C.F.R. § 60.8(a) - \$15,000

3. Size of violator: Net current Assets - \$7,000,000 - \$20,000

\$ 90,000 economic benefit component
224,000 gravity component
\$314,000 preliminary deterrence amount

C. Adjustment factors

1. Degree of willfulness/negligence

No adjustments were made based on willfulness in this category because there was no evidence that Company C knew of the requirements prior to receiving the letter from EPA. Specific evidence may suggest that the company's violations were due to negligence justifying an aggravation of the penalty on that basis.

2. Degree of Cooperation

No adjustments were made in this category because Company C did not meet the criteria.

3. History of noncompliance

The gravity component should be aggravated by an amount agreed to by the litigation team for this factor because the source ignored two letters from EPA informing them of the requirements.

Example 3:

I. Facts

Chemical Inc. operates a mercury cell chlor-alkali plant which produces chlorine gas. The plant is subject to regulations under the National Emissions Standard for Hazardous Air Pollutants (NESHAP) for mercury, 40 C.F.R. Part 61, Subpart E. On September 9, 1990, EPA inspectors conducted an inspection of the facility, and EPA required the source to conduct a stack test pursuant to Section 114. The stack test showed emissions at a rate of 3000 grams of mercury per 24-hour period. The mercury NESHAP states that emissions from mercury cell chlor-alkali plants shall not exceed 2300 grams per 24-hour period. The facility has been in operation since June 1989.

In addition under 40 C.F.R. § 61.53, Chemical Inc. either had to test emissions from the cell room ventilation system within 90 days of the effective date of the NESHAP or follow specified approved design, maintenance and housekeeping practices. Chemical Inc. has never tested emissions. Therefore, it has committed itself to following the housekeeping requirements. At the inspection, EPA personnel noted the floors of the facility were badly cracked and mercury droplets were found in several of the cracks. The inspectors noted that the mercury in the floor cracks was caused by leaks from the hydrogen seal pots and compressor seals which housekeeping practices require be collected and confined for further processing to collect mercury. Chemical Inc. will have to install control equipment to come into compliance. A complaint was filed in June 1991. The equipment was installed and operational by June 1992. A consent decree was entered and penalty paid in February 1992. Chemical Inc. has a net corporate worth of \$2,000,000.

II. Calculation of Penalty

A. Economic Benefit Component

The delay in installing necessary control equipment from June 1989 to June 1992 as calculated using the BEN computer model resulted in an economic benefit to Chemical Inc. of \$35,000.

B. Gravity Component

1. Actual or possible harm

- a. Amount of pollutant: 30 % above the standard - \$5,000
- b. Toxicity of pollutant : \$15,000 for violations involving a NESHA
- c. Sensitivity of the environment: not applicable
- d. Length of time of violation: Measured from first provable date of violation in September 1990 until June 1992 when the source will be in compliance. 22 mos. - \$25,000

2. Importance to regulatory scheme.

Failure to perform work practice requirements - \$15,000

3. Size of Violator: net worth of \$2,000,000 - \$10,000

\$35,000 economic benefit component
+70,000 gravity component
\$105,000 preliminary deterrence amount

C. Adjustment Factors

1. Degree of willfulness/negligence

It is unlikely Chemical Inc. would not be aware of the NESHA requirements. Therefore, an adjustment should probably be made for this factor.

2. Degree of Cooperation

No adjustments made because Chemical Inc. did not meet the criteria.

3. History of Compliance

No adjustments were made because Chemical Inc. had no prior violations.

X. CONCLUSION

Treating similar situations in a similar fashion is central to the credibility of EPA's enforcement effort and to the success of achieving the goal of equitable treatment. This document has established several mechanisms to promote such consistency. Yet it still leaves enough flexibility for tailoring the penalty to particular circumstances. Perhaps the most important mechanisms for achieving consistency are the systematic methods for calculating the benefit component and gravity component of the penalty. Together, they add up to the preliminary deterrence amount. The document also sets out guidance on uniform approaches for applying adjustment factors to arrive at an initial amount prior to beginning settlement negotiations or an adjusted amount after negotiations have begun.

Nevertheless, if the Agency is to promote consistency, it is essential that each case file contain a complete description of how each penalty was developed as required by the August 9, 1990 Guidance on Documenting Penalty Calculations and Justifications in EPA Enforcement Actions. This description should cover how the preliminary deterrence amount was calculated and any adjustments made to the preliminary deterrence amount. It should also describe the facts and reasons which support such adjustments. Only through such complete documentation can enforcement attorneys, program staff and their managers learn from each other's experience and promote the fairness required by the Policy on Civil Penalties.

State agency authorized to receive such funds in conducting this program.

§ 21.13 Effect of certification upon authority to enforce applicable standards.

The certification by EPA or a State for SBA Loan purposes in no way constitutes a determination by EPA or the State that the facilities certified (a) will be constructed within the time specified by an applicable standard or (b) will be constructed and installed in accordance with the plans and specifications submitted in the application, will be operated and maintained properly, or will be applied to process wastes which are the same as described in the application. The certification in no way constitutes a waiver by EPA or a State of its authority to take appropriate enforcement action against the owner or operator of such facilities for violations of an applicable standard.

PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION/TERMINATION OR SUSPENSION OF PERMITS

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- 22.1 Scope of this part.
- 22.2 Use of number and gender.
- 22.3 Definitions.
- 22.4 Powers and duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment.
- 22.5 Filing, service, and form of all filed documents; business confidentiality claims.
- 22.6 Filing and service of rulings, orders and decisions.
- 22.7 Computation and extension of time.
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Subpart B—Parties and Appearances

- 22.10 Appearances.
- 22.11 Intervention and non-party briefs.
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Subpart C—Prehearing Procedures

- 22.13 Commencement of a proceeding.
- 22.14 Complaint.
- 22.15 Answer to the complaint.
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- 22.17 Default.
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Subpart D—Hearing Procedures

- 22.21 Assignment of Presiding Officer; scheduling the hearing.
- 22.22 Evidence.
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Subpart E—Initial Decision and Motion to Reopen a Hearing

- 22.27 Initial decision.
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- 22.29 Appeal from or review of interlocutory orders or rulings.
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Subpart G—Final Order

- 22.31 Final order.
- 22.32 Motion to reconsider a final order.

Subpart H—Supplemental Rules

- 22.33 [Reserved]
- 22.34 Supplemental rules governing the administrative assessment of civil penalties under the Clean Air Act.
- 22.35 Supplemental rules governing the administrative assessment of civil penalties under the Federal Insecticide, Fungicide, and Rodenticide Act.
- 22.36 [Reserved]
- 22.37 Supplemental rules governing administrative proceedings under the Solid Waste Disposal Act.
- 22.38 Supplemental rules of practice governing the administrative assessment of civil penalties under the Clean Water Act.
- 22.39 Supplemental rules governing the administrative assessment of civil penalties under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.
- 22.40 [Reserved]

- 22.41 Supplemental rules governing the administrative assessment of civil penalties under Title II of the Toxic Substances Control Act, enacted as section 2 of the Asbestos Hazard Emergency Response Act (AHERA).
- 22.42 Supplemental rules governing the administrative assessment of civil penalties for violations of compliance orders issued to owners or operators of public water systems under part B of the Safe Drinking Water Act.
- 22.43 Supplemental rules governing the administrative assessment of civil penalties against a federal agency under the Safe Drinking Water Act.
- 22.44 Supplemental rules of practice governing the termination of permits under section 402(a) of the Clean Water Act or under section 3008(a)(3) of the Resource Conservation and Recovery Act.
- 22.45 Supplemental rules governing public notice and comment in proceedings under sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act and section 1423(c) of the Safe Drinking Water Act.
- 22.46-22.49 [Reserved]

Subpart I—Administrative Proceedings Not Governed by Section 554 of the Administrative Procedure Act

- 22.50 Scope of this subpart.
- 22.51 Presiding Officer.
- 22.52 Information exchange and discovery.

AUTHORITY: 7 U.S.C. 136(l); 15 U.S.C. 2615; 33 U.S.C. 1319, 1342, 1361, 1415 and 1418; 42 U.S.C. 300g-3(g), 6912, 6925, 6928, 6991e and 6992d; 42 U.S.C. 7413(d), 7524(c), 7545(d), 7547, 7601 and 7607(a), 9609, and 11045.

SOURCE: 64 FR 40176, July 23, 1999, unless otherwise noted.

Subpart A—General

§ 22.1 Scope of this part.

(a) These Consolidated Rules of Practice govern all administrative adjudicatory proceedings for:

- (1) The assessment of any administrative civil penalty under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 136l(a));
- (2) The assessment of any administrative civil penalty under sections 113(d), 205(c), 211(d) and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7413(d), 7524(c), 7545(d) and 7547(d));
- (3) The assessment of any administrative civil penalty or for the revocation or suspension of any permit under section 105(a) and (f) of the Marine Pro-

tection, Research, and Sanctuaries Act as amended (33 U.S.C. 1415(a) and (f));

(4) The issuance of a compliance order or the issuance of a corrective action order, the termination of a permit pursuant to section 3008(a)(3), the suspension or revocation of authority to operate pursuant to section 3005(e), or the assessment of any civil penalty under sections 3008, 9006, and 11005 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6925(d), 6925(e), 6928, 6991e, and 6992d)), except as provided in part 24 of this chapter;

(5) The assessment of any administrative civil penalty under sections 16(a) and 207 of the Toxic Substances Control Act (15 U.S.C. 2615(a) and 2647);

(6) The assessment of any Class II penalty under sections 309(g) and 311(b)(6), or termination of any permit issued pursuant to section 402(a) of the Clean Water Act, as amended (33 U.S.C. 1319(g), 1321(b)(6), and 1342(a));

(7) The assessment of any administrative civil penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9609);

(8) The assessment of any administrative civil penalty under section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA") (42 U.S.C. 11045);

(9) The assessment of any administrative civil penalty under sections 1414(g)(3)(B), 1423(c), and 1447(b) of the Safe Drinking Water Act as amended (42 U.S.C. 300g-3(g)(3)(B), 300h-2(c), and 300j-6(b)), or the issuance of any order requiring both compliance and the assessment of an administrative civil penalty under section 1423(c);

(10) The assessment of any administrative civil penalty or the issuance of any order requiring compliance under Section 5 of the Mercury-Containing and Rechargeable Battery Management Act (42 U.S.C. 14304).

(b) The supplemental rules set forth in subparts H and I of this part establish special procedures for proceedings identified in paragraph (a) of this section where the Act allows or requires procedures different from the procedures in subparts A through G of this part. Where inconsistencies exist between subparts A through G of this

part and subpart H or I of this part, subparts H or I of this part shall apply.

(c) Questions arising at any stage of the proceeding which are not addressed in these Consolidated Rules of Practice shall be resolved at the discretion of the Administrator, Environmental Appeals Board, Regional Administrator, or Presiding Officer, as provided for in these Consolidated Rules of Practice.

[64 FR 40176, July 23, 1999, as amended at 65 FR 30904, May 15, 2000]

§ 22.2 Use of number and gender.

As used in these Consolidated Rules of Practice, words in the singular also include the plural and words in the masculine gender also include the feminine, and vice versa, as the case may require.

§ 22.3 Definitions.

(a) The following definitions apply to these Consolidated Rules of Practice:

Act means the particular statute authorizing the proceeding at issue.

Administrative Law Judge means an Administrative Law Judge appointed under 5 U.S.C. 3105.

Administrator means the Administrator of the U.S. Environmental Protection Agency or his delegate.

Agency means the United States Environmental Protection Agency.

Business confidentiality claim means a confidentiality claim as defined in 40 CFR 2.201(h).

Clerk of the Board means the Clerk of the Environmental Appeals Board, Mail Code 1103B, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

Commenter means any person (other than a party) or representative of such person who timely:

(1) Submits in writing to the Regional Hearing Clerk that he is providing or intends to provide comments on the proposed assessment of a penalty pursuant to sections 309(g)(4) and 311(b)(6)(C) of the Clean Water Act or section 1423(c) of the Safe Drinking Water Act, whichever applies, and intends to participate in the proceeding; and

(2) Provides the Regional Hearing Clerk with a return address.

Complainant means any person authorized to issue a complaint in accord-

ance with §§ 22.13 and 22.14 on behalf of the Agency to persons alleged to be in violation of the Act. The complainant shall not be a member of the Environmental Appeals Board, the Regional Judicial Officer or any other person who will participate or advise in the adjudication.

Consolidated Rules of Practice means the regulations in this part.

Environmental Appeals Board means the Board within the Agency described in 40 CFR 1.25.

Final order means:

(1) An order issued by the Environmental Appeals Board or the Administrator after an appeal of an initial decision, accelerated decision, decision to dismiss, or default order, disposing of the matter in controversy between the parties;

(2) An initial decision which becomes a final order under § 22.27(c); or

(3) A final order issued in accordance with § 22.18.

Hearing means an evidentiary hearing on the record, open to the public (to the extent consistent with § 22.22(a)(2)), conducted as part of a proceeding under these Consolidated Rules of Practice.

Hearing Clerk means the Hearing Clerk, Mail Code 1900, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

Initial decision means the decision issued by the Presiding Officer pursuant to §§ 22.17(c), 22.20(b) or 22.27 resolving all outstanding issues in the proceeding.

Party means any person that participates in a proceeding as complainant, respondent, or intervenor.

Permit action means the revocation, suspension or termination of all or part of a permit issued under section 102 of the Marine Protection, Research, and Sanctuaries Act (33 U.S.C. 1412) or termination under section 402(a) of the Clean Water Act (33 U.S.C. 1342(a)) or section 3005(d) of the Solid Waste Disposal Act (42 U.S.C. 6925(d)).

Person includes any individual, partnership, association, corporation, and any trustee, assignee, receiver or legal successor thereof; any organized group of persons whether incorporated or not;

and any officer, employee, agent, department, agency or instrumentality of the Federal Government, of any State or local unit of government, or of any foreign government.

Presiding Officer means an individual who presides in an administrative adjudication until an initial decision becomes final or is appealed. The Presiding Officer shall be an Administrative Law Judge, except where §§ 22.4(b), 22.16(c) or 22.51 allow a Regional Judicial Officer to serve as Presiding Officer.

Proceeding means the entirety of a single administrative adjudication, from the filing of the complaint through the issuance of a final order, including any action on a motion to reconsider under § 22.32.

Regional Administrator means, for a case initiated in an EPA Regional Office, the Regional Administrator for that Region or any officer or employee thereof to whom his authority is duly delegated.

Regional Hearing Clerk means an individual duly authorized to serve as hearing clerk for a given region, who shall be neutral in every proceeding. Correspondence with the Regional Hearing Clerk shall be addressed to the Regional Hearing Clerk at the address specified in the complaint. For a case initiated at EPA Headquarters, the term Regional Hearing Clerk means the Hearing Clerk.

Regional Judicial Officer means a person designated by the Regional Administrator under § 22.4(b).

Respondent means any person against whom the complaint states a claim for relief.

(b) Terms defined in the Act and not defined in these Consolidated Rules of Practice are used consistent with the meanings given in the Act.

[64 FR 40176, July 23, 1999, as amended at 65 FR 30904, May 15, 2000]

§ 22.4 Powers and duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment.

(a) *Environmental Appeals Board.* (1) The Environmental Appeals Board rules on appeals from the initial decisions, rulings and orders of a Presiding

Officer in proceedings under these Consolidated Rules of Practice; acts as Presiding Officer until the respondent files an answer in proceedings under these Consolidated Rules of Practice commenced at EPA Headquarters; and approves settlement of proceedings under these Consolidated Rules of Practice commenced at EPA Headquarters. The Environmental Appeals Board may refer any case or motion to the Administrator when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator by the Environmental Appeals Board, all parties shall be so notified and references to the Environmental Appeals Board in these Consolidated Rules of Practice shall be interpreted as referring to the Administrator. If a case or motion is referred to the Administrator by the Environmental Appeals Board, the Administrator may consult with any EPA employee concerning the matter, provided such consultation does not violate § 22.8. Motions directed to the Administrator shall not be considered except for motions for disqualification pursuant to paragraph (d) of this section, or motions filed in matters that the Environmental Appeals Board has referred to the Administrator.

(2) In exercising its duties and responsibilities under these Consolidated Rules of Practice, the Environmental Appeals Board may do all acts and take all measures as are necessary for the efficient, fair and impartial adjudication of issues arising in a proceeding, including imposing procedural sanctions against a party who without adequate justification fails or refuses to comply with these Consolidated Rules of Practice or with an order of the Environmental Appeals Board. Such sanctions may include drawing adverse inferences against a party, striking a party's pleadings or other submissions from the record, and denying any or all relief sought by the party in the proceeding.

(b) *Regional Judicial Officer.* Each Regional Administrator shall delegate to one or more Regional Judicial Officers authority to act as Presiding Officer in proceedings under subpart I of this part, and to act as Presiding Officer

until the respondent files an answer in proceedings under these Consolidated Rules of Practice to which subpart I of this part does not apply. The Regional Administrator may also delegate to one or more Regional Judicial Officers the authority to approve settlement of proceedings pursuant to § 22.18(b)(3). These delegations will not prevent a Regional Judicial Officer from referring any motion or case to the Regional Administrator. A Regional Judicial Officer shall be an attorney who is a permanent or temporary employee of the Agency or another Federal agency and who may perform other duties within the Agency. A Regional Judicial Officer shall not have performed prosecutorial or investigative functions in connection with any case in which he serves as a Regional Judicial Officer. A Regional Judicial Officer shall not knowingly preside over a case involving any party concerning whom the Regional Judicial Officer performed any functions of prosecution or investigation within the 2 years preceding the commencement of the case. A Regional Judicial Officer shall not prosecute enforcement cases and shall not be supervised by any person who supervises the prosecution of enforcement cases, but may be supervised by the Regional Counsel.

(c) *Presiding Officer.* The Presiding Officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay. The Presiding Officer may:

(1) Conduct administrative hearings under these Consolidated Rules of Practice;

(2) Rule upon motions, requests, and offers of proof, and issue all necessary orders;

(3) Administer oaths and affirmations and take affidavits;

(4) Examine witnesses and receive documentary or other evidence;

(5) Order a party, or an officer or agent thereof, to produce testimony, documents, or other non-privileged evidence, and failing the production thereof without good cause being shown, draw adverse inferences against that party;

(6) Admit or exclude evidence;

(7) Hear and decide questions of facts, law, or discretion;

(8) Require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings;

(9) Issue subpoenas authorized by the Act; and

(10) Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these Consolidated Rules of Practice.

(d) *Disqualification, withdrawal and re-assignment.* (1) The Administrator, the Regional Administrator, the members of the Environmental Appeals Board, the Regional Judicial Officer, or the Administrative Law Judge may not perform functions provided for in these Consolidated Rules of Practice regarding any matter in which they have a financial interest or have any relationship with a party or with the subject matter which would make it inappropriate for them to act. Any party may at any time by motion to the Administrator, Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer or the Administrative Law Judge request that he or she disqualify himself or herself from the proceeding. If such a motion to disqualify the Regional Administrator, Regional Judicial Officer or Administrative Law Judge is denied, a party may appeal that ruling to the Environmental Appeals Board. If a motion to disqualify a member of the Environmental Appeals Board is denied, a party may appeal that ruling to the Administrator. There shall be no interlocutory appeal of the ruling on a motion for disqualification. The Administrator, the Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer, or the Administrative Law Judge may at any time withdraw from any proceeding in which he deems himself disqualified or unable to act for any reason.

(2) If the Administrator, the Regional Administrator, the Regional Judicial Officer, or the Administrative Law Judge is disqualified or withdraws from the proceeding, a qualified individual who has none of the infirmities listed in paragraph (d)(1) of this section shall

be assigned as a replacement. The Administrator shall assign a replacement for a Regional Administrator who withdraws or is disqualified. Should the Administrator withdraw or be disqualified, the Regional Administrator from the Region where the case originated shall replace the Administrator. If that Regional Administrator would be disqualified, the Administrator shall assign a Regional Administrator from another Region to replace the Administrator. The Regional Administrator shall assign a new Regional Judicial Officer if the original Regional Judicial Officer withdraws or is disqualified. The Chief Administrative Law Judge shall assign a new Administrative Law Judge if the original Administrative Law Judge withdraws or is disqualified.

(3) The Chief Administrative Law Judge, at any stage in the proceeding, may reassign the case to an Administrative Law Judge other than the one originally assigned in the event of the unavailability of the Administrative Law Judge or where reassignment will result in efficiency in the scheduling of hearings and would not prejudice the parties.

§ 22.5 Filing, service, and form of all filed documents; business confidentiality claims.

(a) *Filing of documents.* (1) The original and one copy of each document intended to be part of the record shall be filed with the Regional Hearing Clerk when the proceeding is before the Presiding Officer, or filed with the Clerk of the Board when the proceeding is before the Environmental Appeals Board. A document is filed when it is received by the appropriate Clerk. Documents filed in proceedings before the Environmental Appeals Board shall either be sent by U.S. mail (except by U.S. Express Mail) to the official mailing address of the Clerk of the Board set forth at § 22.3 or delivered by hand or courier (including deliveries by U.S. Postal Express or by a commercial delivery service) to Suite 600, 1341 G Street, NW., Washington, DC 20005. The Presiding Officer or the Environmental Appeals Board may by order authorize facsimile or electronic filing, subject to any appropriate conditions and limitations.

(2) When the Presiding Officer corresponds directly with the parties, the original of the correspondence shall be filed with the Regional Hearing Clerk. Parties who correspond directly with the Presiding Officer shall file a copy of the correspondence with the Regional Hearing Clerk.

(3) A certificate of service shall accompany each document filed or served in the proceeding.

(b) *Service of documents.* A copy of each document filed in the proceeding shall be served on the Presiding Officer or the Environmental Appeals Board, and on each party.

(1) *Service of complaint.* (i) Complainant shall serve on respondent, or a representative authorized to receive service on respondent's behalf, a copy of the signed original of the complaint, together with a copy of these Consolidated Rules of Practice. Service shall be made personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery.

(ii)(A) Where respondent is a domestic or foreign corporation, a partnership, or an unincorporated association which is subject to suit under a common name, complainant shall serve an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process.

(B) Where respondent is an agency of the United States complainant shall serve that agency as provided by that agency's regulations, or in the absence of controlling regulation, as otherwise permitted by law. Complainant should also provide a copy of the complaint to the senior executive official having responsibility for the overall operations of the geographical unit where the alleged violations arose. If the agency is a corporation, the complaint shall be served as prescribed in paragraph (b)(1)(ii)(A) of this section.

(C) Where respondent is a State or local unit of government, agency, department, corporation or other instrumentality, complainant shall serve the chief executive officer thereof, or as otherwise permitted by law. Where respondent is a State or local officer, complainant shall serve such officer.

(iii) Proof of service of the complaint shall be made by affidavit of the person making personal service, or by properly executed receipt. Such proof of service shall be filed with the Regional Hearing Clerk immediately upon completion of service.

(2) *Service of filed documents other than the complaint, rulings, orders, and decisions.* All filed documents other than the complaint, rulings, orders, and decisions shall be served personally, by first class mail (including certified mail, return receipt requested; Overnight Express and Priority Mail), or by any reliable commercial delivery service. The Presiding Officer or the Environmental Appeals Board may by order authorize facsimile or electronic service, subject to any appropriate conditions and limitations.

(c) *Form of documents.* (1) Except as provided in this section, or by order of the Presiding Officer or of the Environmental Appeals Board there are no specific requirements as to the form of documents.

(2) The first page of every filed document shall contain a caption identifying the respondent and the docket number. All legal briefs and legal memoranda greater than 20 pages in length (excluding attachments) shall contain a table of contents and a table of authorities with page references.

(3) The original of any filed document (other than exhibits) shall be signed by the party filing or by its attorney or other representative. The signature constitutes a representation by the signer that he has read the document, that to the best of his knowledge, information and belief, the statements made therein are true, and that it is not interposed for delay.

(4) The first document filed by any person shall contain the name, address, and telephone number of an individual authorized to receive service relating to the proceeding. Parties shall promptly file any changes in this information with the Regional Hearing Clerk, and serve copies on the Presiding Officer and all parties to the proceeding. If a party fails to furnish such information and any changes thereto, service to the party's last known address shall satisfy the re-

quirements of paragraph (b)(2) of this section and § 22.6.

(5) The Environmental Appeals Board or the Presiding Officer may exclude from the record any document which does not comply with this section. Written notice of such exclusion, stating the reasons therefor, shall be promptly given to the person submitting the document. Such person may amend and resubmit any excluded document upon motion granted by the Environmental Appeals Board or the Presiding Officer, as appropriate.

(d) *Confidentiality of business information.* (1) A person who wishes to assert a business confidentiality claim with regard to any information contained in any document to be filed in a proceeding under these Consolidated Rules of Practice shall assert such a claim in accordance with 40 CFR part 2 at the time that the document is filed. A document filed without a claim of business confidentiality shall be available to the public for inspection and copying.

(2) Two versions of any document which contains information claimed confidential shall be filed with the Regional Hearing Clerk:

(i) One version of the document shall contain the information claimed confidential. The cover page shall include the information required under paragraph (c)(2) of this section and the words "Business Confidentiality Asserted". The specific portion(s) alleged to be confidential shall be clearly identified within the document.

(ii) A second version of the document shall contain all information except the specific information claimed confidential, which shall be redacted and replaced with notes indicating the nature of the information redacted. The cover page shall state that information claimed confidential has been deleted and that a complete copy of the document containing the information claimed confidential has been filed with the Regional Hearing Clerk.

(3) Both versions of the document shall be served on the Presiding Officer and the complainant. Both versions of the document shall be served on any party, non-party participant, or representative thereof, authorized to receive the information claimed confidential by the person making the

claim of confidentiality. Only the redacted version shall be served on persons not authorized to receive the confidential information.

(4) Only the second, redacted version shall be treated as public information. An EPA officer or employee may disclose information claimed confidential in accordance with paragraph (d)(1) of this section only as authorized under 40 CFR part 2.

[64 FR 40176, July 23, 1999, as amended at 69 FR 77639, Dec. 28, 2004]

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

All rulings, orders, decisions, and other documents issued by the Regional Administrator or Presiding Officer shall be filed with the Regional Hearing Clerk. All such documents issued by the Environmental Appeals Board shall be filed with the Clerk of the Board. Copies of such rulings, orders, decisions or other documents shall be served personally, by first class mail (including by certified mail or return receipt requested, Overnight Express and Priority Mail), by EPA's internal mail, or any reliable commercial delivery service, upon all parties by the Clerk of the Environmental Appeals Board, the Office of Administrative Law Judges or the Regional Hearing Clerk, as appropriate.

§ 22.7 Computation and extension of time.

(a) *Computation.* In computing any period of time prescribed or allowed in these Consolidated Rules of Practice, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal holidays shall be included. When a stated time expires on a Saturday, Sunday or Federal holiday, the stated time period shall be extended to include the next business day.

(b) *Extensions of time.* The Environmental Appeals Board or the Presiding Officer may grant an extension of time for filing any document: upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties; or upon its own initiative. Any motion for an extension of time shall be filed suf-

ficiently in advance of the due date so as to allow other parties reasonable opportunity to respond and to allow the Presiding Officer or Environmental Appeals Board reasonable opportunity to issue an order.

(c) *Service by mail or commercial delivery service.* Service of the complaint is complete when the return receipt is signed. Service of all other documents is complete upon mailing or when placed in the custody of a reliable commercial delivery service. Where a document is served by first class mail or commercial delivery service, but not by overnight or same-day delivery, 5 days shall be added to the time allowed by these Consolidated Rules of Practice for the filing of a responsive document.

§ 22.8 *Ex parte* discussion of proceeding.

At no time after the issuance of the complaint shall the Administrator, the members of the Environmental Appeals Board, the Regional Administrator, the Presiding Officer or any other person who is likely to advise these officials on any decision in the proceeding, discuss *ex parte* the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any *ex parte* memorandum or other communication addressed to the Administrator, the Regional Administrator, the Environmental Appeals Board, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication. The requirements of this section shall not apply to any person who has formally recused himself from all adjudicatory functions in a proceeding, or who issues final orders only pursuant to § 22.18(b)(3).

§ 22.9 Examination of documents filed.

(a) Subject to the provisions of law restricting the public disclosure of confidential information, any person may, during Agency business hours inspect and copy any document filed in any proceeding. Such documents shall be made available by the Regional Hearing Clerk, the Hearing Clerk, or the Clerk of the Board, as appropriate.

(b) The cost of duplicating documents shall be borne by the person seeking copies of such documents. The Agency may waive this cost in its discretion.

Subpart B—Parties and Appearances**§ 22.10 Appearances.**

Any party may appear in person or by counsel or other representative. A partner may appear on behalf of a partnership and an officer may appear on behalf of a corporation. Persons who appear as counsel or other representative must conform to the standards of conduct and ethics required of practitioners before the courts of the United States.

§ 22.11 Intervention and non-party briefs.

(a) *Intervention.* Any person desiring to become a party to a proceeding may move for leave to intervene. A motion for leave to intervene that is filed after the exchange of information pursuant to § 22.19(a) shall not be granted unless the movant shows good cause for its failure to file before such exchange of information. All requirements of these Consolidated Rules of Practice shall apply to a motion for leave to intervene as if the movant were a party. The Presiding Officer shall grant leave to intervene in all or part of the proceeding if: the movant claims an interest relating to the cause of action; a final order may as a practical matter impair the movant's ability to protect that interest; and the movant's interest is not adequately represented by existing parties. The intervenor shall be bound by any agreements, arrangements and other matters previously made in the proceeding unless otherwise ordered by the Presiding Officer or

the Environmental Appeals Board for good cause.

(b) *Non-party briefs.* Any person who is not a party to a proceeding may move for leave to file a non-party brief. The motion shall identify the interest of the applicant and shall explain the relevance of the brief to the proceeding. All requirements of these Consolidated Rules of Practice shall apply to the motion as if the movant were a party. If the motion is granted, the Presiding Officer or Environmental Appeals Board shall issue an order setting the time for filing such brief. Any party to the proceeding may file a response to a non-party brief within 15 days after service of the non-party brief.

§ 22.12 Consolidation and severance.

(a) *Consolidation.* The Presiding Officer or the Environmental Appeals Board may consolidate any or all matters at issue in two or more proceedings subject to these Consolidated Rules of Practice where: there exist common parties or common questions of fact or law; consolidation would expedite and simplify consideration of the issues; and consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings. Proceedings subject to subpart I of this part may be consolidated only upon the approval of all parties. Where a proceeding subject to the provisions of subpart I of this part is consolidated with a proceeding to which subpart I of this part does not apply, the procedures of subpart I of this part shall not apply to the consolidated proceeding.

(b) *Severance.* The Presiding Officer or the Environmental Appeals Board may, for good cause, order any proceedings severed with respect to any or all parties or issues.

Subpart C—Prehearing Procedures**§ 22.13 Commencement of a proceeding.**

(a) Any proceeding subject to these Consolidated Rules of Practice is commenced by filing with the Regional Hearing Clerk a complaint conforming to § 22.14.

(b) Notwithstanding paragraph (a) of this section, where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a consent agreement and final order pursuant to § 22.18(b)(2) and (3).

§ 22.14 Complaint.

(a) *Content of complaint.* Each complaint shall include:

(1) A statement reciting the section(s) of the Act authorizing the issuance of the complaint;

(2) Specific reference to each provision of the Act, implementing regulations, permit or order which respondent is alleged to have violated;

(3) A concise statement of the factual basis for each violation alleged;

(4) A description of all relief sought, including one or more of the following:

(i) The amount of the civil penalty which is proposed to be assessed, and a brief explanation of the proposed penalty;

(ii) Where a specific penalty demand is not made, the number of violations (where applicable, days of violation) for which a penalty is sought, a brief explanation of the severity of each violation alleged and a recitation of the statutory penalty authority applicable for each violation alleged in the complaint;

(iii) A request for a Permit Action and a statement of its proposed terms and conditions; or

(iv) A request for a compliance or corrective action order and a statement of the terms and conditions thereof;

(5) Notice of respondent's right to request a hearing on any material fact alleged in the complaint, or on the appropriateness of any proposed penalty, compliance or corrective action order, or Permit Action;

(6) Notice if subpart I of this part applies to the proceeding;

(7) The address of the Regional Hearing Clerk; and

(8) Instructions for paying penalties, if applicable.

(b) *Rules of practice.* A copy of these Consolidated Rules of Practice shall accompany each complaint served.

(c) *Amendment of the complaint.* The complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise the complainant may amend the complaint only upon motion granted by the Presiding Officer. Respondent shall have 20 additional days from the date of service of the amended complaint to file its answer.

(d) *Withdrawal of the complaint.* The complainant may withdraw the complaint, or any part thereof, without prejudice one time before the answer has been filed. After one withdrawal before the filing of an answer, or after the filing of an answer, the complainant may withdraw the complaint, or any part thereof, without prejudice only upon motion granted by the Presiding Officer.

§ 22.15 Answer to the complaint.

(a) *General.* Where respondent: Contests any material fact upon which the complaint is based; contends that the proposed penalty, compliance or corrective action order, or Permit Action, as the case may be, is inappropriate; or contends that it is entitled to judgment as a matter of law, it shall file an original and one copy of a written answer to the complaint with the Regional Hearing Clerk and shall serve copies of the answer on all other parties. Any such answer to the complaint must be filed with the Regional Hearing Clerk within 30 days after service of the complaint.

(b) *Contents of the answer.* The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state: The circumstances or arguments which are alleged to constitute the grounds of any defense; the facts which respondent disputes; the basis for opposing any proposed relief; and whether a hearing is requested.

(c) *Request for a hearing.* A hearing upon the issues raised by the complaint and answer may be held if requested by respondent in its answer. If the respondent does not request a hearing,

the Presiding Officer may hold a hearing if issues appropriate for adjudication are raised in the answer.

(d) *Failure to admit, deny, or explain.* Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.

(e) *Amendment of the answer.* The respondent may amend the answer to the complaint upon motion granted by the Presiding Officer.

§ 22.16 Motions.

(a) *General.* Motions shall be served as provided by § 22.5(b)(2). Upon the filing of a motion, other parties may file responses to the motion and the movant may file a reply to the response. Any additional responsive documents shall be permitted only by order of the Presiding Officer or Environmental Appeals Board, as appropriate. All motions, except those made orally on the record during a hearing, shall:

- (1) Be in writing;
- (2) State the grounds therefor, with particularity;
- (3) Set forth the relief sought; and
- (4) Be accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon.

(b) *Response to motions.* A party's response to any written motion must be filed within 15 days after service of such motion. The movant's reply to any written response must be filed within 10 days after service of such response and shall be limited to issues raised in the response. The Presiding Officer or the Environmental Appeals Board may set a shorter or longer time for response or reply, or make other orders concerning the disposition of motions. The response or reply shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Any party who fails to respond within the designated period waives any objection to the granting of the motion.

(c) *Decision.* The Regional Judicial Officer (or in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board) shall rule on all motions filed or made before an answer to the complaint is filed. Except as provided in §§ 22.29(c) and 22.51, an Administrative Law Judge shall rule on all

motions filed or made after an answer is filed and before an initial decision has become final or has been appealed. The Environmental Appeals Board shall rule as provided in § 22.29(c) and on all motions filed or made after an appeal of the initial decision is filed, except as provided pursuant to § 22.28.

(d) *Oral argument.* The Presiding Officer or the Environmental Appeals Board may permit oral argument on motions in its discretion.

§ 22.17 Default.

(a) *Default.* A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations. Default by complainant constitutes a waiver of complainant's right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice.

(b) *Motion for default.* A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.

(c) *Default order.* When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. For good cause shown, the Presiding Officer may set aside a default order.

(d) *Payment of penalty; effective date of compliance or corrective action orders, and Permit Actions.* Any penalty assessed in the default order shall become due and payable by respondent without further proceedings 30 days after the default order becomes final under § 22.27(c). Any default order requiring compliance or corrective action shall be effective and enforceable without further proceedings on the date the default order becomes final under § 22.27(c). Any Permit Action ordered in the default order shall become effective without further proceedings on the date that the default order becomes final under § 22.27(c).

§ 22.18 Quick resolution; settlement; alternative dispute resolution.

(a) *Quick resolution.* (1) A respondent may resolve the proceeding at any time by paying the specific penalty proposed in the complaint or in complainant's prehearing exchange in full as specified by complainant and by filing with the Regional Hearing Clerk a copy of the check or other instrument of payment. If the complaint contains a specific proposed penalty and respondent pays that proposed penalty in full within 30 days after receiving the complaint, then no answer need be filed. This paragraph (a) shall not apply to any complaint which seeks a compliance or corrective action order or Permit Action. In a proceeding subject to the public comment provisions of § 22.45, this quick resolution is not available until 10 days after the close of the comment period.

(2) Any respondent who wishes to resolve a proceeding by paying the proposed penalty instead of filing an answer, but who needs additional time to pay the penalty, may file a written statement with the Regional Hearing Clerk within 30 days after receiving the complaint stating that the respondent agrees to pay the proposed penalty in accordance with paragraph (a)(1) of this section. The written statement need not contain any response to, or admission of, the allegations in the complaint. Within 60 days after receiving the complaint, the respondent shall pay the full amount of the proposed penalty. Failure to make such payment within 60 days of receipt of the com-

plaint may subject the respondent to default pursuant to § 22.17.

(3) Upon receipt of payment in full, the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board, shall issue a final order. Payment by respondent shall constitute a waiver of respondent's rights to contest the allegations and to appeal the final order.

(b) *Settlement.* (1) The Agency encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations. The parties may engage in settlement discussions whether or not the respondent requests a hearing. Settlement discussions shall not affect the respondent's obligation to file a timely answer under § 22.15.

(2) *Consent agreement.* Any and all terms and conditions of a settlement shall be recorded in a written consent agreement signed by all parties or their representatives. The consent agreement shall state that, for the purpose of the proceeding, respondent: Admits the jurisdictional allegations of the complaint; admits the facts stipulated in the consent agreement or neither admits nor denies specific factual allegations contained in the complaint; consents to the assessment of any stated civil penalty, to the issuance of any specified compliance or corrective action order, to any conditions specified in the consent agreement, and to any stated Permit Action; and waives any right to contest the allegations and its right to appeal the proposed final order accompanying the consent agreement. Where complainant elects to commence a proceeding pursuant to § 22.13(b), the consent agreement shall also contain the elements described at § 22.14(a)(1)-(3) and (8). The parties shall forward the executed consent agreement and a proposed final order to the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board.

(3) *Conclusion of proceeding.* No settlement or consent agreement shall dispose of any proceeding under these Consolidated Rules of Practice without

a final order from the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board, ratifying the parties' consent agreement.

(c) *Scope of resolution or settlement.* Full payment of the penalty proposed in a complaint pursuant to paragraph (a) of this section or settlement pursuant to paragraph (b) of this section shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. Full payment of the penalty proposed in a complaint pursuant to paragraph (a) of this section or settlement pursuant to paragraph (b) of this section shall only resolve respondent's liability for Federal civil penalties for the violations and facts alleged in the complaint.

(d) *Alternative means of dispute resolution.* (1) The parties may engage in any process within the scope of the Alternative Dispute Resolution Act ("ADRA"), 5 U.S.C. 581 *et seq.*, which may facilitate voluntary settlement efforts. Such process shall be subject to the confidentiality provisions of the ADRA.

(2) Dispute resolution under this paragraph (d) does not divest the Presiding Officer of jurisdiction and does not automatically stay the proceeding. All provisions of these Consolidated Rules of Practice remain in effect notwithstanding any dispute resolution proceeding.

(3) The parties may choose any person to act as a neutral, or may move for the appointment of a neutral. If the Presiding Officer grants a motion for the appointment of a neutral, the Presiding Officer shall forward the motion to the Chief Administrative Law Judge, except in proceedings under subpart I of this part, in which the Presiding Officer shall forward the motion to the Regional Administrator. The Chief Administrative Law Judge or Regional Administrator, as appropriate, shall designate a qualified neutral.

§ 22.19 Prehearing information exchange; prehearing conference; other discovery.

(a) *Prehearing information exchange.*

(1) In accordance with an order issued by the Presiding Officer, each party shall file a prehearing information exchange. Except as provided in § 22.22(a), a document or exhibit that has not been included in prehearing information exchange shall not be admitted into evidence, and any witness whose name and testimony summary has not been included in prehearing information exchange shall not be allowed to testify. Parties are not required to exchange information relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence. Documents and exhibits shall be marked for identification as ordered by the Presiding Officer.

(2) Each party's prehearing information exchange shall contain:

(i) The names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony, or a statement that no witnesses will be called; and (ii) Copies of all documents and exhibits which it intends to introduce into evidence at the hearing.

(3) If the proceeding is for the assessment of a penalty and complainant has already specified a proposed penalty, complainant shall explain in its prehearing information exchange how the proposed penalty was calculated in accordance with any criteria set forth in the Act, and the respondent shall explain in its prehearing information exchange why the proposed penalty should be reduced or eliminated.

(4) If the proceeding is for the assessment of a penalty and complainant has not specified a proposed penalty, each party shall include in its prehearing information exchange all factual information it considers relevant to the assessment of a penalty. Within 15 days after respondent files its prehearing information exchange, complainant shall file a document specifying a proposed penalty and explaining how the proposed penalty was calculated in accordance with any criteria set forth in the Act.

(b) *Prehearing conference.* The Presiding Officer, at any time before the hearing begins, may direct the parties and their counsel or other representatives to participate in a conference to consider:

- (1) Settlement of the case;
- (2) Simplification of issues and stipulation of facts not in dispute;
- (3) The necessity or desirability of amendments to pleadings;
- (4) The exchange of exhibits, documents, prepared testimony, and admissions or stipulations of fact which will avoid unnecessary proof;
- (5) The limitation of the number of expert or other witnesses;
- (6) The time and place for the hearing; and
- (7) Any other matters which may expedite the disposition of the proceeding.

(c) *Record of the prehearing conference.* No transcript of a prehearing conference relating to settlement shall be made. With respect to other prehearing conferences, no transcript of any prehearing conferences shall be made unless ordered by the Presiding Officer. The Presiding Officer shall ensure that the record of the proceeding includes any stipulations, agreements, rulings or orders made during the conference.

(d) *Location of prehearing conference.* The prehearing conference shall be held in the county where the respondent resides or conducts the business which the hearing concerns, in the city in which the relevant Environmental Protection Agency Regional Office is located, or in Washington, DC, unless the Presiding Officer determines that there is good cause to hold it at another location or by telephone.

(e) *Other discovery.* (1) After the information exchange provided for in paragraph (a) of this section, a party may move for additional discovery. The motion shall specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought (and, where relevant, the proposed time and place where discovery would be conducted). The Presiding Officer may order such other discovery only if it:

(i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;

(ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and

(iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

(2) Settlement positions and information regarding their development (such as penalty calculations for purposes of settlement based upon Agency settlement policies) shall not be discoverable.

(3) The Presiding Officer may order depositions upon oral questions only in accordance with paragraph (e)(1) of this section and upon an additional finding that:

(i) The information sought cannot reasonably be obtained by alternative methods of discovery; or

(ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

(4) The Presiding Officer may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act. The Presiding Officer may issue a subpoena for discovery purposes only in accordance with paragraph (e)(1) of this section and upon an additional showing of the grounds and necessity therefor. Subpoenas shall be served in accordance with § 22.5(b)(1). Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Any fees shall be paid by the party at whose request the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the Agency.

(5) Nothing in this paragraph (e) shall limit a party's right to request admissions or stipulations, a respondent's right to request Agency records under the Federal Freedom of Information Act, 5 U.S.C. 552, or EPA's authority under any applicable law to conduct inspections, issue information request

letters or administrative subpoenas, or otherwise obtain information.

(f) *Supplementing prior exchanges.* A party who has made an information exchange under paragraph (a) of this section, or who has exchanged information in response to a request for information or a discovery order pursuant to paragraph (e) of this section, shall promptly supplement or correct the exchange when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.

(g) *Failure to exchange information.* Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion:

(1) Infer that the information would be adverse to the party failing to provide it;

(2) Exclude the information from evidence; or

(3) Issue a default order under § 22.17(c).

§ 22.20 Accelerated decision; decision to dismiss.

(a) *General.* The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

(b) *Effect.* (1) If an accelerated decision or a decision to dismiss is issued as to all issues and claims in the proceeding, the decision constitutes an initial decision of the Presiding Officer, and shall be filed with the Regional Hearing Clerk.

(2) If an accelerated decision or a decision to dismiss is rendered on less

than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted. The partial accelerated decision or the order dismissing certain counts shall specify the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.

Subpart D—Hearing Procedures

§ 22.21 Assignment of Presiding Officer; scheduling the hearing.

(a) *Assignment of Presiding Officer.* When an answer is filed, the Regional Hearing Clerk shall forward a copy of the complaint, the answer, and any other documents filed in the proceeding to the Chief Administrative Law Judge who shall serve as Presiding Officer or assign another Administrative Law Judge as Presiding Officer. The Presiding Officer shall then obtain the case file from the Chief Administrative Law Judge and notify the parties of his assignment.

(b) *Notice of hearing.* The Presiding Officer shall hold a hearing if the proceeding presents genuine issues of material fact. The Presiding Officer shall serve upon the parties a notice of hearing setting forth a time and place for the hearing not later than 30 days prior to the date set for the hearing. The Presiding Officer may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act, upon a showing of the grounds and necessity therefor, and the materiality and relevancy of the evidence to be adduced.

(c) *Postponement of hearing.* No request for postponement of a hearing shall be granted except upon motion and for good cause shown.

(d) *Location of the hearing.* The location of the hearing shall be determined in accordance with the method for determining the location of a prehearing conference under § 22.19(d).

§ 22.22 Evidence.

(a) *General.* (1) The Presiding Officer shall admit all evidence which is not

irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence (28 U.S.C.) is not admissible. If, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19 (a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.

(2) In the presentation, admission, disposition, and use of oral and written evidence, EPA officers, employees and authorized representatives shall preserve the confidentiality of information claimed confidential, whether or not the claim is made by a party to the proceeding, unless disclosure is authorized pursuant to 40 CFR part 2. A business confidentiality claim shall not prevent information from being introduced into evidence, but shall instead require that the information be treated in accordance with 40 CFR part 2, subpart B. The Presiding Officer or the Environmental Appeals Board may consider such evidence in a proceeding closed to the public, and which may be before some, but not all, parties, as necessary. Such proceeding shall be closed only to the extent necessary to comply with 40 CFR part 2, subpart B, for information claimed confidential. Any affected person may move for an order protecting the information claimed confidential.

(b) *Examination of witnesses.* Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in paragraphs (c) and (d) of this section or by the Presiding Officer. Parties shall have the right to cross-examine a witness who appears at the hearing provided that such cross-examination is not unduly repetitious.

(c) *Written testimony.* The Presiding Officer may admit and insert into the record as evidence, in lieu of oral testi-

mony, written testimony prepared by a witness. The admissibility of any part of the testimony shall be subject to the same rules as if the testimony were produced under oral examination. Before any such testimony is read or admitted into evidence, the party who has called the witness shall deliver a copy of the testimony to the Presiding Officer, the reporter, and opposing counsel. The witness presenting the testimony shall swear to or affirm the testimony and shall be subject to appropriate oral cross-examination.

(d) *Admission of affidavits where the witness is unavailable.* The Presiding Officer may admit into evidence affidavits of witnesses who are unavailable. The term "unavailable" shall have the meaning accorded to it by Rule 804(a) of the Federal Rules of Evidence.

(e) *Exhibits.* Where practicable, an original and one copy of each exhibit shall be filed with the Presiding Officer for the record and a copy shall be furnished to each party. A true copy of any exhibit may be substituted for the original.

(f) *Official notice.* Official notice may be taken of any matter which can be judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency. Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed.

§ 22.23 Objections and offers of proof.

(a) *Objection.* Any objection concerning the conduct of the hearing may be stated orally or in writing during the hearing. The party raising the objection must supply a short statement of its grounds. The ruling by the Presiding Officer on any objection and the reasons given for it shall be part of the record. An exception to each objection overruled shall be automatic and is not waived by further participation in the hearing.

(b) *Offers of proof.* Whenever the Presiding Officer denies a motion for admission into evidence, the party offering the information may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the information excluded. The offer of

proof for excluded documents or exhibits shall consist of the documents or exhibits excluded. Where the Environmental Appeals Board decides that the ruling of the Presiding Officer in excluding the information from evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence.

§ 22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard.

(a) The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's establishment of a *prima facie* case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.

(b) Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence.

§ 22.25 Filing the transcript.

The hearing shall be transcribed verbatim. Promptly following the taking of the last evidence, the reporter shall transmit to the Regional Hearing Clerk the original and as many copies of the transcript of testimony as are called for in the reporter's contract with the Agency, and also shall transmit to the Presiding Officer a copy of the transcript. A certificate of service shall accompany each copy of the transcript. The Regional Hearing Clerk shall notify all parties of the availability of the transcript and shall furnish the parties with a copy of the transcript upon payment of the cost of reproduction, unless a party can show that the cost is unduly burdensome. Any person not a party to the proceeding may receive a copy of the transcript upon payment of the reproduction fee, except for those parts of the transcript ordered to be kept confidential by the Presiding Officer. Any party may file a motion to conform the transcript to the actual testimony within 30 days after receipt of the transcript, or 45 days after the parties are notified of

the availability of the transcript, whichever is sooner.

§ 22.26 Proposed findings, conclusions, and order.

After the hearing, any party may file proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. The Presiding Officer shall set a schedule for filing these documents and any reply briefs, but shall not require them before the last date for filing motions under § 22.25 to conform the transcript to the actual testimony. All submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

Subpart E—Initial Decision and Motion To Reopen a Hearing

§ 22.27 Initial Decision.

(a) *Filing and contents.* After the period for filing briefs under § 22.26 has expired, the Presiding Officer shall issue an initial decision. The initial decision shall contain findings of fact, conclusions regarding all material issues of law or discretion, as well as reasons therefor, and, if appropriate, a recommended civil penalty assessment, compliance order, corrective action order, or Permit Action. Upon receipt of an initial decision, the Regional Hearing Clerk shall forward copies of the initial decision to the Environmental Appeals Board and the Assistant Administrator for the Office of Enforcement and Compliance Assurance.

(b) *Amount of civil penalty.* If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty

criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.

(c) *Effect of initial decision.* The initial decision of the Presiding Officer shall become a final order 45 days after its service upon the parties and without further proceedings unless:

- (1) A party moves to reopen the hearing;
- (2) A party appeals the initial decision to the Environmental Appeals Board;
- (3) A party moves to set aside a default order that constitutes an initial decision; or
- (4) The Environmental Appeals Board elects to review the initial decision on its own initiative.

(d) *Exhaustion of administrative remedies.* Where a respondent fails to appeal an initial decision to the Environmental Appeals Board pursuant to § 22.30 and that initial decision becomes a final order pursuant to paragraph (c) of this section, respondent waives its rights to judicial review. An initial decision that is appealed to the Environmental Appeals Board shall not be final or operative pending the Environmental Appeals Board's issuance of a final order.

§ 22.28 Motion to reopen a hearing.

(a) *Filing and content.* A motion to reopen a hearing to take further evidence must be filed no later than 20 days after service of the initial decision and shall state the specific grounds upon which relief is sought. Where the movant seeks to introduce new evidence, the motion shall state briefly the nature and purpose of the evidence to be adduced; show that such evidence is not cumulative; and show good cause why such evidence was not adduced at the hearing. The motion shall be made to the Presiding Officer and filed with the Regional Hearing Clerk.

(b) *Disposition of motion to reopen a hearing.* Within 15 days following the service of a motion to reopen a hearing, any other party to the proceeding may file with the Regional Hearing Clerk and serve on all other parties a response. A reopened hearing shall be governed by the applicable sections of these Consolidated Rules of Practice. The filing of a motion to reopen a hearing shall automatically stay the running of the time periods for an initial decision becoming final under § 22.27(c) and for appeal under § 22.30. These time periods shall begin again in full when the motion is denied or an amended initial decision is served.

Subpart F—Appeals and Administrative Review

§ 22.29 Appeal from or review of interlocutory orders or rulings.

(a) *Request for interlocutory appeal.* Appeals from orders or rulings other than an initial decision shall be allowed only at the discretion of the Environmental Appeals Board. A party seeking interlocutory appeal of such orders or rulings to the Environmental Appeals Board shall file a motion within 10 days of service of the order or ruling, requesting that the Presiding Officer forward the order or ruling to the Environmental Appeals Board for review, and stating briefly the grounds for the appeal.

(b) *Availability of interlocutory appeal.* The Presiding Officer may recommend any order or ruling for review by the Environmental Appeals Board when:

- (1) The order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion; and
- (2) Either an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.

(c) *Interlocutory review.* If the Presiding Officer has recommended review and the Environmental Appeals Board determines that interlocutory review is inappropriate, or takes no action within 30 days of the Presiding Officer's recommendation, the appeal is dismissed. When the Presiding Officer declines to

recommend review of an order or ruling, it may be reviewed by the Environmental Appeals Board only upon appeal from the initial decision, except when the Environmental Appeals Board determines, upon motion of a party and in exceptional circumstances, that to delay review would be contrary to the public interest. Such motion shall be filed within 10 days of service of an order of the Presiding Officer refusing to recommend such order or ruling for interlocutory review.

§ 22.30 Appeal from or review of initial decision.

(a) *Notice of appeal.* (1) Within 30 days after the initial decision is served, any party may appeal any adverse order or ruling of the Presiding Officer by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board. Appeals sent by U.S. mail (except by U.S. Postal Express Mail) shall be addressed to the Environmental Appeals Board at its official mailing address: Clerk of the Board (Mail Code 1103B), United States Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Appeals delivered by hand or courier (including deliveries by U.S. Postal Express Mail or by a commercial delivery service) shall be delivered to Suite 600, 1341 G Street, NW., Washington, DC 20005. One copy of any document filed with the Clerk of the Board shall also be served on the Regional Hearing Clerk. Appellant also shall serve a copy of the notice of appeal upon the Presiding Officer. Appellant shall simultaneously serve one copy of the notice and brief upon all other parties and non-party participants. The notice of appeal shall summarize the order or ruling, or part thereof, appealed from. The appellant's brief shall contain tables of contents and authorities (with page references), a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review (with appropriate references to the record), argument on the issues presented, a short conclusion stating the precise relief sought, alternative findings of fact, and alternative conclusions regarding issues of law or dis-

cretion. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal on any issue within 20 days after the date on which the first notice of appeal was served.

(2) Within 20 days of service of notices of appeal and briefs under paragraph (a)(1) of this section, any other party or non-party participant may file with the Environmental Appeals Board an original and one copy of a response brief responding to argument raised by the appellant, together with reference to the relevant portions of the record, initial decision, or opposing brief. Appellee shall simultaneously serve one copy of the response brief upon each party, non-party participant, and the Regional Hearing Clerk. Response briefs shall be limited to the scope of the appeal brief. Further briefs may be filed only with the permission of the Environmental Appeals Board.

(b) *Review initiated by the Environmental Appeals Board.* Whenever the Environmental Appeals Board determines to review an initial decision on its own initiative, it shall file notice of its intent to review that decision with the Clerk of the Board, and serve it upon the Regional Hearing Clerk, the Presiding Officer and the parties within 45 days after the initial decision was served upon the parties. The notice shall include a statement of issues to be briefed by the parties and a time schedule for the filing and service of briefs.

(c) *Scope of appeal or review.* The parties' rights of appeal shall be limited to those issues raised during the course of the proceeding and by the initial decision, and to issues concerning subject matter jurisdiction. If the Environmental Appeals Board determines that issues raised, but not appealed by the parties, should be argued, it shall give the parties reasonable written notice of such determination to permit preparation of adequate argument. The Environmental Appeals Board may remand the case to the Presiding Officer for further proceedings.

(d) *Argument before the Environmental Appeals Board.* The Environmental Appeals Board may, at its discretion, order oral argument on any or all issues in a proceeding.

(e) *Motions on appeal.* All motions made during the course of an appeal shall conform to § 22.16 unless otherwise provided.

(f) *Decision.* The Environmental Appeals Board shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed, and shall set forth in the final order the reasons for its actions. The Environmental Appeals Board may assess a penalty that is higher or lower than the amount recommended to be assessed in the decision or order being reviewed or from the amount sought in the complaint, except that if the order being reviewed is a default order, the Environmental Appeals Board may not increase the amount of the penalty above that proposed in the complaint or in the motion for default, whichever is less. The Environmental Appeals Board may adopt, modify or set aside any recommended compliance or corrective action order or Permit Action. The Environmental Appeals Board may remand the case to the Presiding Officer for further action.

[64 FR 40176, July 23, 1999, as amended at 68 FR 2204, Jan. 16, 2003; 69 FR 77639, Dec. 28, 2004]

Subpart G—Final Order

§ 22.31 Final order.

(a) *Effect of final order.* A final order constitutes the final Agency action in a proceeding. The final order shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. The final order shall resolve only those causes of action alleged in the complaint, or for proceedings commenced pursuant to § 22.13(b), alleged in the consent agreement. The final order does not waive, extinguish or otherwise affect respondent's obligation to comply with all applicable provisions of the Act and regulations promulgated thereunder.

(b) *Effective date.* A final order is effective upon filing. Where an initial decision becomes a final order pursuant to § 22.27(c), the final order is effective 45 days after the initial decision is served on the parties.

(c) *Payment of a civil penalty.* The respondent shall pay the full amount of any civil penalty assessed in the final order within 30 days after the effective date of the final order unless otherwise ordered. Payment shall be made by sending a cashier's check or certified check to the payee specified in the complaint, unless otherwise instructed by the complainant. The check shall note the case title and docket number. Respondent shall serve copies of the check or other instrument of payment on the Regional Hearing Clerk and on complainant. Collection of interest on overdue payments shall be in accordance with the Debt Collection Act, 31 U.S.C. 3717.

(d) *Other relief.* Any final order requiring compliance or corrective action, or a Permit Action, shall become effective and enforceable without further proceedings on the effective date of the final order unless otherwise ordered.

(e) *Final orders to Federal agencies on appeal.* (1) A final order of the Environmental Appeals Board issued pursuant to § 22.30 to a department, agency, or instrumentality of the United States shall become effective 30 days after its service upon the parties unless the head of the affected department, agency, or instrumentality requests a conference with the Administrator in writing and serves a copy of the request on the parties of record within 30 days of service of the final order. If a timely request is made, a decision by the Administrator shall become the final order.

(2) A motion for reconsideration pursuant to § 22.32 shall not toll the 30-day period described in paragraph (e)(1) of this section unless specifically so ordered by the Environmental Appeals Board.

§ 22.32 Motion to reconsider a final order.

Motions to reconsider a final order issued pursuant to § 22.30 shall be filed within 10 days after service of the final order. Motions must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Motions for reconsideration under this provision shall be directed to, and decided by, the Environmental

Appeals Board. Motions for reconsideration directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered, except in cases that the Environmental Appeals Board has referred to the Administrator pursuant to § 22.4(a) and in which the Administrator has issued the final order. A motion for reconsideration shall not stay the effective date of the final order unless so ordered by the Environmental Appeals Board.

Subpart H—Supplemental Rules

§ 22.33 [Reserved]

§ 22.34 Supplemental rules governing the administrative assessment of civil penalties under the Clean Air Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under sections 113(d), 205(c), 211(d), and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7413(d), 7524(c), 7545(d), and 7547(d)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Issuance of notice.* Prior to the issuance of a final order assessing a civil penalty, the person to whom the order is to be issued shall be given written notice of the proposed issuance of the order. Service of a complaint or a consent agreement and final order pursuant to § 22.13 satisfies this notice requirement.

§ 22.35 Supplemental rules governing the administrative assessment of civil penalties under the Federal Insecticide, Fungicide, and Rodenticide Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 1361(a)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Venue.* The prehearing conference and the hearing shall be held in the county, parish, or incorporated city of the residence of the person charged,

unless otherwise agreed in writing by all parties. For a person whose residence is outside the United States and outside any territory or possession of the United States, the prehearing conference and the hearing shall be held at the EPA office listed at 40 CFR 1.7 that is closest to either the person's primary place of business within the United States, or the primary place of business of the person's U.S. agent, unless otherwise agreed by all parties.

§ 22.36 [Reserved]

§ 22.37 Supplemental rules governing administrative proceedings under the Solid Waste Disposal Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings under sections 3005(d) and (e), 3008, 9003 and 9006 of the Solid Waste Disposal Act (42 U.S.C. 6925(d) and (e), 6928, 6991b and 6991e) ("SWDA"). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Corrective action and compliance orders.* A complaint may contain a compliance order issued under section 3008(a) or section 9006(a), or a corrective action order issued under section 3008(h) or section 9003(h)(4) of the SWDA. Any such order shall automatically become a final order unless, no later than 30 days after the order is served, the respondent requests a hearing pursuant to § 22.15.

§ 22.38 Supplemental rules of practice governing the administrative assessment of civil penalties under the Clean Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32 and § 22.45, in administrative proceedings for the assessment of any civil penalty under section 309(g) or section 311(b)(6) of the Clean Water Act ("CWA") (33 U.S.C. 1319(g) and 1321(b)(6)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Consultation with States.* For proceedings pursuant to section 309(g), the complainant shall provide the State agency with the most direct authority over the matters at issue in the case an

opportunity to consult with the complainant. Complainant shall notify the State agency within 30 days following proof of service of the complaint on the respondent or, in the case of a proceeding proposed to be commenced pursuant to §22.13(b), no less than 40 days before the issuance of an order assessing a civil penalty.

(c) *Administrative procedure and judicial review.* Action of the Administrator for which review could have been obtained under section 509(b)(1) of the CWA, 33 U.S.C. 1369(b)(1), shall not be subject to review in an administrative proceeding for the assessment of a civil penalty under section 309(g) or section 311(b)(6).

§22.39 Supplemental rules governing the administrative assessment of civil penalties under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.

(a) *Scope.* This section shall apply, in conjunction with §§22.10 through 22.32, in administrative proceedings for the assessment of any civil penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9609). Where inconsistencies exist between this section and §§22.1 through 22.32, this section shall apply.

(b) *Judicial review.* Any person who requested a hearing with respect to a Class II civil penalty under section 109(b) of CERCLA, 42 U.S.C. 9609(b), and who is the recipient of a final order assessing a civil penalty may file a petition for judicial review of such order with the United States Court of Appeals for the District of Columbia or for any other circuit in which such person resides or transacts business. Any person who requested a hearing with respect to a Class I civil penalty under section 109(a)(4) of CERCLA, 42 U.S.C. 9609(a)(4), and who is the recipient of a final order assessing the civil penalty may file a petition for judicial review of such order with the appropriate district court of the United States. All petitions must be filed within 30 days of the date the order making the assessment was served on the parties.

(c) *Payment of civil penalty assessed.* Payment of civil penalties assessed in the final order shall be made by for-

warding a cashier's check, payable to the "EPA, Hazardous Substances Superfund," in the amount assessed, and noting the case title and docket number, to the appropriate regional Superfund Lockbox Depository.

§22.40 [Reserved]

§22.41 Supplemental rules governing the administrative assessment of civil penalties under Title II of the Toxic Substance Control Act, enacted as section 2 of the Asbestos Hazard Emergency Response Act (AHERA).

(a) *Scope.* This section shall apply, in conjunction with §§22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under section 207 of the Toxic Substances Control Act ("TSCA") (15 U.S.C. 2647). Where inconsistencies exist between this section and §§22.1 through 22.32, this section shall apply.

(b) *Collection of civil penalty.* Any civil penalty collected under TSCA section 207 shall be used by the local educational agency for purposes of complying with Title II of TSCA. Any portion of a civil penalty remaining unspent after a local educational agency achieves compliance shall be deposited into the Asbestos Trust Fund established under section 5 of AHERA.

§22.42 Supplemental rules governing the administrative assessment of civil penalties for violations of compliance orders issued to owners or operators of public water systems under part B of the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§22.1 through 22.32, in administrative proceedings to assess a civil penalty under section 1414(g)(3)(B) of the Safe Drinking Water Act, 42 U.S.C. 300g-3(g)(3)(B). Where inconsistencies exist between this section and §§22.1 through 22.32, this section shall apply.

(b) *Choice of forum.* A complaint which specifies that subpart I of this part applies shall also state that respondent has a right to elect a hearing on the record in accordance with 5 U.S.C. 554, and that respondent waives

this right unless it requests in its answer a hearing on the record in accordance with 5 U.S.C. 554. Upon such request, the Regional Hearing Clerk shall recaption the documents in the record as necessary, and notify the parties of the changes.

§ 22.43 Supplemental rules governing the administrative assessment of civil penalties against a federal agency under the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty against a federal agency under section 1447(b) of the Safe Drinking Water Act, 42 U.S.C. 300j-6(b). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Effective date of final penalty order.* Any penalty order issued pursuant to this section and section 1447(b) of the Safe Drinking Water Act shall become effective 30 days after it has been served on the parties.

(c) *Public notice of final penalty order.* Upon the issuance of a final penalty order under this section, the Administrator shall provide public notice of the order by publication, and by providing notice to any person who requests such notice. The notice shall include:

- (1) The docket number of the order;
- (2) The address and phone number of the Regional Hearing Clerk from whom a copy of the order may be obtained;
- (3) The location of the facility where violations were found;
- (4) A description of the violations;
- (5) The penalty that was assessed; and
- (6) A notice that any interested person may, within 30 days of the date the order becomes final, obtain judicial review of the penalty order pursuant to section 1447(b) of the Safe Drinking Water Act, and instruction that persons seeking judicial review shall provide copies of any appeal to the persons described in 40 CFR 135.11(a).

§ 22.44 Supplemental rules of practice governing the termination of permits under section 402(a) of the Clean Water Act or under section 3008(a)(3) of the Resource Conservation and Recovery Act.

(a) *Scope of this subpart.* The supplemental rules of practice in this subpart shall also apply in conjunction with the Consolidated Rules of Practice in this part and with the administrative proceedings for the termination of permits under section 402(a) of the Clean Water Act or under section 3008(a)(3) of the Resource Conservation and Recovery Act. Notwithstanding the Consolidated Rules of Practice, these supplemental rules shall govern with respect to the termination of such permits.

(b) In any proceeding to terminate a permit for cause under § 122.64 or § 270.43 of this chapter during the term of the permit:

(1) The complaint shall, in addition to the requirements of § 22.14(b), contain any additional information specified in § 124.8 of this chapter;

(2) The Director (as defined in § 124.2 of this chapter) shall provide public notice of the complaint in accordance with § 124.10 of this chapter, and allow for public comment in accordance with § 124.11 of this chapter; and

(3) The Presiding Officer shall admit into evidence the contents of the Administrative Record described in § 124.9 of this chapter, and any public comments received.

[65 FR 30904, May 15, 2000]

§ 22.45 Supplemental rules governing public notice and comment in proceedings under sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act and section 1423(c) of the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings for the assessment of any civil penalty under sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act (33 U.S.C. 1319(g) and 1321(b)(6)(B)(ii)), and under section 1423(c) of the Safe Drinking Water Act (42 U.S.C. 300h-2(c)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Public notice.*—(1) *General.* Complainant shall notify the public before assessing a civil penalty. Such notice shall be provided within 30 days following proof of service of the complaint on the respondent or, in the case of a proceeding proposed to be commenced pursuant to § 22.13(b), no less than 40 days before the issuance of an order assessing a civil penalty. The notice period begins upon first publication of notice.

(2) *Type and content of public notice.* The complainant shall provide public notice of the complaint (or the proposed consent agreement if § 22.13(b) is applicable) by a method reasonably calculated to provide notice, and shall also provide notice directly to any person who requests such notice. The notice shall include:

(i) The docket number of the proceeding;

(ii) The name and address of the complainant and respondent, and the person from whom information on the proceeding may be obtained, and the address of the Regional Hearing Clerk to whom appropriate comments shall be directed;

(iii) The location of the site or facility from which the violations are alleged, and any applicable permit number;

(iv) A description of the violation alleged and the relief sought; and

(v) A notice that persons shall submit comments to the Regional Hearing Clerk, and the deadline for such submissions.

(c) *Comment by a person who is not a party.* The following provisions apply in regard to comment by a person not a party to a proceeding:

(1) *Participation in proceeding.* (i) Any person wishing to participate in the proceedings must notify the Regional Hearing Clerk in writing within the public notice period under paragraph (b)(1) of this section. The person must provide his name, complete mailing address, and state that he wishes to participate in the proceeding.

(ii) The Presiding Officer shall provide notice of any hearing on the merits to any person who has met the requirements of paragraph (c)(1)(i) of this section at least 20 days prior to the scheduled hearing.

(iii) A commenter may present written comments for the record at any time prior to the close of the record.

(iv) A commenter wishing to present evidence at a hearing on the merits shall notify, in writing, the Presiding Officer and the parties of its intent at least 10 days prior to the scheduled hearing. This notice must include a copy of any document to be introduced, a description of the evidence to be presented, and the identity of any witness (and qualifications if an expert), and the subject matter of the testimony.

(v) In any hearing on the merits, a commenter may present evidence, including direct testimony subject to cross examination by the parties.

(vi) The Presiding Officer shall have the discretion to establish the extent of commenter participation in any other scheduled activity.

(2) *Limitations.* A commenter may not cross-examine any witness in any hearing and shall not be subject to or participate in any discovery or prehearing exchange.

(3) *Quick resolution and settlement.* No proceeding subject to the public notice and comment provisions of paragraphs (b) and (c) of this section may be resolved or settled under § 22.18, or commenced under § 22.13(b), until 10 days after the close of the comment period provided in paragraph (c)(1) of this section.

(4) *Petition to set aside a consent agreement and proposed final order.* (i) Complainant shall provide to each commenter, by certified mail, return receipt requested, but not to the Regional Hearing Clerk or Presiding Officer, a copy of any consent agreement between the parties and the proposed final order.

(ii) Within 30 days of receipt of the consent agreement and proposed final order a commenter may petition the Regional Administrator (or, for cases commenced at EPA Headquarters, the Environmental Appeals Board), to set aside the consent agreement and proposed final order on the basis that material evidence was not considered. Copies of the petition shall be served on the parties, but shall not be sent to the Regional Hearing Clerk or the Presiding Officer.

(iii) Within 15 days of receipt of a petition, the complainant may, with notice to the Regional Administrator or Environmental Appeals Board and to the commenter, withdraw the consent agreement and proposed final order to consider the matters raised in the petition. If the complainant does not give notice of withdrawal within 15 days of receipt of the petition, the Regional Administrator or Environmental Appeals Board shall assign a Petition Officer to consider and rule on the petition. The Petition Officer shall be another Presiding Officer, not otherwise involved in the case. Notice of this assignment shall be sent to the parties, and to the Presiding Officer.

(iv) Within 30 days of assignment of the Petition Officer, the complainant shall present to the Petition Officer a copy of the complaint and a written response to the petition. A copy of the response shall be provided to the parties and to the commenter, but not to the Regional Hearing Clerk or Presiding Officer.

(v) The Petition Officer shall review the petition, and complainant's response, and shall file with the Regional Hearing Clerk, with copies to the parties, the commenter, and the Presiding Officer, written findings as to:

(A) The extent to which the petition states an issue relevant and material to the issuance of the proposed final order;

(B) Whether complainant adequately considered and responded to the petition; and

(C) Whether a resolution of the proceeding by the parties is appropriate without a hearing.

(vi) Upon a finding by the Petition Officer that a hearing is appropriate, the Presiding Officer shall order that the consent agreement and proposed final order be set aside and shall establish a schedule for a hearing.

(vii) Upon a finding by the Petition Officer that a resolution of the proceeding without a hearing is appropriate, the Petition Officer shall issue an order denying the petition and stating reasons for the denial. The Petition Officer shall:

(A) File the order with the Regional Hearing Clerk;

(B) Serve copies of the order on the parties and the commenter; and

(C) Provide public notice of the order.

(viii) Upon a finding by the Petition Officer that a resolution of the proceeding without a hearing is appropriate, the Regional Administrator may issue the proposed final order, which shall become final 30 days after both the order denying the petition and a properly signed consent agreement are filed with the Regional Hearing Clerk, unless further petition for review is filed by a notice of appeal in the appropriate United States District Court, with coincident notice by certified mail to the Administrator and the Attorney General. Written notice of appeal also shall be filed with the Regional Hearing Clerk, and sent to the Presiding Officer and the parties.

(ix) If judicial review of the final order is denied, the final order shall become effective 30 days after such denial has been filed with the Regional Hearing Clerk.

§§ 22.46–22.49 [Reserved]

Subpart I—Administrative Proceedings Not Governed by Section 554 of the Administrative Procedure Act

§ 22.50 Scope of this subpart.

(a) *Scope.* This subpart applies to all adjudicatory proceedings for:

(1) The assessment of a penalty under sections 309(g)(2)(A) and 311(b)(6)(B)(i) of the Clean Water Act (33 U.S.C. 1319(g)(2)(A) and 1321(b)(6)(B)(i)).

(2) The assessment of a penalty under sections 1414(g)(3)(B) and 1423(c) of the Safe Drinking Water Act (42 U.S.C. 300g-3(g)(3)(B) and 300h-2(c)), except where a respondent in a proceeding under section 1414(g)(3)(B) requests in its answer a hearing on the record in accordance with section 554 of the Administrative Procedure Act, 5 U.S.C. 554.

(b) *Relationship to other provisions.* Sections 22.1 through 22.45 apply to proceedings under this subpart, except for the following provisions which do not apply: §§ 22.11, 22.16(c), 22.21(a), and 22.29. Where inconsistencies exist between this subpart and subparts A

through G of this part, this subpart shall apply. Where inconsistencies exist between this subpart and subpart H of this part, subpart H shall apply.

§ 22.51 Presiding Officer.

The Presiding Officer shall be a Regional Judicial Officer. The Presiding Officer shall conduct the hearing, and rule on all motions until an initial decision has become final or has been appealed.

§ 22.52 Information exchange and discovery.

Respondent's information exchange pursuant to § 22.19(a) shall include information on any economic benefit resulting from any activity or failure to act which is alleged in the administrative complaint to be a violation of applicable law, including its gross revenues, delayed or avoided costs. Discovery under § 22.19(e) shall not be authorized, except for discovery of information concerning respondent's economic benefit from alleged violations and information concerning respondent's ability to pay a penalty.

PART 23—JUDICIAL REVIEW UNDER EPA—ADMINISTERED STATUTES

Sec.

23.1 Definitions.

23.2 Timing of Administrator's action under Clean Water Act.

23.3 Timing of Administrator's action under Clean Air Act.

23.4 Timing of Administrator's action under Resource Conservation and Recovery Act.

23.5 Timing of Administrator's action under Toxic Substances Control Act.

23.6 Timing of Administrator's action under Federal Insecticide, Fungicide and Rodenticide Act.

23.7 Timing of Administrator's action under Safe Drinking Water Act.

23.8 Timing of Administrator's action under Uranium Mill Tailings Radiation Control Act of 1978.

23.9 Timing of Administrator's action under the Atomic Energy Act.

23.10 Timing of Administrator's action under the Federal Food, Drug, and Cosmetic Act.

23.11 Holidays.

23.12 Filing notice of judicial review.

AUTHORITY: Clean Water Act, 33 U.S.C. 1361(a), 1369(b); Clean Air Act, 42 U.S.C. 7601(a)(1), 7607(b); Resource, Conservation

and Recovery Act, 42 U.S.C. 6912(a), 6976; Toxic Substances Control Act, 15 U.S.C. 2618; Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136n(b), 136w(a); Safe Drinking Water Act, 42 U.S.C. 300j-7(a)(2), 300j-9(a); Atomic Energy Act, 42 U.S.C. 2201, 2239; Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 371(a), 346a, 28 U.S.C. 2112(a), 2343, 2344.

SOURCE: 50 FR 7270, Feb. 21, 1985, unless otherwise noted.

§ 23.1 Definitions.

As used in this part, the term:

(a) *Federal Register document* means a document intended for publication in the FEDERAL REGISTER and bearing in its heading an identification code including the letters *FRL*.

(b) *Administrator* means the Administrator or any official exercising authority delegated by the Administrator.

(c) *General Counsel* means the General Counsel of EPA or any official exercising authority delegated by the General Counsel.

[50 FR 7270, Feb. 21, 1985, as amended at 53 FR 29322, Aug. 3, 1988]

§ 23.2 Timing of Administrator's action under Clean Water Act.

Unless the Administrator otherwise explicitly provides in a particular promulgation or approval action, the time and date of the Administrator's action in promulgation (for purposes of sections 509(b)(1) (A), (C), and (E)), approving (for purposes of section 509(b)(1)(E)), making a determination (for purposes of section 509(b)(1) (B) and (D), and issuing or denying (for purposes of section 509(b)(1)(F)) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on (a) for a FEDERAL REGISTER document, the date that is two weeks after the date when the document is published in the FEDERAL REGISTER, or (b) for any other document, two weeks after it is signed.

§ 23.3 Timing of Administrator's action under Clean Air Act.

Unless the Administrator otherwise explicitly provides in a particular promulgation, approval, or action, the time and date of such promulgation, approval or action for purposes of the second sentence of section 307(b)(1) shall be at 1:00 p.m. eastern time

**NOTICE OF SECURITIES AND EXCHANGE COMMISSION REGISTRANTS' DUTY TO DISCLOSE
ENVIRONMENTAL LEGAL PROCEEDINGS**

Securities and Exchange Commission regulations require companies registered with the SEC (e.g., publicly traded companies) to disclose, on at least a quarterly basis, the existence of certain administrative or judicial proceedings taken against them arising under Federal, State or local provisions that have the primary purpose of protecting the environment. Instruction 5 to Item 103 of the SEC's Regulation S-K (17 CFR 229.103) requires disclosure of these environmental legal proceedings. For those SEC registrants that use the SEC's "small business issuer" reporting system, Instructions 1-4 to Item 103 of the SEC's Regulation S-B (17 CFR 228.103) requires disclosure of these environmental legal proceedings.

If you are an SEC registrant, you have a duty to disclose the existence of pending or known to be contemplated environmental legal proceedings that meet any of the following criteria (17 CFR 229.103(5)(A)-(C)):

- A. Such proceeding is material to the business or financial condition of the registrant;
- B. Such proceeding involves primarily a claim for damages, or involves potential monetary sanctions, capital expenditures, deferred charges or charges to income and the amount involved, exclusive of interest and costs, exceeds 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis; or
- C. A governmental authority is a party to such proceeding and such proceeding involves potential monetary sanctions, unless the registrant reasonably believes that such proceeding will result in no monetary sanctions, or in monetary sanctions, exclusive of interest and costs, of less than \$100,000; provided, however, that such proceedings which are similar in nature may be grouped and described generically.

Specific information regarding the environmental legal proceedings that must be disclosed is set forth in Item 103 of Regulation S-K or, for registrants using the "small business issuer" reporting system, Item 103(a)-(b) of Regulation S-B. If disclosure is required, it must briefly describe the proceeding, "including the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceedings and the relief sought."

You have been identified as a party to an environmental legal proceeding to which the United States government is, or was, a party. If you are an SEC registrant, this environmental legal proceeding may trigger, or may already have triggered, the disclosure obligation under the SEC regulations described above.

This notice is being provided to inform you of SEC registrants' duty to disclose any relevant environmental legal proceedings to the SEC. This notice does not create, modify or interpret any existing legal obligations, it is not intended to be an exhaustive description of the legally applicable requirements and it is not a substitute for regulations published in the Code of Federal Regulations. This notice has been issued to you for information purposes only. No determination of the applicability of this reporting requirement to your company has been made by any governmental entity. You should seek competent counsel in determining the applicability of these and other SEC requirements to the environmental legal proceeding at issue, as well as any other proceedings known to be contemplated by governmental authorities.

If you have any questions about the SEC's environmental disclosure requirements, please contact the SEC Office of the Special Senior Counsel for Disclosure Operations at (202) 942-1888.

EPA DOCKET No. CAA-01-2009-0024
In Re: Cytec Industries Inc.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Complaint and Notice of Opportunity for Hearing has been sent to the following persons on the date and in the manner noted below:

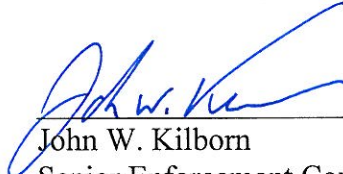
Original and one copy,
hand-delivered:

Ms. Wanda Santiago
Regional Hearing Clerk
U.S. EPA, Region I
One Congress Street, Suite 1100
Boston, MA 02114-2023

Copy, by
Certified Mail

Shane D. Fleming, President and Chief Executive Officer
Cytec Industries Inc.
Five Garret Mountain Plaza
West Paterson, NJ 07424

Dated: 02/13/2009



John W. Kilborn
Senior Enforcement Counsel
U.S. Environmental Protection Agency,
Region 1
One Congress Street, Suite 1100
Boston, MA 02114-2023
Tel (617) 918-1893
FAX (617) 918-1809

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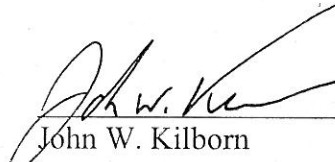
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Shane D. Fleming, President and Chief Executive Officer
Cytec Industries Inc.
Five Garret Mountain Plaza
West Paterson, NJ 07424

Dated: 02/13/2009



John W. Kilborn
Senior Enforcement Counsel
U.S. Environmental Protection Agency,
Region 1
One Congress Street, Suite 1100
Boston, MA 02114-2023
Tel (617) 918-1893
FAX (617) 918-1809

