UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:		
	)	
	)	
U.S. ARMY TRAINING CENTER	)	**Docket No. CAA 04-2001-1502**
	)	
AND	)	
	)	
FORT JACKSON	)	
	)	

INITIAL DECISION[1]

I. Introduction

In this proceeding under Section 113(d) of the Clean Air Act ("CAA"), 42 U.S.C. § 7413(d), EPA charged the Respondent, the U.S. Army Training Center and Fort Jackson ("Fort Jackson"), with four violations of the National Emission Standard for Asbestos, 40 C.F.R. Part 61, Subpart M. The Complaint alleges that in March 1997, during a renovation at a dining hall facility, Building 5422, at Fort Jackson, the Respondent failed to provide written notice at least 10 days prior to beginning a renovation activity, in violation of 40 C.F.R. § 61.145(b), failed to thoroughly inspect the facility for the presence of asbestos prior to beginning the renovation, in

[1]Because their were post-hearing document submittals and a because a period of time had elapsed from the close of the hearing and the time when the Court began its review of the record in order to reach a decision in this matter, the Court did request, on August 21, 2003, that EPA *resubmit* each document evidencing a proper delegation in this case. It directed this to ensure that no document had been misplaced among the post-hearing submittals. EPA complied with the Court's order, but unfortunately decided to go one better by submitting additional documents and making additional arguments. This was properly objected to by the Respondent. **The Court agrees that those aspects of EPA's submission which exceeded the Order were inappropriate and offensive. None of the additional matter was considered**. The Court merely cross-checked its post-hearing documents with those submitted and ignored the improper EPA inclusions.

violation of 40 C.F.R. § 61.145(a), failed to use properly trained personnel during the renovation, in violation of 40 C.F.R. § 61.145(c)(8), and failed to keep removed asbestos material wet until collected for disposal, in violation of 40 C.F.R. § 61.145(c)(6)(i). Stipulations 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, and 34.

Fort Jackson admitted the violations, but it challenges whether EPA complied with the requirements of Section 113(d)(1) of the CAA, which requires that the EPA Administrator and the Attorney General concur on any Section 113(d) action involving violations greater than one year old. The Respondent also challenges whether the penalty criterion of "size of business" applies to federal agencies and whether, in any event, the penalty policy was properly applied in this instance and should be discarded in favor of an independent assessment of a penalty by the Court.

II. Preliminary Determinations

A. Has EPA demonstrated that there was a proper delegation of authority in this matter?

1. The Parties' Arguments

Through a motion at the hearing Respondent urges dismissal of the Complaint on the basis of EPA's failure to establish that the Administrator or a properly delegated official acting on behalf of the Administrator, made the requisite determination to proceed, as required by 42 U.S.C. § 7413 (d)(1). Fort Jackson contends that there is no evidence to document that an "appropriateness determination" was ever made by the Regional Administrator. Although EPA Exhibit 6 makes *reference* to such a determination, that is not the same as documented evidence that the determination itself was made. Respondent adds that there is also no evidence that the "appropriateness determination" was made by the Assistant Administrator for Enforcement and Compliance Assurance.[2] Further, Respondent does not accept that its stipulation number 45 concedes that a proper "appropriateness determination" was made.

Fort Jackson agrees that the joint "appropriateness determination" made by the Administrator and the Attorney General is a delegable duty and it agrees that, as per EPA Ex. 5, the determination was properly made by the Attorney General's duly authorized official. Thus, Fort Jackson's argument is with the EPA end of the requirement. It contends that EPA has not furnished proof of its own delegation to a subordinate official. While Fort Jackson acknowledges that, after the hearing, EPA provided excerpts from its Delegations Manual and a declaration from the Associate Director of the Federal Facilities Enforcement Office, this supplemental documentation does not establish any record that there ever was "a proper

[2]Respondent does concede that EPA Exhibit 6 "was staffed with the Department of Justice ("DoJ") to obtain DoJ's concurrence in the waiver... ." Respondent's Post-Hearing Reply Brief at 6, ftnt 3.

delegation of authority originating from the Administrator." Under its view, Fort Jackson asserts that, to document a proper delegation, a document signed by the Administrator or a rulemaking action would be needed.[3]

Thus, Respondent asserts that EPA's supplemental documents fail to show "when or how the Administrator personally acted in making the purported delegations in the 'Delegations Manual,' [in that there is] no reference to a transmittal or formal rulemaking action involving the Administrator for any of the delegations in the manual, [including] this particular delegation, # 7-6- A." Respondent's Br. at 18. Concerning EPA's supplemental documentation, Fort Jackson concedes that Craig Hooks, the person who signed EPA Ex. 6, then served as the Director of EPA's Federal Facilities Enforcement Office and that such office is subordinate to EPA Headquarters' Office of Enforcement and Compliance Assurance.

Fort Jackson acknowledges that EPA provided an excerpt, consisting of three pages, from a collection of documents known as the "Delegations Manual," which pages purport to show that on August 4, 1994 there was a delegation to the Regional Administrators and the Assistant Administrator for Enforcement and Compliance Assurance, identified as delegation # 7-6-A, and pertaining to the Clean Air Act. It also acknowledges that the Delegations Manual, at subparagraph 1 b, contains a reference to the Section 113(d)(1) issue by including the following: "Authority ...[t]o determine jointly with the Attorney General in accordance with the CAA the circumstances under which a matter involving a larger penalty or longer period of violation is appropriate for administrative penalty action." Last, Fort Jackson notes that the supplemental documents EPA provided includes the Herman Memorandum. It concedes that Mr. Herman intended by that memorandum to further redelegate his authority, including the authority to issue complaints.

However, as to all of these supplemental filings Fort Jackson asserts that none demonstrate when or how *the Administrator* personally acted in making the purported delegations contained in the Delegations Manual. Lacking, Respondent contends, is any reference to a transmittal or formal rulemaking action involving the Administrator for any of the delegations contained in the manual, including the delegation involved here, 7-6-A. It also notes that when one examines delegation 7-6-A, there is a limitation at subparagraph 3e which provides that "[t]he Assistant Administrator for Enforcement and Compliance Assurance must concur in any determination regarding the authority delegated under paragraph 1b." Here, Respondent contends, there is no document showing a concurrence by Mr. Herman, then the Assistant Administrator for Enforcement and Compliance Assurance. It notes that while EPA ex. 6 refers to an "appropriateness determination" made by the Regional Administrator, that document makes no mention of any action by Herman. Nor does the record show that an

[3]Fort Jackson notes that the DoJ delegation is set forth in the Code of Federal Respondent's Post-hearing Br. at 2, n.1.

"appropriateness determination" was made by the Regional Administrator for EPA's Region 4.[4]

Ultimately, Respondent contends that where the joint "appropriateness determination" is required, the ability to act is reserved to the Assistant Administrator for Enforcement and Compliance Assurance, and such concurrence must be provided in advance. Thus, it asserts that the concurrence, in writing, from the Assistant Administrator for Enforcement and Compliance, must be obtained prior to proceeding to exercise jurisdiction. Fort Jackson notes that in the February 22, 1995 Introduction to the Delegations Manual it states: "must obtain advance concurrence": except where specified otherwise, the delegatee must obtain the written agreement of the other official(s) named before exercising the authority." Respondent's Br. at 19.

For its part, EPA asserts that the Administrator's Section 113(d)(1) authority was properly delegated and it contends that evidence was produced to show that the Administrator properly delegated its authority to determine the appropriateness. EPA Reply at 1. To support that there was a proper delegation EPA points to its supplemental filing, which is a copy of Delegation 7-6-A, dated August 4, 1994. It relates that this is taken from its Delegations Manual and that, at paragraph 1b, it documents the delegation of the Administrator's concurrence authority. The delegation flows from the Administrator to the Regional Administrators and to the Assistant Administrator for Enforcement and Compliance Assurance (OECA AA). Also included in the supplemental filing was copy of the June 6, 1994 redelegation for federal facilities cases from the OECA AA to the Director of the Federal Facilities Enforcement Office (FFEO). This is evidenced by the declaration of Elliott Gilberg, the Associate Director of FFEO. *Id*. at 2.

EPA further contends that Exhibit 6, a letter from the Director of FFEO to the Department of Justice ("DoJ") concurring with the Region 4 determination that the 12 month limitation on seeking penalties should be waived, supports its position. EPA's Mr. Michael J. Walker asserted that the Director of FFEO was delegated the authority to express agreement to the waiver and that the letter reflects this. Thus, EPA submits that it is clear that the concurrence authority has been delegated to the Director of FFEO.

EPA recognizes that the Respondent has asserted that the delegation has not been documented, in that it contends there is no evidence of when or how the Administrator personally acted to make the delegation in issue here, because there is no evidence of a transmittal or a formal rulemaking action for any of the delegations in the manual, nor for the particular delegation in this case, number 7-6-A. However, EPA contends that this is an evidentiary matter, which turns on whether Delegation 7-6-A is what Complainant asserts it to

[4]The Respondent acknowledges that it is possible that such a determination was included as an enclosure in the "enforcement sensitive memorandum," but this has never been provided to it. Respondent's Br. at 19.

be. EPA believes it has demonstrated that the appropriate delegation occurred here.[5]

EPA subsequently included, as an attachment to its Reply Brief, copies of memoranda from the Administrator approving and transmitting Delegation 7-6-A. While EPA agrees that such memoranda are "a necessary part of creating the delegation" it does not believe they are necessary, as an evidentiary matter, to document the existence of a delegation. *Id*. at 4. To support this assertion, it declares that Delegation 7-6-A is the form of the delegation "which is readily available to EPA staff." Consequently, EPA relies on that form of delegation to show that the "appropriateness determination" was made. It adds that another ALJ relied on that document to conclude that the delegation was proper in the case of *Julie's Limousine & Coachworks*, *Inc*., Docket No. CAA 042002-1508, April 23, 2003. EPA contends that the form of the delegation is sufficient to meet its evidentiary burden and that requiring it to include the underlying transmittal memoranda, which in this case it has submitted with Attachment B, should not be demanded to document a delegation because it has no significant evidentiary value, absent a specific fact-based challenge to the delegation's existence. *Id*. at 5.

EPA also disputes Respondent's assertion that Delegation 7-6-A, at paragraph 3e, requires showing there was OECA AA concurrence on Section 113(d)(1) determinations. As applied, according to the Respondent, this would require showing Mr. Herman's concurrence, as the Assistant Administrator for OECA. In response, EPA contends that such a reading ignores the unambiguous language of 7-6-A which, at paragraph 1b, delegates the "appropriateness determination" authority to OECA AA *and* to the Regional Administrators. Although paragraph 3e requires that the OECA AA must concur on authority delegated under paragraph 1b, this construction ignores that paragraph 4 allows OECA AA to redelegate its authority to the Division Director level, which is what occurred here by transferring the authority to the FFEO. As the FFEO is an office within OECA, it is considered a division within it. All of this means that, through these delegations, FFEO has the authority to express concurrence and it did express such concurrence, as reflected in EPA Ex. 6. *Id*. at 6. In contrast, EPA asserts that the practical effect of Respondent's interpretation would be to make the authority nondelegable below the OECA AA level, an interpretation at odds with the language of paragraph 4 of 7-6-A. Respondent's suggestion that OECA AA concurrence is still required in the face of action by the FFEO Division Director under the authority delegated would mean that OECA AA's delegation had no effect.

Beyond these arguments, EPA asserts that the Environmental Appeals Board, ("EAB"), held in *Lyon County Landfill*, 8 E.A.D. 559, 567-568 (EAB 1999), that the judge may only conduct a very narrow review to determine if the jurisdictional requirements have been met. As applied here, EPA contends that Exhibit 6 and Mr. Walker's testimony are sufficient to establish that the jurisdictional "appropriateness determination" was made. It submits that delving further, as by examining the underlying appropriateness request by the Region to EPA Headquarters and

[5]EPA asserts that there is no support for Respondents's claim that a delegation requires rulemaking. EPA Reply Br. at 4.

to the DoJ, amounts to a review of the merits of the determination, an inquiry which is forbidden under *Lyon County*.[6]

2. The Court's Analysis of the Section 113 issue

The evidence EPA initially presented[7] to show that it had validly determined that a waiver of the 12 month limitation on its authority to initiate an administrative penalty action consists of the testimony of Mr. Michael J. Walker, the Delegations Manual, and Ex. 6, a letter, dated December 26, 2000, from Craig E. Hooks, the Director of the Federal Facilities Enforcement Office ("FFEO") to Bruce Gelber, Chief of the Environmental Enforcement Section of the U.S. Department of Justice, Environmental and Natural Resources Division, Washington, D.C., in which Hooks informs Gelber that FFEO has concurred with the determination of EPA Region IV that a waiver is appropriate in this case.

Mr. Walker is a senior enforcement counsel for administrative litigation in the Office of Enforcement at EPA Headquarters and the parties agreed that he is intimately familiar with the enforcement policies. Tr 162. When shown EPA ex. 6, Walker identified it as a letter, dated December 29, 2000 from Craig Hooks, Director of Federal Facilities Enforcement Office to Bruce Gelber, Chief of Environmental Enforcement with DoJ. He identified that the letter was written for the incident in this litigation. Walker stated that the EPA Federal Facilities Enforcement Office reports to EPA's Assistant Administrator for Enforcement and that the letter

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[6]EPA misconstrues *Lyon County.* That decision forbids a court from reviewing *the wisdom* of a joint determination, but it does not bar a review to determine if the acts required for a joint determination actually occurred. It is the latter circumstance that Fort Jackson is contesting here. Certainly the Court can determine if there was in fact the required joint determination and this review includes the ability to determine if an office subordinate to the Administrator was in fact delegated the authority to make the determination in place of the Administrator.

[7]There was some roiling between the parties as to one of their stipulations. Stipulation 45 provides that "[o]n December 29, 2000, EPA Headquarters concurred on the waiver of the statutory penalty cap and 12 month time limit contained in Section 113(d)(1) of the Clean Air Act, 42 U.S.C. § 7413(d)(1), in this matter." Fort Jackson contends that the stipulation should read: **On December 29, 2000 the Director of the Federal Facilities Enforcement Office, Headquarters, U.S. E.P.A., concurred with a determination made by EPA Region IV, that a waiver of the twelve month limitation on EPA's authority to initiate a penalty action is appropriate, and forwarded to the Department of Justice a Request for Waiver to take Administrative Enforcement pursuant to 42 U.S.C. § 7413(d)(1) with respect to this matter**. The revised wording offered by the Respondent is consistent with its contention that the delegation was defective. The Court notes that a stipulation cannot eliminate a jurisdictional prerequisite and the challenge raised by Fort Jackson here is just that. "No court may decide a case without subject matter jurisdiction, *and neither the parties nor their lawyers may stipulate to jurisdiction or waive arguments that the court lacks jurisdiction*." *United States v. Tittjung*, 235 F.3d 330, 335 (7th Cir. 2000) (emphasis added).

reflects that office's agreement with the EPA Atlanta Regional Office that administrative enforcement should occur in this instance.

Walker further stated that the statute gives concurrence authority within EPA to the Administrator and that the Administrator delegates the authority to the assistant administrator for enforcement. That person, in turn, delegated it further - - in this case to the Office of Enforcement and concurrently to the Director of the Federal Facilities Office. Walker identified that person as Mr. Craig Hooks. At the same time it was delegated to the Director of Office of Regulatory Enforcement who also has the authority to seek concurrence. Walker asserted that this is a routine procedure, and that some 300 such waiver requests were made in 2001. Tr 191 He also expressed that the letter from Director of Federal Facilities Enforcement is the method EPA uses to express its concurrence under Section 113 of the CAA. *Id*. However, to the Court's inquiry as to where it is provided that a memo like Mr. Herman's in 1998 is deemed to have a particular impact and effect or how one could glean such authority from the memo itself, Walker could only say that such a memorandum is sent to all EPA regions. Tr. 225. Later he added that he thought the delegations manual sets forth that Assistant Administrator has the authority to issue policies, directives, and guidances regarding enforcement. Tr 226 He acknowledged that the Administrator delegates in writing her authority to Mr Herman for the enforcement program. Tr 227. The problem with Mr. Walker's testimony is that the assertion that the Administrator has delegated an authority to another EPA official is not the equivalent of producing the document in which such delegation was made. Here, no witness for EPA ever testified that they had seen the Administrator's document delegating the Section 113 concurrence authority, nor was there testimony that the delegation document in question existed but had been lost or destroyed.

Per the Court's Order at the hearing, directing EPA to supplement the record to demonstrate that the appropriate delegations were made in this case, EPA provided two supplemental filings for the record. The first, filed February 27, 2003, consists of a declaration from Elliott Gilberg, who identifies his current position as the Associate Director of the Federal Facilities Enforcement Office ("FFEO") in EPA's Office of Enforcement and Compliance Assurance ("OECA"). Mr. Gilberg relates in his sworn declaration that

> [t]he EPA Administrator has delegated to the Assistant Administrator for Enforcement and Compliance Assurance the Administrator's authority to exercise the concurrence required under Section 113(d)(1) of the Clean Air Act, 42 U.S.C. §7413(d)(1). A copy of this delegation, number 7-6-A, is included as Attachment 1 to this Declaration. The concurrence authority is specified in Section 1.b. of delegation 7-6-A.

Mr. Gilberg also declared that "the Assistant Administrator for Enforcement and Compliance Assurance has redelegated to the Director of the Federal Facilities Enforcement Office the Administrator's authority to exercise the concurrence required under Section 113(d)(1). To support this assertion Mr. Gilberg cites to "relevant portions of [the] delegation [which were] included [with the] Declaration ... in the last item on the 3rd page of Attachment 2."

As with Mr. Walker's assertion that the delegation had occurred, the problem with Mr. Gilberg's declaration that the Administrator delegated the 113 concurrence authority to the OECA AA also is that *declaring* that such an action occurred does not amount to *proof* of the Administrator's actions. Nor does Gilberg's pointing to 7-6- A of the Delegations Manual amount to proof that the Administrator in fact delegated this authority. While Section 2 of 7-6-A of the Delegations Manual relates, under the heading "AUTHORITY," that it includes "[t]o determine jointly with the Attorney General in accordance with the CAA the circumstances under which a matter involving a larger penalty or longer period of violation is appropriate for administrative penalty action" and, under the heading "TO WHOM DELEGATED,"states the delegation is to "Regional Administrators and the Assistant Administrator for Enforcement and Compliance Assurance," it is Fort Jackson's point that the Delegations Manual's assertion is not the equivalence of the underlying delegation document upon which the Manual must rely.

Nor does the Delegations Manual itself assert that it represents the delegation itself. Rather, on its face, the Delegations Manual only refers that an act of delegation must occur. In the introduction to the Delegations Manual it acknowledges that an underlying act of delegation it states:

> It is EPA's Policy that, in order for other Agency management officials to act on behalf of the Administrator, the authority [to delegate] granted by Congress or the Executive Branch *must be delegated officially*.

Introduction to the Delegations Manual, February 22, 1995. (emphasis added).

Thus, the Court concludes that, depending on the particular challenge to a delegation, the mere production of the Delegations Manual does not establish that an act of delegation in fact occurred.[8]

EPA's second supplemental filing was included as attachments to its Reply Brief. One of these supplemental filings, designated as Attachment B, included Delegation Transmittal Memoranda.[9] This filing contains a critical memorandum, dated August 3, 1994, and entitled

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[8]**The Court believes that EPA could cure the problem of the insufficiency of the Delegations Manual to prove that a delegation occurred by elevating the status of that Manual. For example, if the Administrator were to sign a document asserting that where material is contained in the Delegations Manual, such publication in the Manual has the effect of reflecting all delegations officially issued by the Administrator, then EPA would not need to provide the underlying document issued by the Administrator. As it currently exists, the Delegations Manual does not accomplish this.**

[9]The other supplemental filing, designated as Attachment A, consisted of EPA filings in another CAA case, *In the Matter of Julie's Limousine & Coachworks, Inc.*, CAA-04-2002-1508.

"Clarification of Enforcement Delegations - - DECISION MEMORANDUM. This memorandum and attachments included with it, was issued by Jonathan Z. Cannon, Assistant Administrator to the Administrator, and it proposed that three enforcement delegations be clarified to reflect their intent. As pertinent here, this included a clarification of delegation 7-6-A, which, the memo relates, *was previously approved by the Administrator*. The memorandum concludes by asking the Administrator to approve the attached delegations *by the act of signing the memorandum*.

The memorandum reflects that the Administrator did so approve those attached delegations as it contains the Administrator's signature, Carol M. Browner, dated August 4, 1994. Importantly, the August 4, 1994 memorandum reflects that earlier, on May 11, 1994, the Administrator had approved the delegation in issue here, along with some other delegations. This reference to the May 11th approval is significant in two respects. First, the June 6, 1994 Herman Memorandum, noting that he had been delegated the Section 113 authority, followed the Administrator's delegation. Second, Mr. Herman, by his June 6th Memorandum, redelegated that authority to the Director of FFEO and ORE Division Directorate level.

Thus, the Administrator's act of delegating the Section 113 authority in May 1994 was clarified by her August 3, 1994 act. The attached materials in the August 1994 clarified delegation contained revised materials for insertion into the Delegations Manual. Included among those revised materials is Delegation 7-6-A, which replaced earlier delegations for 7-6-A, dated May 11, 1994, with the revisions for 7-6-A, dated August 4, 1994. As plainly reflected in

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In that case the Respondent raised a similar challenge by alleging that it had not been shown that EPA's Director of the Air Enforcement Division in the Office of Enforcement and Compliance Assurance had been delegated such concurrence authority. As in this case, the judge in *Julie's Limousine* found that EPA provided documentation to show that the Section 113(d)(1) authority had been delegated to the Division Director Level in the Office of Regulatory Enforcement, which office includes the Director of Air Enforcement Division. However, based on the filings EPA submitted in that case, the documentation provided to the judge in *Julie's Limousine* only consisted of the August 4, 1994 revisions to the Delegations Manual, the June 6, 1994 Herman memorandum asserting that he had been delegated such enforcement authority and that it was being redelegated to the new Office of Enforcement and Compliance Assurance. That memo included a chart (described as a "matrix"), signed by Herman, reflecting that the 113(d)(1) authority had been delegated to "RAs, AA/OECA" and was being redelegated to "Director, FFEO and ORE Division Director level - all authorities in this delegation." With regard to EPA's *Julie's Limousine* filings, as EPA is well aware, it first must be noted that the decision of another ALJ is not binding on another ALJ. In any event, in this Court's view, the cases are distinguishable. As described by the ALJ in *Julie*'s *Limousine*, the Respondent's challenge was limited to whether the Director of the Air Enforcement Division in the Office of Enforcement and Compliance Assurance had been properly delegated the Section 113(d)(1) authority. EPA's documentation established that such a delegation had occurred. Here, Fort Jackson's challenge is not so limited, as it questions the delegation chain from the Administrator on down.

the revised materials, the Administrator, by her signature, approved the changes reflected in the revisions to the Delegations Manual for 7-6-A. The authority section for these revisions includes the ability to jointly determine with the Attorney General the circumstances under which a matter involving a larger penalty or longer period of violation is appropriate for administrative penalty action. Thus, as reflected in the second page of the memorandum at the paragraph with the heading "RECOMMENDATION,"the Administrator's signature had the effect of delegating this authority to the Regional Administrators *and* the Assistant Administrator for Enforcement and Compliance Assurance. This delegation included the authority to further redelegate such determinations to the Division Director level. The Administrator's delegation was then immediately reflected in the revisions to the Delegations Manual. One of the revisions impacted by the Administrator's signature was the very joint determination provision in issue here.

The upshot of all this is very plain. The Administrator's act of delegation in May 1994 empowered the Regional Administrators and the Assistant Administrator for Enforcement and Compliance Assurance (OECA AA) with the Section 113 determination authority. Mr. Herman, as Assistant Administrator for Enforcement and Compliance Assurance, redelegated that authority, in June 1994, to the Director of FFEO and ORE Division Directorate level. Further, the Court agrees with EPA that, technically, as FFEO is part of OECA there was no need for a further delegation to that division.[10] Accordingly, the Court finds that EPA has established that the Section 113 authority was properly delegated in this case. Consequently, Fort Jackson's Motion to Dismiss is DENIED.

B. Do the CAA penalty criteria of size of business and economic impact apply to Federal Agencies?

1. The Environmental Appeals Board's *Fort Wainwright* Decision

The EAB's recent decision[11] in *U.S. Army*, *Fort Wainwright Central Heating and Power Plant*, CAA Appeal No. 02-04, June 5, 2003 ("*Ft. Wainwright*"), a remand order on interlocutory appeal, requires some discussion.[12] The EAB upheld the ALJ's decision that, as a matter of law,

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[10]The Court agrees with EPA's point that the practical effect of Respondent's construction would be to make the authority nondelegable below the OECA AA level, and that this would not make sense given the language of paragraph 4 of 7-6-A. Thus, the Court rejects Respondent's suggestion that OECA AA concurrence is still required in the face of action by the FFEO Division Director.

[11]The EAB decision in *Fort Wainwright* was issued after the hearing in this case.

[12]In this case, Fort Jackson only takes issue with the appropriateness of the application of the size of the business factor to it. Accordingly, the EAB's analysis of the "economic benefit of noncompliance" factor are not discussed here. For example, the ALJ in *Fort Wainwright* determined, and EPA apparently conceded, that fiscal law precluded the Garrison from borrowing funds or earning income on investments and consequently it could not realize those

the Clean Air Act's Section 113(e) penalty assessment criteria of the economic benefit of noncompliance and size of the business apply to federal facilities, like Fort Wainwright's Alaska Garrison, and may be taken into account in adjusting the civil penalty.[13] The Army had contended that, where federal facilities are involved, the CAA precludes consideration of those two penalty criteria. The Board noted that its decision dealt with this issue in the abstract and that the implications of its holding could not be definitively stated without the benefit of the specific facts developed during the evidentiary hearing. It stated that nothing in its decision should be taken to suggest that the issues raised by the Army were unimportant, adding that it was "mindful of the important national security aspects of Alaska Garrison's mission, and that [its] decision is being written [after our nation] only recently concluded a war with Iraq." *Id*. at 6. EPA "agreed at oral argument that the ALJ may properly consider the national security mission of Alaska Garrison in connection with the 'size of the business' penalty factor ..." *Id*. at 16. Indeed, the Board endorsed that the "ALJ has the discretion to determine 'that no penalty [is] appropriate ... .'" *Id*. The Board stated that "[w]e expect that on remand the ALJ will take these considerations into account ... [and that] considerations of national security may legitimately form part of a determination of a proper penalty ... under the penalty factors of 'impact of the penalty on the business' and 'other factors as justice may require.'" *Id*. It stated that it was "concerned that issues uniquely affecting the national security of the military departments in the present context be given proper attention." *Id*. at ftnt 3.

As in this case, *Ft Wainwright* was not asserting that it was exempt from penalties for violations of Section 113(a) of the CAA. However it was asserting that the ALJ was precluded from making any adjustment in the penalty attributable to considering the size of the business or the economic benefit of noncompliance. The Board also allowed that, among the possible scenarios, it was possible that the ALJ, after consideration of the evidentiary record, could decide, in a particular case, to assign no weight to those factors: "[T]here is no record before [the Board] that would reveal the weight, *if any*, that the ALJ might assign to 'size of the business' or 'economic benefit of noncompliance' in this case." *Id*. at 9 (emphasis added). The Board stated that it was important for the ALJ to "balance[] the competing considerations that may be required by applying all of the statutory penalty factors set forth in section 113(e) ...[and that this

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types of economic benefit from delaying compliance.

[13]It is unnecessary to relate the details for the Board's conclusion here. It is sufficient to state that the Board found that the plain meaning of the CAA statutory text supported its determination that the size of the business and economic benefit factors apply to federal facilities. It also held that Congress' use of "business" in this context was not limited to "for-profit, private entities" as the term is used interchangeably with 'violator' and, in any event, a 'business' is defined to include a "mission" or "field of endeavor." Further, the Board determined that Section 118 of the CAA as a matter of law provides that all federal facilities are subject to the federal requirements respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity.

consideration includes the factor of] such other factors as justice may require ."[14] *Id*. 9-10.

The Board went to some pains to distinguish the penalty proposed by an EPA Region from that penalty reasoning an ALJ applies. Noting that the Army's arguments regarding Section 118 of the CAA focused on the *Region's* proposed penalty, the Board emphasized that "***the ALJ is not required to follow Agency penalty policies, and therefore, those policies do not limit the ALJ's discretion to assess a penalty that is otherwise in accordance with the statutory factors***." *Id*. at 16 (emphasis added). In fact the Board vigorously asserted that "the role accorded to penalty policies and guidance under the applicable regulations and the prior decisions of this Board run counter to Alaska Garrison's argument that those policies and guidance limit the applicability of the penalty factors." *Id*. at 59. Placing the penalty assessment process in "the proper context," the Board stated that its decisions "make clear that **the ALJ has significant discretion** to assess a penalty other than that calculated pursuant to a particular penalty policy."[15] *Id*. at 61. (Emphasis added). While it affirmed that the ALJ must "contain *a reasoned analysis* of the basis for the penalty assessment" it stated that "**the ALJ is free to depart from the penalty policy" so long as there is an adequate explanation for the rationale**. Underscoring this view, the Board firmly stated that the ALJ's "**penalty assessment decision is ultimately constrained *only* by the *statutory penalty criteria* and by any *statutory cap* limiting the size of the assessable penalty, by the Agency's regulatory requirement (40 C.F.R. § 22.27(b)) to provide 'specific reasons' for rejecting the complainant's penalty proposal, and by the general Administrative Procedure Act requirement that a sanction be rationally related to the offense committed (i.e. that the choice of sanction not be an 'abuse of discretion; or otherwise arbitrary and capricious**." (emphasis added) *Id*. at 61-62, quoting from its decision in *Employers Ins. of Wausau*, 6 E.A.D. at 758-59.

The Board described the EPA penalty approach[16] as "not the only rational method of

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[14]The Board related that although the Army conceded that the CAA requires that the ALJ "consider" all of the statutory factors, it took the position that in every instance the ALJ would be precluded from adjusting the penalty upon considering those factors. Thus, an ALJ's consideration of those factors would be only semantic. *Id*. at 11-12.

[15]One reading the Board's statements in *Fort Wainwright* might wonder how its most recent pronouncement squares with its relatively recent statements in *In re M.A. Bruder and Sons*, *Inc*. RCRA Appeal No. 01-04, at 17. (E.A.B. July 10, 1992), and *In re Carroll Oil Company*, RCRA Appeal No. 01-02, at 28 (E.A.B. July 31, 2002). There the Board talked of "closely scrutiniz[ing]" a trial judge's reasons for not applying a penalty policy to determine if such reasons are "compelling." Its *Fort Wainwright* decision is devoid of such language, as it returned to its traditional review standard of the trial judge's penalty analysis.

[16]The Board summarized the agency method used in these CAA cases as involving establishing a preliminary deterrence amount, which amount considers any economic benefit, and then adjusting that amount, up or down, upon considering the remaining factors. *Id*. At 63.

considering and applying the statutory penalty criteria," noting that while courts have used approaches which start with the maximum penalty, or simply relying upon the factors to determine the penalty, the critical aspect is adherence to the statute, which "only requires that the fine be consistent with a consideration of each of the factors the court is obligated to evaluate." *Id*. at 63. The Board observed that it could not "assume that the ALJ [would] apply economic benefit and size of business as grounds for increasing an initial gravity-based penalty as recommended by Agency guidance." Importantly, the Board added: "[I]n any event, the ALJ is not required to follow Agency guidance ... it also should be clear ... that Agency guidance does not limit the ALJ's authority to assess a penalty that is otherwise in accordance with the statutory factors." *Id*. at 64. The Board repeated this principle throughout its decision, noting: "**[P]rior decisions of this Board *make clear* that Agency penalty policies and guidance do not limit the ALJ's discretion to assess a penalty that is otherwise in accordance with the statutory penalty factors**." (emphasis added). *Id*. at 66.

2. The Court's Determination regarding application of the size of business factor to federal agencies.

The Court has considered the arguments presented by Fort Jackson and concludes that none of them add a new dimension or additional grounds to the matter as considered by Board in its *Fort Wainwright* decision. Thus, on the basis of the Board's decision, the Court rejects Fort Jackson's arguments that the size of the business should not be considered as a penalty factor where a federal agency is the respondent. Independent of the Board's decision, the Court notes that Fort Jackson has not identified any new basis to support its theory that all of the CAA penalty criteria *except* the size of business and economic impact should apply to federal agencies. Certainly there is no legislative basis for its theory of selective penalty criteria exclusions. To the extent that a given penalty hurts an agency's mission, there are safeguards which allow deferral of payment of penalties. In addition, as applied to the military, Congress has included additional protections to ensure its mission is not adversely impacted.

III. Assessment of an Appropriate Civil Penalty[17]

A. Is departure from the Penalty Policy proper in this case?

Independent of its legal argument that the size of the business factor was not intended to apply to federal facilities, Fort Jackson asserts that, in any event, the Court should depart from the penalty policy's application in this instance. Noting that EPA has asserted that the EAB will closely scrutinize an administrative law judge's determination to depart from a penalty policy and strike down such a departure unless compelling reasons are advanced for doing so, Fort

[17]The Court's findings of fact and conclusions of law applicable to this penalty determination section of the decision are inherently included within this discussion.

Jackson expresses concern for such an EAB review standard, given that the penalty policy is supposedly "mere guidance," and it suggests that, in practice, the EAB treats the penalty policies with a "quasi-regulatory effect."[18] Respondent's Reply Br. at 12.

With the backdrop of its concern that the penalty policies are being treated by the EAB as de facto rules, Fort Jackson advances reasons why departure is appropriate in this case. It argues that application of the policy in this case will not result in achieving the policy's stated goals of deterrence, fair and equitable treatment, and swift resolution of the matter. Regarding equitable treatment, Fort Jackson asserts that the $85,800 penalty EPA seeks is disproportionate to the penalty that a non-federal agency would have been assessed. As for the goal of producing a swift resolution of the environmental problem, it asserts that it already acted with as much speed as possible to correct the problem.[19] Further, Fort Jackson maintains that the policy did not adequately consider mitigating factors, such as actions by rogue employees, the discipline it imposed, or the impact of the penalty on its mission. *Id*. at 13.

Fort Jackson further contends that EPA had to depart from its own policy because it was unable to ascribe a "net worth" for the Respondent. This caused EPA to substitute Fort Jackson's budget in place of its net worth, the consequence of which allowed EPA to tack on a 50% surcharge to its penalty proposal. Fort Jackson notes that it has no typical business assets because it can't sell or otherwise use its assets to create proceeds. Rather, it has to use the allotments it is given from headquarters, which are ultimately created by Congressional appropriations.

With the perspective of the EAB's decision in *Fort Wainwright*, the Court notes that the parties have stipulated as follows: "36. During fiscal year 1997 and at all other times relevant to this matter, Respondent's OMA budget exceeded $83,000,000." Stipulation 6 provides: "Respondent is the U.S. Army Training Center and Fort Jackson, located in Fort Jackson, South Carolina." Under the Policy, Respondent's budget placed it in the $70 to $100 million range. However the Policy also provides that where the size of the violator produces a figure that is greater than 50% of the preliminary deterrence amount, then the size is deemed to be 50% of the total preliminary deterrence amount. In this case, application of that provision reduced the $70,000 called for under the Policy to $57,200. Vol. II. Tr. 20. As applied, the Court finds that

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[18]The Court would have agreed with Fort Jackson's analysis on the basis of the EAB's recent decisions in *M.A. Bruder and Sons*, *Inc*. RCRA Appeal No. 01-04, at 17. (E.A.B. July 10, 1992), and in *Carroll Oil Company*, RCRA Appeal No. 01-02, at 28 (E.A.B. July 31, 2002), apparently elevating policies to de facto rule status, were it not for the Board's latest statements about penalty policies in its *Fort Wainwright* decision. *See* the Court's discussion of the *Fort Wainwright* decision, *supra*.

[19]As noted *infra* this argument misses the point that the focus of the asbestos standards is prophylactic.

the penalty assessment applied for the factor of size under the Policy produced a fair figure in this instance.

Fort Jackson describes the Clean Air Act Penalty Policy, and in particular the creation of Appendix III to deal with asbestos NESHAP violations, as a "bureaucratic pegboard" which makes it possible for the agency to mechanically insert those pegs to derive its proposal. *Id*. at 15. Discretion within the pegboard is tightly controlled – only if a permitted variable applies may discretion be permitted. This was confirmed by Russell's testimony that he could only consider those discretionary circumstances identified in the policy. Under this approach the policy itself circumscribes what may be considered under the "as justice may require" factor because it deems that factor as integral with the other factors. Consequently, Respondent contends that, as a practical matter, the policy operates to eliminate the "as justice requires" factor.

Further, Respondent asserts the Policy's constraints are effectively at odds with an individualized determination. For example, as EPA's Walker conceded, discretion to reduce the penalty for a respondent's cooperativeness tops out at 30%. In fact, to go beyond a 20% adjustment to the Policy's formulaic result subjects the case development team to scrutiny in any performance audit.[20] Thus, those applying the policy have a great disincentive to stray from the pegboard's proposal.

EPA argues that the General Penalty Policy and the Asbestos Penalty Policy should be used in calculating the penalty. EPA Brief at pages 17 - 25. More specifically, EPA contends that it used the Clean Air Act Stationary Source Civil Penalty Policy ("General Penalty Policy") and the Asbestos Penalty Policy in determining the penalty here and that such policies provide a "rationale framework" for the assessment of the penalty proposed. EPA concedes that the Court is not required to use a particular penalty policy, but that it must "consider" such policy.[21]

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[20]The Court disagrees with Fort Jackson's view on this aspect as well. It is reasonable for a policy to have limits on the amount that cooperation can offset a penalty proposal, absent some extraordinary circumstances. Such circumstances are not present here. In fact, in the Court's view, under the totality of the circumstances, including the fact that Fort Jackson did not self-report the violations, the Respondent received a very liberal benefit in this regard by receiving a 25% reduction out of the ordinary circumstances maximum of 30%. Vol II. Tr. 52. This was not the only aspect in which the Respondent received a very favorable view of the circumstances in the penalty proposal. For example, EPA ex. 43 is a notice of violation to Fort Jackson's housing division which was issued on July 31, 1992. In that notice the Respondent was cited for one of the same violations in this Complaint; a violation of 40 C.F.R. § 61.145(a), failure to conduct a survey prior to performing a renovation. Yet, despite this prior CAA violation, EPA elected not to increase the penalty for a history of noncompliance. Vol. II Tr.27.

[21]EPA notes that the EAB has stated that it will "closely scrutinize" the trial judge's reasons for not applying a penalty policy to determine if such reasons are "compelling." *Id*. at

In the Court's view Respondent has not demonstrated that application of the Policy would be inappropriate in this case. While Fort Jackson has asserted that levying any penalty will not deter others from committing future violations, the Court notes that this claim is made without any support. In fact, as the civil penalty is the only deterrence tool available in this instance, Respondent's argument presents a reason for upholding the penalty EPA seeks in this instance. Although it may be true, as Respondent asserts, that the penalty may not deter others from committing violations, it is at least more likely that a larger penalty will get the attention of higher ups. Conversely, a diminished or a minimal penalty is less likely to warrant the attention of those in charge.

So too, Fort Jackson's argument that a civil penalty serves no purpose regarding the goal of producing a swift resolution of the environmental problem, as it already acted with as much speed as possible to correct the problem, misses the mark. The violations at issue here were not self-reported, rather they came to light because someone made an anonymous call to the South Carolina DHEC. While it is true that, *after* DHEC arrived at the scene, Fort Jackson responded quickly to, and acted cooperatively with, that state authority, this can be adequately addressed in the individual review of that penalty factor. Consequently, the Respondent's cooperation and speed in dealing with the violations are not a sufficient basis to warrant a wholesale departure from the policy in this instance.

Fort Jackson's contention that the policy did not adequately consider the alleged mitigating factors that the violations arose by the action of a rogue employee and the discipline it imposed on that employee, is also unpersuasive. The rank of Lieutenant Colonel Wall is inconsistent with the notion of a "rogue employee,"a term which is typically associated with a disgruntled low-level worker. Further, while Lieutenant Colonel Wall missed an opportunity for a more important position as a consequence of these violations and apparently decided to retire because of that, his culpability in connection with the admitted violations was not recorded in his official file. In any event, in the Court's view, action taken against an employee who allowed CAA violations to occur seems irrelevant to the assessment of an appropriate civil penalty or, at the very least, is not a basis for justifying a departure from the application of the penalty policy. As for the contention that the imposition of the penalty sought by EPA would impact the mission of Fort Jackson, there is little evidence in this record to support that claim. As noted by EPA witness Melvin Russell who read from Respondent's prehearing exchange "Respondent does not intend to take the position that ... payment would have an adverse effect on Respondent's ability to perform its mission." Vol. II. Tr. 32. Rather, imposition of the penalty would mean that some discretionary spending would have to be deferred but this record does not demonstrate that the

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18, citing *In re M.A. Bruder and Sons*, *Inc*. RCRA Appeal No. 01-04, at 17. (E.A.B. July 10, 1992), and *In re Carroll Oil Company*, RCRA Appeal No. 01-02, at 28 (E.A.B. July 31, 2002). However, the Board's most recent pronouncement on this issue, in its *Fort Wainwright* decision, as discussed *supra*, indicates that the Board has returned to its traditional, long standing, analysis when reviewing the trial judge's review of application of penalty policies in a particular case.

penalty would "impact the mission" of Fort Jackson. Supporting this conclusion is Fort Jackson's concession that a penalty assessment may not have any effect in a given year because "[i]f there are no discretionary current year funds available at the time any penalty is due and payable, payment will merely be deferred until there is an available appropriation." Respondent's Post-Hearing Reply Br. at 27.

Regarding the assertion that the penalty sought by EPA is disproportionate to the penalty that a non-federal agency would have been assessed, the Court ruled at the hearing that such considerations are irrelevant to this proceeding and that ruling is AFFIRMED here. While the ruling is affirmed, some additional discussion is warranted.

Fort Jackson has maintained that the penalty sought by EPA here is "grossly inflated" to the point where it constitutes a "miscarriage of justice." To support this assertion it describes the case as one where the State of South Carolina sought a modest penalty but, after EPA took over the case, it sought a penalty increased by several magnitudes. However, in the view of the Court, the grounds to support this claim are dubious. Respondent argues that EPA itself agrees that it took over the case from South Carolina because Respondent refused "to pay a penalty to the State based upon [Fort Jackson's refusal to issue a] waiver of sovereign immunity [while simultaneously arguing that] sovereign immunity is irrelevant." *Id*. at 27. Fort Jackson also contends that treating the sovereign immunity issue as an irrelevancy is disingenuous and ignores that it caused the EPA action to be filed. It notes that prior to the referral of the case to EPA from SCDHEC, sometime before October 2000, EPA showed no interest in the case.

Fort Jackson further asserts that, properly construed, the cases of *In re Pepperell Associates*, 9 EAD 93, (EAB 2000) and *Steeltech Limited*, 8 EAD 577 (EAB 1999) support the idea that the "other factors" element should be used when the other adjustment factors prove insufficient or inappropriate to achieve justice. Respondent contends that it is necessary to use the "other factors" because of the manner in which enforcement was pursued by EPA.[22] It urges, in an imprecise manner, that there is something objectionable about the referral of the case from the state to EPA because it was prompted by the inability of the state to fine Fort Jackson, due to the sovereign immunity obstacle. In addition, Respondent's Exhibit 6 demonstrates why it could not pay a punitive penalty to the state. *Id*. at 30.[23] From Fort Jackson's perspective "manifest

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[22]Relying on EPA's Mr. Walker statement, Fort Jackson asserts this may be the only case in which EPA brought a CAA administrative enforcement against a Federal facility for violations that occurred before July 16, 1997. That date represents the date the DoJ issued its opinion, as reflected in EPA exhibits 12 and 13. On that basis, Respondent describes this action as an *ex post facto* referral.

[23]In this regard, Fort Jackson refers to evidence that was not admitted. This evidence related to its "extra effort" to reach an agreement with the state and to pay an "administrative *fee*" in lieu of the barred "administrative *penalty*." Respondent's proof that this was EPA's motivation derives from another exhibit the Court would not admit, Respondent's proposed

injustice" exists from the fact that it was not authorized to pay a penalty to the state, resulting in the matter being referred to EPA. It notes that in both instances, the DoJ was involved, first by opining that Fort Jackson could not pay the state, and then by authorizing the EPA action. It also objects that the same facts produced a vastly different penalty calculation in the state action as compared to this EPA proceeding. It makes no sense to the Respondent that there should be such a disparity between the penalty proposed by the State and the amount subsequently sought by EPA. Accordingly, it challenges the notion that EPA's penalty formulation is superior to the State's calculation. Further, had it been allowed to pay the penalty originally proposed by the State, it would have been treated fairly, as such a penalty would be consistent with that imposed by the State on the rest of the regulated community.[24] *Id*. at 43.

Fort Jackson also urges use of the "other factors" element because EPA did not compare it with similarly situated entities. While aware of cases such as *In re Titan Wheel Corporation*, 2000 WL 33126606 (EPA 12/13/00), and the rejection in that case and others of the introduction of penalty assessments in other enforcement actions, Fort Jackson believes there is a critical distinction in this case because it wanted to introduce the original penalty assessment that South Carolina was seeking when it was bringing the enforcement in *this* case. Thus, it seeks to have considered the penalty South Carolina derived as compared to EPA's penalty calculation where both penalty calculations arise from the same underlying violations and the same case file.[25] *Id*. at 36- 37. It submits that where a state proposes a penalty and then the federal government takes control of the matter from that state, a penalty which is exponentially higher is inconsistent with fairness and equity. *Id*. at 38. While Fort Jackson contends that the Court erred in not admitting these state enforcement exhibits,[26] and that it would have been proper to have the specific penalty amounts proposed by the State introduced into the record, it asserts that they were proffered "for the express purpose of showing how hard the Respondent tried to reach an

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Exhibit 15, which it contends shows "some other reason" for refusing to send the case back to South Carolina. As Respondent sees it, the fact that it took ten months for EPA to issue the notice of violation after it refused to return the case translates into evidence that EPA was peeved that Fort Jackson had asserted a sovereign immunity defense. Respondent asserts that this amounts to a systemic due process issue, because the automatic referral of federal facility cases to EPA means that such facilities will be faced with much larger civil penalties than the rest of the regulated community would face, as non-federal agencies would only pay the lesser penalty amount sought by the State.

[24]In fact, Fort Jackson contends that this case is not so much about asbestos violations but really is motivated to punish it for asserting the waiver of sovereign immunity. *Id*. at 43.

[25]To underscore this point, Fort Jackson notes that no additional investigative effort took place once EPA assumed responsibility for the case from South Carolina. The Court ruled that Respondent's Exhibits 8, 9, 11, 12, 13, 14, and 15 were not admissible. That ruling stands.

[26]The exhibits are listed in footnote 24, next above.

accommodation with the State concerning ... payment of a penalty." *Id*. at 39.[27] Rather than being deemed recalcitrant, Fort Jackson contends that it did everything it could to correct the violations, but was precluded from paying a punitive penalty[28] to South Carolina because of the sovereign immunity problem.[29]

In sum, as Respondent sees it, by automatically referring all cases to EPA where sovereign immunity is raised by a federal agency, "blatant discrimination" results because EPA's penalties are much higher than those imposed by the states. Thus all regulated communities, other than federal agencies, enjoy the states' lesser penalties. *Id*. at 45.

However, Respondent, in footnote 31 of its Reply Brief, does not claim that EPA's prosecution is vindictive. It concedes that EPA has retained jurisdiction in all such CAA case, regardless of whether there has been a delegation to a state but Respondent does take issue with EPA's penalty policy and the manner it was applied. Instead, Respondent characterizes its concern as whether there was possible "overzealous interest" on the part of EPA, a concern stemming from Respondent's view that EPA never provided a good explanation why it didn't use the opportunity to return the case to South Carolina in May 2000. Yet, Fort Jackson also asserts that if the Court denies its motion to dismiss, the Court should not delve into and does not have the authority to look behind, the joint determination made by EPA and DoJ, if it is decided that such determination is deemed to have been properly made.

Respondent also believes that the waiver of sovereign immunity should be considered in the context of the "other factors as justice may require" and that the Court should consider Respondent's willingness to pay an administrative fee in lieu of penalty to SCDHEC. *Id*. at 47. Thus, it urges the Court to consider that, as determined by the DoJ, it had no choice but to assert the sovereign immunity claim, and that it would have preferred to pay a sum to the state which would be consistent with the penalty other similarly situated private entities would face from South Carolina, but denominated as an "administrative fee."

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[27]Fort Jackson believes that those exhibits do not run afoul of Rule 408 of the Federal Rules of Evidence. While it agrees that evidence relating to settlement which would be excluded under Rule 408 is not admissible, it contends that it only sought to introduce these for the purpose of demonstrating its cooperation, its good faith efforts to comply, and the "dramatic disparity" between the penalty South Carolina sought and that which EPA seeks for the same matter.

[28]Precluded from paying a penalty, Fort Jackson asserts that it "affirmatively sought to pay an 'administrative fee' that would reimburse the State for costs incurred in all enforcement activity associated with the resolution of the underlying violations." *Id*. at 42.

[29]Fort Jackson also distinguishes its situation from that presented in *In the Matter of Department of Defense, Davis-Monthan Air Force Base*, Dkt. No. CAA 09 98 17, November 17, 1999, because in *Davis-Monthan* the Air Force sought to preclude on the basis of sovereign immunity not merely the penalty but liability itself.

For its part EPA notes that EPA Exhibit 12 is a memorandum from DoJ upholding EPA's authority to issue Section 113(d)(1) penalty orders against the Department of Defense. EPA Brief at 13. The penalty criteria themselves are set out at 113(e)(1), 42 U.S.C. § 7413(e)(1). EPA also notes that this construction is consistent with Section 118 of the Clean Air Act, 42 U.S.C.§ 7418.[30]

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[30]That section provides: § 7418. Control of pollution from Federal facilities

(a) General compliance

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), (B) to any requirement to pay a fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program, (C) to the exercise of any Federal, State, or local administrative authority, and (D) to any process and sanction, whether enforced in Federal, State, or local courts, or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is not otherwise liable.

(b) Exemption

The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from section 7411 of this title, and an exemption from section 7412 of this title may be granted only in accordance with section 7412(i)(4) of this title. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. In addition to any such exemption of a particular emission source, the President may, if he determines it to be in the paramount interest of the United States to do so, issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vehicles, or other classes or categories of property which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State and which are uniquely military in nature. The President shall reconsider the need for such regulations at three-year intervals. The President shall report each January to the Congress all exemptions from the

EPA characterizes this section as requiring federal respondents to be treated the same as non-federal respondents. It notes that subsection (a) provides that this is the case with respect to enforcement as it refers to "any process and sanction." *Id*. at 15, 42 U.S.C.§ 7418(a). EPA also observes that the Respondent did not urge that "the economic impact of the penalty on the business" was inapplicable to it, as it wanted to discuss the impact of a penalty on its operation. Thus, EPA contends that Respondent has selectively opted in and out of the statutory factors, depending on whether it is beneficial or detrimental to it. *Id*. at 16.

Despite the lengthy arguments concerning this issue, its resolution remains brief. It has been conceded that EPA has the authority to act in place of the state. From that point on the only appropriate inquiry is whether, given that the violations were admitted, the EPA penalty policy was appropriately applied in this instance. All matters concerning South Carolina's actions, and the restrictions it operated under, are not material to this proceeding.

B. Application of the CAA Penalty Policy and the Asbestos Penalty Policy to this case.

Section 113(e)(1) of the CAA, 42 U.S.C.§7413(e)(1), provides that in determining the amount of an penalty the following factors are to be taken into consideration: 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 previously assessed for the same violation, the economic benefit of noncompliance, the seriousness of the violation, and such other factors as justice may require.

Each of these criteria are reflected in the applicable penalty policies. The application of size has already been discussed in this decision. In this case, EPA agrees that the criterion of the economic impact of the penalty on the business is not applicable here, and it does not contend that the Respondent economically benefitted from noncompliance. Nor does EPA contend that there has been any penalties previously assessed for the same violations. Apart from these statutory criteria, EPA did not increase the penalty upon consideration of the following penalty criteria which are derived from the statutory criteria as reflected in its penalty policies: Respondent's history of noncompliance; consideration of willfullness or negligence, and evaluation of whether there was severe environmental damage.

C. Fort Jackson's remaining challenges to the penalty computation

Fort Jackson calls into question the amount of asbestos claimed by EPA on the grounds that there was no evidence that the mastic was friable. *Id*. at 17. Further, it challenges the assertion

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requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

that the entire square footage of the floor tile had asbestos containing material. It also takes issue with EPA's assertion that because asbestos-containing material was commingled with non-asbestos material, the amount of asbestos was increased. It contends that the argument that commingling increases the amount of asbestos involved is refuted by Appendix III's statement that where demolition occurs the amount of asbestos can be determined by consulting other sources of that information, such as the contract for the material's removal or a facility's blueprints. On this basis, Respondent argues that the proper finding should be that 25% of the tile has asbestos containing material, which translates into 8.75 units, not the 5,600 square feet EPA asserts. *Id*. at 18.

In response, EPA first notes that the Respondent stipulated that the amount of asbestos removed was approximately 5,600 square feet of tile and mastic.[31] This translates under the Asbestos Policy into 35 units of RACM. To the suggestion of the Respondent that because only one of the six samples of the suspected ACM tile was positive for asbestos[32] the size of the project should be considered to be smaller, EPA responds that, as the Respondent never segregated ACM from non-ACM, there was commingling and the size is appropriately the entire 5,600 square feet. Commingling, according to Mr. Russell, means that the entire amount of material should be deemed contaminated. Apart from the tile, EPA notes that as Mr. Ripp stated that exposed mastic presents an asbestos risk from foot traffic contact and as Farleigh's testimony was undisputed that the mess hall was open at the time of the inspection, these facts present an additional reason for considering the entire 5,600 square feet. Last, EPA notes that if one were to use the sample which indicated that 25 to 50% of the tile had 3% RACM, and from that for the sake of argument conclude that only 50% of the tile had asbestos, such an assumption would still yield 17.5 units of ACM, an amount which would not reduce the proposed penalty.

The Court agrees with EPA's contentions and analysis. There was no evidence offered by the Respondent that any of the ACM was segregated from non-ACM material. Vol. II. Tr. 14. The Court agrees that, once commingled, there is no way to distinguish the non-ACM from the ACM and thus it all must be considered contaminated. However, even assuming for the sake of argument that the amount of ACM were 17.5 units, the policy would yield the same penalty result for that amount.

Fort Jackson also contends that as the "authorized" renovation activity was in fact "unauthorized" by Fort Jackson's requirements and guidance, this should be considered in computing the penalty. Respondent's Reply Br. at 18. The idea of an "authorized unauthorized" activity understandably produces a double take. Here, Respondent, while conceding that the battalion executive officer and his drill sergeants authorized the tile removal, asserts that because Fort Jackson's requirements and guidance forbade such actions, the penalty should reflect that

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[31]Stipulation 15. In addition, Stipulations 12, 16 & 17 agreed that the some of the sampling of the mastic and tile confirmed the presence of asbestos and that both were RACM.

[32]There were also four samples taken of mastic and all were positive for asbestos.

the violative activity was in violation of the Fort's own policies and Lieutenant Colonel Wall paid a price for this transgression, as he was administratively disciplined and he later ended his military career prematurely. This situation, it submits, is different from a facility which had no ban on such activities.[33] As with its related "rogue employee" argument, the Court rejects Fort Jackson's argument.[34]

Distinct from its argument that size should not be considered in assessing civil penalties against federal agencies, Fort Jackson takes issue with the notion that a larger facility is in a better position to comply with environmental requirements. While it concedes that larger facilities may have more economic resources for compliance, such size also brings with it the problem of control over a large number of employees. Additionally, unlike traditional businesses, Fort Jackson suggests that larger penalties are not likely to motivate changes where the violator is a federal agency. This, it asserts, is because agency officials, with no worry about profits or other economic considerations, can afford to shrug off penalties as a little more than an abstract matter. Consequently, a larger penalty is unlikely to "make a difference to Federal agency managers if their budget is decremented by twice as much[.]" *Id*. at 21. Therefore, penalties "only hurt[] the mission of the agency and reduces the services provided by the agency's mission." Therefore, it submits that to be effective a penalty would need to affect an agency's mission. *Id*. at 22.

The Court rejects these contentions as well. If size means less ability to control matters, an unusual assertion for the U.S. military to be asserting, it also means a concomitantly greater responsibility to oversee such matters. In addition, as alluded to earlier, the argument that agency officials can shrug off penalties is, at bottom, a reason for adhering to the proposed penalty, and not a basis for reducing it. In addition, as Fort Jackson has noted, Congress has

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[33]Regarding Respondent's 1992 NOV and EPA's suggestion that this earlier notice had no deterrent effect, Fort Jackson asserts that the violation in this litigation "is not exactly a repeat violation" because it had "procedures in effect to ensure compliance." *Id*. at 25. While the Court (and EPA) has not considered the previous NOV in the assessment of this penalty, it cannot go unnoticed that one can hardly maintain there were procedures in effect to *ensure* compliance in the face of the admitted violations, let alone when, at least related, CAA problems reoccur.

[34]Fort Jackson makes the related argument that the rogue actions of Lieutenant Colonel Wall is a factor that should be considered under the "other factors" criterion. It believes and that the letter of admonition to the Lieutenant and his reassignment to a lesser position, all point to the seriousness of the Army's response to his actions. This contention is also rejected. It is not up to Fort Jackson to craft its own model for determining an appropriate civil penalty. Thus, its position that the actions against the Lieutenant Colonel should operate as a penalty offset are denied.

acted to thwart a mission-affecting penalty, by placing a cap of $2 million where the military is involved. Respondent further maintains that, because of Fort Jackson's size, the effect of doubling the penalty will not have a deterrent effect but "will only adversely affect soldiers in training and other innocent members of the Fort Jackson military community at large." *Id*. However, in this respect it must be noted that potential exposure to asbestos fibers in the mess hall, as occurred here, could adversely affect soldiers in training as well as the mission of Fort Jackson.[35]

Regarding the wetting violation, Fort Jackson asserts that as SCDHEC personnel made no mention about keeping the material wet when they were at the scene, and given Fort Jackson's cooperative attitude with SCDHEC personnel, it would have complied immediately with this requirement had it been informed of the requirement. It believes that the penalty should take this into consideration. *Id*. at 19. The notion of blaming South Carolina because it did not advise Fort Jackson about its duty to keep the ACM wet amounts to an inappropriate shifting of responsibility away from the violator and onto the regulator. In addition, Respondent received fair credit for its cooperative attitude and speed in taking the recommended steps once the violations were discovered by the state agency.

As EPA has noted, that the General Penalty Policy calculates a penalty in two stages. The first stage determines the "preliminary deterrence amount" which itself has two components; the gravity and the economic benefit. The second stage applies the adjustment factors set forth in the General Penalty Policy. EPA Brief at 24. The gravity component "generally addresses" the size of the business, the duration and the seriousness of the violations. *Id*. at 18, citing EPA ex.8 at 8. However, EPA adds that gravity itself is measured by examining the actual or possible harm, the importance to the regulatory scheme and the size of the violator. *Id*. at 19. In determining the preliminary deterrence amount, the Asbestos Penalty Policy provides the specific policy guidance to determine the "harm" and the "regulatory scheme" components of gravity. Violations are classified as "notification" or "work practice" violations, and the policy provides a notification chart as well as a work practice chart to compute the particular penalty.

Regarding work practice violations, the penalty is related to the amount of asbestos involved, with the amount of RACM described in units, with one unit equaling 160 square feet. The size of violator component is part of the calculation of the gravity and the preliminary deterrent amount. There is also a limitation on the size of violator component where it produces a penalty that is more than 50% of the overall preliminary deterrent amount. This results in limiting the size of violator component to 50% of the overall preliminary deterrent amount. At any rate, the harm and regulatory scheme components are added to the size of violator component, which together produces the overall gravity penalty. Then, the economic benefit is

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[35]Although raised in the context of arguing that the size of the violator should not be confused with the seriousness of the harm, **Respondent admitted that the harm is "the release of asbestos fibers and the exposure of soldiers to those fibers** .*Id*. at 24 (emphasis added).

factored, producing the overall preliminary deterrence amount.

In this instance, EPA determined that the Respondent did not gain any economic benefit by its failure to comply with the asbestos standards. Vol. II Tr. 5. The adjustment factors of willfulness or negligence, cooperation, compliance history, and environmental damage were then considered. The General Policy requires consideration of the ability to pay and whether other penalties have been paid for the same violations. Finally, the General Policy considers the "other factors as justice may require" element. EPA Br. at 20.

As that Policy was applied here, EPA notes that Mr. Ripp, who was qualified as an expert regarding EPA's asbestos program, testified about the harm to those exposed to asbestos. He explained that the approach of Asbestos NESHAP was to minimize fiber release and exposure to those fibers. This is accomplished through work practice standards. *Id*. at 21-22. While maintaining that the Asbestos Penalty Policy is "closely tailored to assess appropriate penalties for Asbestos NESHAP violations, EPA also contends that the policy affords "amply opportunity to apply discretion." *Id*. at 23. It asserts that there is discretion initially when EPA evaluates the seriousness of the violations and later, the overall penalty process permits additional discretion. The Asbestos Penalty Policy only limits discretion in that "the exact same violation ... receives the same recommended penalty in each case." *Id*. at 23. The work practices chart in the Policy differentiates penalties based on the size of the project.

Accordingly, EPA believes that the Policy represents "a reasoned policy determination ... as to the relative seriousness posed by certain violations." *Id*. at 24. In applying its discretion, the Agency's policy reflects "a fine balancing" between consistent penalties and the desire to recognize the individual circumstances in each case. *Id*. Thus, EPA argues that the General Penalty Policy and the Asbestos Penalty Policy work together to provide a reasonable framework for applying the statutory criteria to a particular case and that this process provides adequate reasons to consider the facts and circumstances involved.

For each of the four counts, EPA maintains that Mr. Russell properly applied the penalty policies, as reflected in EPA Ex. 7. This produced the Policy's recommended $16,500[36] for Count I's first time failure to provide advance notice. Count II's work practice violation of failing to conduct a proper inspection produced an $11,000 penalty for a first time violation where 35 units of RACM are involved. Count III's inadequate training violation, which involved two days of renovation, produced a $10,000 penalty for the first day of a first time violation plus $1,000 for the second day of the violation, and when the inflation adjustment was added, the policy called for the $12,100 sought by EPA. Finally, for Count IV's first time failure to keep wet violation and for the six additional days it was stipulated the violation continued, the

[36]The penalty figures include the 10% adjustment for inflation under the Debt Collection Improvement Act. Thus, for example, Count I, under the Asbestos Policy actually calls for a $15,000 penalty for a first offense of that nature. With the inflation adjustment that figure grows to $16,500.

Policy provides for $10,000 for the first day plus $1,000 per day for the six days it continued. With the inflation adjustment this produced the $17,600 sought by EPA.

With a subtotal of $57,200 under the Asbestos Policy for the four Counts, the General Penalty Policy is then applied to measure the seriousness of the violations, which includes assessment of the possibility for harm. A host of factors were cited by EPA to support its contention that the seriousness was significant. The exposure to asbestos, including the manual removal process employed, the continued use of the mess hall during the renovation and the risk of foot traffic causing asbestos fibers to be released, the operation of the heating, ventilation, and air conditioning ("HVAC") system during the renovation, and the fact that the Respondent did not have the sampling results when the inspection occurred. Additional seriousness was reflected by the storage of the asbestos bags in an unlined, unsealed truck with no warning sign, coupled with the testimony that some bags in the truck were ripped and none of the material in the bags appeared to be wetted. EPA contends that the seriousness of a violation can be based on the potential for harm, rejecting the view that a penalty can be greatly reduced on the basis a finding of a lack of actual harm. *Id*. at 33. It also notes that it is not necessary to show actual inhalation of asbestos fibers to show that noncompliance poses a serious hazard. Thus, EPA concludes that the violations were shown to be serious, given the various potentials for exposure to asbestos fibers and that, because the actual harm may not reveal itself for decades later, harm in these cases can only be measured as potential or possible.

Still another consideration in measuring the seriousness is the "harm to the regulatory scheme." As the NESHAP regulation is about preventing asbestos emissions, the pre-renovation survey is a critical requirement. Fairleigh described the survey as "basically the foundation of [the] regulations." *Id*. at 35, quoting TR. at 66-67. So too, the notification requirement is critical to the preventative nature of the regulatory scheme. In this regard, Fairleigh described the notification as "critical" and he stated that had a notice been made by the Respondent it would have caused him to be concerned about the planned activity. Fairleigh's office reviews notices so that it may target those projects which will be inspected. Without notifications, the State is unable to determine where renovations are planned. Similarly, Fairleigh explained the importance of trained personnel. Those who have been trained can identify non-compliance and reduce or prevent harm. In this case he opined that trained personnel would have been aware of the noncompliance and also would have known that abatement would have required the dining hall to be shut down. EPA believes that the harm to the regulatory scheme, by itself, justifies the high penalties directed under the Asbestos Penalty Policy.

EPA contends that, as with all the other factors, the "economic impact of the penalty on the business" must be considered in determining the penalty.[37] Relying on its arguments pertaining to the applicability of those other factors, EPA contends that the Respondent has not shown that the penalty will have a negative impact on the base, as it would only affect discretionary spending for maintenance and improvements. EPA Reply Br. at 9. The Court

[37]EPA asserts that Respondent first raised this contention in its Post-Hearing brief.

agrees.

In response to Respondent's related claim that EPA treats federal agencies unequally by virtue of the General Policy's "50% rule," EPA maintains that the General Policy does not require a doubling of fines where federal agencies are concerned. Instead, the Policy operates to limit the size of violator component, not increase it. *Id*. at 16. The Court agrees with this conclusion as well.

EPA also takes issue with Respondent's assertion that it is disadvantaged, as compared to private respondents, because federal agencies have no "ability to pay" arguments available to it. It notes that the Anti-Deficiency Act ("ADA"), 31 U.S.C. § 1341, is available and allows an agency to defer payment of a penalty until funds are available. Further, Respondent has not asserted an inability to pay in this case. While EPA acknowledges that a penalty may require the Respondent to juggle its funds in order to pay it, it observes that the ADA ensures that money for the penalty will be spent only when there are funds available.[38]

Last, EPA asserts that it did consider the "other factors as justice may require" element, in assessing the penalty. It notes that Mr. Russell testified that he did consider that factor but determined that no reduction was warranted. Accepting for the sake of argument that the impact of the penalty on the Fort Jackson should be considered under the "other factors" element, instead of the "economic impact" factor, EPA contends that the bottom line is that the impact here is speculative and undefined in the record. Nor, it contends, is there anything that is "extraordinary" because Section 113(d)(1) waiver cases are commonplace, with some 300 such cases filed in 2000 and because it is not the first time an action has been filed against a federal agency which had raised sovereign immunity in order to bar state enforcement. Similarly, there have been other cases seeking penalties for violations occurring prior to the July 1977 DOJ memorandum which concluded that EPA may apply Section 113 enforcement against federal agency respondents.[39]

In the Court's view, upon review of all of the evidence, the Respondent has not presented

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[38]EPA addresses several of Respondent's arguments in short order. As to Respondent's contentions regarding lack of access to judicial review, EPA's issuance of the 1988 Herman Memo, Respondent's ability to obtain compliance exemptions under 42 U.S.C.§ 7418, and that a large penalty interferes with an Agency's mandated Congressional mission, EPA replies that none of these contentions "impact the substantive assessment of penalties." *Id*. at 17. It also views the argument that any penalty is meaningless as the funds simply go back to the federal treasury and the only tangible impact of this transaction is that the agency's budget is decremented, as indicative of disdain for the enforcement process. *Id*. at 21.

[39]EPA cites the case of *U.S. Army*, *Fort Wainwright Central Heating & Power Plant*, Docket No. CAA 10-99-0121, as noted *infra.*

any evidence or factor in mitigation that would warrant additional consideration under the "other factors" element. Such considerations as were valid were adequately taken into account in EPA's consideration of the other penalty criteria.

Finally, EPA rejects the Respondent's claim that it had sufficient internal procedures to ensure compliance because the facts of this case and the admitted violations, prove otherwise. EPA believes that the positions Respondent has taken, by focusing the blame on individuals, instead of Fort Jackson, and by complaining that the State is to blame for the length of time the wetting violation continued, shows an attitude of not fully accepting its own responsibility for the violations.

The Court agrees with EPA's analysis. In fact, Scott Nahrwold, the Civilian Deputy Garrison Commander at Fort Jackson was, in the Court's estimation, was vague about the measures Respondent took, even in the wake of this most recent problem. He stated: "I'm quite sure we pulled out existing policy and made whatever additional modifications would have been required at that time to preclude any recurrence of any such activity. That's pretty much standard operating procedure as far as any time we discover that soldiers have figured out a way to inadvertently circumvent existing policy." Vol II, Tr. 125-126. The fact that Commander Nahrwold could only speak of the probable actions taken, by his reference to what must have happened as part of standard practice, instead of what actually occurred here is telling, as is the Respondent's insistence that its existing policy is effective and that the problem here arose out of "inadvertent" circumvention of that policy. The penalty as proposed under the applicable penalty policies has produced an appropriate penalty in this instance. Accordingly, the Court affirms the proposed penalty. Consistent with any applicable legal restrictions which may pertain to payment of the civil penalty, the Court finds that the $85,800 penalty proposed by EPA is appropriate, both under the applicable policies and also under the statutory criteria as well as the direction provided by the Board in its *Fort Wainwright* decision.

ORDER

A civil penalty in the amount of $85,800 (Eighty-five thousand eight hundred dollars) is assessed against the Respondent, U.S. Army Training Center and Fort Jackson. Payment of the full amount of the civil penalty assessed shall be made within 30 (thirty) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c). Payment shall be submitted by a certified check or cashier's check made payable to the Treasurer, United States of America and mailed to:

United States Environmental Protection Agency
Region IV
Regional Hearing Clerk
Nations Bank
P.O. Box 100142
Atlanta, GA 30384

A transmittal letter identifying the subject case and the EPA docket number, plus the Respondent's name and address must accompany the check. Failure of the Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalty.

Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order 45 (forty-five) days after its service upon the parties and without further proceedings unless (1) a party moves to re-open the hearing within 20 (twenty) days after service of the Initial Decision, pursuant to 40 C.F.R. § 22.28(a); 2. an appeal to the EAB is taken from it by a party to this decision, pursuant to 40 C.F.R. § 22.30(a), within 30 (thirty) days after the Initial Decision is served upon the parties; or (3) the EAB elects, upon its own initiative, under 40 C.F.R. § 22.30(b), to review the Initial Decision.

So Ordered.

William B. Moran
United States Administrative Law Judge

Dated: September 12, 2003