UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
THE BARDEN CORPORATION,	**)**	**Docket No. CAA -1-2000-0070**
	)	
Respondent.	**)**	

ORDER ON MOTION FOR RECONSIDERATION

An Initial Decision was issued in this matter on August 9, 2002, finding, after hearing, that The Barden Corporation (Respondent or Barden), was liable on eight counts of violating Section 112 of the Clean Air Act (42 U.S.C. § 7412) and Federal and State regulations promulgated pursuant thereto (40 C.F.R. §§ 63.460-.469 (1999) and CONN. AGENCIES REGS. § 22a-174-20 (1996)). Specifically, Respondent was found liable for failing to: (1) comply with hoist rates; (2) comply with labeling requirements; (3) submit initial notifications for solvent cleaning machines; (4) submit initial statements of compliance; (5) submit semi-annual solvent exceedance reports; (6) maintain logs of solvent additions and deletions; (7) perform emissions calculations; and (8) comply with alternative emission limits. Civil administrative penalties totaling $275,550 were imposed on the Respondent for these eight violations.[1]

On September 5, 2002, Respondent submitted a Motion for Reconsideration (Motion) of the Initial Decision, requesting reconsideration only of the penalties assessed in the Initial Decision in regard to Counts VIII and IX of the Complaint.[2] In its Motion, Barden indicates that it is not asking for reconsideration of the findings of liability as to any count nor the penalties

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[1] The original Complaint filed in this matter on October 2, 2000, charged Respondent with nine counts of violations and proposed $310,750 in penalties. *See*, Initial Decision at 2.

[2] On August 30, 2002, Respondent filed a Motion with Environmental Appeals Board (EAB) requesting its permission to file a motion for reconsideration of the Initial Decision with the undersigned, noting that the Consolidated Rules of Practice (40 C.F.R. Part 22) provide that, with some exceptions not relevant here, all motions following an initial decision must be filed with the EAB. By Order dated September 5, 2002, the EAB did not grant or deny its permission, but rather noted that such motions must be filed with the Administrative Law Judge who issued the Initial Decision. That same day, Respondent submitted a request for permission and motion for reconsideration, and served it on the undersigned, and thus, although the caption on that pleading suggests it is pending before the "Environmental Appeals Board," it is taken as pending before the undersigned.

assessed in regard to any of the other six counts. As to penalties assessed in regard to Counts VIII and IX, Barden requests reconsideration suggesting that the penalties imposed as to those Counts should be reduced to $1,000 and $3,500, respectively, on the basis of the absence of actual harm to the environment. Complainant filed an Opposition to the Motion on September 13, 2002.

I. Background

As detailed in the Initial Decision, during the time period relevant hereto, Respondent owned and operated, at its ball bearing manufacturing facility in Connecticut, six batch, vapor, solvent, cleaning machines, also known as "degreasers," which used trichloroethylene (TCE) as a cleaning agent. As a result, Respondent was subject to the Federal regulations known as the National Emission Standards for Hazardous Air Pollutants: Halogenated Solvent Cleaning (halogenated solvent NESHAP), promulgated under the Clean Air Act (CAA) (59 Fed. Reg. 61,801, 61,805 (Dec. 2, 1994) (codified at 40 C.F.R. §§ 63.460-.470)). Barden was also required to comply with certain provisions of Connecticut's Abatement of Air Pollution Regulations (AAPR) (CONN. AGENCIES REGS. § 22a-174-20(1)), which are part of the State Implementation Plan (SIP) adopted pursuant to CAA § 110 (42 U.S.C. § 7410). The SIP provides that it is enforceable by EPA. *See*, 40 C.F.R. § 52.370.

The halogenated solvent NESHAP requires owners or operators of degreasers to choose, for each such machine, one of three approaches for achieving compliance with the Regulations and the goal of reducing solvent air emissions. The compliance options are known as: (1) the control combinations standard; (2) the idling emissions standard; and (3) the alternative standard. All three standards require some form of periodic monitoring, record keeping, and reporting to demonstrate on-going compliance. 40 C.F.R. §§ 63.466-.468. The first two standards require degreasers to meet certain base design requirements and require entities to employ certain work and operational practices. 40 C.F.R. § 63.463(a). Work and operational practices include maintaining equipment as recommended by the manufacturer, minimizing in room air disturbances, minimizing solvent loss due to spraying, reducing solvent pooling on parts, and following proper startup and shutdown procedures. 40 C.F.R. § 63.463(d). The control combinations standard mandates, in addition, other more restrictive specific equipment controls, depending on the machine type, size, and age. 40 C.F.R. § 63.463(b). On the other hand, the idling emissions standard mandates a demonstration, using a "Method 307" test, that the machine can achieve and maintain a certain idling emissions limit (such as .22 kg per hour per square meter). *Id*. On-going compliance with the idling emissions standard is demonstrated by periodic (*e.g.*, weekly or monthly) monitoring of and reporting on the parameters (*i.e.*, status of the equipment and conditions) in effect at the time the machine met and passed the Method 307 test and met its idling limit. 40 C.F.R. §§ 63.463(f) and 63.466. The third option, the alternative standard, sets only a maximum monthly emissions limit. 40 C.F.R. § 63.464. Compliance with the alternative standard is demonstrated by maintaining records of solvent additions and deletions and using that data to calculate the extent of emissions for each machine on a monthly and 3-month rolling average basis. *Id.*

While at a certain points, Respondent had had some of its degreasers tested for compliance with the idling emissions standard using the Method 307 test, at all times relevant hereto, Respondent represented that it had chosen to comply with the alternative standard in regard to all of its degreasers. *See*, Initial Decision, *passim*.

In the Initial Decision, for Count VIII, the penalty proposed by Complainant, $38,500, was assessed against Barden for its acknowledged failure to perform the emissions calculations required under the alternative standard to show that the emissions from each degreaser were below the applicable limit of 30.7 pounds per square foot per month. For Count IX, Respondent was assessed the $93,500 penalty proposed by Complainant for exceeding the alternative standard's emissions limit in 1998 for one of its degreasers known as EMU-9.

II. Request for Permission to File Motion for Reconsideration

Along with its Motion for Reconsideration, Respondent submitted a Request for Permission to file the Motion. Therein, Respondent acknowledges that the applicable procedural rules, the Consolidated Rules of Practice at 40 C.F.R. Part 22, do not provide for reconsideration of an *initial* decision. Nevertheless, Barden requests reconsideration on grounds that, with the familiarity of the undersigned with the evidence and issues in this matter, a decision on the Motion may obviate the need for appeal, and, at least, may clarify certain findings, which may narrow the focus of any appeal.

Rule 22.32 of the Consolidated Rules (40 C.F.R. § 22.32) provides for reconsideration only of a *final* order issued by the EAB upon appeal or *sua sponte* review. The Rules also provide that an initial decision becomes a final order 45 days after its service unless a party appeals, moves to reopen the hearing or to set aside a default order, or the EAB elects to review it. 40 C.F.R. §§ 22.27(c). Such provisions arguably suggest that motions to reconsider an initial decision are inconsistent with the Consolidated Rules.

Moreover, the instances in which motions to reconsider an initial decision have been granted are rare, such as cases where the presiding judge in the initial decision had explicitly given the parties the right to move for reconsideration within a certain set time period. *See, Phibro Energy USA, Inc.*, EPA Docket No. CAA-R6-P-9-LA-92002, 1997 EPA ALJ LEXIS 83 (Order Upon Motion for Reconsideration, July 31, 1997) and 1994 EPA ALJ LEXIS 64, n. 24 (Initial Decision, October 10, 1994). The rarity of such reconsideration may stem from the fact that prior to their amendment in 1999, the Consolidated Rules required the EAB to rule on all motions filed after service of the initial decision, except motions for disqualification or to reopen the hearing. 40 C.F.R. § 22.16(c)(1998). With those exceptions, the Consolidated Rules terminated the jurisdiction of the Administrative Law Judge (ALJ) upon service of the initial decision.

Accordingly, prior to the 1999 amendment, the EAB, noting that the ALJ's jurisdiction

over a case terminated on the date he filed an order dismissing a complaint, stated that the ALJ "was without authority to rule on the merits of a motion for reconsideration." *Asbestos Specialists, Inc.*, 4 E.A.D. 819, 824 n. 15, 1993 EPA App. LEXIS 7 (EAB 1993). The EAB explained that the rationale for terminating the ALJ's jurisdiction was to avoid the possibility of conflicting orders from the ALJ and the EAB, although it acknowledged that other means may exist to prevent such an occurrence. The EAB opined that such interpretation of the Consolidated Rules "is sufficiently established that we see no compelling reason to change it." *Id.; see also, Fisher-Calo Chemicals and Solvents Corp.*, 1983 EPA App. LEXIS 1, RCRA (3008) Appeal No. 83-2 (CJO, April 20, 1983)("[T]he function of the motion for reconsideration is to correct errors in the Administrator's review of the initial decision; its function is not to correct errors in the presiding officer's initial decision which could have been corrected on appeal . . . .")

Since the 1999 amendment, however, the ALJ's jurisdiction does not terminate upon service of the initial decision. The Rules require the EAB to rule on all motions filed after an appeal is filed, except motions to reopen the hearing, and require the ALJ to rule on all motions after the filing of an answer and before the initial decision becomes final or is appealed. 40 C.F.R. § 22.16(c) (2001). The current rules are consistent with the need for the ALJ, on occasion, to issue errata to correct minor errors in an initial decision, orders clarifying an initial decision, and orders on motions to set aside a default which constitutes an initial decision. *See, e.g., Joe Mortiboy*, 1995 EPA LEXIS 49, EPA Docket No. RCRA-UST-1092-12-01-9006 (Clarification of Default Order, August 18, 1995). Consequently, the EAB's comments, expressed in *Asbestos Specialists* as to reconsideration of an initial decision, may not represent the EAB's interpretation of the current Consolidated Rules. Rather, the Order issued by the EAB in response to Respondent's Motion for Permission to File A Motion For Reconsideration of the Initial Decision, suggesting that such a Motion must be filed with the undersigned, implies that under the current rules the EAB would view jurisdiction regarding such motions to lie with the ALJs.[3]

Therefore, with no clear basis under the current Consolidated Rules or under EAB precedent to reject out of hand a motion to reconsider an initial decision, the Respondent's request for permission to file its Motion for Reconsideration is **GRANTED.**

III. Standard for Reconsideration

The next issue to be determined is what standard would be appropriate to apply to a motion to reconsider an initial decision. Rule 22.32 of the Consolidated Rules provides that motions for reconsideration of a final order "must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." 40 C.F.R. § 22.32. The Preamble

[3] The EAB's Order also suggests that the time for filing an appeal would be stayed by the filing for reconsideration until such time as the motion is ruled upon by the ALJ.

discussion of the 1999 amendments to the Consolidated Rules describes the intent of that Rule as follows:

> The purpose of § 22.32 is to provide a mechanism to bring to the EAB's attention a manifest error, such as a simple oversight, or a mistake of law or fact, or a change in the applicable law. *See, In the Matter of Cypress Aviation, Inc.*, 4 E.A.D. 390, 392 (EAB 1992). The motion for reconsideration is not intended as a forum for rearguing positions already considered or raising new arguments that could have been made before.

64 Fed. Reg. 40138, 40168 (July 23, 1999). The EAB has stated, in *Southern Timber Products*, 3 E.A.D. 880, 889 (EAB, Feb. 28, 1992), that "reconsideration of a Final Decision is justified by an intervening change in the controlling law, new evidence, or the need to correct a clear error or prevent manifest injustice."[4] The EAB therein quoted an earlier decision of the appellate tribunal, *City of Detroit*, TSCA App. No. 89-5 (CJO Feb. 20, 1991), slip op. at 2, which stated:

> A motion for reconsideration should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of this office clearly erroneous factual or legal conclusions. Reconsideration is normally appropriate only when this office has obviously overlooked or misapprehended the law or facts or the position of one of the parties.

The standard enunciated by the EAB is similar to that used by Federal trial courts under Federal Rule of Civil Procedure 60(b), with which courts may grant relief from judgment for, *inter alia*, "obvious errors of law, apparent on the record." *Van Skiver v. United States*, 952 F.2d 1241, 1244 (10th Cir. 1991), *cert. denied*, 506 U.S. 828 (1992), *citing, Alvestad v. Monsanto Co.*, 671 F.2d 908, 912-13 (5th Cir.), *cert. denied*, 459 U.S. 1070 (1982); *see also, United States v. MPM Contractors, Inc.*, 767 F. Supp. 231 (D. Kan. 1990)(a motion for reconsideration is the opportunity for the court to correct manifest errors of law or fact, where the court has obviously misapprehended a party's position, the facts, or the law, or the court has mistakenly decided issues outside of those the parties presented for determination.). Motions for reconsideration are not for presenting the same issues ruled upon by the court, either expressly or by reasonable implication. *United States v. Midwest Suspension & Brake*, 803 F. Supp. 1267, 1269 (E.D. Mich 1992), *aff'd*, 49 F.3d 1197 (6th Cir. 1995). Judge Selya of the First Circuit has colorfully stated, "a trial court, having considered the parties' arguments and ruled on them, is under no obligation to repastinate well-ploughed soil simply because an unsuccessful litigant balks at taking 'no' for an answer." *Air Line Pilots Ass'n v. Precision Valley Aviation, Inc.*, 26 F.3d 220, 227 (1st Cir. 1994).

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[4] New evidence would not be an appropriate basis for reconsideration of an initial decision, because the Consolidated Rules provide for a motion to reopen the hearing to address new evidence. 40 C.F.R. § 22.28.

In light of the availability of avenues for review and appeal of an initial decision as well as the desirability of expeditiously moving towards finality of decisions, it seems that this tribunal's standard for ruling on a motion to reconsider such a decision should be at least as strict as the EAB's standard for reconsidering a final order. *See, Oklahoma Metal Processing, Inc.*, EPA Docket No. TSCA-VI-659C, 1997 EPA ALJ LEXIS 16 * 2 (ALJ, Order Denying Motion for Reconsideration, June 4, 1997)(requiring a motion for reconsideration of an interlocutory order not only to meet the EAB's standard for reconsideration under 40 C.F.R. § 22.32, but also to demonstrate that a variance from the rules, which do not provide for reconsideration of ALJ orders and decisions, will further the public interest); *Ray & Jeanette Veldhuis*, EPA Docket No. CWA–9-99-0008, 2002 EPA ALJ LEXIS 47 * 7 (ALJ, Order Denying Motion to Reopen Hearing, Aug. 13, 2002)("assuming that a motion for reconsideration from an initial decision may be brought properly before an administrative law judge, such motion would be subject to the same standard of review as that of the EAB"). However, the exact standard to apply in such circumstances need not be decided here, because as discussed further below, Respondent's Motion has not even met the standard enunciated by the EAB for reconsideration under 40 C.F.R. § 22.32.

IV. Whether to Reconsider the Initial Decision

A. Count VIII

As indicated above, in Count VIII Respondent was found liable for failing to perform the emissions calculations necessary to demonstrate that the emissions from each of its six degreasers were below the alternative standard limit of 30.7 pounds per square foot per month for the 13 month period from January 1, 1998 until January 31, 1999.[5] A penalty of $38,500 was imposed upon Respondent for this violation. This penalty was calculated in accordance with the Clean Air Act Stationary Source Civil Penalty Policy (Policy), which provides that a violation of this type continuing for 13 months be assessed a penalty of $20,000 in consideration of the factor of the violation's "actual or possible harm,"[6] and that an additional $15,000 under the factor

[5] The regulations require that owners and operators calculate the emissions for each degreaser once a month and then use the monthly emissions calculations, on a monthly basis, to determine a three month rolling average which is compared against the regulatory limit to determine compliance. 40 C.F.R. § 63.464. Thus, during the 13 month period, Respondent failed to do a total of 156 calculations for its six machines. The penalty imposed computes out to be approximately $250 per calculation not performed.

[6] The Policy indicates that "[t]his factor focuses on whether (and to what extent) the activity of the defendant actually resulted or was likely to result in the emission of a pollutant in violation of the level allowed by the applicable State Implementation Plan, federal regulation or (continued...)

reflecting the regulations' requirement's "importance to the regulatory scheme."[7] A ten percent increase for the inflation factor brought the total penalty for Count VIII to $38,500.

In its Motion, Respondent requests reduction of this amount because it suggests that in assessing the penalty, due regard was not given "to the substantial evidence that Barden's violations created no harm to the environment," and asserts that Barden "did not compromise human health or the environment." Motion at 1. Representing that the Policy does not "factor in no actual harm," Barden requests a reduction of the penalty because "fairness to the regulated community and the interests of justice require that this be taken into consideration." *Id.*

Specifically, Barden asserts that as to all but one of its six degreasers, its "compliance with those facets of the idling emission standard that actually effect emission control, the physical [degreaser design] requirements and the inspection requirements, demonstrates that no excess emissions resulted" from Respondent's failure to perform emissions calculations under the alternative standard compliance option. Motion at 2 (pages not numbered). As to the one other degreaser, EMU-16, which did not meet the idling emissions standard, Respondent asserts, it was in compliance with the emission limit, citing to testimony of Mr. Koopman. Tr. 161-162. Respondent argues that environmental harm can only be found if there is evidence that the environment was actually harmed by a particular instance of excess emissions by a specific regulated entity, and cannot be based merely upon an entity's failure to do the paperwork required to demonstrate compliance with emission limits. Respondent states that it was in compliance with the monitoring element of the idling emissions standard, as evidenced by Ms. Zuvich's testimony that degreaser inspections and hoist speed checks were performed, and that EPA's inspections of Barden's facility did not yield any comments on defects in degreaser covers. Tr. 306-309, 254-256. EMU-12, the only degreaser which had hoist speed problems, was instantaneously corrected pursuant to the EPA inspection, and there was no evidence that it ever exceeded emissions limits, Barden asserts.

In its Opposition to the Motion, Complainant asserts that Barden is simply rearguing the same points it raised in its post-hearing briefs, which arguments were addressed and rejected in the Initial Decision.

Complainant's point is well taken. The Initial Decision expressly acknowledges

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[6](...continued)
permit." It notes that this assessment "is a complex matter," and that the Agency has chosen to distinguish between violations in this regard based upon certain considerations including amount of pollutant, sensitivity of the environment, toxicity of the pollutant, length of the violation and size of violator. C's Ex. 17, pp. 9-10. In regard to this specific count, only the length of the violation was considered, although the size of the violator was considered as to all counts.

[7] The Policy indicates that "[t[his factor focuses on the importance of the requirement to achieving the goals of the Clean Air Act and its implementing regulations." C's Ex. 17 p. 7.

Respondent's argument that the penalty should be reduced for the statutory penalty determination factor "such other factors as justice may require" because all of the degreasers except one physically met design criteria for the idling emission or control combinations standard; however, the penalty was not reduced for that factor. Initial Decision at 45. It acknowledges further the testimony of Respondent's expert, Mr. Fraga, that there was no harm to the environment from excess emissions. *Id.* Nevertheless, the penalty was not reduced because, as stated in the Initial Decision, "there is no evidence in the record that over the period at issue here Respondent would have complied with all of the workplace practices and record keeping requirements pertinent to those other standards." *Id.*

Moreover, Respondent has not demonstrated a clear error with regard to that finding or as to evaluating the penalty on the basis of the alternative standard rather than another standard. Respondent did not show that it was continually in compliance with another standard. While Ms. Zuvich testified that Barden had "always done a certain amount of inspections;" that all hoists "were always inspected;" there were no defects in degreaser covers on the day of the inspection or the day of the hearing; and that every operator is trained to record results of inspecting degreaser covers; she could not recall *when* Barden started recording the results of these inspections and Barden never produced *any* records of *any* such inspection. Tr. 249, 307-309. This testimony, absent records indicating that the degreasers were periodically inspected as required during the relevant time and noting any problems or absence thereof, does not provide a basis upon which to conclude that all required workplace practices and inspections were consistently performed and that no problems with the degreasers' equipment or operation ever occurred which could have caused excess emissions under the other standards during the relevant time period.

In addition, there is no basis under the Penalty Policy to reduce the penalty. The Penalty Policy provides that specified levels of penalties be added together to represent the "actual or possible harm," meaning the extent to which the activity "actually resulted in *or was likely to result in* the emission of a pollutant in violation of the level allowed . . . ." C's Ex. 17 p. 9 (emphasis added). Accordingly, the penalty for Count VIII included $20,000 for "actual or possible harm," reflecting merely the length of violation "until the source demonstrates compliance." *Id.* pp. 11, 12. Nothing was added to reflect the amount, toxicity or effect of any emissions. If the amount of emissions were taken into account, even as little as one percent above the standard, at least $5000 would be added to the Penalty under the Policy (C's Ex. 17 p.10), and if the toxicity of the emissions were taken into account, another $15,000 would be added. C's Ex. 17 p. 11. Further penalties could be added for sensitivity of the environment. There is nothing in the Policy which would allow or suggest any reduction to the $20,000 penalty amount for lack of proof of actual harm to the environment. Rather, the Policy presumes that the actual damage to the environment may be negligible, or difficult, impossible, or very expensive for the Agency to determine. Indeed, the Policy provides only for an *increase* in penalties where there is severe environmental damage. C's Ex. 17 p. 19.

Respondent's mere assertions of "fairness to the regulated community and the interests of justice," in light of the evidence it presented, does not establish any basis for deviating from the

Penalty Policy. The EAB has "emphasized that the Agency's penalty policies should be applied whenever possible because such policies 'assure that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner.'" *Carroll Oil Co.*, RCRA (9006) Appeal No. 01-02, slip op. at 28 (EAB, July 31, 2002)(quoting *M.A. Bruder & Sons*, RCRA (3008) Appeal No. 01-04, slip op. at 21 (EAB, July 10, 2002). It is well established that the presiding judge has the "discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where circumstances warrant." *DIC Americas* , 6 E.A.D. 184, 189 (EAB 1995).[8] However, such circumstances must be demonstrated by a preponderance of the evidence. 40 C.F.R. § 22.24 ("respondent shall have the burden of presenting . . . any response or evidence with respect to the appropriate relief" and "[e]ach matter of controversy shall be decided . . . upon a preponderance of the evidence").[9] Respondent has not demonstrated, by a preponderance of the evidence, circumstances which would warrant a departure from the Penalty Policy.

Barden simply has not shown that the penalty for Count VIII, calculated in accordance with the Penalty Policy, and pursuant to the statutory factors of Section 113(e) of the Clean Air Act, must be reduced to correct "clearly erroneous factual or legal conclusions" or because the undersigned "has obviously overlooked or misapprehended the law or facts or the position of one of the parties." *Southern Timber Products, supra*.

B. Count IX

For Count IX, Respondent was found liable for exceeding the alternative standard's emission limit for the degreaser EMU-9. Barden requests in its Motion that the penalty be reduced because EMU-9 never harmed human health or the environment, citing the testimony of Mr. Fraga. Tr. 432-434. Acknowledging that EMU-9 exceeded the alternative standard's emission limits, Barden asserts, however, that EMU-9 met the limits of the idling emission

[8] Although the EAB has not specifically outlined the type of circumstances which would warrant deviation from a penalty policy, it has stated that a finding of "extraordinary circumstances" is not required. *Steeltech, Inc.*, 8 E.A.D. 577 (EAB 1999). The EAB has also stated that it will not grant deference to a penalty determination in which the ALJ did not utilize the applicable penalty policy where the ALJ's reasons for choosing not to apply it were not "compelling." *Carroll Oil*, slip op. at 28.

[9] A higher evidentiary standard may be required in some contexts to justify a penalty reduction for "other factors as justice may require." *See, Spang & Company*, 6 E.A.D. 226, 250 (EAB 1995)(For violations of the Emergency Planning and Right to Know Act, reducing a penalty under the rubric "other factors as justice may require" for environmentally beneficial projects requires the Agency's policy encouraging such projects to be balanced with the primary enforcement objective of initial compliance with the laws, so a reduction may be warranted only if the evidence is "clear and unequivocal.").

standard, except for the "paperwork requirements," because it met the Method 307 Test in January 1998. Barden relies again on Ms. Zuvich's testimony that the periodic monitoring and/or inspections of equipment which are required under the idling emissions standard were performed but not always recorded. Barden asserts that reliance on Dr. Smuts's testimony in regard to harm to health or the environment, as to an increased risk to human health when there is an additional load of TCE, is "clearly erroneous." Motion at 4. Barden points out that Dr. Smuts never visited Barden's facility and never performed a risk analysis.

In determining the penalty for Count IX, it was noted that in 1998, EMU-9 emitted 10 tons of TCE over the regulatory limit, had a 3-month average emission of more than three times the legal limit, and a total excess emissions that year of 722 pounds per square foot. With the three month average emission level of 313 percent over the standard, applying the Penalty Policy methodology yielded a penalty of $85,000. An inflation factor of 10 percent brought the penalty to $93,500. The testimony of Dr. Smuts did not result in any increase in the penalty, but merely buttressed the rationale of the Penalty Policy for assessing a penalty of that magnitude, particularly in regard to the factor of possible harm.

Again, as with Count VIII, Ms. Zuvich's general testimony as to Barden having performed unrecorded inspections does not establish that no excess emissions in fact ever occurred under the idling emissions standard during the relevant time period. Moreover, while Mr. Fraga opined that EMU-9's emissions during the 13 month period did not harm the environment because it met the Method 307 test standards when tested one day in January of 1998 and the machine was not modified thereafter, he also admitted that he did not know if Barden was complying with workplace practices or inspection requirements to maintain on-going compliance under the idling emissions standard. Tr. 443-445.[10] Considering Mr. Fraga's testimony as well as Dr. Smuts' testimony, it is difficult to conclude that no harm to human health or the environment could have occurred, at any time within the relevant time period, as a result of the violation.

In sum, Complainant carried its burden at the hearing to show the appropriateness of the

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[10] Mr. Fraga testified that to be in full compliance with the idling emissions standard, the control equipment on EMU-9 that Barden would have had to monitor would be the hoist and the cover. The hoist would be monitored to determine if its speed was within the regulatory limit and the cover would have been monitored to assure that it closed properly and had no defects such as holes or cracks. Tr. 397, 416-18. Ms. Zuvich alleged that such monitoring was being done in regard to this and all the other degreasers in the facility. However, as indicated in the Initial Decision, on the day of the inspection, it was discovered that the hoist for another degreaser was operating above the legal limit and that at least one degreaser did not have the requisite operating instructions posted -- this, despite all of the inspections Barden was allegedly performing but perhaps not recording. Therefore, one cannot simply presume that the equipment on EMU-9 would have been in compliance at all times during the 13 month period at issue and not have caused excess emissions even under the idling emissions standard.

penalty it proposed, and Respondent's testimony and evidence was insufficient to rebut it with proof that no excess emissions occurred under the idling emissions standard. Barden's mere request that the absence of harm must be factored into the penalty calculation for Count IX does not reflect any factual or legal error, or misapprehension of its position, that must be corrected on reconsideration.

ORDER

Accordingly, Respondent's Motion for Reconsideration is **DENIED.**

Susan L. Biro
Chief Administrative Law Judge

Dated: October 1, 2002
Washington, D.C.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	**)**	
	)	
THE BARDEN CORPORATION	**)**	
	)	**Docket No. CAA -1-2000-0070**
	)	
Respondent	**)**	

ERRATUM

The last sentence of the Order on Motion for Reconsideration, dated October 1, 2002, states "A civil administrative penalty in the amount of $275,550 was imposed on the Respondent for these eight violations." The penalty amount recited in the Order is a scrivener's error. The sentence should read, and is hereby amended to read as follows: "A civil administrative penalty in the amount of $281,050 was imposed on the Respondent for these eight violations."

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Susan L. Biro
Chief Administrative Law Judge

Dated: October 8, 2002
Washington, D.C.