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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
EK Associates, L. P.,)	
d/b/a EKCO/GLACO,)	Docket No. 5-CAA-95-
012)	
and EK Management Corporation,)	
)	
Respondents)	

INITIAL DECISION

By: Carl C. Charneski
Administrative Law Judge

Issued: June 15, 1998
Washington, D.C.

Appearances

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This is a civil penalty action brought by the U.S. Environmental Protection Agency ("EPA") against EK Associates, L.P., d/b/a EKCO/GLACO, and EK Management Corporation (collectively, "Ekco"), pursuant to Section 113(d) of the Clean Air Act (the "Act"). 42 U.S.C. § 7413(d). EPA seeks civil penalties totaling \$151,622 for three violations of the Act. These alleged violations involve regulations intended

to prevent the formation of the pollutant ozone. A hearing was held in this matter on August 13 and 14, 1997, in Chicago, Illinois.

For the reasons that follow, Ekco is held to have violated the Clean Air Act as alleged in Counts I and IV of the EPA complaint, but not as alleged in Count II.⁽¹⁾ A civil penalty of \$86,107 is assessed for the Count I and Count IV violations.⁽²⁾

I. Introduction

Ekco operates a plant in which commercial baking pans are cleaned and reglazed with a release coating which inhibits baked goods from sticking to the pans. Jt. Ex. 4. This cleaning and reglazing process involves the use of Volatile Organic Compounds, commonly referred to as "VOCs." Emissions from VOCs contribute to the creation of ozone. 44 *Fed. Reg.* 8220 (February 8, 1979).⁽³⁾

Accordingly, EPA has promulgated regulations governing Volatile Organic Compound emissions. This case involves Ekco's alleged failure to comply with these VOC regulations during its bakeware cleaning and reglazing operations.

II. The Clean Air Act

An overview of the Clean Air Act will be helpful in understanding the context in which the present case arises. A primary goal of the Act is "to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population." Section 101(b)(1), 42 U.S.C. § 7401(b)(1). In order to achieve this goal, Congress has adopted a statutory scheme in which the States and the Federal government share responsibility for the regulation of air pollutants such as ozone.

For example, under Section 109 of the Clean Air Act it is the responsibility of the Federal government, through the U.S. Environmental Protection Agency, to establish National Ambient Air Quality Standards ("NAAQS"). The NAAQS are established "for each air pollutant for which air quality criteria have been issued." 42 U.S.C. § 7409. These standards set the allowable ambient concentration for the targeted pollutant at a level designed to protect public health and public welfare. National Ambient Air Quality Standards have been established for carbon monoxide, nitrogen dioxide, sulfur dioxide, particulate matter, hydrocarbons, lead, and ozone, the pollutant involved in this case. 36 *Fed. Reg.* 8186, 8187 (1971). The NAAQS for ozone appears at 40 C.F.R. 50.9.

Once EPA has issued a National Ambient Air Quality Standard, it is up to each State to adopt a State Implementation Plan ("SIP") to implement, maintain, and enforce the NAAQS within its borders. Section 110, 42 U.S.C. § 7410. Among other things, each SIP is to "include enforceable emission limitations and other control measures, means, or techniques . . . , as well as schedules and timetables for compliance, as may be necessary or appropriate." Section 110(a)(2)(A), 42 U.S.C. § 7410(a)(2)(A).

Areas that have achieved compliance with the NAAQS are designated as "attainment areas." States, or areas, that have not achieved NAAQS compliance are designated as "nonattainment areas." Section 171(2), 42 U.S.C. § 7501(2). For nonattainment areas, the SIP must require that sources of pollution implement "reasonably available control technology" ("RACT") to reduce the level of pollution. Section 172(c)(1) of the Act, titled "Nonattainment plan provisions," states:

Such plan provisions shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national primary ambient air quality standards.

42 U.S.C. § 7502(c)(1).

In addition to the RACT provisions of Section 172(c)(1), Section 108(b) provides that EPA is to issue to the States, and to the appropriate air pollution control agencies, information relative to air pollution control techniques. This information is published in the form of Control Techniques Guidelines ("CTG") and it includes "the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology." 42 U.S.C. § 7408(b).

The States must submit their SIPs to EPA for approval. If, upon review, EPA determines that the State Implementation Plan provides for the attainment and maintenance of applicable air quality standards, the SIP is approved and it becomes legally binding. Section 110(k), 42 U.S.C. § 7410(k). In the event that a State either fails to submit a SIP to EPA, or submits a SIP that ultimately is not approved, the agency then prepares and publishes a Federal Implementation Plan ("FIP") designed to achieve and maintain compliance with the National Ambient Air Quality Standards. Section 110(c), 42 U.S.C.

§ 7410(c). [\(4\)](#)

III. Facts

A. Ekco's Plant Relocation and the State Permit

Ekco currently operates a plant in Rockdale, Illinois, where it cleans and reglazes commercial baking pans. Rockdale is located in Will County, approximately 40 miles outside of Chicago. Tr. 472-78. This cleaning and reglazing plant had previously been located in the city of Chicago. In 1992, however, the company transferred its bakeware refurbishing operations from Chicago to Rockdale. Tr. 485-89.

While at the Chicago location, Ekco held a permit issued by the Illinois Environmental Protection Agency ("IEPA"). Resp. Ex. 8, Attach. A. When the company moved to Rockdale, it obtained a new IEPA permit. Jt. Ex. 11. This new permit allowed Ekco two years to develop a glaze for the baking pans that was low in Volatile Organic Compounds, the VOCs referred to earlier. If, at the end of this two-year period Ekco had not developed a low-VOC content glaze, the State permit required Ekco to install add-on technological emission controls. These add-on controls were to capture and incinerate the VOCs being emitted from its cleaning and reglazing operations. Jt. Exs. 10 & 11.

B. The Federal Implementation Plan Applicable to the Chicagoland Area

The greater Chicago area is classified as a "severe ozone nonattainment area." See 40 C.F.R. 81.314. In 1990, pursuant to Section 110(c) of the Clean Air Act, the Administrator for the U.S. EPA promulgated a regulation titled, "Control Strategy: Ozone Control Measures for Cook, DuPage, Kane, Lake, McHenry and Will Counties." 55 *Fed. Reg.* 26856. This regulation is codified at 40 C.F.R. 52.741. Because Ekco's Rockdale facility is located in Will County, Illinois, it falls within this severe ozone nonattainment area.

Section 52.741 is the Chicago Federal Implementation Plan, otherwise known as the "Chicago FIP." It was promulgated by EPA pursuant to an order of the United States District Court for the Eastern District of Wisconsin to remedy deficiencies in the Illinois State Implementation Plan. 55 *Fed. Reg.* 26814. The resulting plan, in the form of the Chicago FIP, consists of some State rules and some Federal rules. 55 *Fed. Reg.* 26815.

Specifically, the Federal rules modified certain stationary source category rules so as to bring those rules into compliance with applicable RACT, *i.e.*, reasonably available control technology, requirements. Insofar as this case is concerned, one of the stationary source categories listed was "Coating operations, including ... MMPP [*i.e.*, 'Miscellaneous Metal Parts and Products']." Another listed category was "Major Non-CTG Sources (Generic Rules), including ... other emission sources." 55 *Fed. Reg.* 26849.

The Miscellaneous Metal Parts and Products provisions are found in 40 C.F.R. 52.741(e). The "other emissions sources" provisions are found in 40 C.F.R. 52.741(x).

A major issue in this case, discussed in Count IV, is which of the two FIP provisions applies to Ekco's Rockdale operation. EPA asserts that Section 52.741(e) applies. Ekco asserts that Section 52.741(x) is the applicable regulation.

C. Ekco's Cleaning and Reglazing Operation

Ekco's customers are commercial bakeries. Essentially, Ekco reconditions baking pans at its Rockdale plant. It straightens, cleans and reglazes the baking pans with a non-stick, silicone release coating. The reglazed baking pans are used by the commercial bakeries until the release characteristics of the glazing compound dissipate, or until a build-up of carbon, oil, and grease necessitate another round of cleaning and reglazing. Tr. 472-73.

The cleaning process at the Rockdale facility involves the immersion of the baking pans into solvent-filled tanks. The pans are placed into large baskets and then lifted by crane into a series of vats. Tr. 475. The vats, or tanks, contain diethylene glycol and hexylene glycol. Both diethylene glycol and hexylene glycol are organic solvents which are maintained at a temperature below their boiling point during the bakeware cleaning process. Tr. 159-60; Jt. Exs. 5 & 6. These solvents are highly caustic. They break up, destroy and degrade oil, grease, and old glaze on the pans. Tr. 475.

After the baking pans are cleaned, they are reglazed. The reglazing process involves the application of a silicone release coating known as "Dow Corning 1-2531 Release Coating."

Jt. Ex. 4. Dow Corning 1-2531 is the only release coating in the United States that has been approved by the U.S. Food and Drug Administration for use on food preparation surfaces.

Tr. 478. It is intended for repeated exposure to baking temperatures well above 203 degrees Fahrenheit. Tr. 478-79, 519-20; Jt. Ex.4.

The Dow Corning 1-2531 Release Coating is applied to the baking pans in a coating booth. Jet sprays are used to apply the coating. After this application, the solvents are allowed to "flash-off" the bakeware. Tr. 162, 477. The solvents that do not remain on the surface of the baking pans are collected in a sump located in the spray booth area. Tr. 479. This recaptured Dow Corning 1-2531 is mixed with the organic solvents naphtha, mineral spirits, toluene, propylene glycol methyl ether, and isobutyrate and is reapplied to the bakeware.

Tr. 515-16; Jt. Ex. 4. Once the silicone release coating process is completed, the baking pans are cured in an oven. Tr. 162-63, 477.

As a result of this cleaning and reglazing operation, during the period of July 1, 1992, through December 31, 1992, Ekco emitted 9.34 tons of Volatile Organic Compounds at the Rockdale plant. Jt. Ex. 8. It emitted 10.18 tons of VOCs during the period of January 1, 1993, through June 30, 1993. Jt. Ex. 9.

D. The EPA Inspection

On July 1, 1993, EPA environmental engineer Basim DiHu inspected Ekco's Rockdale facility. Inspector DiHu collected samples at the point of application of the release coating to the baking pans. The sampling results showed the presence of 5.03 pounds of VOCs per gallon of coating, minus water. Jt. Ex. 1. The Chicago FIP allows for no more than 3.5 pounds of VOCs per gallon of coating, minus water, where the application involves an "extreme performance coating" on to Miscellaneous Metal Parts and Products. Tr. 188. [\(5\)](#)

On November 4, 1993, Kathy Ticho, an EPA environmental scientist, conducted a follow-up inspection of the Rockdale plant. Ticho's inspection was prompted by the VOC sampling results from DiHu's July 1 inspection. The specific purpose of Ticho's November 4 inspection was "to verify [the] use of a noncompliant coating" as

reported by DiHu, and also to familiarize EPA personnel with plant operations. Compl. Ex. 5.

During her November 4 inspection, Ticho did not observe any air pollution control devices at the facility. She was informed that in fact there were no such air pollution controls and that the VOC emissions were being vented from the plant roof. Tr. 164, 526. On May 19, 1994, Ekco installed a thermal oxidizer unit to capture and destroy the VOCs. Tr. 184, 509-10.

In the meantime, however, EPA issued a Notice of Violation to respondents on April 28, 1994. Compl. Ex. 6. On June 30, 1995, EPA initiated the present action against Ekco by filing a complaint.

E. The Complaint

EPA charges Ekco with three counts of violating the Chicago FIP. Count I alleges a violation of 40 C.F.R. 52.741(d)(1) for failure to comply with 35 Illinois Administrative Code §§ 215.182(a) and (b). This count involves Ekco's cleaning of the baking pans. Count II alleges a violation of 40 C.F.R. 52.741(e)(5)(ii) for failing to certify that the silicone release coating line was in compliance with 40 C.F.R. 52.741(e)(1)(i). Finally, Count IV alleges a violation of 40 C.F.R. 52.741(e)(1) because the coating that was applied, Dow Corning 1-2531, exceeded the applicable VOC emissions limitation for extreme performance coatings for MMPP.

IV. Discussion

A. Liability

Count I

Section 52.741(d)(1) of the Chicago FIP requires that solvent cleaning operations comply with 35 Illinois Administrative Code § 215. This Section 52.741(d)(1) requirement applies "to all cold cleaning, open top vapor degreasing, and conveyORIZED degreasing operations." It is undisputed that the cleaning operations at Ekco's Rockdale plant fall within this definition. Ekco's cleaning tanks are considered to be a cold cleaning degreasing operation inasmuch as the solvents diethylene glycol and hexylene glycol are heated below their boiling point. See definition of "Cold cleaning" at Section 52.741(a)(3) of the FIP. The question, therefore, is not whether Section 52.741(d)(1) of the Chicago FIP applies to Ekco's bakeware cleaning operations, but whether respondents have complied with the provisions of the Illinois Administrative Code as referenced in the FIP.

EPA alleges that Ekco violated Section 52.741(d)(1) because it failed to comply with Sections 215.182(a) and (b) of Title 35 of the Illinois Administrative Code. Section 215.182(a) addresses cold cleaning "Operating Procedures," while Section 215.182(b) addresses cold cleaning "Equipment Requirements."⁽⁶⁾

Section 215.182(a)(2) of the Illinois Administrative Code provides that "[n]o person shall operate a cold cleaning degreaser unless ... [t]he cover of the degreaser is closed when parts are not being handled." 35 Ill. Admin. Code § 215.182(a)(2). In other words, if parts are being handled during the cleaning operation, the cover of the degreaser may be open. At all other times, however, the cover must be closed.

The thrust of Count I of EPA's complaint is that on November 4, 1993, a cleaning tank containing the organic solvents diethylene glycol and hexylene glycol was left uncovered at the Rockdale plant, even though parts were not being handled. EPA argues that this violates the Chicago FIP. Ekco counters with the argument that there can be no violation of the Illinois Administrative Code, and hence the FIP, because the cold cleaning degreasing tank was not operational during the time that it was uncovered and parts were not being handled. Ekco submits that the tank was not operational because it was not heated at the time of inspection.

EPA's case regarding Count I rests in large measure upon the testimony and

inspection report of Kathy Ticho. See Compl. Ex. 5. Ticho, an environmental scientist with EPA's Region 5, Air and Radiation Division, inspected Ekco's Rockdale plant on November 4, 1993. Tr. 152, 155. As noted earlier, Ticho's inspection was a follow-up to an inspection conducted by Basim DiHu of EPA during the summer of 1993. Ticho testified that she was in part seeking to verify Ekco's use of the Dow Corning 1-2531 release coating that had been sampled by DiHu. Tr. 155. Based upon DiHu's earlier sampling, Ticho was aware that the VOC content of the release coating used on the baking pans was in excess of that allowed under the Chicago Federal Implementation Plan. Tr. 164.

During the November 4 inspection, Ticho visited the bake pan stripping area. This is an area of tanks where the pans are immersed in a mixture of diethylene glycol and hexylene glycol in order to remove the accumulated oil and grease. The pan stripping area also contains rinse tanks and bleaching tanks. This cleaning procedure precedes the coating of the bakeware with Dow Corning 1-2531, the silicone release coating. Tr. 157-158, 160.

In this cleaning area, Ticho observed that one of the degreasing tanks was uncovered. This uncovered tank contained a liquid. Tr. 161-162. There is no assertion on the part of respondent that this liquid was something other than the organic solvents diethylene glycol and hexylene glycol. Indeed, this point is essentially conceded by respondents. Resp. Br. at 53-54.

Ticho testified that at the time of the inspection she was aware of the Chicago FIP requirement that such degreasing tanks were to be covered when parts are not being handled. Tr. 162. Ticho further testified that she did not observe any bakeware being cleaned when she inspected the pan stripping area. Tr. 161. In addition, Ticho stated that during the November 4 inspection she was informed by company personnel that the cleaning tanks containing the diethylene glycol and hexylene glycol were being maintained at 200 degrees Fahrenheit.

Tr. 158-159, 236-37. ⁽⁷⁾ Ticho also stated that Ekco's plant is a very small facility where a person could see all aspects of the operation. The thrust of this testimony is that if baking pans were being handled in the pan stripping area during the time of the EPA inspection, and during the time that the degreasing tank cover was uncovered, they would have been observed.

Tr. 236.

Ekco argues that the involved provisions of the Illinois Administrative Code apply only to "operating" degreasing tanks. Resp. Br. at 44-45. As to this point, respondents submit that the testimony of both Inspector Ticho and Dr. Hanley establishes that the degreasing tanks were not operational when observed during the November 4 inspection. Ekco concludes, therefore, that this uncovered, non-operational cleaning tank was not in violation of the Illinois Administrative Code.

Whether the pan stripping area was operational during EPA's November 4 inspection is an issue not so easily resolved. On the one hand, Ticho testified that she did not observe any bakeware cleaning activity in this area. Nonetheless, Ticho did testify that she was told that the degreasing tanks were being heated to 200 degrees Fahrenheit. Also, her inspection report states that "[t]he cleaning tanks are kept heated all day." Compl. Ex. 5 at 2. Still, Ticho did not actually touch the tanks to see if the tanks were in fact heated.

On the other hand, the testimony of respondents' witness on this issue is even less compelling. Unlike Inspector Ticho, Dr. Hanley did not testify on the basis of personal observation. He testified as to his institutional knowledge of the plant's standard operating procedure. Dr. Hanley was not present during the November 4 inspection and, accordingly, he could not provide an eyewitness account as to the condition of the cleaning tanks on that date.

While there unquestionably is a dearth of evidence concerning the condition of the cleaning tanks referenced in Count I, the evidence that does exist is sufficient to support a finding of a violation.

First, the record supports a finding that the degreasing tank observed by Ticho contained diethylene glycol and hexylene glycol, both organic solvents. Second, the record further supports a finding that Ticho observed that the degreasing tank was not covered. Third, it is undisputed that bakeware items were not being handled in the pan stripping area during the time that the tank was uncovered. Finally, Ticho's testimony that she was informed that the cleaning tanks were kept heated is credited. Taken together, these facts establish that Ekco violated the Chicago FIP by failing to comply with 35 Illinois Administrative Code § 215.182(a)(2).

In any event, in light of the plain language of the Illinois Administrative Code, whether the uncovered degreasing tank was heated to 200 degrees Fahrenheit at the time of Ticho's inspection seems to be irrelevant for purposes of determining compliance with Section 215.182(a)(2). In that regard, Section 215.182(a)(2) provides that "[n]o person shall operate a cold cleaning degreaser unless ... [t]he cover of the degreaser is closed when parts are not being handled." This language supports EPA's position that an uncovered degreasing tank which contains organic solvents is prohibited, when parts are not being handled, regardless of whether the tank is heated.

A consideration of Section 215.182(a)(1) offers insight into the intended remedial purpose of this regulation, thus adding further support for EPA's position. Section 215.182(a)(1) provides that no person shall operate a cold cleaning degreaser unless: "Waste solvent is stored in *covered containers only* and not disposed of in such a manner that more than 20 percent of the waste solvent (by weight) is allowed to evaporate into the atmosphere." (*Emphasis added.*)

Subsection (a)(1) of the involved regulation seeks to prohibit the evaporation into the atmosphere of organic waste solvents. Hence, the requirement that the containers of the waste solvent be covered. This requirement of Subsection (a)(1) goes hand-in-hand with the requirement in Subsection (a)(2) that the degreasing tank containing the organic solvent be covered unless, by necessity, the tank must be uncovered because parts are being handled. Reading these subsections together clearly establishes that the intent of Section 215.182 is to prevent the evaporation of organic solvents into the atmosphere by requiring, in part, that cold cleaning degreasing tanks and storage containers be kept covered when not in use.

Ekco's argument that such cold cleaning degreasing tanks can be left uncovered as long as the organic solvents contained in the tanks are not heated is inconsistent with the plain language of the regulation, as well as with its remedial purpose. Accordingly, because Ekco failed to keep the cold cleaning degreasing tank covered while parts were not being handled, as required by 35 Illinois Administrative Code § 215.182(a)(2), it is found to be in violation of 40 C.F.R. 52.741(d)(1), the Chicago FIP.

Count II

In Count II, EPA charges a violation of 40 C.F.R. 52.741(e)(5)(ii). EPA alleges that for the period of August 31, 1992, to May 19, 1994, Ekco failed to certify to the Administrator that its bakeware coating line complied with 40 C.F.R. 52.741(e)(1)(i). As one of its defenses, Ekco invokes the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.* ("PRA"). Ekco's reliance upon the PRA is well-placed.

Congress enacted the Paperwork Reduction Act to minimize paperwork demands on the public by the Federal government. S. Rep. No. 96-930, 96th Cong., 2d Sess. 2 (1980). Accordingly, Congress directed the Office of Management and Budget ("OMB") to "develop and implement Federal information policies, principles, standards, and guidelines and ... provide direction and oversee the review and approval of information collection requests." 44 U.S.C. § 3504.

Thus, even before an agency requests information from the public, it must submit the proposed Information Collection Request ("ICR") to OMB, publish in the Federal Register a notice of the informational request, and obtain OMB approval. 44 U.S.C. § 3507(a). If approved, the agency receives an OMB control number which is "to be

displayed upon the information collection request." 44 U.S.C. § 3507(f). OMB regulations also require that EPA publish the OMB control number in the Federal Register as part of the regulatory text or as a technical amendment. 5 C.F.R. 1320.7(e).⁽⁸⁾ This OMB control number signifies that the agency has satisfied the PRA requirements.

Respondents argue that with respect to the information requested by 40 C.F.R. 52.745(e)(5)(ii), EPA failed to comply with the "display" provisions of PRA Section 3507(f). It submits, therefore, that the agency is foreclosed from collecting a civil penalty for the violation alleged in Count II. 44 U.S.C. § 3512; 5 C.F.R. 1320.5(a)(2). See Resp. Br. at 41.

EPA concedes that when the Chicago FIP was published in the Federal Register, it did not contain the required Information Collection Request control number. Compl. R.Br. at 12.⁽⁹⁾ EPA adds, however, that "[t]he OMB control number for reporting requirements of the FIP was published in the Federal Register on May 23, 1993." Compl. R.Br. at 12. See 58 Fed. Reg. 30165.⁽¹⁰⁾ Complainant further adds that the July 1, 1993, edition of Title 40 of the Code of Federal Regulations includes the OMB control number for the information requested by the FIP. The ICRs are reproduced in tables in Part 9, at the end of each volume of Title 40. *Id.*

Even assuming that publication of the OMB control number in Part 9 of Title 40 satisfies the display requirements of the Paperwork Reduction Act, the record in this case shows that EPA failed to comply with all of the then existing display requirements. Specifically, EPA failed to properly display the subject OMB control number in the Federal Register.

On May 26, 1993, EPA published in the Federal Register the OMB control number for the regulation alleged to have been violated in Count II. This publication read:

EPA ICR #1565.02; Federal Implementation Plan for Ozone in the Chicago Area; was approved 05/19/93; OMB #2060-0203; expires 05/31/96.

58 Fed. Reg. 30165.

This Federal Register publication simply does not inform the regulated community that the Office of Management and Budget approved the Information Collection Request that is the subject of Count II. As such, it does not satisfy the "display" requirements of the PRA. The Environmental Appeals Board (EAB) reached a similar conclusion in *Lazarus, Inc.*, TSCA Appeal No. 95-2 (September 30, 1997). There, the EAB commented that "[t]he Region apparently ignores the fact that these short notices provide no context for the OMB approval and do not even identify which regulations are implicated." *Id.* at 41.

Accordingly, inasmuch as EPA's Federal Register publication regarding the OMB control number for 40 C.F.R. 52.741(e)(5)(ii) does not satisfy the "display" requirements of the PRA, Count II of the complaint is dismissed.

Count IV

Like Counts I and II, Count IV alleges a violation of the Chicago FIP. In this count, EPA charges that Ekco violated 40 C.F.R. 52.741(e)(1) because, in coating the bakeware with Dow Corning 1-2531, it applied Volatile Organic Compounds in excess of that permitted by the regulation.⁽¹¹⁾ Ekco disagrees, arguing that its coating line operation is subject to the provisions of Section 52.741(x) of the Chicago FIP, and not Section 52.741(e). Whether Section 52.741(e) or Section 52.741(x) applies here is a critical threshold inquiry.

Section 52.741(e) is titled, "Coating operations." Section 52.741(e)(1) in part states:

(i) Except as provided in paragraph (e)(3) of this section, no owner or operator of a coating line shall apply at any time any coating in which the VOM [i.e., volatile organic material] content exceeds the following emission limitations for the specified coating. The following emission limitations are expressed in units of VOM per volume of coating (minus water and any compounds which are specifically exempted from the definition of VOM) as applied at each coating applicator, except where noted....

Section 52.741(e)(1)(i)(J)(3) contains such an emissions limitation. It provides that when an "[e]xtreme performance coating" is being applied, the emissions limitation for the "Miscellaneous Metal Parts and Products Coating" is 3.5 pounds of VOC per gallon of coating (minus water).

EPA submits that this 3.5 lb./gal. emissions limitation applies to Ekco's coating line operation and that respondents failed to comply with this regulatory requirement. EPA asserts that because the bakeware being reglazed is metal, it falls under Miscellaneous Metal Parts and Products, or MMPP, coverage; that the Dow Corning 1-2531 glaze that Ekco applies is an extreme performance coating; and that this glaze contains volatile organic compounds in excess of the applicable 3.5 pounds per gallon of coating (minus water) VOC limit.

By way of comparison with Section 52.741(e), the applicability statement of Section 52.741(x) indicates that it is a "catch-all" regulation. See 55 Fed. Reg. at 26850. The requirements of Section 52.741(x) apply to a plant's VOC emission sources if such sources are not otherwise regulated in Section 52.741. Analysis of this issue, therefore, must begin with an examination of whether Section 52.741(e) regulates the subject VOC emission source, i.e., Ekco's coating line.

EPA essentially argues that the plain wording of Section 52.741(e) establishes that the Rockdale facility coating line comes within its coverage. With a little aid from the definitional section of the Chicago FIP, Section 52.741(a)(3), complainant is correct.

Section 52.741(a)(3) of the Chicago FIP defines the key terms contained in Section 52.741(e). This definitional section, together with the provisions contained in paragraph (e), make it clear that the Rockdale facility coating line operation constitutes the type of coating activity contemplated by Section 52.741(e).

For example, the Chicago FIP defines the term "Miscellaneous Metal Parts and Products" as "*any metal part or metal product, even if attached to or combined with a nonmetal part or product, except cans, coils, metal furniture, large appliances, magnet wire, automobiles, ships, and airplane bodies.*" (*Emphasis added.*) This rather sweeping definition of what constitutes an MMPP supports EPA's assertion that "any metal part not specifically exempted is a miscellaneous metal part or product." Compl. Br. at 23. In this case, the bakeware that is coated by Ekco is a metal product that is not otherwise exempted. It therefore fits within the definition of MMPP. Tr. 480.

Another key definition is the term "coating." The FIP in part defines coating as "a material applied onto or impregnated into a substrate for protective, decorative, or functional purposes." (*Emphasis added.*) Here, it is undisputed that the Dow Corning 1-2531 release coating is applied to the bakeware for the functional purpose of preventing baked goods from sticking to the pans. Tr. 474, 478. This is further proof that the provisions of Section 52.741(e) were intended to cover respondents' coating line operation. A related term, "Miscellaneous metal parts or products coating line," is defined as "a coating line in which any protective, decorative, or functional coating is applied onto the surface of miscellaneous metal parts or products." The coating line at Ekco's Rockdale facility is such a line.

Finally, "Extreme performance coating" is defined as "any coating which during intended use is exposed to extreme environmental conditions." Here, the very purpose of coating the bakeware with a silicone release to enhance baking efficiency supports the notion that the Dow Corning 1-2531 coating is an extreme performance coating. As to this point, Dr. Hanley confirmed that the coated bakeware is used by commercial bakeries in high temperature ovens. Tr. 519-20.

Accordingly, a plain reading of the provisions of the Chicago FIP support a finding that Section 52.741(e) applies to Ekco's coating line operation. Ekco's arguments to the contrary are addressed below.⁽¹²⁾

First, Ekco argues that Section 52.741(e) applies only to the manufacturing of parts or products. Resp. Br. at 26-27. In support of this proposition, respondents cite to the heading of Section 52.741(e)(1) which reads, "Emission limitations for manufacturing plants." Ekco submits that because it doesn't engage in manufacturing, the provisions of Section 52.741(e) do not apply to its facility. Respondents do not argue that because of subparagraph (e)(1)'s reference to manufacturing they were somehow misled into believing that the regulation did not apply to them. Their argument is solely that the use of the term "manufacture" is evidence that Section 52.741(e) applies only to entities which, unlike themselves, engage in traditional manufacturing.

Ekco's argument, while not an unreasonable one, nonetheless must fail. In that regard, Section 52.741(e) is titled, "Coating operations." The text of this section discusses coating lines in which Volatile Organic Material (otherwise referred to as Volatile Organic Compounds) are applied to various products. In particular, Section 52.741(e)(1)(i)(J) sets emissions limits for "Miscellaneous Metal Parts and Products Coating." Even though Ekco does not manufacture the metal bakeware which it coats, the straightening, cleaning, and reglazing of the bakeware by respondents fall within the types of activities regulated by Section 52.741(e)(1). Thus, whether one categorizes Ekco's activities as "manufacturing," or as "refurbishing," the bottom line is that they fit within the type of "coating operations" covered by Section 52.741(e)(1).

In addition, as cited by EPA, "[w]hile words in the title of a statute or the heading of a section can shed light on the meaning of an ambiguous word or phrase in the text of the statute, they cannot create an ambiguity where none otherwise would exist." Compl. Br. at 13, *citing*, *Natural Res. Def. Council v. EPA*, 915 F.2d 1314,1321 (9th Cir. 1990). Thus, even assuming that the heading of subparagraph (e)(1) does not cover the operations performed at the Rockdale facility (an assumption that this court is not yet willing to make), the overall text of the regulation establishes that it is indeed intended to cover respondents' facility.

Second, Ekco argues that application of Section 52.741(e) to its facility is inconsistent with the MMPP CTG (*i.e.*, the Miscellaneous Metal Parts and Products Control Techniques Guidelines) issued by EPA in 1978. See Resp. Ex. 1. In that regard, Ekco submits that the cleaning and reglazing of baking pans is not listed, or even mentioned, in this EPA document. Moreover, respondents further submit that while the MMPP CTG lists Standard Industrial Codes ("SIC") to define the scope of its coverage, it does not list the SIC for the cleaning and reglazing of baking pans. Accordingly, Ekco argues that these facts support the conclusion that when Section 52.741(e) was drafted, it was not intended to apply to the cleaning and reglazing operations of its Rockdale plant.⁽¹³⁾

The flaw in respondents' argument is that it still fails to account for the unambiguous language of Section 52.741(e) of the Chicago FIP. Here, Ekco puts considerable effort into arguing that Section 52.741(e) cannot mean what EPA now says it means because the MMPP CTG, in its view, didn't apply to bakeware cleaning and reglazing activities. In some respects, respondents' argument resembles more of a rulemaking challenge to Section 52.741(e), a challenge which this court is unwilling to entertain. Given the plain language of the Chicago FIP, as discussed above, respondents' reliance upon the MMPP CTG is greatly misplaced.⁽¹⁴⁾

Third, Ekco argues that when it relocated its plant from Chicago to Rockdale in 1992, the Illinois Environmental Protection Agency, the "IEPA," issued a permit recognizing that the plant's operations came within the State equivalent of Section 52.741(x)'s "[o]ther emission sources" category. In that regard, Ekco states that the State of Illinois and EPA had nearly identical regulations with respect to the application of extreme performance coatings. Accordingly, respondents submit that

the State of Illinois' application of its "[o]ther emission sources" regulations to the Rockdale cleaning and reglazing facility is reasonable and is entitled to deference. Resp. Br. at 32-36.

Ekco's arguments regarding the IEPA's issuance of the state permit are not convincing. As the EPA correctly notes, Section 110(c) of the Clean Air Act authorizes the Federal government to promulgate a Federal Implementation Plan when the State fails to submit an adequate implementation plan to attain the National Ambient Air Quality Standards for a given pollutant. That is what happened in this case when EPA promulgated the Chicago FIP to attain the NAAQS for ozone. This FIP established the new Federal standards by which respondents' actions were to be measured.

In promulgating the Chicago FIP, EPA laid out the implementation plan's regulatory scheme. As noted, it defined the key term "Miscellaneous Metal Parts and Products" so as to include the reglazing activities engaged in by Ekco. Whether the IEPA may have categorized Ekco's reglazing operation different from EPA (and the record is not particularly clear that such was the case) is of no consequence here for purposes of determining liability. What is of consequence is whether respondents complied with the provisions of the new Federal rules. As discussed earlier, the record shows that they did not.

Moreover, respondents were on notice that separate Federal regulations may be applicable to its Rockdale cleaning and reglazing operations. The Illinois State Permit that allowed Ekco to transfer its operations to Will County specifically stated:

Please note that this permit has been reviewed according to applicable state law and regulations. However, the U.S. Environmental Protection Agency has promulgated an extensive set of regulations for the control of a variety of sources of volatile organic compounds (VOC) in the six-county Chicago metropolitan area (Cook, DuPage, Kane, Lake, McHenry and Will County), 55 Federal Register 26814-26909 (June 29, 1990). *These federal regulations have a compliance date of July 1, 1991, and may be applicable to your plant.*

Jt. Ex. 11(*emphasis added*). Given this "heads-up" by the State, respondents' argument that it should somehow avoid liability in this matter because it complied with the IEPA permit is not at all convincing.

A fourth argument raised by respondents involves a due process claim. Respondents' Exhibit 3 is a November 4, 1994, memorandum from EPA Region 5 to EPA Headquarters regarding the applicability of the MMPP regulations. See n.14, *supra*. This memorandum requests "written concurrence with the multi-regional position that a source engaged in the reapplication of a coating to a metal part or product is subject to all applicable portions of the reasonably available control technology (RACT) requirements developed for control of volatile organic compound (VOC) emissions from miscellaneous metal parts and products (MMPP) coating operations, unless otherwise expressly exempted under those rules." Resp. Ex. 3.

EPA Headquarters responded to Region 5's inquiry in a memorandum dated January 26, 1995. Compl. Ex. 4. EPA Headquarters agreed with the multi-regional position that "recoaters/refurbishers are subject to the RACT regulations for MMPP, unless they are specifically exempted." *Id.* In reaching this conclusion, EPA Headquarters specifically discussed baking pan refurbishers.

Ekco points to the contents of Respondents' Exhibit 3 and Complainant's Exhibit 4 as evidence of EPA's "deliberative process" in determining that the reglazing operations of respondents' Rockdale facility come within the jurisdiction of the Chicago FIP, in particular, Section 52.741(e)(1). Thus, Ekco submits that it wasn't until January, 1995, well after the 1992 EPA inspections in this case, that EPA reached a final policy relative to the reglazing of bakeware. Resp. Br. at 36-40. Ekco reasons that it could not be expected to have known in 1993 of EPA's policy

interpretation regarding the coating of Miscellaneous Metal Parts and Products, when EPA didn't have such a policy in effect until 1995.

Respondents misconstrue the import of Region 5's jurisdictional inquiry and EPA Headquarters' response. These memoranda, Respondents' Exhibit 3 and Complainant's Exhibit 4, were created after Region 5 issued a Notice of Violation to Ekco on November 4, 1993, but before the agency filed the present complaint on June 30, 1995. They portray Region 5 seeking Headquarters approval for a developing multi-regional litigation position. In other words, Region 5 believed that Ekco violated the Chicago FIP and it just wanted a second opinion from the main office. This is not the case, as respondents suggest, of an enforcement agency pondering the words of an ambiguous regulation and weighing its litigation chances before proceeding. Moreover, Region 5's decision to proceed against Ekco in this case is consistent with the above finding that the regulation at issue covers the reglazing operation engaged in by respondents. Accordingly, Ekco's due process argument is rejected.

B. Civil Penalty Assessment

Having held that Ekco violated 40 C.F.R. 52.741(d)(1) as alleged in Count I, and 40 C.F.R. 52.741(e)(1) as alleged in Count IV, the next step is to assess an appropriate civil penalty. Section 113(d)(1) of the Clean Air Act authorizes the assessment of a penalty for each violation of the Act. 42 U.S.C. § 7413(d)(1). The factors that are to be considered in determining the penalty are set forth in Section 113(e)(1). This section in part provides:

... [T]he Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence ..., payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

42 U.S.C. § 7413(e)(1).

EPA requests that a civil penalty totaling \$151,622 be assessed for the three alleged violations. See Compl. Ex. 8. (As discussed, *supra*, however, Count II of the complaint has been dismissed.) EPA computed this penalty figure by following the penalty formula contained in the agency's "Clean Air Act Stationary Source Civil Penalty Policy." Compl. Ex. 7.

Rule 27(b) of the Consolidated Rules of Practice states that the administrative law judge is to assess a civil penalty "in accordance with any criteria set forth in the Act." 40 C.F.R. 22.27(b). While Rule 27(b) also requires that the judge consider EPA's penalty guidelines, the Environmental Appeals Board recently observed in *Predex Corporation*, No. 97-8 (May 8, 1998), at p. 8, "that [u]ltimately, of course, any penalty assessed must 'reflect[] a reasonable application of the statutory penalty criteria to the facts of the particular violations.' *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 758 (EAB 1997)."⁽¹⁵⁾ The Board's holdings in *Predex* and *Wausau* are consistent with the principle that it is Congress that sets the maximum civil penalties that can be assessed, and that it is Congress that establishes the statutory criteria that is to be considered in calculating an appropriate penalty.

Application of the Section 113(d)(1) Clean Air Act penalty criteria to the evidence presented in this case results in the assessment of a civil penalty totaling \$86,107. Of this amount, \$7,000 is assessed for the violation listed in Count I, and \$79,107 is assessed for the violation listed in Count IV. This penalty assessment is explained below, in the context of the statutory penalty criteria.

1. Size of the Business

As for the "size of the business" penalty criterion, the evidence in the record is somewhat limited. The record shows that on August 31, 1992, EK Associates, L.P., received the assets of Ekco/Glaco, Inc., including the Rockdale facility, in a bulk sale of assets. Ekco paid \$6.6 million for this operation. In addition, approximately 8 employees work at the Rockdale plant. Compl. Ex. 8.

2. Economic Impact of the Penalty

The "economic impact of the penalty on the business" penalty criterion likewise received little attention from the parties. Nonetheless, the evidence that is in the record is sufficient to support a finding that the assessment of a \$86,107 penalty in this case will not adversely affect respondents' ability to remain in business.

First, Ekco was able to make an initial capital investment of \$72,938 for the installation of the thermal oxidizer control system. Compl. Ex. 8. Second, Dr. Hanley testified that Ekco spent \$250,000 in research and development in attempting to find an innovative low-VOC coating. Tr. 22; Resp. R.Br. at 22. These facts demonstrate an ability by the company to pay the assessed penalty. Moreover, while respondents asserted that EPA's initially proposed penalty was excessive, they offered no evidence to show that the company was unable to pay a civil penalty in the amount that is being assessed here.

3. Compliance History

The "violator's full compliance history and good faith efforts to comply" is the next penalty criterion. Inasmuch as EPA has not shown that Ekco had previously violated Sections 52.741(d)(1) and 52.741(e)(1), it is found that no such adverse history exists. It also is found that respondents acted in good faith in obtaining the thermal oxidizer to remedy the violation cited in Count IV.

4. Duration of the Violation

The violative condition listed in Count I lasted only one day. The violative condition listed in Count IV lasted from August 31, 1992, until May 19, 1994, when Ekco installed the thermal oxidizer destruction unit.

5. Payment of Previously Assessed Penalties

As was the case with respondents' compliance history, EPA offered no evidence showing that Ekco had paid "penalties assessed for the same violation." Accordingly, it is found that no such penalties have been paid by respondents.

6. Economic Benefit of Noncompliance

EPA established that Ekco's "economic benefit of noncompliance" with Section 52.741(e)(1), the Count IV violation, was \$29,107. There was no economic benefit to Ekco as a result of the Count I violation.

The economic benefit finding regarding the Section 52.741(e)(1) violation is based upon the testimony of Jonathan Shefftz, a Senior Associate with Industrial Economics, Inc.⁽¹⁶⁾ Mr. Shefftz was qualified as an expert in the areas of "economic benefit" and "the BEN model."⁽¹⁷⁾

Shefftz explained that economic benefit consists of two components. One component is avoided costs due to noncompliance. The other component is delayed pollution control expenditures. Tr. 340. Shefftz described his analysis as follows:

I calculate the cash flows in each year that Ekco would have experienced. Then I compute the after tax value of those cash flows. Then I adjust all cash flows to a common present value. Then I have a total present value for each scenario. I subtract the delayed scenario present value from the on time scenario present value and that is the economic benefit results.

Tr. 340. As noted, after making these calculations, Shefftz concluded that Ekco derived an economic benefit of \$29,107 as a result of its delayed compliance with section 52.741(e)(1). [\(18\)](#)

7. Seriousness of the Violation

The two Clean Air Act violations committed by Ekco involve a failure by respondents to comply with a Federal Implementation Plan for ozone. Regarding the hazards presented by ozone, in *Navistar Intern. Transp. Corp. v. U.S. E.P.A.* 941 F.2d 1339 (6th Cir. 1991), the Court observed:

Ozone is the primary cause of the ill effects associated with smog at certain concentration levels, ozone irritates the respiratory system and causes coughing, wheezing, chest tightness, and headaches. Due to its irritating nature, ozone can aggravate asthma, bronchitis, and emphysema. Some studies indicate that chronic exposure to fairly low levels of ozone may reduce resistance to infection and alter blood chemistry or chromosome structure. *American Petroleum Institute v. Costle*, 665 F.2d 1176, 1177 (D.C. Cir. 1981), cert. denied, 455 U.S. 1034 (1982).

941 F.2d at 1341 n.2.

Because Ekco's Rockdale facility is located in a severe nonattainment area for ozone, the violations involved in this case are considered to be quite serious. 40 C.F.R. 81.314. [\(19\)](#) In that regard, the cleaning tanks involved in the Section 52.741(d)(1) violation (Count I) contained diethylene glycol and hexylene glycol. Compl. Ex. 5. Diethylene glycol and hexylene glycol are organic solvents. Jt. Exs. 5 & 6; Tr. 516. Both chemicals are glycol ethers and are listed as toxic air pollutants pursuant to Section 112(b)(1) of the Clean Air Act. 42 U.S.C. § 7412(b)(1). [\(20\)](#)

With respect to the Section 52.741(e)(1) violation (Count IV), the Dow Corning 1-2531 Release Coating is composed of solvents mixed in a pre-determined proportion with various solids, including a base coating and a "slip" ingredient, intended to remain on the metal baking pan. Tr. 478-80; Jt. Ex. 4, at pp. 1-3. The solvents mixed with the release coating are naphtha mineral spirits, toluene, propylene glycol methyl ether, and isobutyl isobutyrate. Tr. 515-16;

Jt. Ex. 4, at p. 1. The Dow Corning 1-2531 "over spray" that is allowed to flash off the bakeware is reused after the addition of aromatic petroleum solvent, glycol ether, and petroleum naphtha. Tr. 516; Compl. Ex. 12, at p. 2.

The solvents listed as ingredients in the Dow Corning 1-2531 Release Coating are organic compounds. Tr. 516. The chemicals toluene and propylene glycol methyl ether are also listed as toxic air pollutants pursuant to Section 112(b)(1) of the Clean Air Act.

42 U.S.C. § 7412(b)(1); Tr. 194-95.

Accordingly, given the nature of the chemicals involved and their contribution to the creation of ozone in the Chicago area, the violations at issue here are found to be quite serious.

ORDER

For the reasons mentioned above, EK Associates, L.P., d/b/a EKCO/GLACO, and Ekco Management Corporation are held to have violated 40 C.F.R. 52.741(d)(1) as alleged in Count I, and 40 C.F.R. 52.741(e)(1) as alleged in Count IV. For these two violations, respondents are assessed a civil penalty of \$86,107. Count II of the complaint is dismissed, with prejudice.

Respondents shall pay the civil penalty within 60 days from the date of this order. Payment may be made by mailing, or presenting, a cashier's or certified check made

payable to the Treasurer of the United States of America, U.S. Environmental Protection Agency, Region 5, P.O. Box 70753, Chicago, Illinois, 60673. [\(21\)](#)

Carl C. Charneski
Administrative Law Judge

1. Count III was withdrawn by EPA prior to the hearing.
2. Prior to the hearing, EPA filed a motion for accelerated decision requesting that any finding of liability against Ekco Associates, L.P., for any violations of the Clean Air Act, extend to its general partner, EK Management Corporation. Ruling was reserved on EPA's motion. Tr. 9. In part for the reasons mentioned by EPA, and in part because respondents have offered no substantive argument to the contrary, the motion is granted.
3. "Ozone is not directly emitted into the atmosphere but results from complex photochemical reactions involving *organic compounds*, oxides of nitrogen, and solar radiation." 40 C.F.R. Part 58, App. D (*emphasis added*).
4. As discussed, *infra*, this case involves a FIP.
5. As discussed, *infra*, given the use of the bakeware in high temperature settings, the Dow Corning 1-2531 silicone release coating qualifies as an extreme performance coating.
6. The extent to which EPA seeks to prove a violation of Section 215.182(b) in this case is, quite frankly, confusing. First, the complaint itself is unclear. The complaint's description of the alleged violation appears to be directed at Section 215.182(a)(2), and not Section 215.182(b). Second, the testimony of EPA's only witness on the violation alleged in Count I likewise appears to be aimed solely at the provisions contained in Section 215.182(a)(2). Finally, EPA's post-hearing brief and reply brief fail to identify clearly just what is required by Section 215.182(b) and just how, in this case, Ekco failed to meet those requirements. Given these concerns, and inasmuch as Ekco is found to have violated Section 215.182(a)(2), there is no need to address Section 215.182(b).
7. This point is disputed by Dr. Wayne Hanley, Ekco's Vice President and General Manager for glaze operations. Tr. 465. Dr. Hanley testified that as an energy conservation measure, the cleaning tanks are not heated when there is no bakeware in the plant to process. Tr. 483-85.
8. The OMB regulations subsequently were amended to provide that the "display" requirements are satisfied with publication in either the Federal Register or the Code of Federal Regulations. 60 *Fed. Reg.* 44977 (August 29, 1995). The amended OMB regulations, however, are not applicable to this case.
9. The FIP's preamble stated, "The information collection provisions relating to the final rules have been submitted to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*" 55 *Fed. Reg.* 26814, 26856 (June 29, 1990).
10. Accordingly, EPA used May, 1993, as the starting period for calculating its proposed penalty for Count II. Compl. Br. at 37-38.
11. "Volatile Organic Compounds" are also referred to as "Volatile Organic Material."
12. Ekco's arguments relative to Section 52.741(e) coverage apply to Count II as well as to Count IV. As discussed earlier, however, Count II was dismissed on other grounds.
13. Ekco relies upon the testimony of its expert witness, Gary McCutchen, for the

proposition that EPA did not intend to include bakeware cleaning and reglazing activities in its MMPP CTG. Resp. Br. at 31.

14. In determining Ekco to be in noncompliance with the Chicago FIP, EPA Region 5 Inspector Ticho did not rely upon the MMPP CTG. Tr. 239. EPA Headquarters employee Maria Malave, however, did reference the MMPP CTG in responding to an inquiry from Ticho concerning application of the FIP to MMPP coating lines. Tr. 60, 68. Malave essentially concluded that coating operations like Ekco's came within the coverage of the Chicago FIP. See Resp. Ex. 3 and Compl. Ex. 4.

While respondents understandably point to the testimony of Malave in an attempt to show the relevance of the MMPP CTG to this case, the fact remains that the alleged violation of Section 52.741(e)(1) is resolved on the basis of the regulatory language itself. Moreover, as respondents correctly argue, the testimony of Malave was vague and provided little insight as to her drafting of Complainant's Exhibit 4.

15. Procedural Rule 27(b) also states that in determining the amount of a penalty the judge is to consider any penalty guidelines issued by the agency. That was done in this case. Nonetheless, the holdings in *Predex Corp.*, *supra*, and *Employers Ins. of Wausau*, *supra*, strongly suggest that the penalty assessment process begins with, and focuses upon, the statutory penalty criteria.

16. Industrial Economics, Inc., is a consulting firm which provides economic, financial, and policy analysis to public and private sector clients. Tr. 310. In this case, Shefftz was called to testify on behalf of complainant EPA.

17. EPA uses the BEN computer model to determine the economic advantage that a violator may have realized as a result of delayed or avoided expenditures associated with compliance. Tr. 175-76; see Compl. Ex. 7 at p. 5. Using the BEN model in this case, EPA determined that Ekco's noncompliance with Section 52.741(e)(1) resulted in an economic benefit of \$30,622. Tr. 176; Compl. Ex. 8 at pp. 1 & 5. While Shefftz generally explained how the BEN model works (see Tr. 318-26), he nonetheless testified that he used a computerized spreadsheet to analyze Ekco's delayed compliance in this case and that this method more accurately reflected the economic benefit realized by respondents. Tr. 328, 343-45. While Shefftz stated that EPA's use of the BEN model in this case is a reasonable approach, and while the results of the BEN model and Shefftz' spreadsheet approach are consistent, given the fact that the expert testimony of Shefftz was directed more toward his own economic benefit determination, his figure of \$29,107, is accepted as the economic benefit derived by Ekco.

18. Shefftz' calculations appear in a report designated as Complainant's Exhibit 14. This exhibit, however, was not received into evidence because it had not been provided to the respondents in a timely manner. See Tr. 364, 386, 394-96.

19. The fact that the Section 52.741(d)(1) violation (Count I) lasted only one day was taken into account.

20. As noted earlier, organic compounds contribute to the formation of ozone. See 40 C.F.R. Part 58, App. D.

21. Unless this decision is appealed to the Environmental Appeals Board in accordance with 40 C.F.R. 22.30, or unless the Board elects to review this decision *sua sponte*, it will become a final order of the Board.

