UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

IN THE MATTERS OF:	)	
	)	Docket Nos. CWA-08-2008-0005
Homeland Gas & Oil Ltd, Inc.	)	CWA-08-2008-0006
	)	CWA-08-2008-0007
	)	
Respondent.	)	

ORDER ON MOTION FOR ENTRY OF "EXPEDITED" CONSENT AGREEMENTS

On January 17, 2008, Complainant, United States Environmental Protection Agency ("EPA" or "Agency") filed a Motion for Entry of "Expedited" Consent Agreements. The motion requests this Presiding Officer to approve three expedited consent agreements with the Respondent, Homeland Gas & Oil, Ltd., Inc., and issue final orders. EPA has the authority to enter into expedited consent agreements pursuant to the Office of Enforcement and Compliance Assurance ("OECA") guidance, *Use of Expedited Settlements to Support Appropriate Tool Selection* issued on December 2, 2003. In its motion, Complainant provided an explanation for why approving these expedited consent agreements pursuant to 40 C.F.R. Part 22 ("Part 22") is appropriate when they appear to deviate from the criteria set forth in the guidance on when an expedited consent agreement can be used.

Complainant states that the expedited consent agreements should be approved for the following reasons:

1) EPA has the authority to file and settle administrative penalty actions through delegations that do not condition the authority in terms of the application of any specified memoranda, policy or guidance document.
2) Agency guidance documents are advisory only and not binding on EPA officials.
3) The agreements were reached prior to the expiration of a statute of limitations or other legal restriction.
4) The agreements are appropriate for the minor nature of the violations.
5) EPA imposed a 30-day limit for accepting these settlements, which was complied with by Respondent.
6) EPA policy discourages the use of expedited settlements for repeat violators.[1] In the instant cases, the inspections were conducted within the same week, and the settlement offers were received, signed and returned as one package, each event occurring on the same day.

[1] Repeat violator is defined as an entity who, "in the past five years, has had the same or closely related violations: 1) at the facility where the instant violation occurred; or 2) at multiple facilities, i.e., three or more facilities, under the ownership, operation, or control of the violator." (See, p. 10 of 2003 policy).

Complainant argues that the action by EPA (i.e., the three expedited consent agreements filed at the same time) constitutes one act of notice for all three violations, and therefore, is not a repeat violator scenario.

The three expedited consent agreements attached to the motion are, for all intents and purposes, the same except for the name and location of each facility. The violation, failure to prepare and implement a Spill Prevention, Control, and Countermeasure ("SPCC") Plan, is the same in each expedited consent agreement except one agreement identified several additional missing items. Each agreement contains a paragraph that states the following:

> Respondent will revise, implement, and maintain an SPCC plan in accordance with 40 C.F.R. § 112.7. Respondent's cost of corrective actions and measures to achieve compliance to date has been $_____.

In each of the three expedited consent agreements submitted to this Presiding Officer for review and approval, the dollar amount is left blank. All three expedited consent agreements are signed by the appropriate EPA designee on December 10, 2007. The documents are also signed, but not dated, by the Respondent's representative.

Discussion

Complainant's primary rationale for persuading this Presiding Officer to approve the expedited consent agreements is that the guidance documents used to assist EPA in developing this action are advisory and not binding on EPA officials. Essentially, Complainant is asking this court to ignore guidance in its review and approval of a Part 22 proceeding even when EPA relies on the guidance in its penalty assessment and resolution of the proceeding. Complainant's explanation for why approval of the expedited consent agreements is appropriate does not rely on any case law or precedent to support its argument. While this court understands that EPA guidance in general, and expedited settlement policies specifically, can be used at the discretion of the Agency in forming the basis of settlements, it is not in the discretion of this court to ignore those policies if the Agency chooses to use them. Therefore, if a policy is not followed as intended, the Agency official approving the consent agreement is expected to ensure that the statutory factors are evaluated and adhered to in the consent agreement. (See, 40 C.F.R. § 22.18(b)).

For example, the Environmental Appeals Board (EAB) has inquired, in its review for ratification of consent agreements and proposed final orders, whether: 1) the agreement satisfies the prerequisites for consent agreements under Part 22; and, 2) the consent agreement properly applies the penalty policy and statutory criteria in the determination of the penalty amounts stipulated in the agreement. See, *In Re Consent Agreements and Proposed Final Orders for Animal Feeding Operations ("In Re Consent Agreements for AFOs"), CAA-HQ-2005-xx, CERCLA-HQ-2005-xx, EPCRA-HQ-2005-xx,* 5 (EAB, Jan. 27, 2006, p. 5).[2] *In Re Consent Agreements for AFOs* , the EAB

[2] The EAB issued an order requesting OECA to file a supplemental memorandum answering several

required the Agency to explain its deviation from the penalty policies. "While the use of penalty policy documents serves an important purpose in helping assure that penalties are appropriate for the violations committed, and are fairly and consistently assessed, the Agency has the authority to deviate from these policies where the circumstances warrant." *In Re Consent Agreements for AFOs,* at 32. The EAB approved the consent agreements and agreed with the Agency's position stating that, in this particular matter, the Agency had clearly articulated why it deviated from the policies. *In Re Consent Agreements for AFOs,* p. 33, note 33. Like the EAB, the Regional Judicial Officer or the Agency Official reviewing consent agreements submitted for ratification under Part 22 also must ensure that any deviation from the policies, when the Agency relies on the policy, is explained prior to signing a final order.

Furthermore, the EAB has ruled that where an Administrative Law Judge's ("ALJ") method of assessing a penalty represents a fundamental deviation from Agency guidance regarding the assessment of penalties that decision should be scrutinized by the EAB on appeal. See, *Wilkes-Barre. A.R. Popple, Inc., & Wyoming S.& P.(Wilkes-Barre*), (EAB, Jul. 11, 2007). The EAB indicates that it "reserves the right to closely scrutinize" when there is a deviation from the penalty policy, especially when the ALJ does not acknowledge or explain the deviation, because the Agency's penalty policies provide a sound framework for consistency of civil penalties. *Id.* at 21. See, also, *In Re Friedman*, 11 E.A.D. 302, 342 (EAB 2004) (citations omitted), *aff'd*, No. 2:04-cv-00517-WBS (E.D. Cal. Feb. 25, 2005), *aff'd*, No. 05-15664, 2007 WL 528073 (9th Cir. Feb. 15, 2007); *In re Capozzi*, 11 E.A.D. 10, 32 (EAB 2003). In *Wilkes-Barre*, the EAB stated, "Having found no persuasive reason for the ALJ's deviation for the applicable penalty policy, we reject the ALJ's penalty assessment in this case." *Id.* at p.30. The EAB has often noted in its decisions that "penalty policies, while not rules, offer a useful mechanism for ensuring consistency in civil penalty assessment." *Id.* at p. 30-31 (citing *Friedman*, 11 E.A.D. at 342). Therefore, when the Agency intends to use a penalty policy, including expedited settlement policies, and there is a deviation from the policy, an explanation and rationale for the deviation is warranted.

With respect to Complainant's arguments that the three expedited consent agreements were reached prior to expiration of a statute of limitation, are appropriate for minor, easily correctible violations, were accepted by Respondent within the 30-day time limit, and finally do not abuse the repeat violator definition of the policy, I take exception with only the repeat violator argument. Complainant has not clearly articulated why a deviation from the expedited settlement policy is warranted under these circumstances. Complainant seems to argue that there is a distinction between EPA's strategy for discovering the violations and how it chooses to prosecute the violations and the actual, on the ground, facts based on the inspection that meet the definition of repeat violator under the policy. Following Complainant's theory, EPA could decide three or three hundred minor, easily correctible violations, found prior to the statute of limitations expiring, and all found on the same day, the same week or the same month is not a repeat violator scenario under the policy. Complainant suggests that as long as one notice is

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questions regarding the consent agreements. See, Order Scheduling Hearing and Requesting Supplemental Information (EAB, Nov. 18, 2005).

given to Respondent for any and all violations found during that period of inspection, whatever that period of time may be, that this is an acceptable interpretation of the policy. I do not find this interpretation to have merit. It construes the policy well beyond its intent.

Efficiency and streamlining seem to be EPA's reasoning for resolving these matters as expedited consent agreements and this court is sensitive to and understands its motivation. However, Complainant can continue to pursue settlement of these actions with Respondent administratively and expediently, using the many resources and tools available to the parties, without deviating from the intent of the expedited settlement policy. As noted above, there may be instances where a deviation from a policy is appropriate and warranted. In those cases, a reasoned explanation of the deviation is expected.

With respect to the incomplete paragraphs found in each expedited consent agreement, the question of whether the consent agreements are fully executed arises. This Presiding Officer cannot presume that the agreement is a full and complete agreement between the parties when information is missing. If Respondent is not going to include its actual cost of corrective action, or does not want to include the actual cost of corrective action, then the Respondent should either not sign the consent agreement or request that the paragraph be stricken from the document. There is nothing in Part 22 that requires the paragraph addressing Respondent's actual cost to return to compliance be contained in the expedited consent agreement. (See, 40 C.F.R. § 22.18(b)(2)). If the parties determine that this information should be included in the consent agreement then the dollar amount should not be left blank. The parties shall include the dollar amount in the consent agreement or determine an alternative avenue for exchanging this information. Therefore, I will not approve a consent agreement lacking substantive information, which on its face, suggests it was intended to be included.

Order

Based on the above, the Motion for Entry of "Expedited" Consent Agreements is **Denied**.

So Ordered this 17th day of January, 2008.

Elyana R. Sutin
Regional Presiding Officer

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

Docket Nos. CWA-08-2008-0005
CWA-08-2008-0006
CWA-08-2008-0007

IN THE MATTERS OF:	)	
	)	
Homeland Gas & Oil Ltd., Inc.	)	**Motion for Entry of "Expedited"**
	)	**Consent Agreements**
	)	
Respondent.	)	

Complainant, United States Environmental Protection Agency ("EPA"), by its undersigned attorney, moves the Presiding Officer to approve the three attached consent agreements and issue the appropriate final order or orders. EPA provides some description of the background facts and explanation of how these settlements comport with Agency policy, and cites as support the Presiding Officer's decision to approve a similar previous trio of settlements (In the Matters of: Kerr-McGee Oil & Gas Onshore, LP; *Order Regarding Expedited Settlements and Final Order*; Docket numbers CWA-08-2006-0041, 0042, and 0043).

These three agreements would resolve violations found at three separate facilities owned and/or operated by Respondent. EPA inspections were conducted at the facilities within the same week. Once EPA concluded that the violations warranted the expedited settlement approach, all three settlement offers were sent on the same day and received by Respondent on October 22, 2007. The signed settlement agreements were all received by EPA on November 21, 2007. All three settlements were signed by the authorized EPA official on December 10, 2007.

These settlement should be approved for the following reasons:

1. EPA has the authority to file and settle administrative penalty actions for these violations, pursuant to authority delegated from the Administrator of EPA to the management official who signed the agreement. See, EPA national and regional delegations, Clean Water Act; 2-51; Class I Administrative Penalty Actions. These delegations do not condition the authority in terms of the application of any specified memoranda, policy, or guidance document.

2. By definition, Agency memoranda, policy, and guidance documents are advisory only and not binding on EPA's officials. Instructions that are binding are subject to public notice and comment pursuant to the Administrative Procedure Act. 5 U.S.C. § 551, et seq.

3. The agreements in these cases were reached prior to the expiration of a statute of limitations or other such legal restriction.

4. These agreements are appropriate for the minor, easily correctable violations found in these cases, in lieu of more formal administrative enforcement actions.

5. EPA imposed a 30-day limit for accepting these settlements, which was complied with by Respondent.

6. EPA policy discourages the use of expedited settlements for repeat violators, defining a

"repeat violation" as one that occurs within five years of when the violator receives notice of a violation. In these cases, the inspections were conducted within the same week, and the settlement offers were received, signed, returned and signed by EPA as one package, each event on the same day. The action by EPA, then, constitutes one act of notice. After these settlements, expedited settlements would not be appropriate if Respondent was again found in violation. This view of how EPA regards notice in this regard is buttressed further by the plain fact that the policy does not simply limit such settlement to one per violator.

7. Finally, Complainant offers a logical hypothetical alternative as further support. Complainant has the authority to issue administrative complaints and may establish the penalty amount, up to the statutory cap, for administrative actions. Respondent may conclude any such complaint at any time by paying the proposed penalty and then, under the part 22 rules, the Presiding Officer, "shall issue a final order."
40 C.F.R. § 22.18 (a)(3)(emphasis added).

In conclusion, Respondent corrected its violations, then received, assessed, and accepted a legitimate settlement offer from EPA. Accordingly, Complainant requests that the three settlements be approved in a final order.

Respectfully submitted,

12/11/2007
Date

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CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **MOTION FOR ENTRY OF "EXPEDITED CONSENT AGREEMENTS"** and **ORDER ON MOTION FOR ENTRY OF "EXPEDITED" CONSENT AGREEMENTS** in the matter of **HOMELAND GAS & OIL LTD., INC.; DOCKET NOs.: CWA-08-2008-0005; CWA-08-2008-0006; and CWA-08-2008-0007** was filed with the Regional Hearing Clerk was filed on January 17, 2008.

Further, the undersigned certifies that a true and correct copy of the document was delivered to David Janik, Senior Enforcement Attorney, U. S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned document was placed in the United States mail certified/return receipt requested on January 17, 2008, to:

Brian Jones, President
Homeland Gas & Oil, Ltd., Inc.
P. O. Box 1775
Roosevelt, UT 84066

January 17, 2008

Tina Artemis
Paralegal/Regional Hearing Clerk