UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
1595 Wynkoop Street
Denver, CO 80202-1129
Phone 800-227-8917
www.epa.gov/region08

DEC 11 2014

Ref: 8ENF-RC

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Darin Bergquist, Secretary of Transportation
South Dakota Department of Transportation
Becker-Hansen Building
700 E. Broadway Avenue
Pierre, South Dakota 57501

Re: Complaint and Notice of Opportunity for Hearing

Dear Mr. Bergquist:

The U.S. Environmental Protection Agency Region 8 (EPA) is issuing you the enclosed Complaint and Notice of Opportunity for Hearing (Complaint) for alleged underground storage tank (UST) violations at the McIntosh facility (Facility) on the Standing Rock reservation in McIntosh, South Dakota. The Complaint is issued pursuant to section 9006 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6991(e).

The EPA alleges in the Complaint that the South Dakota Department of Transportation (Respondent) failed as owner and/or operator of the Facility to comply with the federal UST regulations codified at 40 C.F.R. part 280, subpart D in violation of RCRA section 9003, 42 U.S.C. § 6991b(c). Specifically, Respondent failed to monitor a UST containing used oil every 30 days for the six month period from May 2013 through October 2013. The EPA proposes a civil penalty of $8,294 for the violation alleged.

You have the right to a hearing to contest the factual allegations in the Complaint. If you admit the allegations, or the allegations are found to be true after you have had an opportunity for a hearing, you have the right to contest the penalty proposed in the Complaint. A copy of the EPA's administrative procedures is enclosed for your review. Please note the requirements for an Answer set forth in 40 C.F.R. §§ 22.15 and 22.37. If you wish to contest the allegations in the Complaint or the penalty proposed in the Complaint, you must file a written Answer within thirty (30) days of receipt of the enclosed Complaint with the EPA Regional Hearing Clerk at the following address:

Ms. Tina Artemis, Regional Hearing Clerk (8RC)
U.S. EPA, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

Printed on Recycled Paper

If you do not file an Answer by the applicable deadline, you will have defaulted and each allegation in the Compliant may be deemed to be admitted as true. You will have waived your right to appear in this action for any purpose and will also have waived your right to be notified of any Agency proceedings that occur before a civil penalty may be imposed. Provided that the Complaint is legally sufficient, the presiding officer may then find you liable and assess against you a civil penalty of up to $16,000 for each tank for each day of violation.

Whether or not you request a hearing, you may confer informally with the EPA concerning the alleged violations or the amount of the proposed penalty. A request for an informal conference does not extend the thirty (30) day period for filing your Answer and/or requesting a hearing.

If you have any questions, the most knowledgeable people on our staff regarding this matter are Francisca Chambus and Abigail Dean. Ms. Chambus is in the Underground Storage Tank Program and can be reached at (303) 312-6782. Ms. Dean is in the Legal Enforcement Program and can be reached at (303) 312-6106.

We urge your prompt attention to this matter.

Sincerely,

Kelcey Land, Director
RCRA/CERCLA Technical Enforcement Program

James H. Eppers, REU Supervisory Attorney
Legal Enforcement Program

Enclosures:

Complaint and Notice of Opportunity for Hearing, with Exhibits 1, 2, and 3

cc: The Honorable Dave Archambault, II, Chairman
Allyson Two Bears, Environmental Director
Janet Frazier, UST/LUST Coordinator
Standing Rock Sioux Tribe

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2014 DEC 11 AM 11:21

FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:	)	Docket No. **RCRA-08-2015-0001**
	)	
South Dakota Department of Transportation, Owner/Operator	)	**COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING**
	)	
McIntosh Facility 136 N. Highway 12 McIntosh, SD 57641	)	
Respondent.	)	

AUTHORITY

This is a civil administrative action issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (EPA) by section 9006 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6991e. The Administrator has properly delegated this authority to the undersigned EPA officials. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules) set forth at 40 C.F.R. Part 22, a copy of which is enclosed (Exhibit 1).

GENERAL ALLEGATIONS

1. Subtitle I of RCRA, RCRA sections 9001 – 9010, 42 U.S.C. §§ 6991 – 6991i, authorizes the EPA to regulate the installation and use of "underground storage tanks" ("USTs"), which contain regulated substances as defined by section 9001(7) of RCRA, 42 U.S.C. § 6991(7).

2. The EPA has jurisdiction over this matter pursuant to RCRA section 9006, 42 U.S.C. § 6991e.

3. Section 9003(c)(1) of RCRA, 42 U.S.C. § 6991b(c)(1), authorizes the EPA to promulgate regulations setting forth requirements for maintaining a leak detection system, an inventory control system together with tank testing, or a comparable system or method designed to identify releases in a manner consistent with the protection of human health and the environment. The EPA has promulgated such regulations at 40 C.F.R. part 280, subpart D.

4. Petroleum, and any fraction thereof, is a regulated substance as defined at RCRA section 9001(7), 42 U.S.C. § 6991(7).

5. The EPA is the "implementing agency" as that term is used at 40 C.F.R. § 280.12.

6. Respondent South Dakota Department of Transportation (SD DOT) owns and operates the McIntosh Facility (Facility), which is located on the Standing Rock Reservation in McIntosh, South Dakota.

7. The Facility has one single-walled 2,500-gallon STIP3 UST containing diesel (Tank 1); one 1,000-gallon STIP3 UST containing unleaded gasoline (Tank 2); and one 500-gallon STIP3 UST containing used oil (Tank 3). All three USTs were installed in June 1990.

8. The Respondent owns and/or operates the Facility, including the USTs, as a storage facility that is not open to the public.

9. The Respondent is a "person" as defined by section 9001(5) of RCRA, 42 U.S.C. § 6991(5).

10. The Respondent is an "operator" within the respective meanings of section 9001(3) of RCRA, 42 U.S.C. § 6991(3), and 40 C.F.R. § 280.12, of an "underground storage

tank system" (UST system) as defined by section 9001(10) of RCRA, 42 U.S.C. § 6991(10), and 40 C.F.R. § 280.12.

11. The Respondent's UST system meets the performance standards for new USTs described in 40 C.F.R. § 280.20.

12. The Facility was selected for inspection by the EPA as a routine re-inspection. It was last inspected by the EPA in April 2011, at which time the Respondent was issued a field citation for failure to monitor its used oil UST at least every 30 days in violation of 40 C.F.R. § 280.41(a). Specifically, the Facility used manual tank gauging which was not a valid test method for a 2000-gallon UST. The field citation (RCRA (CIT) -08-2011-0001) was settled on June 27, 2011.

13. On April 29, 2014, EPA inspector Darla Hohman (Inspector) re-inspected the Facility to determine its compliance with RCRA Subtitle I and the EPA regulations relating to USTs.

14. A Facility representative was present at the time of the inspection and consented to the inspection.

15. At the time of the inspection, the Respondent reported that an automatic tank gauge (ATG) was used for monthly tank leak detection at the Facility. The Inspector confirmed that the Facility had a Veeder Root TLS-450 ATG.

16. The Inspector reviewed the Facility's tank leak detection records from the ATG, which indicated a passing test for the previous 12 months for Tanks 1 and 2.

17. The ATG showed no leak detection results for Tank 3 for May 2013 through October 2013. The Respondent indicated that there were no records for Tank 3 from May 2013 through October 2013 because the tank was empty or the levels were too low to run a test.

However, the Respondent reported that Midwest Tank re-programmed the ATG to conduct testing regardless of the levels. As a result, the ATG documented a passing monthly leak detection test for Tank 3 for November 2013 through April 2014.

18. The Inspector completed a Notice of Inspection (NOI) and the Respondent signed the NOI at the conclusion of the inspection.

19. The Inspector informed the Respondent that the Facility was out of compliance and explained the violations.

20. Section 9006(d)(2) of RCRA, 42 U.S.C. § 6991e(d)(2), states in pertinent part that any owner or operator of a UST who fails to comply with any requirement or standard promulgated by the Administrator under section 6991b of this title shall be subject to a civil penalty not to exceed $16,000 for each tank for each day of violation occurring after January 12, 2009 through December 6, 2013.

21. As alleged herein and pursuant to section 9006(d)(2) of RCRA, 42 U.S.C. § 6991e(d)(2), and 40 C.F.R. § 19.4, the Respondent is liable for civil penalties of up to $16,000 per day per tank during which the violation continues.

22. Paragraphs 1 through 21 are incorporated by reference in the count listed below.

COUNT 1
Failure to monitor tanks every 30 days

23. Pursuant to 40 C.F.R. § 280.41(a), tanks must be monitored every 30 days for releases using one of the methods listed in 40 C.F.R. § 280.43(d) through (h).

24. The Respondent uses ATG monitoring as the method of leak detection for the USTs at the Facility.

25. Tank 3 does not have any passing leak detection tests for the six month period May 2013 through October 2013.

26. The Respondent's failure to monitor Tank 3 every 30 days for the six month period May 2013 through October 2013 constitutes a violation of section 9003(c) of RCRA, 42 U.S.C. § 6991b(c), and 40 C.F.R. § 280.41(a).

PROPOSED CIVIL PENALTY

Section 9006(d)(2)(A) of RCRA, 42 U.S.C. § 6991e(d)(2)(A), authorizes the assessment of a civil penalty of up to $16,000 for each UST for each day of violation occurring after January 12, 2009, through December 6, 2013. Based upon the facts alleged in this Complaint and taking into account the factors prescribed by statute, i.e., the seriousness of the violations and any good faith efforts by the Respondent to comply with the applicable requirements, Complainant proposes to assess a civil penalty of **$8,294** as follows:

COUNT	VIOLATION	PROPOSED PENALTY
Count 1	Failure to monitor tanks every 30 days 40 C.F.R. § 280.41(a)	$8,294

TOTAL PROPOSED PENALTY: $8,294

The proposed civil administrative penalty above has been calculated in accordance with the U.S. EPA Penalty Guidance for Violations of UST Regulations (November 1990) (Exhibit 2). This policy is used by the EPA to provide a rational and consistent application of the statutory factors to the facts and circumstances of a specific case. The Penalty Calculation Worksheets for the alleged RCRA UST violation in support of the assessment of civil penalties proposed in this Complaint are attached hereto (Exhibit 3).

TERMS OF PAYMENT

If the Respondent does not contest the findings and penalty proposal set out above, this action may be resolved by paying the proposed penalty in full pursuant to 40 C.F.R. § 22.18. If such payment is made within 30 calendar days of receipt of this Complaint, no Answer need be

filed. For more time for payment, the Respondent may file a statement agreeing to pay the penalty within 30 days of receipt of the Complaint, then pay the money within 60 days of such receipt. Payment shall be made by remitting a cashier's or certified check for the amount, including the name and docket number of the case, payable to the "**Environmental Protection Agency**" to:

US checks by regular US postal service mail:	U.S. Environmental Protection Agency Fines and Penalties Cincinnati Finance Center P.O. Box 979077 St. Louis, Missouri 63197-9000
Federal Express, Airborne, Or other commercial carrier:	U.S. Bank 1005 Convention Plaza Mail Station SL-MO-C2GL St. Louis, Missouri 63101
Wire transfers:	Federal Reserve Bank of New York ABA = 021030004 Account = 68010727 SWIFT address = FRNYUS33 33 Liberty Street New York, New York 10045 Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"
Online Payment:	WWW.PAY.GOV Enter sfo 1.1 in the search field

A copy of the check or wire transfer shall be simultaneously sent to:

Abigail Dean, Enforcement Attorney
U.S. EPA Region 8 (8ENF-L)
1595 Wynkoop Street
Denver, CO 80202-1129

Payment of the penalty in this manner does not relieve the Respondent of its obligation to comply with the requirements of this statute and regulations. Payment of the penalty in this

manner shall constitute consent by the Respondent to the assessment of the proposed penalty and a waiver of the Respondent's right to a hearing on this matter.

OPPORTUNITY TO REQUEST A HEARING

As provided in section 9006(b) of RCRA, 42 U.S.C. § 6991e(b), you have the right to request a public hearing within thirty (30) calendar days after the Complaint is served. If you (1) contest the factual claims made in this Complaint; (2) wish to contest the appropriateness of the proposed penalty; or (3) assert that you are entitled to judgment as a matter of law, you must file a written Answer in accordance with 40 C.F.R. §§ 22.15 and 22.37 within thirty (30) calendar days after this Complaint is served. Your answer must (1) clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint; (2) state all facts and circumstances, if any, which constitute grounds for defense; (3) state the facts intended to be placed at issue; and (4) specifically request an administrative hearing, if desired. The denial of any material fact or the raising of any affirmative defense in your Answer shall be construed as a request for a hearing. Failure to deny any of the factual allegations in this Complaint constitutes an admission of the undenied allegations.

The answer and one copy must be sent to the EPA Region 8 Regional Hearing Clerk (8RC), 1595 Wynkoop Street, Denver, Colorado 80202-1129, and a copy must be sent to the enforcement attorney listed below.

IF YOU FAIL TO REQUEST A HEARING, YOU MAY WAIVE YOUR RIGHT TO FORMALLY CONTEST ANY OF THE ALLEGATIONS SET FORTH IN THE COMPLAINT.

IF YOU FAIL TO FILE A WRITTEN ANSWER WITHIN THE 30 CALENDAR DAY TIME LIMIT, A DEFAULT JUDGMENT MAY BE ENTERED PURSUANT TO 40 C.F.R. § 22.17. THIS JUDGMENT MAY IMPOSE THE PENALTY PROPOSED IN THE COMPLAINT.

SETTLEMENT CONFERENCE

The EPA encourages the exploration of settlement possibilities through an informal settlement conference. Please note that a request for, scheduling of, or participation in a settlement conference does not extend the period for filing an answer and request for hearing as set forth above. The settlement process, however, may be pursued simultaneously with the administrative litigation procedures found in 40 C.F.R. Part 22. If a settlement can be reached, its terms shall be expressed in a written consent agreement, signed by the parties and incorporated into a final order signed by the regional judicial officer. A request for a settlement conference or any questions that you may have regarding this Complaint should be directed to the attorney-of-record listed below.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 8,
Complainant.

Date: DEC 9 2014

By: _____
James H. Eppers, REU Supervisory Attorney
Legal Enforcement Program

Date: 12/9/14

By: _____
Kelcey Land, Director
RCRA/CERCLA Technical Enforcement Program

Exhibit 1

approve or disapprove the State issued statement, in accordance with the requirements of § 21.5.

(2) The Regional Administrator will periodically review State program performance. In the event of State program deficiencies the Regional Administrator will notify the State of such deficiencies.

(3) During that period that any State's program is classified as deficient, statements issued by a State shall also be sent to the Regional Administrator for review. The Regional Administrator shall notify the State, the applicant, and the SBA of any determination subsequently made, in accordance with § 21.5, on any such statement.

(i) If within 60 days after notice of such deficiencies has been provided, the State has not taken corrective efforts, and if the deficiencies significantly affect the conduct of the program, the Regional Administrator, after sufficient notice has been provided to the Regional Director of SBA, shall withdraw the approval of the State program.

(ii) Any State whose program is withdrawn and whose deficiencies have been corrected may later reapply as provided in § 21.12(a).

(g) Funds appropriated under section 106 of the Act may be utilized by a State agency authorized to receive such funds in conducting this program.

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

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

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

Subpart A—General

Sec.

Subpart B—Parties and Appearances

Subpart C—Prehearing Procedures

Subpart D—Hearing Procedures

Subpart E—Initial Decision and Motion to Reopen a Hearing

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

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

Subpart A—General

§ 22.1 Scope of this part.

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

(1) The assessment of any administrative civil penalty under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 136*l*(a));

(2) The assessment of any administrative civil penalty under sections 113(d), 205(c), 211(d) and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7413(d), 7524(c), 7545(d) and 7547(d));

(3) The assessment of any administrative civil penalty or for the revocation or suspension of any permit under section 105(a) and (f) of the Marine Protection, Research, and Sanctuaries Act as amended (33 U.S.C. 1415(a) and (f));

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

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

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

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

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

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

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

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

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

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

§ 22.2 Use of number and gender.

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

§ 22.3 Definitions.

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

Act means the particular statute authorizing the proceeding at issue.

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

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

Agency means the United States Environmental Protection Agency.

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

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

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

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

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

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

Consolidated Rules of Practice means the regulations in this part.

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

Final order means:

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

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

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

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

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

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

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

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

Person includes any individual, partnership, association, corporation, and any trustee, assignee, receiver or legal successor thereof; any organized group of persons whether incorporated or not; and any officer, employee, agent, department, agency or instrumentality of the Federal Government, of any State or local unit of government, or of any foreign government.

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

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

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

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

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

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

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

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

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

(a) *Environmental Appeals Board.* (1) The Environmental Appeals Board rules on appeals from the initial decisions, rulings and orders of a Presiding Officer in proceedings under these Consolidated Rules of Practice; acts as Presiding Officer until the respondent files an answer in proceedings under these Consolidated Rules of Practice commenced at EPA Headquarters; and approves settlement of proceedings under these Consolidated Rules of Practice commenced at EPA Headquarters. The Environmental Appeals Board may refer any case or motion to the Administrator when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator by the Environmental Appeals Board, all parties shall be so notified and references to the Environmental Appeals Board in these Consolidated Rules of Practice shall be interpreted as referring to the Administrator. If a case or motion is referred

to the Administrator by the Environmental Appeals Board, the Administrator may consult with any EPA employee concerning the matter, provided such consultation does not violate § 22.8. Motions directed to the Administrator shall not be considered except for motions for disqualification pursuant to paragraph (d) of this section, or motions filed in matters that the Environmental Appeals Board has referred to the Administrator.

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

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

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

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

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

(3) Administer oaths and affirmations and take affidavits;

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

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

(6) Admit or exclude evidence;

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

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

(9) Issue subpoenas authorized by the Act; and

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

(d) *Disqualification, withdrawal and reassignment.* (1) The Administrator, the Regional Administrator, the members of the Environmental Appeals Board, the Regional Judicial Officer, or the Administrative Law Judge may not perform functions provided for in these

Consolidated Rules of Practice regarding any matter in which they have a financial interest or have any relationship with a party or with the subject matter which would make it inappropriate for them to act. Any party may at any time by motion to the Administrator, Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer or the Administrative Law Judge request that he or she disqualify himself or herself from the proceeding. If such a motion to disqualify the Regional Administrator, Regional Judicial Officer or Administrative Law Judge is denied, a party may appeal that ruling to the Environmental Appeals Board. If a motion to disqualify a member of the Environmental Appeals Board is denied, a party may appeal that ruling to the Administrator. There shall be no interlocutory appeal of the ruling on a motion for disqualification. The Administrator, the Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer, or the Administrative Law Judge may at any time withdraw from any proceeding in which he deems himself disqualified or unable to act for any reason.

(2) If the Administrator, the Regional Administrator, the Regional Judicial Officer, or the Administrative Law Judge is disqualified or withdraws from the proceeding, a qualified individual who has none of the infirmities listed in paragraph (d)(1) of this section shall be assigned as a replacement. The Administrator shall assign a replacement for a Regional Administrator who withdraws or is disqualified. Should the Administrator withdraw or be disqualified, the Regional Administrator from the Region where the case originated shall replace the Administrator. If that Regional Administrator would be disqualified, the Administrator shall assign a Regional Administrator from another Region to replace the Administrator. The Regional Administrator shall assign a new Regional Judicial Officer if the original Regional Judicial Officer withdraws or is disqualified. The Chief Administrative Law Judge shall assign a new Administrative Law Judge if the original Administrative Law Judge withdraws or is disqualified.

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

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

(a) *Filing of documents.* (1) The original and one copy of each document intended to be part of the record shall be filed with the Regional Hearing Clerk when the proceeding is before the Presiding Officer, or filed with the Clerk of the Board when the proceeding is before the Environmental Appeals Board. A document is filed when it is received by the appropriate Clerk. The Presiding Officer or the Environmental Appeals Board may by order authorize facsimile or electronic filing, subject to any appropriate conditions and limitations.

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

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

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

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

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

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

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

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

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

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

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

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

(4) The first document filed by any person shall contain the name, address, and telephone number of an individual authorized to receive service relating to the proceeding. Parties shall promptly file any changes in this information with the Regional Hearing Clerk, and serve copies on the Presiding Officer and all parties to the proceeding. If a party fails to furnish such information and any changes thereto, service to the party's last known address shall satisfy the requirements of paragraph (b)(2) of this section and § 22.6.

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

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

(2) Two versions of any document which contains information claimed

confidential shall be filed with the Regional Hearing Clerk:

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

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

(3) Both versions of the document shall be served on the Presiding Officer and the complainant. Both versions of the document shall be served on any party, non-party participant, or representative thereof, authorized to receive the information claimed confidential by the person making the claim of confidentiality. Only the redacted version shall be served on persons not authorized to receive the confidential information.

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

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

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

§ 22.7 Computation and extension of time.

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

(b) Extensions of time. The Environmental Appeals Board or the Presiding Officer may grant an extension of time for filing any document: upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties; or upon its own initiative. Any motion for an extension of time shall be filed sufficiently in advance of the due date so as to allow other parties reasonable opportunity to respond and to allow the Presiding Officer or Environmental Appeals Board reasonable opportunity to issue an order.

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

§ 22.8 Ex parte discussion of proceeding.

At no time after the issuance of the complaint shall the Administrator, the members of the Environmental Appeals Board, the Regional Administrator, the Presiding Officer or any other person who is likely to advise these officials

on any decision in the proceeding, discuss *ex parte* the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any *ex parte* memorandum or other communication addressed to the Administrator, the Regional Administrator, the Environmental Appeals Board, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication. The requirements of this section shall not apply to any person who has formally recused himself from all adjudicatory functions in a proceeding, or who issues final orders only pursuant to §22.18(b)(3).

§ 22.9 Examination of documents filed.

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

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

Subpart B—Parties and Appearances

§ 22.10 Appearances.

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

§ 22.11 Intervention and non-party briefs.

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

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

§ 22.12 Consolidation and severance.

(a) *Consolidation.* The Presiding Officer or the Environmental Appeals Board may consolidate any or all matters at issue in two or more proceedings subject to these Consolidated Rules of Practice where: there exist common parties or common questions of fact or law; consolidation would expedite and simplify consideration of the issues; and consolidation would not adversely affect the rights of parties

engaged in otherwise separate proceedings. Proceedings subject to subpart I of this part may be consolidated only upon the approval of all parties. Where a proceeding subject to the provisions of subpart I of this part is consolidated with a proceeding to which subpart I of this part does not apply, the procedures of subpart I of this part shall not apply to the consolidated proceeding.

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

Subpart C—Prehearing Procedures

§ 22.13 Commencement of a proceeding.

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

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

§ 22.14 Complaint.

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

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

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

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

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

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

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

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

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

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

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

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

(8) Instructions for paying penalties, if applicable.

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

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

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

§ 22.15 Answer to the complaint.

(a) *General.* Where respondent: Contests any material fact upon which the complaint is based; contends that the proposed penalty, compliance or corrective action order, or Permit Action, as the case may be, is inappropriate; or contends that it is entitled to judgment as a matter of law, it shall file an

original and one copy of a written answer to the complaint with the Regional Hearing Clerk and shall serve copies of the answer on all other parties. Any such answer to the complaint must be filed with the Regional Hearing Clerk within 30 days after service of the complaint.

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

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

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

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

§ 22.16 Motions.

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

(1) Be in writing;

(2) State the grounds therefor, with particularity;

(3) Set forth the relief sought; and

(4) Be accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon.

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

(c) *Decision.* The Regional Judicial Officer (or in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board) shall rule on all motions filed or made before an answer to the complaint is filed. Except as provided in §§ 22.29(c) and 22.51, an Administrative Law Judge shall rule on all motions filed or made after an answer is filed and before an initial decision has become final or has been appealed. The Environmental Appeals Board shall rule as provided in § 22.29(c) and on all motions filed or made after an appeal of the initial decision is filed, except as provided pursuant to § 22.28.

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

§ 22.17 Default.

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

right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice.

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

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

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

§ 22.18 Quick resolution; settlement; alternative dispute resolution.

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

(2) Any respondent who wishes to resolve a proceeding by paying the proposed penalty instead of filing an answer, but who needs additional time to pay the penalty, may file a written statement with the Regional Hearing Clerk within 30 days after receiving the complaint stating that the respondent agrees to pay the proposed penalty in accordance with paragraph (a)(1) of this section. The written statement need not contain any response to, or admission of, the allegations in the complaint. Within 60 days after receiving the complaint, the respondent shall pay the full amount of the proposed penalty. Failure to make such payment within 60 days of receipt of the complaint may subject the respondent to default pursuant to § 22.17.

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

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

(2) *Consent agreement.* Any and all terms and conditions of a settlement shall be recorded in a written consent agreement signed by all parties or their representatives. The consent

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

(3) *Conclusion of proceeding.* No settlement or consent agreement shall dispose of any proceeding under these Consolidated Rules of Practice without a final order from the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board, ratifying the parties' consent agreement.

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

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

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

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

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

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

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

(i) The names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony, or a statement that no witnesses will

be called; and (ii) Copies of all documents and exhibits which it intends to introduce into evidence at the hearing.

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

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

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

(1) Settlement of the case;

(2) Simplification of issues and stipulation of facts not in dispute;

(3) The necessity or desirability of amendments to pleadings;

(4) The exchange of exhibits, documents, prepared testimony, and admissions or stipulations of fact which will avoid unnecessary proof;

(5) The limitation of the number of expert or other witnesses;

(6) The time and place for the hearing; and

(7) Any other matters which may expedite the disposition of the proceeding.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Exclude the information from evidence; or

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

§ 22.20 Accelerated decision; decision to dismiss.

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

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

(2) If an accelerated decision or a decision to dismiss is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted. The partial accelerated decision or the order dismissing certain counts shall specify the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.

Subpart D—Hearing Procedures

§ 22.21 Assignment of Presiding Officer; scheduling the hearing.

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

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

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

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

§ 22.22 Evidence.

(a) *General.* (1) The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence (28 U.S.C.) is not admissible. If, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19 (a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.

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

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

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

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

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

(f) *Official notice.* Official notice may be taken of any matter which can be

judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency. Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed.

§ 22.23 Objections and offers of proof.

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

(b) *Offers of proof.* Whenever the Presiding Officer denies a motion for admission into evidence, the party offering the information may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the information excluded. The offer of proof for excluded documents or exhibits shall consist of the documents or exhibits excluded. Where the Environmental Appeals Board decides that the ruling of the Presiding Officer in excluding the information from evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence.

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

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

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

§ 22.25 Filing the transcript.

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

§ 22.26 Proposed findings, conclusions, and order.

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

Subpart E—Initial Decision and Motion To Reopen a Hearing

§ 22.27 Initial Decision.

(a) *Filing and contents.* After the period for filing briefs under § 22.26 has expired, the Presiding Officer shall issue an initial decision. The initial decision shall contain findings of fact,

conclusions regarding all material issues of law or discretion, as well as reasons therefor, and, if appropriate, a recommended civil penalty assessment, compliance order, corrective action order, or Permit Action. Upon receipt of an initial decision, the Regional Hearing Clerk shall forward copies of the initial decision to the Environmental Appeals Board and the Assistant Administrator for the Office of Enforcement and Compliance Assurance.

(b) *Amount of civil penalty.* If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.

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

(1) A party moves to reopen the hearing;

(2) A party appeals the initial decision to the Environmental Appeals Board;

(3) A party moves to set aside a default order that constitutes an initial decision; or

(4) The Environmental Appeals Board elects to review the initial decision on its own initiative.

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

§ 22.28 Motion to reopen a hearing.

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

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

Subpart F—Appeals and Administrative Review

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

(a) *Request for interlocutory appeal.* Appeals from orders or rulings other than an initial decision shall be allowed only at the discretion of the Environmental Appeals Board. A party seeking interlocutory appeal of such orders or rulings to the Environmental

Appeals Board shall file a motion within 10 days of service of the order or ruling, requesting that the Presiding Officer forward the order or ruling to the Environmental Appeals Board for review, and stating briefly the grounds for the appeal.

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

(1) The order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion; and

(2) Either an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.

(c) *Interlocutory review.* If the Presiding Officer has recommended review and the Environmental Appeals Board determines that interlocutory review is inappropriate, or takes no action within 30 days of the Presiding Officer's recommendation, the appeal is dismissed. When the Presiding Officer declines to recommend review of an order or ruling, it may be reviewed by the Environmental Appeals Board only upon appeal from the initial decision, except when the Environmental Appeals Board determines, upon motion of a party and in exceptional circumstances, that to delay review would be contrary to the public interest. Such motion shall be filed within 10 days of service of an order of the Presiding Officer refusing to recommend such order or ruling for interlocutory review.

§ 22.30 Appeal from or review of initial decision.

(a) *Notice of appeal.* (1) Within 30 days after the initial decision is served, any party may appeal any adverse order or ruling of the Presiding Officer by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board (Clerk of the Board (Mail Code 1103B), United States Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Hand deliveries may be made at Suite 500, 607 14th Street, NW.). One copy of any document filed with the Clerk of the Board shall also be served on the Regional Hearing Clerk. Appellant also shall serve a copy of the notice of appeal upon the Presiding Officer. Appellant shall simultaneously serve one copy of the notice and brief upon all other parties and non-party participants. The notice of appeal shall summarize the order or ruling, or part thereof, appealed from. The appellant's brief shall contain tables of contents and authorities (with page references), a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review (with appropriate references to the record), argument on the issues presented, a short conclusion stating the precise relief sought, alternative findings of fact, and alternative conclusions regarding issues of law or discretion. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal on any issue within 20 days after the date on which the first notice of appeal was served.

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

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

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

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

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

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

Subpart G—Final Order

§ 22.31 Final order.

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

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

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

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

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

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

§ 22.32 Motion to reconsider a final order.

Motions to reconsider a final order issued pursuant to § 22.30 shall be filed within 10 days after service of the final order. Motions must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Motions for reconsideration under this provision shall be directed to, and decided by, the Environmental Appeals Board. Motions for reconsideration directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered, except in cases that the Environmental Appeals Board has referred to the Administrator pursuant to § 22.4(a) and in which the Administrator has issued the final order. A motion for reconsideration shall not stay the effective date of the final order unless so ordered by the Environmental Appeals Board.

Subpart H—Supplemental Rules

§ 22.33 [Reserved]

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

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

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

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

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 136l(a)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

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

§ 22.36 [Reserved]

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

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

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

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

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

(b) *Consultation with States.* For proceedings pursuant to section 309(g), the complainant shall provide the State agency with the most direct authority over the matters at issue in the case an opportunity to consult with the complainant. Complainant shall notify the State agency within 30 days following proof of service of the complaint on the respondent or, in the case of a proceeding proposed to be commenced pursuant to § 22.13(b), no less than 40 days before the issuance of an order assessing a civil penalty.

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

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

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

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

(c) *Payment of civil penalty assessed.* Payment of civil penalties assessed in the final order shall be made by forwarding a cashier's check, payable to the "EPA, Hazardous Substances Superfund," in the amount assessed, and noting the case title and docket number, to the appropriate regional Superfund Lockbox Depository.

§ 22.40 [Reserved]

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

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

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

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

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

(b) *Choice of forum.* A complaint which specifies that subpart I of this part applies shall also state that respondent has a right to elect a hearing on the record in accordance with 5 U.S.C. 554, and that respondent waives this right unless it requests in its answer a hearing on the record in accordance with 5 U.S.C. 554. Upon such request, the Regional Hearing Clerk shall recaption the documents in the record as necessary, and notify the parties of the changes.

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

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

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

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

(1) The docket number of the order;

(2) The address and phone number of the Regional Hearing Clerk from whom a copy of the order may be obtained;

(3) The location of the facility where violations were found;

(4) A description of the violations;

(5) The penalty that was assessed; and

(6) A notice that any interested person may, within 30 days of the date the order becomes final, obtain judicial review of the penalty order pursuant to section 1447(b) of the Safe Drinking Water Act, and instruction that persons seeking judicial review shall provide copies of any appeal to the persons described in 40 CFR 135.11(a).

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

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

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

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

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

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

[65 FR 30904, May 15, 2000]

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

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

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

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

(i) The docket number of the proceeding;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(C) Provide public notice of the order.

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

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

§§ 22.46–22.49 [Reserved]

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

§ 22.50 Scope of this subpart.

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

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

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

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

§ 22.51 Presiding Officer.

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

§ 22.52 Information exchange and discovery.

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

PART 23—JUDICIAL REVIEW UNDER EPA—ADMINISTERED STATUTES

Sec.

AUTHORITY: Clean Water Act, 33 U.S.C. 1361(a), 1369(b); Clean Air Act, 42 U.S.C. 7601(a)(1), 7607(b); Resource, Conservation and Recovery Act, 42 U.S.C. 6912(a), 6976; Toxic Substances Control Act, 15 U.S.C. 2618; Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136n(b), 136w(a); Safe Drinking Water Act, 42 U.S.C. 300j–7(a)(2), 300j–9(a); Atomic Energy Act, 42 U.S.C. 2201, 2239; Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 371(a), 346a, 348; 28 U.S.C. 2112(a), 2343, 2344.

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

§ 23.1 Definitions.

As used in this part, the term:

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

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

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

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

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

Unless the Administrator otherwise explicity provides in a particular promulgation or approval action, the time and date of the Administrator's action

Exhibit 2

http://www.epa.gov/oust/directiv/od961012.htm
Last updated on Thursday, December 20, 2012

Underground Storage Tanks

U.S. EPA Penalty Guidance For Violations of UST Regulations OSWER Directive 9610.12 November 14, 1990

Directive Organization

NOTE: The document you are viewing is an HTML facsimile of OSWER Directive 9610.12 that has been reformatted for the Internet. This version maintains as much as possible of the original document integrity. Only a couple of non-essential elements are missing, namely facsimiles of the OSWER Directive cover page, and EPA Form 1315-17 (the Directive Initiation Request). Also, the original typed document had the directive number as a header on each page--in this version the directive number appears at the beginning of each new section.

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NOTICE

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

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CHAPTER 1. INTRODUCTION TO UST PENALTY GUIDANCE

This document provides guidance to U.S. Environmental Protection Agency (EPA) Regional Offices on calculating civil penalties against owner/operators of underground storage tanks (USTs) who are in violation of

the UST technical standards and financial responsibility regulations. The methodology described in this guidance seeks to ensure that UST civil penalties, which can be as high as $10,000 for each tank for each day of violation, are assessed in a fair and consistent manner, and that such penalties serve to deter potential violators and assist in achieving compliance.

This penalty document is part of a series of enforcement documents which includes: (1) the Agency's **UST/LUST Enforcement Procedures Guidance Manual** (OSWER Directive 9610.11, July 1990), which provides guidance to U.S. EPA Regional personnel on taking enforcement actions against violations of the UST technical requirements; and (2) the draft "Interim Enforcement Response Strategy for Violations of UST Financial Responsibility Requirements," which provides guidance on taking enforcement actions against violations of the financial responsibility requirements. Although these enforcement documents are intended primarily for U.S. EPA Regional enforcement staff, State and local UST implementing agencies may find it useful to adapt some of the concepts and methodologies for their own UST enforcement programs.

This chapter briefly describes the U.S. EPA's authorities for taking enforcement action and assessing civil penalties. It also provides an overview of the enforcement actions that may be taken in response to UST violations, and indicates how the assessment of penalties fits into the enforcement framework.

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1.1 U.S. EPA PENALTY AUTHORITY

The U.S. EPA's authority for assessing civil penalties for violations of UST requirements is provided by Subtitle I of the Resource Conservation and Recovery Act (RCRA). Under the Hazardous and Solid Waste Amendments of 1984, Congress added Subtitle I to RCRA in response to the growing environmental and health problems created by releases from USTs. The statutory framework for the national UST program is set forth in Sections 9002 through 9004 of Subtitle I.

Under Section 9006 of Subtitle I, EPA is authorized to take enforcement actions and assess penalties against violators of requirements promulgated under Subtitle I, including technical standards and financial responsibility requirements. (Footnote 1) In particular, Section 9006(a) provides the authority to issue administrative orders requiring compliance within a reasonable specified time period. All such orders will be processed within the Agency according to the Consolidated Rules of Practice (CROP). (Footnote 2) Pursuant to Section 9006(d), a Section 9006 compliance order may assess a civil penalty, provided that the penalty does not exceed $10,000 for each tank for each day of violation of the technical standards and financial responsibility rules. (Footnote 3) This document presents guidance for determining the appropriate civil penalty amount for an administrative complaint and order, and discusses use of penalties in field citations.

In addition to administrative enforcement actions, EPA may initiate judicial enforcement actions under Section 9006 to compel compliance with Subtitle I's statutory and regulatory requirements. EPA's judicial enforcement actions are processed through Federal courts and are reserved for violations of administrative orders. Under such actions, EPA is authorized to seek judicial penalties of up to $25,000 for each day of continued noncompliance with an administrative order issued under Section 9006 or a corrective action order issued under Section 9003. In these cases, Agency personnel should seek the maximum penalty. (Footnote 4)

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1.2 OVERVIEW OF THE UST ENFORCEMENT PROCESS

The **UST/LUST Enforcement Procedures Guidance Manual** (OSWER Directive 9610.11, July 1990) describes the range of enforcement actions that may be taken in response to an UST violation. These enforcement options vary from initial responses, such as warning letters or notices of violation (NOVs), which encourage compliance, to more stringent actions, such as administrative orders and judicial injunctions, which compel compliance and, if appropriate, penalize violators. Exhibit 1 presents the various enforcement actions that may be taken once a violation of an UST requirement is identified. In general, enforcement personnel will take the least costly enforcement action that appears necessary to achieve compliance and create a strong deterrent, and will escalate the severity of the enforcement response if the initial action fails.

NOTE: Exhibit 1 is a flowchart: "Overview of Enforcement Response Options". This exhibit file contains a GIF image that is 29,203 bytes. View Exhibit 1.

As shown in Exhibit 1, there are two approaches to taking enforcement actions. Under the "traditional" approach, enforcement personnel may initially respond to a discovered violation by issuing a warning letter or

NOV to inform the owner/operator of the violation, explain what actions need to be taken, and indicate possible consequences if the owner/operator fails to achieve compliance. If necessary, enforcement personnel may then meet with the owner/operator to negotiate an agreed-upon course of action for the owner/operator to follow to achieve compliance. However, for recalcitrant violators, or where violations pose a threat to human health and the environment, enforcement personnel will typically issue administrative complaints or take judicial action. To provide a deterrent effect, an administrative complaint may include an initial penalty target figure. Upon receipt of the complaint, a violator may pay the penalty specified, request an informal settlement conference, and/or request an administrative hearing. Regardless of the violator's response, the outcome generally will be a final penalty that the violator must pay or else face judicial prosecution. Exhibit 1 shows where the target and final penalties appear in the enforcement process.

As an alternative to the traditional approach, enforcement personnel may initiate an enforcement response using field citations (see Chapter 5). Field citations, similar to traffic tickets, are modified compliance orders issued by inspectors on-site at a facility when violations are discovered. However, the use of field citations is generally limited to first-time violators when compliance is expected and when the violation does not pose an immediate threat to human health and the environment. A typical field citation will not only require that the violator take actions to achieve compliance, but will also assess a pre-established, non-negotiable penalty. This penalty is usually fairly low (*e.g.*, $100) to encourage prompt payment and response. In paying the citation penalty, the violator gives up the right to appeal and consents to the requirements specified; thus, the citation is analogous to the final penalty that results from settlement negotiations. This alternative path to arriving at a penalty is also shown in Exhibit 1. If the owner/operator fails to respond to the field citation, enforcement personnel may resort to enforcement actions under the traditional approach or may initiate judicial actions.

Under the UST program's franchise approach, States will undertake most of the enforcement actions. However, in certain cases (*e.g.*, where an owner/operator is particularly recalcitrant or the State lacks sufficient enforcement authority), Federal assistance may be needed. In such cases, the Regional office may omit initial, informal responses and proceed directly with administrative or judicial actions. However, U.S. EPA enforcement also may be needed at the beginning of an enforcement case in certain circumstances (*e.g.*, in States without active enforcement programs or on Indian Lands). In such cases, Regional enforcement personnel may begin with either the traditional responses or may determine that it is appropriate to use field citations.

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1.3 UST PENALTY ASSESSMENT FRAMEWORK

This document provides guidance on calculating penalties to be used in the administrative enforcement actions described above. Consistent with the U.S. EPA's Policy on Civil Penalties, penalties assessed under this methodology are intended to achieve the following goals: (Footnote 5)

- Encourage timely resolution of environmental problems;
- Support fair and equitable treatment of the regulated community; and
- Deter potential violators from future violations.

Exhibit 2 provides an overview of the major components used to set penalties at levels that will achieve these goals. Specifically, to deter the violator from repeating the violation and to deter other potential violators from failing to comply, the penalty must place the violator in a worse position economically than if he or she had complied on time. Such deterrence is achieved by:

1. Removing any significant economic benefit that the violator may have gained from noncompliance (the "economic benefit component"); and
2. Charging an additional amount, based on the specific violation and circumstances of the case, to penalize the violator for not obeying the law (the "gravity-based component").

NOTE: Exhibit 2 is a flowchart: "Process for Assessing UST Civil Penalties". This exhibit file contains a GIF image that is 65,678 bytes. View Exhibit 2.

The procedures for determining the economic benefit component and gravity-based component are discussed in Chapter 2 and Chapter 3. Furthermore, to support fair and equitable treatment of the regulated community, the penalty must allow for adjustments to take into account legitimate differences between similar cases. Thus, under this methodology, the gravity-based component incorporates adjustments that reflect the specific circumstances of the violation, the violator's background and actions, and the environmental threat posed by the situation.

The sum of the economic benefit component and the gravity-based component yields the initial penalty target figure that is assessed in the administrative complaint. (Footnote 6) For each case that involves more than one violation, the Regional case team will need to decide on the number of counts addressed in the complaint. Each count should be accompanied by an appropriate penalty calculation, and the sum of these penalties will be the initial penalty target figure assessed in the complaint. Once a complaint is issued, the Agency may enter into settlement negotiations with the owner/operator to encourage timely resolution of the violation. Such negotiations provide the owner/operator with the opportunity to present evidence to support downward adjustments in the penalty. The process of adjusting the penalty during settlement negotiations is addressed in Chapter 4. The outcome of such negotiations will be the final penalty.

For specific types of cases, enforcement personnel may issue field citations, which assess penalties while encouraging a swift return to compliance without a drawn-out appeals process. The use of field citations to assess penalties is addressed in Chapter 5.

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CHAPTER 2. DETERMINING THE ECONOMIC BENEFIT COMPONENT

As explained in the preceding chapter, to ensure that the penalty deters potential violators, the initial penalty target figure assessed in the complaint must include two fundamental components:

- **Economic Benefit Component**, which removes any significant profit from noncompliance; and
- **Gravity-Based Component**, which imposes an assessment to penalize current and/or past noncompliance.

This chapter discusses the process for determining the economic benefit component. The gravity-based component is discussed inChapter 3.

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2.1 DEFINITION OF ECONOMIC BENEFIT COMPONENT

The economic benefit component represents the economic advantage that a violator has gained by delaying capital and/or non-depreciable costs and by avoiding operational and maintenance costs associated with compliance. (Footnote 7) The total economic benefit component is based on the benefit from two sources: (1) avoided costs; and (2) delayed costs. All penalties assessed must include the full economic benefit unless the benefit is determined to be "incidental" (*i.e.*, less than $100).

Economic Benefit Component = Avoided Costs + Delayed Costs

Avoided costs are the periodic, operation and maintenance expenditures that should have been incurred, but were not.

Delayed costs are the expenditures that have been deferred by the violation, but will be incurred to achieve compliance.

The Agency-wide penalty policy prescribes the use of two methods for calculating a violator's economic benefit from noncompliance:(Footnote 8) (1) the rule-of-thumb approach; and (2) the software program called BEN. (Footnote 9) The rule-of-thumb approach (described in the sections that follow) should be used for making an initial estimate of the economic benefit of noncompliance. If the initial estimate is less than $10,000, the rule-of-thumb calculation may be used as a basis for the economic benefit assessed in the penalty. If, however, the estimate indicates that the economic benefit is greater than $10,000, the BEN model should be used. The BEN model should also be used if the violator rejects the rule-of-thumb calculation.

The BEN model, which is accessible by computer from anywhere in the country, uses a financial analysis technique known as "discounting" to determine the net present value of economic gains from noncompliance. BEN determines the economic benefit for an individual violator based on 12 specific factors, or inputs, including the violator's initial capital investment, nondepreciable expenditures, and operation and maintenance costs. For some inputs, such as income tax rate, annual inflation rate, and discount rate, BEN will provide standard values if the user does not have actual figures. This use of standard values allows for

national consistency in determining economic benefit. Because the majority of UST violations will be associated with an economic benefit of less than $10,000, the rule-of-thumb approach will be used in most cases.

The procedures for calculating the economic benefit of noncompliance using the rule-of-thumb approach are described below. Because of the fundamental differences between avoided and delayed costs, the process for determining the economic benefit component will depend on the type of cost involved. The sections that follow describe methods for calculating each type of cost.

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2.2 AVOIDED COSTS

Avoided costs are the operation and maintenance expenditures that are averted by the violator's failure to comply. These are considered to be avoided because they will never be incurred even if the violator comes into compliance. For example, a violator who has failed to maintain product inventory records in the past never will have to make up for the costs saved, even if he is directed to start maintaining inventory records now. Other examples of avoided costs include: (1) failure to conduct a required periodic test; (2) failure to obtain financial assurance by the phase-in date; and (3) failure to conduct periodic maintenance of equipment. The violator's benefit from avoided costs is generally expressed as the avoided expenditures plus the interest potentially earned on the money not spent.

DETERMINING AVOIDED COSTS

$$\text{Avoided Costs} = \left\{\text{Avoided Expenditures} + \text{Avoided Expenditures} \times \text{Interest} \times \frac{\text{Number of Days}}{365 \text{ Days}}\right\} \times (1 - \text{Marginal Tax Rate})$$

Avoided Expenditures are estimated using local, comparable costs.
Interest is the equity discount rate provided in the BEN model (currently 18.1 percent).
Number of Days is from the date of noncompliance to the date of compliance.
365 Days is the number of days in a year.
Marginal Tax Rate is based on corporate tax rates or financial responsibility compliance class.

To determine the value of the interest, compounded annually, the equity discount rate should be used. This represents the risk-free rate (T-bill) plus the cost of financing for pollution control equipment. This rate can be obtained by calling the EPA Office of Enforcement or by accessing the BEN computer model. (Footnote 10) As of the beginning of FY91, the equity discount rate was 18.1 percent. When used in the formula, this number should be expressed as a decimal and not a percentage (*e.g.*, 0.181, instead of 18.1%).

The marginal tax rate (MTR) used in calculating the avoided costs will vary depending on the size of the business. Exhibit 3 provides a list of appropriate tax rates based on the facility or company's taxable income. As with the interest rate, this number should be expressed as a decimal, not a percentage (*e.g.*, 0.15 instead of 15%). To determine the taxable income, enforcement staff should contact EPA's National Enforcement Investigations Center (NEIC) to determine whether the business in violation is listed in the Dun and Bradstreet Business Information Report data base.(Footnote 11) The data base provides information on the annual incomes of a large number of companies across the country, including the smaller, "Mom and Pop" businesses. Although most of the incomes listed in the data base are those reported to Dun and Bradstreet, the data base also includes some estimated incomes for companies that have not reported.

If information on annual income cannot be obtained from NEIC, enforcement staff may use the company's financial responsibility compliance class as a basis for determining the appropriate marginal tax rate, as follows:

MARGINAL TAX RATES BASED ON FINANCIAL RESPONSIBILITY COMPLIANCE CLASS

Compliance Class[a]	Tax Rate

FR Classes 1 & 2	0.34 (34%)
FR Class 3	0.25 (25%)
FR Class 4	0.15 (15%)

[a]Compliance class is determined as follows: Class 1 - large petroleum marketing firms with 1,000 or more USTs or any firm with net worth over $20 million; Class 2 - large and medium-sized petroleum marketing firms with 100 to 999 USTs; Class 3 - small petroleum marketing firms with 13 to 99 USTs; and Class 4 - very small marketing firms with 1 to 12 USTs or less than 100 USTs at one site, all other firms with net worth of less than $20 million, and municipalities.

In the absence of specific information on the violator's FR compliance class, enforcement staff should assume that the violator is in FR Class 4 (which will result in the highest penalty).

Exhibit 3

Applicable Tax Rates for Determining Avoided Costs

MARGINAL TAX RATE BASED ON FEDERAL CORPORATE TAX RATES
(from 1989 U.S. Master Tax Guide):

	Taxable income over	Not over	Tax rate
$0	$50,000	15%	
$50,000	$75,000	25%	
$75,000	$100,000	34%	
	$100,000	$335,000	39%*
	$335,000	.....	34%

*An additional 5% tax is applied to income between $100,000 and $335,000 to phase out the benefits of the graduated rates in that income range.

The marginal tax rate is applied to each increment of income specified above (e.g., for an income of $75,000, 15% is applied to the first $50,000 and 25% to the next $25,000). The weighted average tax rates below have been calculated for each $10,000 increment in income to reflect the actual tax burden at each income level. These values will facilitate the determination of penalty amounts by eliminating the need to calculate the tax burden on each increment of marginal taxable income. To find the weighted tax rate, round the estimated taxable income to the nearest $10,000 and use the tax rate indicated in the table.

WEIGHTED AVERAGE TAX RATES BY INCOME LEVEL**

Taxable Income not greater than	Tax Rate	Taxable Income not greater than	Tax Rate
$50,000	0.15	$200,000	0.31
$60,000	0.17	$210,000	0.31
$70,000	0.18	$220,000	0.31
$80,000	0.19	$230,000	0.32
$90,000	0.21	$240,000	0.32
$100,000	0.22	$250,000	0.32
$110,000	0.24	$260,000	0.33
$120,000	0.25	$270,000	0.33
$130,000	0.26	$280,000	0.33
$140,000	0.27	$290,000	0.33
$150,000	0.28	$300,000	0.33
$160,000	0.29	$310,000	0.34

$170,000	0.29	$320,000	0.34
$180,000	0.30	$330,000	0.34
$190,000	0.30	$340,000	0.34

**This table includes the additional 5% tax applied to incomes between $100,000 and $335,000.

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2.3 DELAYED COSTS

Delayed costs are the capital expenditures and one-time non-depreciable costs that have been deferred because the violator failed to comply with the requirements. Examples of delayed costs include: (1) failure to install required equipment, such as cathodic protection; and (2) failure to clean up a spill. These expenditures are considered only to be delayed, and not avoided altogether, because the violator will eventually have to incur these costs to come into compliance. The benefit from delayed costs is generally expressed as only the return on investment that could have been earned on the money not spent.

DETERMINING DELAYED COSTS

$$\text{Delayed Costs} = \frac{\text{Delayed Expenditures} \times \text{Interest} \times \text{Number of Days}}{365 \text{ Days}}$$

Delayed Expenditures are estimated using local, comparable costs.
Interest is the equity discount rate provided in the BEN model (currently 18.1 percent).
Number of Days is from the date of noncompliance to the date of compliance.
365 Days is the number of days in a year.

For delayed costs there is no computation of the tax rate. Although there may be a modest tax consequence for the violator because of delayed costs, this effect was deemed to be insignificant. Furthermore, such a tax consequence only would be incurred if the violation were to span more than one of the violator's tax years.

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CHAPTER 3. DETERMINING THE GRAVITY-BASED COMPONENT

The second component of a penalty, and the one that serves to deter potential violators, is the gravity-based component. The purpose of the gravity-based component is to ensure that violators are economically disadvantaged relative to owner/operators of those facilities in compliance, and to penalize current and/or past noncompliance. The gravity-based component consists of four elements:

- Matrix Value (Section 3.1);
- Violator-Specific Adjustments to the Matrix Value (Section 3.2);
- Environmental Sensitivity Multiplier (Section 3.3); and
- Days of Noncompliance Multiplier (Section 3.4).

The gravity-based component is then added to the economic benefit component to arrive at the initial penalty target figure assessed in the complaint.

DETERMINING THE GRAVITY-BASED COMPONENT

$$\text{Gravity-Based Component} = \text{Matrix Value} \times \text{Violator-Specific Adjustments} \times \text{Environmental Sensitivity Multiplier} \times \text{Days of Noncompliance Multiplier}$$

Matrix Value is based on potential for harm and deviation from the requirement.

Violator-Specific Adjustments to the matrix value are based on violator's cooperation, willfulness, history of noncompliance, and other factors.

Environmental Sensitivity Multiplier (ESM) is a value based on the environmental sensitivity associated with the location of the facility.

Days of Noncompliance Multiplier (DNM) is a value based on the number of days of noncompliance.

If the complaint results in settlement negotiations, certain factors used to adjust the matrix value may be re-assessed during negotiations to determine whether a downward adjustment in the gravity-based component is appropriate. In general, it is the violator's responsibility to provide evidence in support of reducing the penalty assessment during the settlement stage (see Chapter 4).

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3.1 DETERMINING THE MATRIX VALUE

The first step in determining the gravity-based component is determining the initial matrix value. The matrix value is based on the following two criteria:

1. **Extent of deviation from requirement** - An assessment of the extent to which the violation deviates from the UST statutory or regulatory requirements.
2. **Actual or potential harm** - An assessment of the likelihood that the violation could (or did) result in harm to human health or the environment and/or has (or had) an adverse effect on the regulatory program.

A matrix has been developed in which these two criteria form the axes (Exhibit 4). Three gravity levels apply to each of these criteria -- major, moderate, and minor -- and form the grid of the matrix. Thus, the matrix has nine cells, each of which contains a penalty amount. The specific cell to be used in determining the matrix value is identified by selecting a gravity level for both factors. As a guide to determining the appropriate gravity level, Appendix A provides a list of selected violations of the Federal UST requirements and the associated deviation from the requirements and potential for harm.

NOTE: Exhibit 4 is a chart: "Matrix Values for Determining the Gravity-Based Component of a Penalty". This exhibit file contains a GIF image that is 30,511 bytes. View Exhibit 4.

Based on the type of violation (see Appendix A), penalties will be assessed on a per-tank basis if the specific requirement or violation is clearly associated with one tank (e.g., tank upgrading). If the requirement addresses the entire facility (e.g., recordkeeping practices), the penalty will be assessed on a per-facility basis. For requirements that address piping, the unit of assessment will depend on whether the piping is associated with one tank or with more than one tank. Appendix A indicates the suggested unit of assessment for specific violations.

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3.1.1 Extent of Deviation from Requirements

The first factor in determining the matrix value is the extent of deviation from the requirements. The categories for extent of deviation from the requirements are the following:

- **Major** - The violator deviates from the requirements of the regulation or statute to such an extent that there is substantial noncompliance. An example is installing a bare steel tank without cathodic protection.
- **Moderate** - The violator significantly deviates from the requirement of the regulation or statute, but to some extent has implemented the requirement as intended. An example is installing improperly constructed cathodic protection.
- **Minor** - The violator deviates slightly from the regulatory or statutory requirements, but most of the requirements are met. An example is failing to keep every maintenance record on properly constructed cathodic protection.

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3.1.2 Potential for Harm

The second criterion for determining the matrix value of a violation is the extent to which the owner/operator's actions resulted in, or were likely to result in, a situation that could cause harm to human health or the environment. When determining this factor, it is the **potential** in each situation that is important, not solely whether the harm has actually occurred. Violators should not be rewarded with lower penalties simply because no harm has occurred. The potential **extent** of this harm, if it were to occur, is addressed by the environmental sensitivity multiplier, discussed in Section 3.3 of this chapter.

The potential-for-harm factor will also be applied to violations of administrative requirements (e.g., recordkeeping and notification requirements) that are integral to the regulatory program. For violations of these requirements, enforcement personnel should consider the "importance" of the requirement violated. For example, failure to submit tank notification data may be considered to have significant potential for harm because the Agency has few other sources of information on the location of USTs. For purpose of this guidance, the categories for potential for harm are the following:

- **Major** - The violation causes or may cause a situation resulting in a substantial or continuing risk to human health and the environment and/or may have a substantial adverse effect on the regulatory program. Examples are: (1) improperly installing a fiberglass reinforced plastic tank (because a catastrophic release may result); or (2) failing to provide adequate release detection by the specified phase-in date (because without release detection a release may go unnoticed for a lengthy period of time with detrimental consequences).
- **Moderate** - The violation causes or may cause a situation resulting in a significant risk to human health and the environment and/or may have a significant adverse effect on the regulatory program. An example would be installing a tank that fails to meet tank corrosion protection standards (because it could result in a release, although the use of release detection is expected to minimize the potential for continuing harm from the release).
- **Minor** - The violation causes or may cause a situation resulting in a relatively low risk to human health and the environment and/or may have a minor adverse effect on the regulatory program. An example would be failing to provide certification of UST installation (assuming that the installation was done correctly).

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3.2 VIOLATOR-SPECIFIC ADJUSTMENTS

In general, adjustments to the matrix value may be made at both the pre-negotiation and settlement stages of penalty assessment to address the unique facts of each case and to resolve the case quickly. Prior to settlement negotiations, enforcement personnel have the discretion to use any relevant information to adjust the matrix value upwards or downwards. These adjustments are solely at the discretion of EPA enforcement personnel.

Specifically, to ensure that penalties are assessed in a fair and consistent manner, and take into account case-specific differences, enforcement personnel have the option of adjusting the matrix value based on any information known about the violator's: (1) degree of cooperation or noncooperation; (2) degree of willfulness or negligence; (3) history of noncompliance; and (4) other unique factors.

VIOLATOR-SPECIFIC ADJUSTMENTS TO THE MATRIX VALUE

Adjustment Factor	Range of Percentage Adjustment
Degree of Cooperation/Noncooperation	Between 50% increase and 25% decrease
Degree of Willfulness or Negligence	Between 50% increase and 25% decrease
History of Noncompliance	Up to 50% increase only
Other Unique Factors	Between 50% increase and 25% decrease

The sections that follow discuss these four adjustment factors. In addition, the matrix value should be adjusted to reflect the environmental sensitivity and the days of noncompliance, which are discussed in Section 3.3 and Section 3.4. Subsequent adjustments made during the settlement stage, including adjustments for inability to pay, are discussed in Chapter 4.

To ensure that the penalty maintains a deterrent effect, enforcement staff should consider adjustments toward increased penalties in all cases (*i.e.*, make upwards adjustments to the matrix value). It is up to the

violator to present information during settlement that mitigates use of such upward adjustments. However, to ensure that penalties are calculated fairly and consistently, any upwards adjustment may be made only if the circumstances of the case warrant such adjustments. Furthermore, for any adjustments made to the matrix value, justification must be provided on the penalty assessment worksheet (see Appendix B).

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3.2.1 Degree of Cooperation/Noncooperation

The first factor that may be considered in adjusting the matrix value is the violator's cooperation or good faith efforts in response to enforcement actions. In adjusting for the violator's degree of cooperation or noncooperation, enforcement staff may consider making upward adjustments by as much as 50 percent and downward adjustments by as much as 25 percent of the matrix value.

In order to have the matrix value reduced, the owner/operator must demonstrate cooperative behavior by going beyond what is minimally required to comply with requirements that are closely related to the initial harm addressed. For example, an owner/operator may indicate a willingness to establish an environmental auditing program to check compliance at other UST facilities, if appropriate, or may demonstrate efforts to accelerate compliance with other UST regulations for which the phase-in deadline has not yet passed. (Footnote 12) Because compliance with the regulation is expected from the regulated community, **no downward adjustment** may be made if the good faith efforts to comply primarily consist of coming into compliance. That is, there should be no "reward" for doing now what should have been done in the first place. On the other hand, lack of cooperation with enforcement officials can result in an increase of up to 50 percent of the matrix value.

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3.2.2 Degree of Willfulness or Negligence

The second adjustment that may be made to the matrix value is for willfulness or negligence, which takes into account the owner/operator's culpability and intentions in committing the violation. In assessing the degree of willfulness or negligence, the following factors may be considered:

- How much control the violator had over events constituting the violation (*e.g.*, whether the violation could have been prevented or was beyond the owner/operator's control, as in the case of a natural disaster);
- The foreseeability of the events constituting the violation;
- Whether the violator made any good faith efforts to comply and/or took reasonable precautions against the events constituting the violation; and
- Whether the violator knew or should have known of the hazards associated with the conduct; and
- Whether the violator knew of the legal requirement that was violated (resulting in an upward adjustment only).(Footnote 13)

In certain circumstances, the amount of control that the violator has over how quickly the violation is remedied also can be relevant. Specifically, if correction of a violation is delayed by factors that the violator clearly can show were not reasonably foreseeable and out of his or her control, the penalty assigned for the **duration** of noncompliance may be reduced (see Section 3.4), although the original penalty for noncompliance should not be. In assessing the degree of willfulness, enforcement staff may consider making upward adjustments by as much as 50 percent and downward adjustments by as much as 25 percent of the matrix value.

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3.2.3 History of Noncompliance

The third factor to be considered in adjusting the matrix value is the violator's history of noncompliance. Previous violations of any environmental regulation are usually considered clear evidence that the violator was not deterred by previous interaction with enforcement staff and enforcement actions. Unless the current violation was caused by factors entirely out of the control of the violator, prior violations should be taken as an indication that the matrix value should be adjusted upwards. When assessing the history of noncompliance, some of the factors that may be considered are:

- Number of previous violations;
- Seriousness of the previous violations;
- Time period over which previous violations occurred;
- Similarity of the previous violations;

- Enforcement tools utilized (*e.g.*, whether the owner/operator's previous behavior required use of more stringent enforcement actions); and
- Violator's response to the previous violation(s) with respect to correction of the problem.

For purposes of this document, a "prior violation" includes any act or omission for which an accountable enforcement action has occurred (e.g., an inspection that found a violation, a notice of violation, an administrative or judicial complaint, or a consent order). A prior violation of the same or a related requirement would constitute a similar violation.

In cases of large corporations that have many divisions and/or subsidiaries, if the same corporation is involved in the current violation the adjustments for history of noncompliance will apply. In addition, enforcement staff should be wary of a company that changes operators or shifts responsibility for compliance to different persons or organizational units as a way of avoiding increased penalties. A consistent pattern of noncompliance by several divisions or subsidiaries of a corporation may be found, even though the facilities are at different locations. Again, in these situations, enforcement staff may make only upward adjustments to the matrix value by as much as 50 percent.

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3.2.4 Other Unique Factors

This guidance allows an adjustment for unanticipated factors that may arise on a case-by-case basis. As with the previous factors, enforcement staff may want to make upward adjustments to the matrix value by as much as 50 percent and downward adjustments by as much as 25 percent for such reasons.

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3.3 ENVIRONMENTAL SENSITIVITY MULTIPLIER (ESM)

In addition to the violator-specific adjustments discussed above, enforcement personnel may make a further adjustment to the matrix value based on potential site-specific impacts that could be caused by the violation. The environmental sensitivity multiplier takes into account the adverse environmental effects that the violation may have had, given the sensitivity of the local area to damage posed by a potential or actual release. This factor differs from the potential-for-harm factor (discussed in Section 3.1.2) which takes into account the**probability** that a release or other harmful action**would occur** because of the violation. The environmental sensitivity multiplier addressed here looks at the**actual or potential impact** that such a release, once it **did occur**, would have on the local environment and public health.

To calculate the environmental sensitivity multiplier, enforcement personnel must first determine the sensitivity of the environment. For purposes of this document, the environmental sensitivity will be either low, moderate, or high. Factors to consider in determining the appropriate sensitivity level include:

- Amount of petroleum or hazardous substance potentially or actually released (*e.g.*, size of the tanks and number of tanks at the facility that were involved in the violation, as they relate to the potential volume of materials released);
- Toxicity of petroleum or hazardous substance released;
- Potential hazards presented by the release or potential release, such as explosions or other human health hazards;
- Geologic features of the site that may affect the extent of the release and may make remediation difficult;
- Actual or potential human or environmental receptors, including:

  - Likelihood that release may contaminate a nearby river or stream;

  - Number of drinking water wells potentially affected;

  - Proximity to environmentally sensitive areas, such as wetlands; and

  - Proximity to sensitive populations, such as children (e.g., in schools).

- Ecological or aesthetic value to environmentally sensitive areas.

Thus, a "low" sensitivity value may be given in a case where one tank containing petroleum is located in clay soil in a semi-residential area where all drinking water is supplied by municipal systems, and where little wildlife is expected to be affected. A moderate sensitivity value may be given if: several tanks were in violation; the geology of the site would allow for some movement of a plume of released substance; and

several drinking water wells could have been affected. A high sensitivity value may be given if: a number of tanks (or very large tanks) were involved; there were several potential receptors of the released substance through drinking water wells or contact with contaminated surface water; and the contamination would be difficult to remediate. Each level of sensitivity is given a corresponding multiplier value, as provided below.

DETERMINING THE ENVIRONMENTAL SENSITIVITY MULTIPLIER

Environmental Sensitivity Multiplier (**ESM**) is based on the potential or actual environmental impact at a site, and is given a corresponding value as follows:

Environmental Sensitivity	ESM
Low	1.0
Moderate	1.5
High	2.0

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3.4 DAYS OF NONCOMPLIANCE MULTIPLIER

The final adjustment that may be made to the matrix value takes into account the number of days of noncompliance. To determine the amount of the adjustment, locate the days of noncompliance multiplier (or DNM) in the table below that corresponds to the duration of the violation:

DETERMINING THE DAYS OF NONCOMPLIANCE MULTIPLIER

Days of Noncompliance Multiplier (**DNM**) is based on the number of days of noncompliance.

Days of Noncompliance	DNM
0-90	1.0
91-180	1.5
181-270	2.0
271-365	2.5
Each additional 6 months or fraction thereof	add 0.5

The DNM is then multiplied by the adjusted matrix value and environmental sensitivity multiplier to obtain the gravity-based component of the penalty, as follows:

DETERMINING THE GRAVITY-BASED COMPONENT

Gravity-Based Component	=	Matrix Value	x	Violator-Specific Adjustments	x	Environmental Sensitivity Multiplier	x	Days of Noncompliance Multiplier

The economic benefit component is added to the gravity-based component to form the initial penalty target figure to be assessed in the complaint. As discussed previously, this figure cannot exceed $10,000 for each tank for each day of violation.

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CHAPTER 4. SETTLEMENT ADJUSTMENTS

After the initial penalty target figure has been presented to the potential violator in a complaint, additional adjustments**may be made** as part of a settlement compromise. All such adjustments are entirely within the

discretion of Agency personnel. The burden is always on the owner/operator to provide evidence supporting any reduction of the penalty.

In response to a complaint, the owner/operator may request an informal conference and/or a hearing to settle the penalty and violation. The Federal Consolidated Rules of Practice (CROP) procedures for administrative actions at 40 CFR Part 22 provide for a settlement conference and a right to a public hearing, giving the owner/operator the opportunity to present data to support a penalty adjustment. At a minimum, enforcement personnel may consider adjustments based on the four violator-specific adjustment factors discussed in Chapter 3, including:

- Degree of cooperation/noncooperation;
- Degree of willfulness or negligence;
- History of noncompliance; and
- Other unique factors.

The settlement adjustment is usually **not** made to the economic benefit component unless new and better information about the economic benefits is made available. The Agency should maintain a record that includes a statement of the reasons for adjusting the penalty.

In addition to the adjustment factors listed above, and because of the nature of the UST regulated community, one factor that commonly will be discussed during negotiations is the owner/operator's inability to pay. An adjustment may need to be made for inability to pay to ensure fair and equitable treatment of the regulated community. It is important, however, that this reduction not allow the regulated community to regard violations of environmental requirements as a way to save money. Furthermore, a penalty should not be reduced when a violator refuses to correct a violation, has a history of noncompliance, or in cases with egregious violations (*e.g.*, failure to abate a release that is contaminating drinking-water supplies).

The Agency should assume that the owner/operator is able to pay unless the owner/operator demonstrates otherwise. The inability to pay adjustment should be based on the amount of the initial penalty target figure and the financial condition of the business, but it is the owner/operator's responsibility to provide evidence of inability to pay. The owner/operator may provide evidence, such as tax returns, to document his or her claims. In cases when the owner/operator fails to demonstrate inability to pay, the Agency should determine whether the owner/operator is **unwilling** to pay, in which case no adjustments to the initial penalty target figure should be made. In cases where the owner/operator can successfully demonstrate: (1) that the company is unable to pay; or (2) that payment of all or a portion of the penalty will preclude the violator from achieving compliance, the following options may be considered:

- An installment payment plan with interest;
- A delayed payment schedule with interest;
- An in-kind mitigation activity performed by the owner/operator;
- An environmental auditing program implemented by the owner/operator; or
- Reduction of up to 80 percent of the gravity-based component.

A reduction of the gravity-based component should be considered**only** after determining that the other four options are not feasible.(Footnote 14)

In order to evaluate a violator's claim regarding inability to pay, two sources of information are available to determine the likelihood that a company can afford to pay a certain civil penalty:

National Enforcement Investigation Center (NEIC). The NEIC of EPA's Office of Enforcement has developed the Superfund Financial Assessment System that can determine a company's ability to pay. For publicly owned companies, specific financial data is available from NEIC. If investigating a private company, enforcement staff can report financial data to NEIC and it will be keyed into NEIC's computerized economic computer model for analysis.(Footnote 15)

ABEL. EPA's Office of Enforcement developed the "ABEL" model as part of an ongoing effort to evaluate the financial health of firms involved in enforcement proceedings. The ABEL model has been used by EPA, Regions, and States to evaluate a firm's claim regarding inability to pay based on 21 inputs gathered from the company's Federal income tax returns from the previous 3 years. Enforcement staff may access ABEL by computer dial-up on a personal computer with a modem and an ABEL user ID number. (Footnote 16) In addition, OUST has developed a PC-based model called ABELPRO which is a simplified version of ABEL that is run on a PC using a LOTUS spreadsheet or Macintosh Excel.(Footnote 17)

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CHAPTER 5. USE OF FIELD CITATIONS

[Reserved]

The Office of Underground Storage Tanks (OUST) has been exploring the use of field citations as an alternative means of assessing civil penalties and obtaining compliance with UST requirements. Once the manner in which field citations will be used in the Federal UST program has been determined, this policy will be revised to reflect how field citations fit into the UST penalty policy.

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FOOTNOTES

Footnote #1: These are contained in two separate rules: the UST Technical Standards Rule, 40 CFR Part 280, Subparts A through G (promulgated September 23, 1988) and the UST Financial Responsibility Rule, 40 CFR Part 280, Subpart H (promulgated October 26, 1988). Back to Text

Footnote #2: 40 CFR Part 22, "The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits." The CROP was extended to cover administrative enforcement actions under Section 9006 (see 53 FR 5373, February 24, 1988). Back to Text

Footnote #3: This $10,000 limit also applies to violations of the Interim Prohibition provisions and any requirement of an approved State program. For violations of the May 1985 (statutory) notification requirements, the penalty may not exceed $10,000 for each tank. Back to Text

Footnote #4: This guidance is in no way intended to limit the penalty amounts sought in civil judicial actions. In settling judicial cases, however, the Agency may use the narrative penalty assessment criteria set forth in this guidance to determine or justify the penalty amount that the Agency agrees to accept in settlement. Back to Text

Footnote #5: The "EPA Policy on Civil Penalties" (EPA General Enforcement Policy #GM-21, February 1984) and the "Framework for Statute-Specific Approaches to Penalty Assessment" (EPA General Enforcement Policy #GM-22, February 1984) establish a consistent Agency-wide approach to the assessment of civil penalties. Back to Text

Footnote #6: However, it should be remembered that the sum of the gravity-based component plus the economic benefit component cannot be greater than the statutory maximum of $10,000 for each tank for each day of violation of the technical standards and financial responsibility regulations. Back to Text

Footnote #7: This policy does not outline a methodology for the recovery, as a measure of economic benefit, of profits proximately attributable to illegal or non-compliant activities. Because the Federal UST regulations do not include a permitting process, the Agency is not presently aware of situations where such profits would be realized, or where we would expect to seek recovery of such profits as a measure of economic benefit in the Federal UST program. Should EPA determine that the recovery of such profits is appropriate in a particular case, the Agency will calculate such profits in a manner consistent with the RCRA Civil Penalty Policy (October 1990). Back to Text

Footnote #8: Revised guidelines for calculating the economic benefit from noncompliance are incorporated into a memorandum from Courtney Price (Assistant Administrator for Enforcement and Compliance Monitoring) entitled, "Guidance for Calculating the Economic Benefit of Noncompliance for a Civil Penalty Assessment" (November 5, 1984). Back to Text

Footnote #9: For information, contact the BEN/ABEL Coordinator in the Office of Enforcement at the U.S. EPA Headquarters by phoning (202) 475-6777 or FTS 475-6777. Back to Text

Footnote #10: To obtain the equity discount rate from the Office of Enforcement, or to access BEN, call the BEN/ABEL coordinator at (202) 475-6777 or FTS 475-6777. Back to Text

Footnote #11: For information from the Dun and Bradstreet data base call NEIC at (303) 236-3219 or FTS 8 -776-3219. Using information on the violator's name and location (city and State), NEIC staff can search the data base for information on the company's annual income. Back to Text

Footnote #12: For information on establishing environmental auditing programs, see "EPA Policy on the Inclusion of Environmental Auditing Provisions in Enforcement Settlements," U.S. EPA, Office of Enforcement and Compliance Monitoring, November 1986. Back to Text

Footnote #13: Lack of knowledge of the legal requirements may not be used as a basis to reduce the matrix value. Rather, informed violation of the law should serve to increase the matrix value. Back to Text

Footnote #14: The Agency is currently developing cross-media guidance on environmental mitigation projects which, when final, will supersede the "Alternative Payments" section of the Agency's February 16, 1984 penalty policy (#GM-22). Until the revised Agency guidance is finalized, the Agency's 1984 penalty policy should be consulted for additional guidance. Back to Text

Footnote #15: For further information, contact the NEIC at (303) 236-5100 or FTS 8-776-5100. Back to Text

Footnote #16: To obtain the ABEL User's Manual and user ID numbers for computer hookup, contact the BEN/ABEL Coordinator at the U.S. EPA Headquarters, by phoning (202) 475-6777 or FTS 475-6777. Back to Text

Footnote #17: For information, contact the appropriate Regional Desk Officer at U.S. EPA Headquarters' Office of Underground Storage Tanks. Back to Text

APPENDICES

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APPENDIX A

Matrix Values for Selected Violations of Federal Underground Storage Tank Regulations

- Subpart B--UST Sstems: Design, Construction, Installation, and Notification
- Subpart C--General Operating Requirements
- Subpart D--Release Detection
- Subpart E--Release Reporting, Investigation, and Confirmation
- Subpart F--Release Response and Corrective Action
- Subpart G--Out-of-Service UST Systems and Closure
- Subpart H--Financial Responsibility

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APPENDIX B

UST Penalty Computation Worksheet

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APPENDIX C

UST Penalty Computation Examples (PDF) (33 pp, 1.3MB, About PDF)

Exhibit 3

PENALTY CALCULATION WORKS .T DATE: 08-Sep-14

RESPONDENT: TAT FACILITY NAME: SD DOT McIn
ADDRESS: Indian Country UST NAME/NO.:
CITY, STATE: Region 8

COUNT ID: 1 Unit Assessment: By Tank 1 tank

VIOLATION: 280.41(a) Failure to monitor the tank at least 30 days

1. ECONOMIC BENEFIT COMPONENT

Avoided Expense:	$300
Delayed Expense:	$0
Interest Rate:	0.048
Marginal Tax Rate:	0.15
Days of Violation:	183
Net Avoided Costs:	$306
Net Delayed Costs:	$0
Total Economic Benefit:	$306

2. GRAVITY BASED COMPONENT

Potential for Harm:	Major
Extent of Deviation:	Major
Matrix Value:	$2,130
Cooperation (-25%/+50%):	0.00
Willfulness (-25%/+50%):	0.00
History (+50%):	0.25
Unique Factors (-25%/+50%):	0.00
Adjusted Matrix Value:	$2,663
DNM:	2
ESM:	1.5
Total Gravity Based Component:	$7,988

0

UNADJUSTED PENALTY:	$8,294
ABILITY TO PAY REDUCTION:	$0
TOTAL PROPOSED PENALTY:	$8,294

EXPLANATIONS:
Violation Start Date: 05/01/13 Violation End Date: 10/31/13
Avoided Costs: 6 months x $50 per tank for SIR = 300

Delayed Costs: None

ESM: 1.5, because facility is in Indian Country DNM: 183 Days

Cooperat'n: No change

Wilfulness: No change

History: .25 previous violations

Unique: No change

Ability to Pay: No evidence of inability to pay has been demonstrated.