



believe that, as a matter of law, an oral evidentiary hearing is not necessary, Complainant supplements her Pre-Hearing Exchange in the event that the Motion is denied and a hearing, in whole or in part, is conducted.

**(I) LIST OF WITNESSES AND LIST OF EXHIBITS**

- (a) Complainant may call as a witness Katya Smirnova and/or Gail Code to testify with regard to Respondent's "ability to pay" the penalty amount proposed. As there is currently pending Complainant's Second Motion for Production of Documents, filed September 17, 2009, based upon Complainant's need to review certain records of Respondent to allow for a sound financial analysis of Respondent's circumstances, Complainant cannot at this time provide a brief summary of the testimony of these witnesses, nor a copy of their written report.
- (b) Complainant may call as an adverse witness Respondent, Kathryn Lewis-Campbell, who will testify to selling Donald Freeman, Jr., the residential house identified in Attachment A of Complainant's Pre-Hearing Exchange, and that she did not provide Mr. Freeman with any lead-based paint warnings or information.
- (c) Complainant may introduce into evidence at hearing documents contained in Attachments A through J, attached to the Motion for Accelerated Decision on Liability and Penalty.
- (d) Complainant may introduce into evidence a copy of Respondent's TSCA Subpoena response, and envelope. Attachment J of this Supplemental Pre-Hearing Exchange.
- (e) Complainant may introduce into evidence a certified copy of the City of Springfield Code Enforcement Division file on the property located at 137 East Southern Avenue, Springfield, Ohio, Attachment K of this Supplemental Pre-Hearing Exchange.

**(II) PENALTY PRESENTATION**

Pursuant to an order of the Presiding Officer, dated April 17, 2009, Complainant included in her Pre-Hearing Exchange a 25-page Penalty Rationale, providing in detail an analysis of the known evidence in this matter in consideration of the TSCA penalty criteria, as interpreted in the Administrator's relevant penalty policy, to support the penalty amount proposed. With her

Motion for Accelerated Decision on Liability and Penalty, Complainant provided a 27-page Memorandum in Support of the Penalty Amount Proposed, again, analyzing the facts in the record in consideration of the TSCA penalty criteria, as interpreted in the Administrator's relevant penalty policy, to support the penalty amount proposed. At hearing, at the conclusion of the presentation of any evidence, Complainant anticipates making the same analysis to support the penalty amount proposed in its post-hearing brief.<sup>1</sup> Moreover, at the conclusion of the hearing, counsel for Complainant, assisted by Scott Cooper of Complainant's staff, will be available to answer any questions the Presiding Officer may have regarding Complainant's analysis supporting the penalty amount it will be proposing.

Complainant does not intend to call a witness to testify in support of the proposed penalty in that the testimony of such a witness is not required by the APA, the Administrator's Rules, or any other law or regulation. Federal reviewing courts have recognized that the determination of an appropriate amount of civil penalty for violations of a federal environmental statute is not

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<sup>1</sup>At this time, Complainant's penalty argument is based upon what it expects the evidence of record to be at the conclusion of the hearing. The expected evidence is identified in the Motion for Accelerated Decision on Liability and Penalty, and the accompanying Memorandum in Support of the Penalty Amount Proposed. To the extent that the actual evidence presented at hearing deviates from that expectation, the argument will have to be adjusted, as any penalty amount proposed at the conclusion of the hearing must be based upon "a consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative and substantial evidence." See 556(d) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 556(d).

“factual finding,” but rather an exercise of discretion by the agency.<sup>2</sup> And, under the APA, “the agency” here is the Administrator.<sup>3</sup> Moreover, a final decision of the Administrator assessing a

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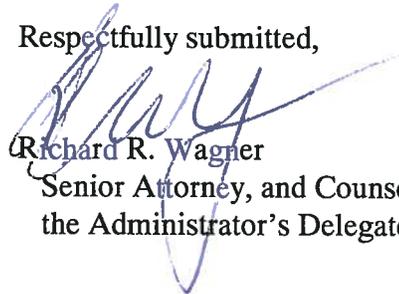
<sup>2</sup>“The assessment of a penalty is particularly delegated to the administrative agency. Its choice of a sanction is not to be overturned unless ‘it is unwarranted in law’ or ‘without justification in fact.’ [Citations omitted.] The assessment [of a penalty] is not a factual finding but the exercise of a discretionary grant of power.” Panhandle Co-op Ass’n v. U.S. EPA, 771 F.2d 1149, at 1152 (8th Cir. 1985). Citing prior U.S. Supreme Court decisions, the Tenth Circuit has held that “once the agency determines that a violation has been committed, the sanctions to be imposed are a matter of agency policy and discretion.” Robinson v. United States, 718 F.2d 336, at 339 (10th Cir. 1983). In a published decision issued by her Chief Judicial Officer, the Administrator has recognized the distinction between facts upon which a penalty amount determination is based and the actual calculation of the penalty amount. In re Chautauqua Hardware Corp., 3 E.A.D. 616, 622-23 (CJO 1991). While the “quantity” of a particular chemical may be a “factual issue” bearing on the appropriateness of a penalty, as may be the “ability of the company to continue in business,” whether the policy “should impose a separate penalty for each chemical not reported by a given facility during a given year[,]” or whether the Agency “has chosen an appropriate penalty dollar figure for each box in the penalty matrix of its Penalty Policy” is a “legal or policy issue.” Id. at 623. Moreover, in agency decisionmaking, witness “credibility and demeanor” are “irrelevant to an assessment of the seriousness of petitioner’s violations and of the sanction most appropriate for the promotion of agency policy regarding them.” River Forest Pharmacy, Inc. v. Drug Enforcement Administration, 501 F.2d 1202 (7th Cir. 1974).

<sup>3</sup>“Agency” is defined under the APA as “each authority of the Government of the United States[.]” Section 551(1) of the APA, 5 U.S.C. § 551(1). Legislative history reveals that “[a]uthority’ means any officer or board, whether within another agency or not, which by law has authority to take final and binding action with or without appeal to some superior administrative authority.” Tom C. Clark, Attorney General, U.S. Department of Justice, Attorney General’s Manual on the Administrative Procedure Act, 9 (1947). The Attorney General’s Manual is “the Government’s own most authoritative interpretation of the APA” and one which the U.S. Supreme Court “[has] repeatedly given great weight[,]” [citations omitted], as it “was prepared by the same Office of the Assistant Solicitor General that had advised Congress in the latter stages of enacting the APA, and was originally issued ‘as a guide to the agencies in adjusting their procedures to the requirements of the Act.’ AG’s Manual 6.” Bowen v. Georgetown Univ. Hospitals, 488 U.S. 204, at 218 (1988) (Scalia, J., concurring). See also Pacific Gas & Elec. Co. v. Fed. Power Comm’n, 506 F.2d 33, 38 n.17 (D.C. Cir. 1974) (“The Attorney General’s Manual [on the Administrative Procedure Act] is entitled to considerable weight because of the very active role that the Attorney General played in the formulation and enactment of the APA.”). As it is “the Administrator” that exclusively is authorized by Congress to assess civil penalties for violations of the federal environmental statutes, including the Toxic

penalty of \$1.345 million without any penalty witness testifying in support of the penalty amount was upheld on judicial review. Newell Recycling Company, Inc., v. U.S. EPA, 232 F.2d 204, 207-208 (5th Cir. 2000) (rejecting Newell's "due process" claim that before a penalty could be assessed "an evidentiary hearing was 'required' in [the] matter, and that the absence of one violated Newell's right to due process of law.").<sup>4</sup>

However, should the Presiding Officer direct Complainant to present a witness to testify in support of the penalty amount proposed, Complainant will make her objection for the record and proceed to present a witness to provide that testimony.

Respectfully submitted,



Richard R. Wagner  
Senior Attorney, and Counsel for  
the Administrator's Delegated Complainant

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Substance Control Act, "the Administrator" is the "authority of the Government of the United States," and, therefore, "the agency" as identified in the APA. In other statutes a "Board" or "Commission" or "Secretary" might be the "agency."

<sup>4</sup>In addition, the Administrator has assessed the penalty amounts in the following cases without a witness being called to "testify" as to how the penalty amount proposed was calculated: In Re Green Thumb Nursery, 6 E.A.D. 782 (1997) (\$3,000 assessed, \$4,000 proposed). In Re Spitzer Great Lakes Ltd, Inc., 9 E.A.D. 302 (2000) (\$165,000 assessed, same as proposed). In Re Roger Antkiewicz, 8 E.A.D. 218 (1998) (\$3,500 assessed for each of two violations proven, same as proposed). In Re Federal Cartridge Company, RCRA-05-2002-003 (2004) (\$225,000 assessed, \$265,000 proposed).

In Re Kathryn Y. Lewis-Campbell  
No. TSCA-05-2009-0004

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**CERTIFICATE OF SERVICE**

I hereby certify that today I filed the original of the **Supplemental Pre-Hearing Exchange of the Administrator's Delegated Complainant, with attachments identified therein, and Appearance of Co-Counsel** in the office of the Regional Hearing Clerk (R-19J), United States Environmental Protection Agency, Region 5, 77 W. Jackson Boulevard, Chicago, IL 60604, with this Certificate of Service.

I further certify that I then caused true and correct copies of the filed documents to be mailed to the following:

Honorable William B. Moran  
Office of the Administrative Law Judges  
U.S. Environmental Protection Agency  
Ariel Rios Building, Mailcode: 1900L  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

I further certify that I then caused true and correct copies of the filed document to be sent to the following, by mail:

Cassandra Collier-Williams, Esq.  
P.O. Box 94062  
Cleveland, Ohio 44101

September 28, 2009



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