UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL PROTECTION AGENCY-REG. II
2012 SEP 26 P 3:35
REGIONAL HEARING CLERK

In the Matter of:	)	Docket No. CAA-02-2012-1213
Puerto Rico Aqueduct and Sewer Authority	)	Administrative Complaint under Section 113 of the Clean Air Act, 42 U.S.C. §7413
Respondent.	)	

ADMINISTRATIVE COMPLAINT

I. JURISDICTION

1. This Complaint ("Complaint") initiates an administrative action for the assessment of a civil penalty pursuant to Section 113(d) of the Clean Air Act ("the Act"), 42 U.S.C. § 7413(d). The Complainant in this action is the Director of the Emergency and Remedial Response Division of the United States Environmental Protection Agency ("EPA"), Region 2, who has been delegated the authority to institute this action.

2. EPA and the U.S. Department of Justice have determined, pursuant to Section 113(d)(1) of the Act, 42 U.S.C. § 7413(d)(1), that EPA may pursue this matter through administrative enforcement action.

II. APPLICABLE STATUTES AND REGULATIONS

3. Section 113(d) of the Act, 42 U.S.C. § 7413(d), provides for the assessment of penalties for violations of Section 112(r) of the Act, 42 U.S.C. § 7412(r).

4. Section 112(r)(7) of the Act, 42 U.S.C. § 7412(r)(7), authorizes the Administrator to promulgate release prevention, detection, and correction requirements regarding regulated substances in order to prevent accidental releases of regulated substances. EPA promulgated regulations at 40 C.F.R. Part 68 in order to implement Section 112(r)(7) of the Act. For stationary sources subject to these regulations, these regulations set forth the requirements of risk management programs that must be established and implemented. The regulations at 40 C.F.R. Part 68, Subparts A through G, require such owners and operators of stationary sources to, among other things, develop and implement: (1) a management system to oversee the implementation of the risk management program elements; and (2) a risk management program that includes, but is not limited to, a hazard assessment, a prevention program, and an emergency response program. Pursuant to 40 C.F.R. Part 68, Subparts A and G, the risk management

program for a stationary source that is subject to these requirements is to be described in a risk management plan ("RMP") that must be submitted to EPA.

5. Sections 112(r)(3) and (5) of the Act, 42 U.S.C. §§ 7412(r)(3) and (5), require the Administrator to promulgate a list of regulated substances with threshold quantities. EPA promulgated a regulation known as the List Rule, at 40 C.F.R. Part 68, Subpart F, which lists the regulated substances, including propane and butane, and their threshold quantities.

6. Pursuant to Section 112(r)(7) of the Act, 42 U.S.C. §7412(r)(7), and 40 C.F.R. §§ 68.10(a), 68.12, and 68.150, an owner or operator of a stationary source that has more than a threshold quantity of a regulated substance in a process shall comply with the requirements of 40 C.F.R. Part 68 (including, but not limited to, submission of an RMP to EPA), no later than June 21, 1999, or three years after the date on which such regulated substance is first listed under 40 C.F.R. § 68.130, or the date on which the regulated substance is first present in a process at such a stationary source above the threshold quantity, whichever is latest.

7. The regulations at 40 C.F.R. Part 68 separate the covered processes into three categories, designated as Program 1, Program 2, and Program 3. A covered process is subject to Program 3 requirements, as per 40 C.F.R. § 68.10(d), if the process (a) does not meet one or more of the Program 1 eligibility requirements set forth in 40 C.F.R. § 68.10(b), and (b) is listed in one of the specific North American Industry Classification System codes found at 40 C.F.R. § 68.10(d)(1) or is subject to the United States Occupational Safety and Health Administration ("OSHA") process safety management ("PSM") standard set forth in 29 C.F.R. § 1910.119.

8. The regulations at 40 C.F.R. § 68.12(d) require that the owner or operator of a stationary source with a Program 3 process undertake certain tasks, including, but not limited to, development and implementation of a management system (as provided in 40 C.F.R. § 68.15), the implementation of prevention program requirements (as provided in 40 C.F.R. §§ 68.65-68.87), the development and implementation of an emergency response program (pursuant to 40 C.F.R. §§ 68.90-68.95), and the submission of, as part of the RMP, data on prevention program elements for Program 3 processes (as provided in 40 C.F.R. § 68.175).

III. DEFINITIONS

9. 40 C.F.R. § 68.3 defines "stationary source," in relevant part, as "any buildings, structures, equipment, installations, or substance emitting stationary activities which belong to the same industrial group, which are located on one or more contiguous properties, which are under the control of the same person (or persons under common control), and from which an accidental release may occur."

10. 40 C.F.R. § 68.3 defines "threshold quantity" as the quantity specified for regulated substances pursuant to Section 112(r)(5) of the Act, as amended, listed in 40 C.F.R. § 68.130, and determined to be present at a stationary source as specified in 40 C.F.R. § 68.115.

11. 40 C.F.R. § 68.3 defines "regulated substance" as any substance listed pursuant to Section 112(r)(3) of the Act and set forth in 40 C.F.R. § 68.130.

12. 40 C.F.R. § 68.3 defines "process," in relevant part, as any activity involving a regulated substance including any use, storage, manufacturing, handling, or on-site movement of such substances, or combination of these activities.

13. 40 C.F.R. § 68.3 defines "covered process" as a process that has a regulated substance present in more than a threshold quantity as determined pursuant to 40 C.F.R. § 68.115.

IV. FINDINGS OF VIOLATIONS

14. Puerto Rico Aqueduct and Sewer Authority ("Respondent") is, and at all times referred to herein was, a "person" within the meaning of Section 302(e) of the Act, 42 U.S.C. § 7602(e).

15. Chlorine is a regulated substance pursuant to Section 112(r)(2) and (3) of the Act and 40 C.F.R. § 68.3.

16. The threshold quantity for chlorine, as listed in 40 C.F.R. § 68.130, Tables 1 and 2, are 2,500 pounds.

Facility 1–Ponce Regional Wastewater Treatment Plant

17. Respondent is and, at all times relevant to this Complaint, was the owner and/or operator of the Ponce Regional Wastewater Treatment Plant located at PR Road #2, Km 259.3, Ponce, Puerto Rico ("Ponce Facility").

18. Respondent uses and has used chlorine at the Ponce Facility in amounts exceeding the threshold quantity.

19. On or about December 18, 2007, Respondent submitted to EPA an updated RMP for the Ponce Facility that identified the chlorine process at the Facility as a Program 3 process. Respondent submitted an updated RMP on September 21, 2011 after the inspection.

20. EPA conducted an inspection at the Ponce Facility on or about December 8, 2010 to assess compliance with Section 112(r) of the Clean Air Act and the applicable regulations, including those listed in 40 C.F.R. Part 68.

21. According to information obtained by EPA during the December 8, 2010 inspection, the RMP-covered chlorine process at the Ponce Facility is subject to Program 3 requirements pursuant to 40 C.F.R. § 68.10(d) because it does not meet the requirements for Program 1 processes set forth in 40 C.F.R. § 68.10(b) and because it is subject to the OSHA PSM standard set forth in 29 C.F.R. § 1910.119.

22. According to information obtained by EPA during the December 8, 2010 inspection, Respondent had not performed a five-year review and had not updated its offsite consequence analyses since 2004. Respondent failed to review and update its offsite consequence analyses at least once every five years, as required by 40 C.F.R. § 68.36(a).

23. According to information obtained by EPA during the December 8, 2010 inspection, documentation pertaining to potentially impacted population estimates within the Worst Case and Alternate Case distance-to-endpoints was not available. Respondent failed to maintain documentation pertaining to the data used to estimate population and environmental receptors potentially affected, as required by 40 C.F.R. § 68.39(e).

24. According to information obtained by EPA during the December 8, 2010 inspection, the piping and instrument diagram ("P&ID") was deficient in that it did not include sufficient detail. Respondent failed to develop the required P&ID pursuant to the requirements of 40 C.F.R. § 68.65(d)(1)(ii).

25. According to information obtained by EPA during the December 8, 2010 inspection, Respondent failed to develop process safety information ("PSI") including a description of the design of the ventilation system in the chlorine room and scale area, as required by 40 C.F.R. § 68.65(d)(1)(v).

26. According to information obtained by EPA during the December 8, 2010 inspection, the process hazard analysis ("PHA") did not address facility siting. Respondent failed to ensure that the completed PHA addressed stationary source siting, as required by 40 C.F.R. § 68.67(c)(5).

27. According to information obtained by EPA during the December 8, 2010 inspection, the PHA conducted on December 3, 2010 was not effective in evaluating a range of possible safety and health effects of a potential failure of controls. Respondent failed to ensure that the completed PHA evaluated a range of possible safety and health effects of a potential failure of controls, as required by 40 C.F.R. § 68.67(c)(7).

28. According to information obtained by EPA during the December 8, 2010 inspection, some of the 2010 PHA recommendations included recommendations which remained unresolved from the previous 2008 PHA. Respondent failed to establish a system to promptly address the findings and recommendations, assure that the recommendations are resolved in a timely manner, and complete actions as soon as possible, as required by 40 C.F.R. § 68.67(e).

29. According to information obtained by EPA during the December 8, 2010 inspection, there was no copy of the initial PHA or other PHA performed prior to November 13, 2008, although the facility's RMP submission history indicates that PHAs were preformed on May 9, 1999 and December 14, 2007. Respondent failed to maintain PHAs and their updates/revalidations for the life of the process pursuant to 40 C.F.R. § 68.67(g).

30. According to information obtained by EPA during the December 8, 2010 inspection, Respondent did not have written operating procedures for all chlorine handling operations, including procedures for the receipt and movement of full 1-ton chlorine containers and 150-lb cylinders and the movement of empty containers and cylinders, as required by 40 C.F.R. § 68.69(a)(1)(ii).

31. During the December 8, 2010 inspection, facility personnel indicated that initial training from past years did not include formalized training in operating procedures with appropriate documentation indicating that the operator is capable of performing process operations. Additionally, the facility had not reconciled training documentation for operators who began operating the chlorine process prior to June 19, 1999. Respondent failed to ensure that operator training is received, understood, and that the appropriate records documenting training are prepared, as required by 40 C.F.R. § 68.71(c).

32. According to information obtained by EPA during the December 8, 2010 inspection, the mechanical integrity ("MI") program did not include written procedures for performing tests on operability of a vacuum regulating valve which is a safety system. Respondent failed to develop written procedures to maintain the on-going integrity of process equipment, as required by 40 C.F.R. § 68.73(b).

33. According to information obtained by EPA during the December 8, 2010 inspection, Respondent failed to include a basis for the frequency of established inspections and tests of process equipment in the MI program, as required by 40 C.F.R. § 68.73(d)(3).

34. According to information obtained by EPA during the December 8, 2010 inspection, Respondent failed to ensure that documentation of completed inspections and tests are equipment specific, as required by 40 C.F.R. § 68.73(d)(4).

35. According to information obtained by EPA during the December 8, 2010 inspection, there was no management of change documentation ("MOC") available for review regarding a new chlorine detector installed in November 2010. Respondent failed to ensure that MOC reviews are completed, authorized, and documented, as required by 40 C.F.R. § 68.75(a).

36. During the December 8, 2010 inspection, facility personnel indicated that there were no applicable incidents or near-misses that occurred with respect to catastrophic releases of a regulated substance within the last five years. However, an October 19, 2006 inspection by EPA indicated that a one-ton cylinder was dropped because of a faulty hoist. Respondent failed to investigate this incident which resulted in, or could reasonably have resulted in, a catastrophic release of a regulated substance, as required by 40 C.F.R. § 68.81(a).

37. According to information obtained by EPA during the December 8, 2010 inspection, Respondent did not sufficiently inspect its emergency response equipment. Required monthly inspections had been missed, Self-Contained Breathing Apparatus ("SCBA") equipment was determined to be incompatible, fit-testing methods were determined to be inadequate, and chlorine kits were present without appropriate seals. Respondent failed to develop and

implement an emergency response program including adequate procedures for the use of emergency response equipment and for its inspection, testing, and maintenance, as required by 40 C.F.R. § 68.95(a)(2).

Facility 2–Mayaguez Regional Wastewater Treatment Plant

38. Respondent is and, at all times relevant to this Complaint, was the owner and/or operator of the Mayaguez Regional Wastewater Treatment Plant located at PR Road #342, Km 0.5, Mayaguez, Puerto Rico ("Mayaguez Facility").

39. Respondent uses and has used chlorine at its Mayaguez Facility in amounts exceeding the threshold quantities.

40. On or about November 30, 2007, Respondent submitted to EPA an updated RMP for the Mayaguez Facility that identified the chlorine process at the Facility as a Program 3 process. Respondent submitted an updated RMP on August 11, 2011 after the inspection.

41. EPA conducted an inspection at the Mayaguez Facility on or about December 7, 2010 to assess compliance with Section 112(r) of the Clean Air Act and the applicable regulations, including those listed in 40 C.F.R. Part 68.

42. According to information obtained by EPA during the December 7, 2010 inspection, the facility's February 2009 hazard Assessment re-validation was incorrect and incomplete. Respondent failed to review and update its offsite consequence analyses at least once every five years, as required by 40 C.F.R. § 68.36(a).

43. According to information obtained by EPA during the December 7, 2010 inspection, P&ID was deficient in that it did not include sufficient detail. Respondent failed to develop the required P&ID pursuant to the requirements of 40 C.F.R. § 68.65(d)(1)(ii).

44. According to information obtained by EPA during the December 7, 2010 inspection, PSI did not include a description of the design of the ventilation system in the chlorine room and scale area. Respondent failed to develop PSI, as required by 40 C.F.R. § 68.65(d)(1)(v).

45. According to information obtained by EPA during the December 7, 2010 inspection, the PHA did not evaluate facility siting. Respondent failed to ensure that the completed PHA addressed stationary source siting, as required by 40 C.F.R. § 68.67(c)(5).

46. According to information obtained by EPA during the December 7, 2010 inspection, the PHA conducted on August 14, 2008 was not effective in evaluating a range of possible safety and health effects of a potential failure of controls. Respondent failed to ensure that the completed PHA evaluated a range of possible safety and health effects of a potential failure of controls, as required by 40 C.F.R. § 68.67(c)(7).

47. According to information obtained by EPA during the December 7, 2010 inspection, there was incomplete documentation on the resolution of five of the recommendations identified during the August 14, 2008 PHA. Respondent failed to ensure that documentation on the resolution of PHA recommendations is maintained on-file, as required by 40 C.F.R. § 68.67(e).

48. According to information obtained by EPA during the December 7, 2010 inspection, there was no copy of the initial PHA or other PHA performed prior to August 14, 2008, although the facility's RMP submission history indicates that PHAs had been performed prior to August 14, 2008. Respondent failed to maintain PHAs and their updates or revalidations for the life of the process pursuant to 40 C.F.R. § 68.67(g).

49. According to information obtained by EPA during the December 7, 2010 inspection, Respondent did not retain sufficient records indicating that each operator has been initially trained. Respondent failed to ensure that operator training is received, understood, and that the appropriate records documenting training are prepared, as required by 40 C.F.R. § 68.71(c).

50. According to information obtained by EPA during the December 7, 2010 inspection, Respondent did not have written operating procedures for all chlorine handling operations, including procedures for the receipt and movement of full 1-ton chlorine containers and 150-lb cylinders and the movement of empty containers and cylinders, as required by 40 C.F.R. § 68.69(a)(1)(ii).

51. According to information obtained by EPA during the December 7, 2010 inspection, Respondent failed to ensure that the MI and test procedures for all equipment in the covered process, including vacuum regulators, alarm systems, *Vega* gas arrestors, and polyethylene lines, were established, as required by 40 C.F.R. § 68.73(d)(1).

52. According to information obtained by EPA during the December 7, 2010 inspection, except for monthly inspections of SCBAs, Respondent failed to perform any of the weekly or monthly scheduled inspections and tests per the established schedule, as required by 40 C.F.R. § 68.73(d)(1).

53. According to information obtained by EPA during the December 7, 2010 inspection, Respondent failed to include a basis for the frequency of established inspections and tests of process equipment in the MI program, as required by 40 C.F.R. § 68.73(d)(3).

54. According to information obtained by EPA during the December 7, 2010 inspection, records of completed equipment inspections did not have supervisor signatures or dates. Respondent failed to ensure that documentation of completed inspections and tests included identification of the dates completed and employees involved with each inspection and test, as required by 40 C.F.R. § 68.73(d)(4).

55. According to information obtained by EPA during the December 7, 2010 inspection, there was no documentation regarding completed MOC/Pre-Startup reviews available for review. Respondent failed to ensure that MOC reviews are completed, authorized, and documented, as required by 40 C.F.R. § 68.75(a).

56. According to information obtained by EPA during the December 7, 2010 inspection, Respondent did not perform adequate fit-testing methods for respirators and has not completed sufficient monthly inspections of a Chlorine A kit. Respondent failed to include and implement appropriate procedures for the use of emergency response equipment and for its inspection, testing, and maintenance in its Emergency Response Program, as required by 40 C.F.R. § 68.95(a)(2).

57. During the December 7, 2010 inspection, facility personnel indicated that emergency response drills had been scheduled but not conducted. Respondent failed to ensure that employees involved in emergency response remain adequately trained in emergency response procedures, as required by 40 C.F.R. § 68.95(a)(3).

Facility 3–Puerto Nuevo Regional Wastewater Treatment Plant

58. Respondent is and, at all times relevant to this Complaint, was the owner and/or operator of the Puerto Nuevo Regional Wastewater Treatment Plant located at Ave. Kennedy, Km 2.0 Calle Marginal, San Juan, Puerto Rico ("Puerto Nuevo Facility").

59. Respondent uses and has used chlorine at its Puerto Nuevo Facility in amounts exceeding the threshold quantities.

60. On or about June 22, 2007, Respondent submitted to EPA an updated RMP for the Puerto Nuevo Facility that identified the chlorine process at the Facility as a Program 3 process. Respondent submitted an updated RMP on September 16, 2011 after the inspection.

61. EPA conducted an inspection at the Puerto Nuevo Facility on or about December 9, 2010 to assess compliance with Section 112(r) of the Clean Air Act and the applicable regulations, including those listed in 40 C.F.R. Part 68.

62. According to information obtained by EPA during the December 9, 2010 inspection, Respondent had not performed a five-year review and had not updated its offsite consequence analyses since 2004. Respondent failed to review and update its offsite consequence analyses at least once every five years, as required by 40 C.F.R. § 68.36(a).

63. According to information obtained by EPA during the December 9, 2010 inspection, documentation pertaining to potentially impacted population estimates within the Worst Case and Alternate Case distance-to-endpoints was not available. Respondent failed to maintain documentation pertaining to the data used to estimate population and environmental receptors potentially affected, as required by 40 C.F.R. § 68.39(e).

64. During the December 9, 2010 inspection, EPA noted discrepancies where equipment configuration and arrangement was inconsistent with the P&ID, including an indication on the P&ID of a manual valve which was to be installed downstream of the chlorinators shown that was not actually installed. Also, the P&ID was deficient in that it did not include sufficient detail. Respondent failed to ensure that the P&ID is reflective of actual 'as-built' conditions and to develop the required P&ID pursuant to the requirements of 40 C.F.R. § 68.65(d)(1)(ii).

65. According to information obtained by EPA during the December 9, 2010 inspection, Respondent failed to develop PSI including a description of the design of the ventilation system in the chlorine room and scale area, as required by 40 C.F.R. § 68.65(d)(1)(v).

66. According to information obtained by EPA during the December 9, 2010 inspection, Respondent failed to evaluate and take appropriate action in ensuring that the chlorine process complies with recognized and generally accepted good engineering practices, as required by 40 C.F.R. § 68.65(d)(2).

67. According to information obtained by EPA during the December 9, 2010 inspection, the PHA did not address facility siting. Respondent failed to ensure that the completed PHA addressed stationary source siting, as required by 40 C.F.R. § 68.67(c)(5).

68. According to information obtained by EPA during the December 9, 2010 inspection, the PHA conducted on July 1, 2009 was not effective in evaluating a range of possible safety and health effects of a potential failure of controls. Respondent failed to ensure that the completed PHA evaluated a range of possible safety and health effects of a potential failure of controls, as required by 40 C.F.R. § 68.67(c)(7).

69. According to information obtained by EPA during the December 9, 2010 inspection, PHAs performed prior to the July 1, 2009 PHA were not available at the facility on the date of the inspection. Respondent failed to maintain PHAs and their updates or revalidations for the life of the process pursuant to 40 C.F.R. § 68.67(g).

70. According to information obtained by EPA during the December 9, 2010 inspection, Respondent did not have written operating procedures for all chlorine handling operations, including procedures for the receipt and movement of full 1-ton chlorine containers and the movement of empty containers and cylinders, as required by 40 C.F.R. § 68.69(a)(1)(ii).

71. According to information obtained by EPA during the December 9, 2010 inspection, Respondent failed to provide a certification that each employee operating a covered process prior to June 21, 1999 had the skills, knowledge, and abilities to safely execute the duties and responsibilities as specified in the facility's operating procedures, as required by 40 C.F.R. § 68.71(a)(2).

72. According to information obtained by EPA during the December 9, 2010 inspection, Respondent failed to document the means used to verify that each trained employee understood the training, as required by 40 C.F.R. § 68.71(c).

73. According to information obtained by EPA during the December 9, 2010 inspection, the MI program did not include written procedures for performing tests on operability of a vacuum regulating valve which is a safety system. Respondent failed to develop written procedures to maintain the integrity of process equipment, as required by 40 C.F.R. § 68.73(b).

74. According to information obtained by EPA during the December 9, 2010 inspection, the table of inspections and tests included in the MI program did not list the polyethylene lines or vacuum regulating valves that are used in the chlorine process. Also, there was no description of the basis for the scheduled inspection and test frequency. Respondent failed to include a schedule of inspections and tests of all covered equipment and a basis for the frequency of established inspections and tests of process equipment in the MI program, as required by 40 C.F.R. § 68.73(d)(3).

75. According to information obtained by EPA during the December 9, 2010 inspection, a MOC on file for changes made to the chlorine feed system indicated that inspection and test records were updated to include new vacuum regulators and polyethylene lines installed as a result of the change, however the inspection and test schedule did not list this equipment, and these changes were not reflected in the P&ID. Respondent failed to update PSI and operating procedures and/or practices as a result of the MOC, as required by 40 C.F.R. § 68.75(d) and (e).

76. According to information obtained by EPA during the December 9, 2010 inspection, Respondent failed to promptly determine a response to each compliance audit finding and correct noted deficiencies, as required by 40 C.F.R. § 68.79(d).

77. According to information obtained by EPA during the December 9, 2010 inspection, the facility's October 2007 Emergency Action Plan had not been reviewed or updated annually, as specified in its procedures. The Emergency Action Plan did not reflect updated chlorine operations and a new Plant Manager. Respondent failed to implement procedures to review and update the Emergency Action Plan to reflect changes at the facility and to ensure that employees are informed of the changes, as required by 40 C.F.R. § 68.71(c).

COUNT 1

78. The allegations set forth in paragraphs 1 through 76 above are incorporated herein by reference.

79. Each of the above-described facilities is a "stationary source" as that term is defined at 40 C.F.R. § 68.3.

80. Respondent's failures to comply with the requirements of 40 C.F.R. Part 68 as described above constitute violations of Section 112(r)(7) of the Act, 42 U.S.C. § 7412(r)(7). Respondent is therefore subject to the assessment of penalties under Section 113(d) of the Act, 42 U.S.C. § 7413(d).

V. NOTICE OF PROPOSED ORDER ASSESSING A CIVIL PENALTY

Pursuant to Section 113(d) of the Act, 42 U.S.C. § 7413(d), as modified pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, 73 Fed. Reg. 75340-46 (December 11, 2008), which was mandated by the Debt Collection Improvement Act of 1996, 40 C.F.R. Part 19, EPA is currently authorized to assess civil penalties not to exceed $32,500 per day for each violation of Section 112 of the Act that occurred after March 15, 2004 through January 12, 2009, and $37,500 per day for each violation of Section 112 of the Act that occurred after January 12, 2009. This amount is subject to revision under federal law and regulation. Civil penalties under Section 113 of the Act may be assessed by Administrative Order. On the basis of the violations of the Act described above, Complainant alleges that Respondent is subject to penalties for violating Section 112(r) of the Act, 42 U.S.C. § 7412(r).

The proposed civil penalty in this matter has been determined in accordance with the "Combined Enforcement Policy for CAA Sections 112(r)(1), 112(r)(7), and 40 C.F.R. Part 68," dated June 2012 ("Section 112(r) Penalty Policy"). A copy of the Section 112(r) Penalty Policy accompanies this Complaint. A Penalty Calculation Worksheet which shows how the proposed penalty was calculated is included as Attachment 1.

In determining the amount of any penalty to be assessed, Section 113(e) of the Act, 42 U.S.C. § 7413(e), requires EPA to take into consideration the size of Respondent's business, the economic impact of the proposed penalty on Respondent's business, Respondent's full compliance history and good faith efforts to comply, the duration of the violations as established by any credible evidence, payment by Respondent of any penalties previously assessed for the same types of violations, the economic benefit of noncompliance, and the seriousness of the violations.

In accordance with Section 113(d) of the Act, 40 C.F.R. Part 19, and the Section 112(r) Penalty Policy, and based on the facts alleged in this Complaint, Complainant proposes to assess a civil penalty of $147,300 against Respondent.

Payment of a civil penalty shall not affect Respondent's ongoing obligation to comply with the Act and other applicable federal, Commonwealth, state, or local laws.

The proposed penalty reflects a presumption of Respondent's ability to pay the penalty and to continue in business based on the size of its business and the economic impact of the proposed penalty on its business. Respondent may submit appropriate documentation to rebut this presumption.

VI. PROCEDURES GOVERNING THIS ADMINISTRATIVE PROCEEDING

The rules of procedure governing this civil administrative litigation are entitled, "CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION/TERMINATION OR SUSPENSION OF PERMITS" (hereinafter, the "Consolidated Rules"), and are codified at 40 C.F.R. Part 22. A copy of the Consolidated Rules accompanies this Complaint.

A. Notice of Opportunity to Request a Hearing and Answering The Complaint

To request a hearing, Respondent must file an Answer to the Complaint, pursuant to 40 C.F.R. §§ 22.15(a) - (c). Pursuant to 40 C.F.R. § 22.15(a), such Answer must be filed within 30 days after service of the Complaint. An Answer is also to be filed, pursuant to 40 C.F.R. § 22.15(a), if Respondent contests any material fact upon which the Complaint is based, contends that the proposed penalty is inappropriate, or contends that Respondent is entitled to judgment as a matter of law. If filing an Answer, Respondent must file with the Regional Hearing Clerk of EPA, Region 2, both an original and one copy of a written Answer to the Complaint. The address of the Regional Hearing Clerk of EPA, Region 2, is:

Karen Maples
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866

Respondent shall also serve one copy of the Answer to the Complaint upon Complainant and any other party to the action. See 40 C.F.R. § 22.15(a). Complainant's copy of Respondent's Answer, as well as a copy of all other documents that Respondent files in this action, shall be sent to:

Jocelyn P. Scott
Assistant Regional Counsel
New York/Caribbean Superfund Branch
Office of Regional Counsel
U.S. Environmental Protection Agency
290 Broadway, 17th Floor
New York, NY 10007

Pursuant to 40 C.F.R. § 22.15(b), Respondent's Answer to the Complaint must 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 lacks knowledge of a particular factual allegation and so states that in its Answer, the allegation is deemed denied, pursuant to 40 C.F.R. § 22.15(b). The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense; (2) the facts which Respondent disputes; (3) the basis for opposing any proposed relief; and (4) whether Respondent requests a hearing.

If Respondent fails in its Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation, pursuant to 40 C.F.R. § 22.15(d).

Respondent's failure to affirmatively raise in the Answer facts that constitute or that might constitute the grounds of its defense may preclude Respondent, at a subsequent stage in this proceeding, from raising such facts and/or from having such facts admitted into evidence at a hearing.

Any hearing in this proceeding will be held at a location determined in accordance with 40 C.F.R. § 22.21(d). A hearing of this matter will be conducted in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-59, and the procedures set forth in Subpart D of 40 C.F.R. Part 22.

B. Failure To Answer

If Respondent fails to file a timely answer to the Complaint, EPA may file a Motion for Default pursuant to 40 C.F.R. §§ 22.17(a) and (b), which may result in the issuance of a default order assessing the proposed penalty pursuant to 40 C.F.R. § 22.17(c). If a default order is issued, 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. If necessary, EPA may then seek to enforce such final order of default against Respondent, and to collect the assessed penalty amount, in federal court.

VII. INFORMAL SETTLEMENT CONFERENCE

Whether or not Respondent requests a formal hearing, EPA encourages settlement of this proceeding consistent with the provisions and objectives of the Act and the applicable regulations. See 40 C.F.R. § 22.18(b). At an informal conference with a representative(s) of Complainant, Respondent may comment on the charges made in this Complaint, and Respondent may also provide whatever additional information that it believes is relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein alleged; (2) any information relevant to Complainant's calculation of the proposed penalty; (3) the effect the proposed penalty would have on Respondent's ability to continue in business; and/or (4) any other special facts or circumstances Respondent wishes to raise. Complainant has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement agreement reached with Respondent, to reflect any relevant information previously not known to Complainant, or to dismiss any or all of the charges if Respondent can demonstrate that the relevant allegations are without merit and that no cause of action as herein alleged exists.

Any request for an informal conference or any questions that Respondent may have regarding this Complaint should be directed to the EPA Assistant Regional Counsel identified in Section VI.A., above.

Respondent's request for a formal hearing does not prevent it from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with

the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the Complaint. Complainant does not deem a request for an informal settlement conference as a request for a hearing pursuant to 40 C.F.R. § 22.15(c).

A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer to the Complaint pursuant to 40 C.F.R. § 22.15. No penalty reduction will be made simply because an informal settlement conference is held.

In the event settlement is reached, its terms shall be recorded in a written consent agreement signed by the parties and incorporated into a final order, pursuant to 40 C.F.R. §§ 22.18(b)(2) and (3). Respondent's entering into a settlement through the signing of such Consent Agreement and its complying with the terms and conditions set forth in such consent agreement terminates this administrative litigation and the civil proceedings arising out of the allegations made in this Complaint. Respondent's entering into a settlement does not extinguish, waive, satisfy, or otherwise affect its obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

VIII. RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

Instead of filing an Answer, Respondent may choose to pay the total amount of the proposed penalty within 30 days after receipt of the Complaint, provided that Respondent files with the Regional Hearing Clerk, Region 2 (at the address provided in Section VI.A. above), a copy of the check or other instrument of payment, as provided in 40 C.F.R.§ 22.18(a). A copy of the check or other instrument of payment should be provided to the EPA Assistant Regional Counsel identified in Section VI.A., above. Payment of the penalty assessed should be made by sending a cashier's or certified check payable to the "Treasurer, United States of America," in the full amount of the penalty assessed in this Complaint to the following addressee:

US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

The check must be identified with a notation of the name and docket number of this case, which is set forth in the caption on the first page of this Complaint. Pursuant to 40 C.F.R.§ 22.18(a)(3), upon EPA's receipt of such payment, a final order shall be issued. Furthermore, as provided in 40 C.F.R.§ 22.18(a)(3), the making of such payment by Respondent shall constitute a waiver of Respondent's rights to contest the allegations made in the Complaint and to appeal such a final order. Such payment does not extinguish, waive, satisfy, or otherwise affect Respondent's obligation and responsibility to comply with all applicable regulations and requirements, and to maintain such compliance.

Dated: Sept. 20, 2012

Walter Mugdan, Director
Emergency and Remedial Response Division
U.S. Environmental Protection Agency
Region 2
290 Broadway
New York, NY 10007-1866

TO: Mr. Jose Capeles
Compliance and Quality Control Director
Puerto Rico Aqueduct & Sewer Authority
P.O. Box 7066
San Juan, Puerto Rico 00916-7066

Attachment

cc: Karen Maples, Region 2 Hearing Clerk

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

In the Matter of:	)	Docket No. CAA-02-2012-1213
Puerto Rico Aqueduct and Sewer Authority	)	Administrative Complaint under Section 113 of the Clean Air Act, 42 U.S.C. §7413
Respondent.	)	

CERTIFICATION OF SERVICE

I certify that the foregoing Administrative Complaint has been sent this day in the following manner to the addresses listed below:

Original and one copy by hand delivery to:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866

Copy by certified mail to:

Mr. Jose Capeles
Compliance and Quality Control Director
Puerto Rico Aqueduct & Sewer Authority
P.O. Box 7066
San Juan, Puerto Rico 00916-7066

Date: 9/26/12

Name: Brenda Hadley

Title: Branch Secretary

Address: 290 Broadway NYC 10007

ATTACHMENT 1

Prepared by: Ellen Banner, Environmental Scientist, and Francesco Maimone, Physical Scientist
ERRD - Response & Prevention Branch
August 1, 2012

Facility Name/Address: PRASA- Mayaguez, Ponce, Puerto Nuevo; December 7-9, 2010
Violations: Section 112(r)(7) of the Clean Air Act, 42 U.S.C. § 7412(r)(7), and the regulations at 40 C.F.R. Part 68 (failure to comply with Risk Management Program requirements)

Penalty Calculation Worksheet

The total penalty was calculated by adding the economic benefit of noncompliance plus an amount that reflects the gravity of the violation.

1. Economic Benefit

"Economic benefit" is the financial gain that a violator accrues by delaying and/or avoiding the costs of compliance. In this case, the EPA calculated the economic benefit for PRASA ("Respondent") by examining the costs of the RMP elements with which Respondent did not timely comply for each of the three facilities referenced above. The EPA's BEN computer program (BEN ver. 4.6) was used to calculate the economic benefit that Respondent gained through noncompliance. The economic benefit component of the penalty was established at $9,300.

2. Gravity Component

a) Extent of deviation: Moderate - the violations have the potential to affect, or has had significant effect on, the ability of the facility to prevent or respond to releases through the development and implementation of the Part 68 requirements.

The RMP-regulated process at the Respondent's facilities (the "Facilities") is the storage of chlorine used as a disinfectant in water treatment.

EPA conducted inspections at the subject Facilities from December 7 to 9th, 2010 to assess compliance with Section 112(r) of the Clean Air Act and the applicable regulations including those listed in 40 C.F.R. Part 68. During the inspection, EPA discovered violations of the requirements of 40 C.F.R. Part 68 including violations regarding process safety information, Process Hazard Analysis (PHAs), training, mechanical integrity, management of change and emergency response.

The new Combined Enforcement Policy for 112(r) issued in June 2012 states that for multiple violations of Part 68, separate counts have separate penalty amount. With the seriousness of the violations calculated for each. In this case, the "potential for harm" element of the matrix was found to be "Moderate". The separate violations are listed below:

1. Failure to sufficiently compile Process Safety Information, as required by 40 CFR Part 68.65. . $10,000
2. Failure to sufficiently perform Process Hazard Analyses (PHAs) as required by 40 CFR Part 68.67 $10,000
3. Failure to provide sufficient training, as required by 40 CRF Part 68.71. $10,000
4. Failure to sufficiently establish a mechanical integrity program, as required by 40 CFR Part 68.73. $10,000
5. Failure to sufficiently establish a management of change program, as required by 40 CFR Part 68.75. $10,000
6. Failure to sufficiently develop and implement an emergency response program, as required by 40 CFR Part 68.90-68.95 $10,000

Pursuant to the Penalty Policy, EPA considered the circumstances surrounding the violations in determining the specific penalty and considered the potential for harm in determining gravity based penalty of $60,000.

b) Duration of violation:

The EPA has calculated the duration component of the penalty from the dates of the inspections. Because full compliance has not been achieved as of the date of this document, the facility has been in noncompliance for approximately 18 months since the date of the inspection (November 17, 2009). Under the Penalty Policy, the first twelve months are assessed a penalty of $750 per month or $9,000 and the next six months would be assessed a penalty of $1,500 per month or $9,000. – total $18,000. As a result, this raises the proposed penalty amount to $78,000.

c) Size of violator:

Consistent with the Penalty Policy, the EPA scales the penalty to the "size of the violator" by calculating the violator's net worth. Although specific information regarding PRASA's net worth was not available, several sources, including PRASA's website, indicate that PRASA's net worth is greater than $100,000,000. Because the size adjustment for the facility's net worth would be greater than 50% of the total penalty, the Region has chosen to reduce the "size of violator" penalty component to $60,000 – the amount of the gravity component. As a result, the total penalty, reflecting the "size of violator" would be $138,000.

3. Adjustments to Gravity Component

EPA considered all relevant factors as described below. There were no adjustments made for willfulness or negligence, degree of cooperation, history of noncompliance, environmental damage, or inability to pay.

Consideration of Relevant Factors

Degree of Willfulness or Negligence
No upward adjustment for degree of willfulness or negligence.

Degree of Cooperation
No upward adjustment for degree of cooperation.

History of Noncompliance
No upward adjustment for history of noncompliance.

Environmental Damage
No upward adjustment for environmental damage

Economic Impact of the Penalty (Ability to Pay)
No upward or downward adjustment for economic impact of the penalty (ability to pay).

TOTAL PENALTY: $9,300 + $138,000 = $147,300.

ENCLOSURES

Combined Enforcement Policy

for

Clean Air Act Sections 112(r)(1),

112(r)(7), and 40 C.F.R. Part 68

June 2012

U.S. Environmental Protection Agency
Office of Enforcement and Compliance Assurance
Office of Civil Enforcement
Waste and Chemical Enforcement Division

Table of Contents

Section 1: Introduction and Overview

I. Introduction

This policy addresses civil enforcement actions for violations of Clean Air Act (CAA) section 112(r)(1), 42 U.S.C. § 7412(r)(1), known as the General Duty Clause (GDC) and for violations of section 112(r)(7) and its implementing regulations found at 40 C.F.R. Part 68. EPA is issuing this policy to ensure that enforcement responses for these violations are consistent; that the enforcement response is appropriate for the violations; and that parties will be deterred from committing such violations in the future. This policy should be used to develop settlement penalty amounts for civil judicial enforcement actions and for civil administrative cases.

This policy applies only to violations of EPA's civil regulatory program. It does not apply to enforcement pursuant to criminal provisions of laws or regulations that are enforced by EPA.

The procedures set out in this document are intended solely for the guidance of government personnel. 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.

The Agency reserves the right to act at variance with the policy and to change it any time without public notice. This policy is not binding on the Agency. Enforcement staff should continue to make appropriate case-by-case enforcement judgments, guided by, but not restricted or limited to, the policies contained in this document.

This policy is immediately effective and applicable, and it supersedes any enforcement response or penalty guidance previously issued for CAA § 112(r).

II. Overview of the Policy

This Combined Enforcement Policy (CEP) is divided into four main sections. The first section is "Introduction and Overview." The second section, "Determining the Level of Enforcement Response," describes the Agency's options for responding to violations of CAA § 112(r). The third section, "Calculating Civil Penalties," elaborates on EPA's policies and procedures for calculating civil penalties against persons who violate CAA § 112(r). The fourth section, "Appendices," contains examples of GDC violations, the extent of damages matrix, and a list of references for policy documents.

Section 2: Determining the Level of Enforcement Response

Once the Agency finds that a CAA § 112(r) violation has occurred, it will need to determine the appropriate level of enforcement response for the violation. EPA can respond with a range of enforcement response options. These options include:

- Administrative Compliance Orders
- Notices of Noncompliance
- Civil Administrative Penalty Orders
- Civil Judicial Referrals
- Criminal Sanctions

An appropriate response will achieve a timely return to compliance and serve as a deterrent to future non-compliance by eliminating any economic benefit received by the violator from its noncompliance. The failure or refusal to comply with any requirement of section 112(r) (42 U.S.C. § 7412) is a prohibited act and civil penalties can be assessed to address each violation pursuant to CAA § 113 (42 U.S.C. § 7413). In all but rare instances, EPA should seek penalties to address noncompliance, either by initiating a civil administrative action or a civil judicial referral. However, in limited circumstances, EPA may pursue a non-penalty action.

I. Administrative Compliance Orders/Notices of Noncompliance

A. Administrative Compliance Orders

An administrative compliance order (ACO), issued pursuant to CAA §§ 112(r)(9), 113(a)(3)(B) or 303, is a formal action ordering compliance with the CAA. Regions should consider issuing an ACO for violations that pose an immediate threat to human health and/or the environment or in other circumstances when the Region concludes that it is important to obtain immediate compliance. In such cases, the order should be clearly drafted to reserve the Agency's right to subsequently file a penalty action for those violations and to seek additional injunctive relief if necessary. An ACO should cite the relevant statutory or regulatory requirements that the facility is violating. Failure to comply with an ACO is a separate violation for which the Region should seek penalties. In situations where immediate compliance may not be necessary, an order on consent may be the appropriate response.

B. Notices of Noncompliance

On a case-by-case basis, EPA may determine that the issuance of a notice of noncompliance (NON), rather than a civil administrative or judicial action is the most appropriate enforcement response to a violation. Once the decision has been made to issue a NON, EPA should issue one NON addressing all instances of noncompliance evident at that point in time.

If EPA should issue a NON (via Certified Mail, return receipt requested, or any other method where delivery can be confirmed), the NON should require the violator to return to compliance no more than thirty (30) days from the date of receipt (as evidenced by the signature and date on the delivery confirmation) and describe the necessary steps taken to come into compliance. Failure to correct any violation for which a NON is issued may be the basis for issuance of a civil administrative complaint. EPA may issue one CAA § 112(r) NON to a facility in a three-year period. The three-year time period begins the day after the date of the NON. If subsequent violations of CAA § 112(r) occur in the three-year time period, EPA should take a penalty action.

A NON may be issued to address violations in the following circumstances:

i. Where a first time violator's violation has low probability of recurrence and low potential for harm; or

ii. When a violator is in substantial compliance with the requirement as the specific facts and circumstances support.

II. Civil Administrative Penalty Orders

A civil administrative penalty order is typically the appropriate response to violations of CAA § 112(r) and failure to comply with a notice of noncompliance. *See* Clean Air Act § 113(d).

III. Civil Judicial Referrals

Under CAA § 113(b), the EPA Administrator may refer civil judicial cases to the United States Department of Justice (DOJ) for assessment and/or collection of the penalty in the appropriate U.S. district court. EPA may also refer to DOJ an action for a permanent or temporary injunction. EPA must refer to DOJ cases for which EPA is seeking a penalty greater than the cap established in CAA § 113(d)(1) (which is adjusted regularly by the Civil Monetary Penalty Inflation Adjustment Rule, *see* 40 C.F.R. Part 19), or for which the first alleged date of violation occurred more than 12 months prior to initiation of the administrative action. EPA and DOJ may jointly determine, however, to waive this requirement and address these cases administratively.

Section 2: Determining the Level of Enforcement Response

IV. Criminal Sanctions

This CEP does not address criminal violations of CAA § 112(r). If, however, the civil case team has reason to believe that a violator knowingly violated any provision of CAA § 112(r), it should promptly refer the matter to the Criminal Investigations Division (CID). Pursuant to 18 U.S.C. § 1001, it is a criminal violation to knowingly and willfully make a false or fraudulent statement in any matter within EPA's jurisdiction. In addition, it may be considered a criminal violation to knowingly or willfully falsify information provided to the Agency.

EPA may also refer to CID any negligent releases of listed hazardous air pollutants and extremely hazardous substances. Pursuant to CAA § 113(c)(4), it is a criminal violation to negligently release into the air any hazardous air pollutant listed pursuant to CAA § 112 or any extremely hazardous substance listed pursuant to section 302(a)(2) of the Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. § 11002(a)(2)) that is not listed in CAA § 112 and negligently place another person in imminent danger of death or serious body injury.

V. Parallel Criminal and Civil Proceedings

Although the majority of EPA's enforcement actions are brought as either a civil action or a criminal action, there are instances when it is appropriate to bring both a civil and a criminal enforcement response. These include situations where the violations merit the deterrent and retributive effects of criminal enforcement, yet a civil action is also necessary to obtain an appropriate remedial result, and where the magnitude or range of the environmental violations and the available sanctions make both criminal and civil enforcement appropriate.

Active consultation and cooperation between EPA's civil and criminal programs, in conformance with all legal requirements and with OECA's Parallel Proceedings Policy (September 24, 2007),[1] is critical to the success of EPA's overall enforcement program. The success of any parallel proceeding depends upon coordinated decisions by the civil and criminal programs as to the timing and scope of their activities. For example, it will often be important for the criminal program to notify the civil enforcement program managers that an investigation is about to become overt or known to the subject. Similarly, the civil program should notify the criminal program when there are significant developments that might change the scope of the relief. In every parallel proceeding, communication and coordination should be initiated at both the staff and manager levels and should continue until resolution of all parallel matters.

[1] See Appendix C: *Parallel Proceedings Policy*

Section 3: Calculating Civil Penalties

I. Calculating the Penalty

The factors relevant to setting an appropriate penalty appear in CAA § 113(e). These factors are: the economic benefit of noncompliance; the seriousness of the violation; the duration of the violation as established by any credible evidence; the size of the business; the violator's full compliance history; good faith efforts to comply; the economic impact of the penalty on the business; payment by the violator of penalties previously assessed for the same violation; and other factors as justice may require. The purpose of this penalty policy is to ensure that: (1) civil penalties are assessed in accordance with the CAA and in a fair and consistent manner; (2) penalties are appropriate for the gravity of the violation; (3) economic incentives for non-compliance are eliminated; (4) penalties are sufficient to deter persons from committing violations; and, (5) compliance is expeditiously achieved and maintained.

Proposed penalties are comprised of two components: the amount equal to the economic benefit of noncompliance and an amount reflective of the gravity of the violation. These components should be calculated using the assumptions most protective of the environment. This policy also allows for the upward or downward adjustment of the gravity component, depending on the circumstances, as discussed below.

The proposed penalty amount is the result of the following formula:

Penalty = [Economic Benefit] + [Gravity Component (*i.e.*, seriousness of each violation) + Duration Component (of the violation with the longest duration) + Size of violator (both duration and size are calculated only once)) ± Adjustment Factors][2]

II. Economic Benefit of Noncompliance[3]

An entity that has violated CAA § 112(r) should not profit from its actions. The Agency's Policy on Civil Penalties (EPA General Enforcement Policy #GM – 21, February 16, 1984) requires EPA to recover any significant economic benefit of noncompliance (EBN) that accrues to a violator from noncompliance with the law. Economic benefit can result from a violator delaying or avoiding compliance costs or when the violator achieves an illegal competitive advantage through its noncompliance. A fundamental premise of the 1984 policy is that economic incentives for noncompliance are to be eliminated. If, after a penalty is paid, a violator still

[2] Note that the economic benefit plus the gravity component may not exceed the statutory maximum penalty on a per violation basis.

[3] *See* http://www.epa.gov/EPA-GENERAL/1999/June/Day-18/g15271.htm for a further discussion of the *Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases*.

profits by violating the law, there is little incentive to comply. Therefore, the enforcement team should always evaluate the economic benefit of noncompliance in calculating penalties.[4]

A. Economic Benefit from Delayed Costs and Avoided Costs

Delayed costs are expenditures that have been deferred by the violator's failure to comply with the requirements. For example, an owner or operator who fails to implement necessary changes to process instrumentation and equipment in a timely manner (*e.g.*, installing monitoring systems such as high temperature, pressure, level, and flow indicators and alarms) that are necessary to safely operate the facility but ultimately makes the changes, has achieved an economic benefit by delaying the costs associated with those changes.

Avoided costs are expenditures that will never be incurred. Using the example above, the cost of installation is a delayed cost, while the cost of maintaining the equipment for a period when the equipment should have been in use, is an avoided cost.

B. BEN Model

The primary purpose of the Agency's computer BEN model is to calculate economic benefit for settlement purposes. The model can perform a calculation of economic benefit from delayed or avoided costs based on data inputs, including optional data items and standard values already contained in the program. Enforcement personnel who have questions while running the model can access the model's help system. The help system contains information on how to use BEN, how to understand the data needed, and how to understand the model's outputs.

The economic benefit component should be calculated for the entire period for which there is evidence of noncompliance (*i.e.*, all time periods for which there is evidence to support the conclusions that the respondent was violating the CAA and thereby gained an economic benefit). Such evidence should be considered in the overall assessment of the penalty calculated for the violations alleged or proven, up to the statutory maximum for those violations. In certain cases, credible evidence may demonstrate that a respondent received an economic benefit for noncompliance for a period longer than the period of the violations for which a penalty is sought.

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[4] *See Economic Analysis in Support of the Final Rule on Risk Management Program Regulations for Chemical Accident Release Prevention, as Required by Section 112(r) of the Clean Air Act* (June 1996), Docket No. A-91-73, for a detailed analysis of the costs of complying with CAA 112(r) requirements. *See also Appendix B: Wage Rates and Unit Cost Tables, Updated Based on 2006 BLS and OPM Wage Rates* and *Risk Management Planning Handbook, 2nd Edition.*

In such cases, it may be appropriate to consider all of the economic benefit evidence in determining the appropriate penalty for the violations for which the respondent is liable. [5]

In most cases, the violator will have the funds gained through noncompliance available for its continued use and/or competitive advantage until it pays the penalty. Therefore, for cases in which economic benefit is calculated by using BEN or by a financial expert, the economic benefit should be calculated through the anticipated date a consent agreement would be entered. If the matter goes to hearing, this calculation should be based on a penalty payment date corresponding with the relevant hearing date. It should be noted that the respondent will continue to accrue additional economic benefits after the hearing date, until the assessed penalty is paid. Note that economic benefit recapture may not exceed the statutory maximum penalty amount.

III. Gravity-Based Penalty

The statutory considerations relevant in determining the gravity component are the seriousness of the violation, duration of the violation, size of the business, the violator's full compliance history, good faith efforts to comply, the economic impact of the penalty on the business, and payment by the violator of penalties previously assessed for the same violation. The seriousness of the violation is incorporated into Tables I and II. The other statutory factors are discussed below.

CAA § 113(d) authorizes the Administrator to issue an administrative order assessing an administrative penalty of not more than $25,000 per day for each violation of the CAA and implementing regulations. Pursuant to section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note, as amended by the Debt Collection Improvement Act (DCIA) of 1996, 31 U.S.C. § 3701 note, EPA must make adjustments to civil monetary penalties at least once every four years in order to account for inflation. As a result of the DCIA, the Agency issued and periodically revises the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19.

A. Seriousness of the Violation(s)

The seriousness of a violation depends in part on the risk posed to the surrounding population and the environment as a result of the violation. Risk is a function of the extent of the deviation from the requirements, the likelihood of a release, and the sensitivity of the environment around the facility. The extent of the deviation depends on the degree and nature of the violations of the relevant requirements and their effect. The greater the extent of deviation, the more likely that

[5] When considering the economic benefit of noncompliance that accrued to the respondent more than five years prior to the filing of a complaint or a pre-filing Consent Agreement, the litigation team should consult with the Waste and Chemical Enforcement Division.

the owner or operator of the facility has compromised the safe operation of the facility and the safe management of the chemicals. The sensitivity of the environment can be characterized by considering the potential impact of the violation on the surrounding population and the environment from a worst-case release at the facility. These factors will be more severe when the community impacted by a violation is already overburdened by environmental pollution.

The GDC and the Part 68 regulations are two separate and distinct obligations imposed on sources. This policy establishes two sets of tables for determining the seriousness of the violation component, one for Part 68 violations and one for GDC violations. When EPA is alleging Part 68 violations, enforcement personnel should use Table I. When EPA is alleging GDC violations, enforcement personnel should use Table II.

Part 68 Violations

In calculating the seriousness of the violation component of a penalty for Part 68 violations, first determine the potential for harm resulting from each of the alleged Part 68 violations. The potential for harm can be major, moderate, or minor.

To determine the potential for harm for a particular Part 68 requirement, use the following guidelines:

Major: The violation has the potential to undermine, or has undermined, the ability of the facility to prevent or respond to releases through the development and implementation of the Part 68 requirements.

Moderate: The violation has the potential to affect, or has had significant effect on, the ability of the facility to prevent or respond to releases through the development and implementation of the Part 68 requirements.

Minor: The violation has little potential to affect, or has had little effect on, the ability of the facility to prevent or respond to releases through the development and implementation of the Part 68 requirements.

EPA personnel should consider the circumstances surrounding each violation to arrive at a specific penalty within the range for a given cell in the matrices below. Some examples of relevant factors are:

- Amount of regulated chemical present in a process;
- Toxicity of the regulated chemical;
- Whether emergency personnel, the community, and/or the environment, were potentially or actually exposed to hazards that resulted from the violation;

- The relative proximity of the surrounding population;
- The extent of community evacuation required or potentially required;
- The effect noncompliance has on the community's ability to plan for chemical emergencies;
- Any potential or actual problems first responders and emergency managers encountered because of the facility's violation;
- Number of processes at which the same violations occurred and,
- Prevention Program level.

Second, determine the extent of deviation from each of the Part 68 requirements for the violations alleged. The extent of deviation can be major, moderate, or minor.

To determine the extent of deviation for a particular Part 68 requirement, use the following guidelines:

Major: The violator deviates from the requirements of the regulations or statute to such an extent that most (or important aspects) of the requirements are not met, resulting in substantial noncompliance.

Moderate: The violator significantly deviates from the requirements of the regulations or statute but some of the requirements are implemented as intended.

Minor: The violator deviates somewhat from the regulatory or statutory requirements but most (or all important) aspects of the requirements are met.

These two determinations, the potential for harm and the extent of deviation, will lead to a cell within one of the penalty matrices. Within that cell, choose an appropriate penalty figure from the range given.

For those situations where a facility fails to submit a Risk Management Plan (RMP), the case team should plead multiple violations of Part 68 in addition to the one failure to file a RMP (40 C.F.R. § 68.12), as long as the evidence supports the additional independent counts. For example, if the Region has evidence of failure to perform an initial process hazard analysis on covered processes (40 C.F.R. § 68.67) and failure to train an employee involved in operating a covered process (40 C.F.R. § 68.71) then it should plead both violations. If a facility has not submitted an RMP but has a chemical accident prevention program in place which satisfies the specific Part 68 requirements, a single count for failing to file an RMP may be appropriate.

Section 3: Calculating Civil Penalties

Table I
The Part 68 Seriousness Matrix

		Potential for Harm		
		Minor	**Moderate**	**Major**
Extent of Deviation	**Major**	$25,000 $20,000	$30,000 $25,000	$37,500 $30,000
	Moderate	$10,000 $5,000	$15,000 $10,000	$20,000 $15,000
	Minor	$1,000 $500	$3,000 $1,000	$5,000 $3,000

GDC Violations

In calculating the seriousness of the violation component of a penalty for GDC violations, first determine the potential for harm resulting from each of the alleged GDC violations. The potential for harm can be major, moderate, or minor.

To determine the potential for harm for each GDC violation, use the following guidelines:

Major: The violation has the potential to undermine, or has undermined, the ability of the facility to prevent releases of any extremely hazardous substance(s) and/or to minimize the consequences of any such releases.

Moderate: The violation has the potential to affect, or has had significant effect on, the ability of the facility to prevent releases or threatened releases of extremely hazardous substances and/or to minimize the consequences of any such releases.

Minor: The violation has little potential to affect, or has had little effect on, the ability of the facility to prevent releases or threatened releases of extremely hazardous substances and/or to minimize the consequences of any such releases.

EPA personnel should consider the circumstances surrounding the violation(s) to arrive at a specific penalty within the range for a given cell.

Section 3: Calculating Civil Penalties

Table II
The GDC Seriousness Matrix

Extent of Deviation	Potential for Harm: Minor	Potential for Harm: Moderate	Potential for Harm: Major
Major	$25,000 $20,000	$30,000 $25,000	$37,500 $30,000
Moderate	$10,000 $5,000	$15,000 $10,000	$20,000 $15,000
Minor	$1,000 $500	$3,000 $1,000	$5,000 $3,000

Notes:

- For a list of examples of common failures that have resulted in GDC violations see Appendix A. This listing is not exhaustive and does not limit the case team from identifying additional violations and proposing penalties for such violative acts.
- In some situations, a facility will have both GDC and Part 68 violations. In most cases, the case team should assess a gravity-based penalty for both the Part 68 and the GDC violations.[6]

Second, determine the extent of deviation from the requirements for each of the violations alleged. The extent of deviation can be major, moderate, or minor.

To determine the extent of deviation for a particular GDC violation, use the following guidelines:

Major: The violator deviates from the requirements of the statute to such an extent that most (or important aspects) of the requirements are not met, resulting in substantial noncompliance.

Moderate: The violator significantly deviates from the requirements of the statute but some of the requirements are implemented as intended.

Minor: The violator deviates somewhat from the statutory requirements but most (or all important) aspects of the requirements are met.

[6] In situations where a process may fluctuate between exceeding and falling below the RMP threshold, the case team may choose to propose one gravity-based penalty for both GDC and RMP violations.

These two determinations, the potential for harm and the extent of deviation, will lead to a cell within one of the penalty matrices. Within that cell, choose an appropriate penalty figure from the range given, using the guidance discussed below.

Pursuant to CAA § 112(r)(1), owners or operators have a general duty to: 1) identify hazards, 2) design and maintain a safe facility, and 3) minimize consequences of accidental releases that do occur. Therefore, when determining GDC penalties, the case team should consider each of the three statutory obligations as an independent violation and calculate the penalty accordingly. Each of the three specific statutory requirements may also implicate multiple violations.

Extent of Damages

The gravity component for both Part 68 and GDC violations already takes into account such factors as the toxicity of the regulated chemical, the sensitivity of the environment, the length of time the violation continues, and the degree to which the source has deviated from a requirement. However, there may be cases where the actual damage caused by the violation is so severe that the gravity component alone is not a sufficient deterrent, for example, in the case of a significant release of a regulated chemical in a populated area.

Thus, in cases of a release, fire, explosion, or other significant event, after choosing an appropriate number from Tables I or II, and, where the facts and circumstances warrant, go to the Extent of Damages Matrix in Appendix B of this document to consider additional penalty adjustments. **The Extent of Damages multiplier should be applied to the gravity component before adjusting the penalty for Duration of Violation, Size of Violator, and other adjustments.**

B. Duration of Violation(s)

The duration of a violation is based on the time period from the first day of violation for which the Region has evidence through the last provable date of the violation, including those days when the process may be under threshold except when six months have lapsed between days when the facility had chemicals over threshold (note that stationary sources must delist their facility within six months of no longer being subject to the Part 68 regulations). For example, if a facility fails to submit an RMP, the first date of violation is the day the plan was due. The violation continues until the day the facility submits the plan. Table III is used to determine the duration component of a penalty.

Note: One-day violations should not have an added duration component.

Table III
Duration of a Violation

Months	Penalty
0-12	$750/month
13-24	$1,500/month
25-36	$2,250/month
37 +	$3,000/month

For example, if a violation is found to have a duration of 30 months, the duration component would be:

> $9,000 ($750/month for the first 12 months) + $18,000 ($1,500/month for the second 12 months) + $13,500 ($2,250/month for the final 6 months) = $40,500

In cases where the duration of violation amount (as determined in Table III) exceeds the seriousness of the violation component, EPA may, but need not, reduce the duration component down to an amount equal to the seriousness component if the Region determines that the duration component results in a penalty that is disproportionate for the violation. For example, if the Region determines the seriousness component is $35,000 and the violation continued for 60 months, the duration component would be $126,000. Because the $126,000 duration component is greater than the seriousness component of $35,000, the Region may choose to reduce the duration component to no less than $35,000, so it equals the seriousness component.

C. Size of Violator

EPA should scale the penalty to the size of the violator. The size of the violator is based on the company's net worth, or in the case of municipalities, the size of the service population. In the case of a company with more than one facility, the size of the violator is determined based on the entire company's net worth, not just the violating facility. With regard to parent and subsidiary corporations, generally only the size of the current owner or operator subject to enforcement should be considered. If the company's net worth cannot be determined, the size of the violator may be based on gross revenues from all revenue sources during the prior calendar year. If the revenue data for the previous year appears to be unrepresentative of the general performance of the business or the income of the individual, an average of the gross revenues for the prior three years may be used.

EPA should consider reducing the size of violator component if the initial penalty calculation would lead to an inequitable result because the size of violator component is large and the rest of the gravity component is comparatively small. Where the size of the violator figure (as

determined in Table IV) represents more than 50% of the total gravity-based penalty (before adjustments), EPA may, but need not, reduce the size of the violator figure to an amount equal to the rest of the penalty without the size of violator component included. For example, EPA calculates an initial penalty of $100,000, with $70,000 for size of violator and $30,000 for the other penalty elements. Since the $70,000 size of violator component is more than 50% of the $100,000 total penalty, the size of violator component may be reduced to $30,000 -- an amount equal to the balance of the penalty ($30,000). With this reduction, the final resulting penalty will be $60,000, and the size of violator component will be 50% of this amount. The size of violator component is applied only once, regardless of the number of violations alleged.

Table IV
Size of Violator Component

Net Worth	Size Adjustment
Under $1,000,000	$0
$1,000,000 – $5,000,000	$10,000
$5,000,001 – $20,000,000	$20,000
$20,000,001 – $40,000,000	$35,000
$40,000,001 – $70,000,000	$50,000
$70,000,001 – $100,000,000	$70,000
Over $100,000,001	$70,000 + $25,000 for every additional $30,000,000

Municipalities

Service Population	Size Adjustment
100 – 50,000	$0
50,001 – 100,000	$5,000
100,001 – 250,000	$10,000
250,001 – 500,000	$20,000
500,001 – 750,000	$30,000
750,001 – 1,000,000	$40,000
Over 1,000,000	$40,000 + $10,000 for every additional 250,000

IV. Modifying the Penalty

This policy establishes adjustment factors to promote flexibility while maintaining national consistency. In addition to the CAA statutory factors of: seriousness, duration, size of violator,

history of noncompliance, good faith efforts to comply, and economic impact of the penalty (ability to pay), this policy considers: degree of culpability, environmental damage, and other factors. These adjustment factors apply only to the gravity component (which includes the duration and size components) and not to the economic benefit component. In cases where the gravity component is mitigated to reflect a violator's good faith efforts to comply, the violator bears the burden of justifying any mitigation proposed. The gravity component may also be aggravated by as much as 100% for degree of willfulness or negligence and history of noncompliance. In addition, EPA may consider offsetting penalties previously assessed, special circumstances/extraordinary adjustments, and quick settlement reductions. Finally, Supplemental Environmental Projects (SEPs) may further reduce penalties and are considered only after the above listed adjustments to the gravity-based penalty have been made.

In order to promote equity, the system for penalty assessment must have enough flexibility to account for the unique facts of each case, yet must produce results consistent enough to ensure that similarly-situated violators are treated similarly. The CEP allows for flexibility by identifying the legitimate differences between cases and adjusting the gravity component in light of those facts. The application of these adjustments to the gravity component prior to the commencement of negotiation yields the initial minimum settlement amount. During the course of a case, EPA may further adjust this figure based on new information to yield the adjusted minimum settlement amount.

A. Degree of Culpability

This factor may be used to increase the gravity-based penalty. CAA is a strict liability statute for civil actions, so that culpability is irrelevant to the determination of legal liability. However, this does not render the violator's culpability irrelevant in assessing an appropriate penalty. Knowing violations generally reflect an increased culpability on the part of the violator. The culpability of the violator should be reflected in the amount of the penalty, which may be adjusted upward by up to 25% for this factor. In assessing the degree of culpability, all of the following points should be considered:

- Amount of control the violator had over the events constituting the violation;
- Level of sophistication (knowledge) of the violator in dealing with compliance issues; and
- Extent to which the violator knew, or should have known, of the legal requirement that was violated.

B. History of Violations

Gravity-based penalties determined using the procedure provided in Part III of this section are intended to apply to "first-time offenders." The gravity-based penalty should be adjusted upward

when EPA determines that a facility has had one or more prior CAA § 112(r) violations. Such upward adjustment derives from the violator not having been sufficiently motivated to comply as a result of the penalty assessed for the previous violation(s). In addition, it is appropriate to penalize repeat offenders more severely than first time offenders because of the additional enforcement resources required for the same violator. When determining whether an actionable prior history of violation exists, the following criteria apply:

1. Prior Violations Must Have Resulted In an Enforcement Response: For purposes of this section, a prior violation includes any act or omission for which an enforcement response has occurred (*e.g.*, notice of noncompliance, notice of violation, notice of determination, warning letter, complaint, consent decree, consent agreement, or final order).

2. Prior Violations Must be Within Five Years: To be considered a compliance history for the purposes of making an upward adjustment to the gravity-based penalty, the violation must have occurred within five years of the present violation, regardless of whether a respondent admitted to the prior violation.

3. Corporate Relationships: Generally, companies with multiple facilities are considered as one entity when determining the history of violative conduct. The following criteria provide more detail on analyzing corporate relationships:

- If a facility is part of a company with another facility with a prior violation, EPA will consider each facility within the company to have the same violative history.
- However, two companies held by the same parent corporation do not necessarily affect each other's history if they are in substantially different lines of business, are substantially independent of one another in their management, and are substantially independent in the functioning of their Boards of Directors.
- EPA reserves the right to request, obtain, and review all underlying and supporting financial documents that may clarify relationships between entities to determine whether it is appropriate to consider prior history of violation. If the violator fails to provide the necessary information, and the information is not readily available through other sources, then EPA is entitled to rely on the information it does have in its control or possession.

4. Amount of Adjustment:

a. One Prior Violation: The gravity-based penalty should be adjusted upward by 25% for one prior violation;

b. Two or More Prior Violations: The gravity-based penalty should be adjusted upward by 50% for two or more prior violations.

C. Good Faith

In cases where a settlement is negotiated prior to a hearing, after other factors have been applied as appropriate, EPA may reduce the resulting adjusted proposed civil penalty up to a total of 30%. In addition to creating an incentive for cooperative behavior during the compliance evaluation and enforcement process, this adjustment factor further reinforces the concept that respondents face a significant risk of higher penalties in litigation than in settlement. The good faith adjustment has two components:

- EPA may reduce the adjusted proposed penalty up to 15% based on a respondent's cooperation throughout the entire compliance monitoring, case development, and settlement process.
- EPA may reduce the adjusted proposed penalty up to 15% for a respondent's immediate good faith efforts to comply with the violated regulation and the speed and completeness with which it comes into compliance.

D. Economic Impact of the Penalty (Ability to Pay)

Absent proof to the contrary, EPA can establish a respondent's ability to pay with circumstantial evidence relating to a company's size and annual revenue. Once this is done, the burden is on the respondent to demonstrate an inability to pay all or a portion of the calculated civil penalty. Under the Environmental Appeals Board ruling in *In re: New Waterbury, LTD*, 5 E.A.D. 529 (EAB 1994), in administrative enforcement actions for violations under statutes that specify ability to pay (which is analogous to the economic impact of the penalty on the business) as a factor to be considered in determining the penalty amount, EPA must prove it adequately considered the appropriateness of the penalty in light of all of the statutory factors. Accordingly, enforcement professionals should be prepared to demonstrate that they considered the respondent's ability to pay, as well as the other statutory penalty factors, and that their recommended penalty is supported by their analysis of those factors. Thus, to determine the appropriateness of the proposed penalty in relation to a person's ability to pay, the case team should review publicly-available information, such as Dun and Bradstreet reports, a company's filings with the Securities and Exchange Commission, other available financial reports, news media reports about a company, or request information from the respondent before issuing the complaint.

The Agency will notify the respondent of its right to have EPA consider its ability to pay in determining the amount of the penalty. Any respondent may raise the issue of ability to

pay/ability to continue in business in its answer to the complaint or during the course of settlement negotiations. If a respondent raises inability to pay in its answer or in the course of settlement negotiations, the Agency should ask the respondent to present appropriate documentation, such as tax returns and financial statements. The respondent should provide records that conform to generally accepted accounting principles and procedures at its expense. EPA generally should request the following types of information:

- Last three to five years of tax returns;
- Balance sheets;
- Income statements;
- Statements of changes in financial position;
- Statement of operations;
- Information on business and corporate structure;
- Retained earnings statements;
- Loan applications, financing agreements, security arrangements;
- Annual and quarterly reports to shareholders and the SEC, including 10K reports;
- Assets and Liabilities Statement.

The violator's ability to pay should be determined according to the Agency's "Guidance on Determining a Violator's Ability to Pay a Civil Penalty," December 16, 1986, codified as PT 2-1 in the General Enforcement Policy Compendium (previously codified as GM-56). There are three relevant computer models used for determining the financial health of businesses, individuals, and municipalities – ABEL, INDIPAY, and MUNIPAY. ABEL is used to calculate inability to pay for corporations and partnerships, while INDIPAY can be used to calculate inability to pay for individual taxpayers. For municipalities or other local governmental bodies, enforcement personnel should use the MUNIPAY computer model. Enforcement personnel may also consider obtaining the services of a financial analyst for assistance in determining a violator's ability to pay. Because these programs focus on a violator's cash flow, there are other sources of revenue that could be considered to determine if a firm is able to pay the full penalty.

These include:

- Certificates of deposit, money market funds, or other liquid assets;
- Reduction in business expenses such as advertising, entertainment, or compensation of corporate officers;
- Sale or mortgage of non-liquid assets such as company cars, aircraft, or land;
- Related entities (*e.g.*, the violator is a wholly owned subsidiary of a Fortune 500 company).

A respondent may argue that it cannot afford to pay the proposed penalty even though the penalty as adjusted does not exceed EPA's assessment of its ability to pay. In such cases, EPA may consider a delayed payment schedule calculated in accordance with Agency installment payment guidance and regulations.[7]

Finally, EPA will generally not collect a civil penalty that exceeds a violator's ability to pay as evidenced by a detailed tax, accounting, and financial analysis. However, it is important that the regulated community not choose noncompliance as a way of aiding financially troubled businesses. Therefore, EPA reserves the option, in appropriate circumstances, of seeking a penalty that might exceed the respondent's ability to pay, cause bankruptcy, or result in a respondent's inability to continue in business. Such circumstances may exist where the violations are egregious and/or the violator refuses to pay the penalty. In such situations, the case file must contain a written explanation, signed by the regional authority delegated to issue and settle administrative penalty orders under CAA, which explains the reasons for exceeding the "ability to pay" guidelines. To ensure full and consistent consideration of penalties that may cause bankruptcy or closure of a business,the enforcement personnel should consult with the Waste and Chemical Enforcement Division (WCED). In the event the violator is a small business, EPA should refer to and apply all relevant factors given in the EPA Small Business Compliance Policy.

E. Offsetting Penalties Paid to Federal, State, Tribal, and Local Governments or Citizen Groups for the Same Violations

In assessing a penalty under the CAA § 113(e)(1), the court in a civil judicial action or the Administrator in an administrative action must consider "payment by the violator of penalties previously assessed for the same violation." While EPA need not automatically subtract any

[7] *See* 40 C.F.R. § 13.18.

penalty amount paid by a source to a federal, state, tribal, or local agency in an enforcement action or to a citizen group in a citizen suit for the same violation that is the basis for EPA's enforcement action, EPA may do so if circumstances suggest that it is appropriate. EPA should consider primarily whether the remaining penalty is a sufficient deterrent.

F. Special Circumstances/Extraordinary Adjustments

A case may present other factors that the case team believes justify a further reduction of the penalty.[8] For example, a case may have particular litigation strengths or weaknesses that have not been adequately captured in other areas of this policy. If the facts of the case or the nature of the violation(s) at issue reduce the strength of the Agency's case, then an additional penalty reduction may be appropriate. If after careful consideration the case team determines that an additional reduction of the penalty is warranted, it should ensure the case file includes substantive reasons why the extraordinary reduction of the civil penalty is appropriate, including: (1) why the penalty derived from the CAA § 112(r) civil penalty matrices and gravity adjustment is inequitable; (2) how all other methods for adjusting or revising the proposed penalty would not adequately resolve the inequity; (3) the manner in which the adjustment of the penalty effectuated the purposes of the Act; and (4) documentation of management concurrence in the extraordinary reduction. Significant reductions for litigation risk must be approved by the Director of the Waste and Chemical Enforcement Division. *See Final Guidance and Procedures for Nationally Significant Issues under EPCRA, CERCLA§ 103 and CAA § 112(r),* March 9, 2012. EPA should still obtain a penalty sufficient to remove any economic incentive for violating applicable CAA § 112(r) requirements.

G. Supplemental Environmental Projects

Supplemental Environmental Projects (SEPs) are environmentally beneficial projects that a respondent agrees to undertake in settlement of an environmental enforcement action, but which the respondent is not otherwise legally required to perform. Some percentage of the cost of the SEP is considered as a factor in establishing the final penalty to be paid by the respondent. EPA has broad discretion to settle cases with appropriate penalties. Evidence of a violator's commitment and ability to perform a SEP is a relevant factor for EPA to consider in establishing an appropriate settlement penalty. While SEPs may not be appropriate in settlement of all cases, they are an important part of EPA's enforcement program. Whether to include a SEP as part of a settlement of an enforcement action is within the sole discretion of EPA. EPA will ensure that the inclusion of a SEP in settlement is consistent with "EPA Supplemental Environmental Projects Policy," effective May 1, 1998, or as revised.

[8] *See*, Appendix C, TSCA Enforcement Policy and Guidance Documents, Memorandum, *Documenting Penalty Calculations and Justifications of EPA Enforcement Actions*, James Strock, August 9, 1990.

Section 3: Calculating Civil Penalties

V. Settlement of Penalties

This policy should be used to calculate penalties sought in all Part 68 and GDC administrative complaints or accepted in settlement of both administrative and civil judicial enforcement actions brought after the date of the policy, regardless of the date of the violation.

VI. Documenting Penalty Settlement Amount

In order to ensure that EPA promotes consistency, it is essential that each case file contain a complete description of how each penalty was calculated as required by the August 9, 1990, *Guidance on Documenting Penalty Calculations and Justification in EPA Enforcement Actions*. This description should cover how the preliminary deterrence amount was calculated and any adjustments made to the preliminary deterrence amount. Furthermore, it should explain the facts and reasons which support such adjustments.

VII. Apportioning the Penalty among Multiple Respondents

This policy is intended to yield a minimum settlement penalty figure for the case as a whole. In many cases, there may be more than one respondent. In such cases, the case team should generally take the position of seeking a sum for the case as a whole, which the respondents allocate among themselves. Civil violations of the CAA are strict liability violations and the case team generally should not discuss the relative fault of respondents or apportioning the penalty. In some instances, however, apportionment of the penalty in a multi-respondent case may be required if one party is willing to settle and other are not. In such cases, if certain portions of the penalty are attributable to such party, that party should pay those amounts and a reasonable portion of the amounts not directly assigned to any single party. If the case is settled as to one respondent, a penalty not less than the balance of the settlement figure for the case as a whole must be obtained from the remaining respondents.

VIII. Conclusion

Establishing fair, consistent, and sensible guidelines for addressing violations is central to the credibility of EPA's enforcement of the CAA § 112(r) requirements and to the success of achieving the goal of equitable treatment. This policy establishes several mechanisms to promote consistency while retaining flexibility when determining significant violations of the regulations. Also, the systematic methods for calculating both the economic benefit and gravity components of the penalty should provide the consistency and flexibility to address any issue fairly (tailored to the specific circumstances of the violation). Furthermore, this policy sets guidance on uniform approaches for applying adjustment factors to arrive at an initial amount after negotiations have begun.

Section 4: Appendices

Appendix A
Examples of Common Failures that Have Resulted in General Duty Clause Violations

(This listing is not exhaustive and does not limit the case team from identifying additional violations and proposing penalties for such violative acts.)

Clean Air Act § 112(r)(1) states: The owners and operators of stationary sources producing, processing, handling or storing such substances have a general duty in the same manner and to the same extent as section 654 of title 29 to identify hazards which may result from such releases using appropriate hazard assessment techniques, to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases which do occur.

FAILURES

To identify hazards:

Failure to identify chemical or process hazards which may result in accidental release or explosion.[9]

Failure to consider risk from adjacent processes, which may pose a threat to the process.

Failure to adequately consider safety considerations given the facility's siting (*e.g.*, when facility is located in close proximity to residential neighborhoods, sensitive ecosystems, and/or to an industrial park containing industries utilizing listed hazardous substances).

[9] An important point of reference is the Legislative History for CAA § 112(r). This is Senate Report No. 101-228 in which the Senate committee stated as follows: "Hazard assessments will be conducted in accordance with guidance issued by the Administrator. That guidance may draw from recognized hazard evaluation techniques including elements of any of the eleven different techniques described by the American Institute of Chemical Engineers (AIChE) in the published report "Guidelines for Hazard Evaluation Procedures." The applicability of various techniques at specific facilities depends on the size and complexity of the facilities and the risks presented by the processes and substances present." Senate Report at pp. 3606-07. *See also*, GUIDANCE FOR IMPLEMENTATION OF THE GENERAL DUTY CLAUSE CLEAN AIR ACT SECTION 112(r)(1) -- http://www.epa.gov/oem/docs/chem/gdcregionalguidance.pdf; "Review of Emergency Systems, Report to Congress, section 305(b) SARA 1988 TD 811.5.r.263 1988 ; and "Guidelines for Hazard Evaluation Procedures, The Center for Chemical Process Safety, American Institute of Chemical Engineers 1985, TP155.5g77 1985.

Section 4: Appendices

To design and maintain a safe facility taking such steps as are necessary to prevent releases:

Failure to design and maintain a safe facility. In determining this factor, the case team should consider the conditions at the facility, applicable design codes, federal and state regulations, recognized industry practices and/or consensus standards.[10]

Failure to provide for sufficient layers of protection. An additional layer of protection would have prevented the release or explosion.

Failure to update design codes.

Failure to implement a quality control program to ensure that components and materials meet design specifications and to construct the process equipment as designed.

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[10] Design failures include, but are not limited to failure to adhere to applicable design codes and/or industry guidelines, including advisory standards. Examples include: API (American Petroleum Institute) standards; ASME (American Society of Mechanical Engineers) standards; ANSI (American National Standards Institute) standards; NFPA (National Fire Protection Association) guidelines; NACE (National Association of Corrosion Engineers) standards; AIChE (American Institute of Chemical Engineers) guidelines; ISA (Instrument Society of America) standards; International Fire Code.

Design failures also include failures to adhere to consensus standards which may also include manufacturer's procedures. An example of an industry consensus standard is a manufacturer's product safety bulletin, the Material Safety Data Sheet, or other publication which outlines safe handling and processing procedures for a specific chemical or substance. Many of these publications discuss materials of construction, safety equipment, tank design, and which API or ANSI standards to apply to the handling of that specific chemical or substance.

Other design failures include common sense design flaws or inadequate equipment such as failure to include sufficient instrumentation to monitor temperature, pressure, flow, pH level, etc. Other design flaws include lack of emergency shutdown systems, overflow controls, instrumentation interlocks and use of failsafe design. For example, operators should typically design steam vent valves so that, if they fail, they will fail to a safe part of the plant and not a part of plant where there is material in process. Instrumentation is vital for any process including foods processing as well as industrial and petrochemicals. This is especially important in vessels and tank reactors which handle polymers. Such chemicals have the potential for runaway reactions. It is important to have automated systems to detect high levels of chemical vapors and alert the appropriate facility personnel/authorities that a release may be occurring from a process. Such monitors and alarms should be placed in the appropriate locations.

Maintenance failures would include failures to maintain tanks, piping, instrumentation, valves and fittings, such as the isolation valves on tanks, or the steam shutoff valves and level switches and gauges. Such failures have historically contributed to major catastrophic releases and/or explosions. For storage facilities, considerations must be made for incompatible chemicals, spillage, tank/container integrity, appropriate secondary containment, appropriate temperature conditions for storage, building code compliance, adequate aisle space for emergency responders and forklifts, cut off storage, fire protection systems, etc.

Failure to provide for or to properly size pressure-relieving device on a tank or reactor subjected to pressure.

Failure to train employees as to hazards which they may encounter; Failure to train chemical plant operators how to safely respond to process or manufacturing upsets.

Failure of operators or employees to implement or follow operating instructions or company rules.

To minimize the consequences of accidental releases which do occur:

Failure to develop an emergency plan that specifically addresses release scenarios developed from the identification of hazards and historical information.

Failure to follow emergency plan or to coordinate with LEPC or local emergency management agency.

Failure to monitor any shutdown of facility.

Failure to mitigate consequences of a releaseor an explosion. This may include the failure to provide for or properly size an emergency scrubber, knock-out pot or other device or vessel to contain vapors and expelled substances. This may also include failure to provide for adequate water spray or deluge system, fire suppression or other minimization system.

Failure to provide for sufficient layers of protection. An additional layer of protection would have prevented the release or explosion.

Failure to train employees as to hazards which they may encounter; failure to train chemical plant operators how to safely respond to process or manufacturing upsets.

Section 4: Appendices

Appendix B
Extent of Damages

If consideration of Extent of Damages is applicable to the action, consider the following incident consequences to determine which ones may apply to the facts. Each has a number of points associated with it. After adding up the points, use the multiplying factor to increase the overall baseline gravity component determined above. The Extent of Damages multiplier should be applied to the gravity component before adjusting the penalty for Duration of Violation, Size of Violator, and other adjustments.

Instructions: Depending on the facts and circumstances of the incident, for each chemical or for the cumulative damage caused by the failures, circle the items that apply and are relative to the incident. Add the points.

Total Points	Multiplying Factor
1-10	1.1 to 2.0
11-20	2.1 to 3.0
21-30	3.1 to 4.0
31-40	4.1 to 5.0
41-50	5.1 to as necessary

Points	Description of Incident Consequences
1	Explosion or fire only.
2	Explosion with offsite debris field.
3	Explosion with offsite debris and pressure shock wave.

Onsite and Offsite Release of Substances

Creation of Cloud or Plume.

1	Plume smaller than facility and remained onsite before dissipating.
2	Plume migrated off site then dissipated before reaching into populated area.
3	Plume large enough to migrate off site and reach into populated area or more than 1 mile from facility.
4	Plume large enough to migrate off site and reach into populated area and impact more than one county or more than 10 miles.
5	Plume large enough to migrate off site and reach into populated area and impact more than one county or more than 50 to 100 miles.

Injury or Potential Injury to Human Health

1	Injuries or potential injuries to Human Health, undetermined amounts.
2	Injuries or potential injuries and/or chemical exposures with treatment by EMT personnel.
3	Injuries or potential injuries and/or chemical exposures with hospital admission.
4	Deaths or potential for deaths (include intensive care admissions) (multiply for each).

Damage or Potential Damage to the Environment

1	Damage or potential damage to on-site flora/fauna.
2	Damage to off-site flora/fauna.
2	Destroyed or potentially destroyed flora/fauna.
3	Major environmental impact or threats of impact including: water runoff from fire fighter water or water knockdown spray creating contaminated creeks, lakes and ponds.

Damage or Potential Damage to the Facility

1	Damage or potential damage to facility, undetermined amounts.
2	Damages or potential damage to facility up to $750,000.
3	Damage or potential damage to facility greater than $750,000.

Damage or Potential Damage Offsite -- Public, Residential or Commercial

1	Damage or potential damage to offsite properties- undetermined amounts.
2	Damage or potential damage to offsite properties up to $750,000.
3	Damage or potential damage to offsite properties greater than $750,000.

Inconvenience to Public

1	Sheltering in place.

1	Evacuation of public for less than 4 hours.
2	Evacuation of public for more than 4 hours but less than 2 days.
3	Evacuation of public for 2 days or more.

1	More than 100 people evacuated or sheltered.
2	More than 500 people evacuated or sheltered.

3	More than 1,000 people evacuated or sheltered.
4	More than 10,000 people evacuated or sheltered.
5	More than 50,000 people evacuated or sheltered.

Interruption of Commerce

1	Closure of highways or roads; closure of businesses, undetermined amount of time.
2	Closure of interstate highways; closure of businesses 1- 3 days.
3	Closure of ship channels; closure of businesses 3-5 days.
4	Closure of air space; closure of businesses more than 5 days.

Amount of Chemical or Substance Released

1	Amount of substance(s) released less than 1 pound but detected by instruments.
2	Amount of substance(s) released greater than 1 pound but less than or equal to10 pounds.
3	Amount of substance(s) greater than 10 pounds but less than or equal to100 pounds.
4	Amount of substance(s) released greater than 100 pounds but less than or equal to 1000 pounds.
5	Amount of substance(s) greater than 1000 pounds but less than or equal to 10,000 pounds.
6	Amount of substance(s) released greater than 10,000 pounds but less than or equal to 100,000 pounds.
7	Amount of substance(s) greater than 100,000 pounds but less than or equal to 300,000 pounds.
8	Amount of substance(s) released greater than 300,000 pounds but less than or equal to 1,000,000 pounds.
9	Amount of substance(s) greater than 1,000,000 pounds but less than or equal to 10,000,000 pounds.
10	Amount of substance(s) released greater than 10,000,000 pounds.

Toxicity of Chemical/Substance:
IDLH = Immediately Dangerous to Life or Health concentrations.

1	If Toxicity of released substance(s) is IDLH 1000 ppm or more
2	If Toxicity of released substance(s) is IDLH 500 to 999 ppm
3	If Toxicity of released substance(s) is IDLH 400 to 499 ppm
4	If Toxicity of released substance(s) is IDLH 300 to 399 ppm
5	If Toxicity of released substance(s) is IDLH 200 to 299 ppm

6	If Toxicity of released substance(s) is IDLH 51 to 199 ppm
7	If Toxicity of released substance(s) is IDLH 11-50 ppm
8	If Toxicity of released substance(s) is IDLH 6-10 ppm
9	If Toxicity of released substance(s) is IDLH 1-5 ppm
10	If Toxicity of released substance(s) is IDLH less than 1 ppm

Other Factors

5	Carcinogen

Example list of substances and corresponding IDLH levels. Source *NIOSH, 1997 Pocket Guide to Chemical Hazards.*

SUBSTANCE	IDLH
PHOSGENE	2 PPM
BROMINE	3 PPM
CHLORINE	10 PPM
SULFURIC ACID MIST	15 PPM
ALLYL ALCOHOL	20 PPM
NITRIC ACID	25 PPM
HYDROFLOURIC ACID	30 PPM
HYDROGEN CYNANIDE	50 PPM
HYDROGEN SULFIDE	100 PPM
NITRO TOLUENE	200 PPM
NITRO BENZENE	200 PPM
AMMONIA	300 PPM
TOLUENE	500 PPM
BENZENE	500 PPM

Section 4: Appendices

Appendix C
Internet References for Policy Documents

Depending on the facts and circumstances of each case, the following policies should be consulted as appropriate:

Parallel Proceedings Policy:
http://www.epa.gov/compliance/resources/policies/enforcement/parallel-proceedings-policy-09-24-07.pdf

Supplemental Environmental Projects:
http://cfpub.epa.gov/compliance/resources/policies/civil/seps/

Final Supplemental Environmental Projects Policy (1998):
http://www.epa.gov/compliance/resources/policies/civil/seps/fnlsup-hermn-mem.pdf

Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations (Audit Policy):
http://www.epa.gov/compliance/incentives/auditing/auditpolicy.html

Small Compliance Business Policy:
http://www.epa.gov/compliance/incentives/smallbusiness/index.html

Redelegation of Authority:
http://www.epa.gov/compliance/resources/policies/civil/rcra/hqregenfcases-mem.pdf

Documenting Penalty Calculations and Justifications of EPA Enforcement Actions, (Aug 1990):
http://www.epa.gov/compliance/resources/policies/civil/rcra/caljus-strock-mem.pdf

Amendments to Penalty Policies to Implement Penalty Inflation Rule 2008:
http://cfpub.epa.gov/compliance/resources/policies/civil/penalty/

Policy on Flexible State Enforcement Responses to Small Community Violations:
http://epa.gov/compliance/resources/policies/incentives/smallcommunity/scpolicy.pdf

Equal Access to Justice Act:
http://www.law.cornell.edu/uscode/html/uscode05/usc_sec_05_00000504----000-.html

Policy on Civil Penalties -- EPA General Enforcement Policy #GM-21:
http://www.epa.gov/compliance/resources/policies/civil/penalty/epapolicy-civilpenalties021684.pdf

A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties -- EPA General Enforcement Policy #GM - 22:
http://www.epa.gov/compliance/resources/policies/civil/penalty/penasm-civpen-mem.pdf

Enforcement Economic Models:
http://www.epa.gov/compliance/civil/econmodels/

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

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. Documents filed in proceedings before the Environmental Appeals Board shall either be sent by U.S. mail (except by U.S. Express Mail) to the official mailing address of the Clerk of the Board set forth at § 22.3 or delivered by hand or courier (including deliveries by U.S. Postal Express or by a commercial delivery service) to Suite 600, 1341 G Street, NW., Washington, DC 20005. 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.

[64 FR 40176, July 23, 1999, as amended at 69 FR 77639, Dec. 28, 2004]

§ 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. Appeals sent by U.S. mail (except by U.S. Postal Express Mail) shall be addressed to the Environmental Appeals Board at its official mailing address: Clerk of the Board (Mail Code 1103B), United States Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Appeals delivered by hand or courier (including deliveries by U.S. Postal Express Mail or by a commercial delivery service) shall be delivered to Suite 600, 1341 G Street, NW., Washington, DC 20005. 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.

[64 FR 40176, July 23, 1999, as amended at 68 FR 2204, Jan. 16, 2003; 69 FR 77639, Dec. 28, 2004]

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, 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 in promulgation (for purposes of sections 509(b)(1) (A), (C), and (E)), approving (for purposes of section 509(b)(1)(E)), making a determination (for purposes of section 509(b)(1) (B) and (D), and issuing or denying (for purposes of section 509(b)(1)(F)) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on (a) for a FEDERAL REGISTER document, the date that is two weeks after the date when the document is published in the FEDERAL REGISTER, or (b) for any other document, two weeks after it is signed.

§ 23.3 Timing of Administrator's action under Clean Air Act.

Unless the Administrator otherwise explicitly provides in a particular promulgation, approval, or action, the time and date of such promulgation, approval or action for purposes of the second sentence of section 307(b)(1) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on (a) for a FEDERAL REGISTER document, the date when the document is published in the FEDERAL REGISTER, or (b) for any other document, two weeks after it is signed.

United States
Environmental Protection
Agency

Office of Enforcement and Compliance Assurance (2201A)
EPA 300-F-07-003 October 2007

Office of Enforcement and Compliance Assurance

INFORMATION SHEET

U. S. EPA Small Business Resources

If you own a small business, the United States Environmental Protection Agency (EPA) offers a variety of compliance assistance resources such as workshops, training sessions, hotlines, websites, and guides to assist you in complying with federal and state environmental laws. These resources can help you understand your environmental obligations, improve compliance, and find cost-effective ways to comply through the use of pollution prevention and other innovative technologies.

Compliance Assistance Centers

(www.assistancecenters.net)
In partnership with industry, universities, and other federal and state agencies, EPA has established Compliance Assistance Centers that provide information targeted to industries with many small businesses.

Agriculture
(www.epa.gov/agriculture or 1-888-663-2155)

Automotive Recycling Industry
(www.ecarcenter.org)

Automotive Service and Repair
(www.ccar-greenlink.org or 1-888-GRN-LINK)

Chemical Industry
(www.chemalliance.org)

Construction Industry
(www.cicacenter.org or 1-734-995-4911)

Education
(www.campuserc.org)

Healthcare Industry
(www.hercenter.org or 1-734-995-4911)

Metal Finishing
(www.nmfrc.org or 1-734-995-4911)

Paints and Coatings
(www.paintcenter.org or 1-734-995-4911)

Printed Wiring Board Manufacturing
(www.pwbrc.org or 1-734-995-4911)

Printing
(www.pneac.org or 1-888-USPNEAC)

Transportation Industry
(www.transource.org)

Tribal Governments and Indian Country
(www.epa.gov/tribal/compliance or 202–564-2516)

US Border Environmental Issues
(www.bordercenter.org or 1-734-995-4911)

The Centers also provide State Resource Locators (www.envcap.org/statetools/index.cfm) for a wide range of topics to help you find important environmental compliance information specific to your state.

EPA Websites

EPA has several Internet sites that provide useful compliance assistance information and materials for small businesses. If you don't have access to the Internet at your business, many public libraries provide access to the Internet at minimal or no cost.

EPA's Home Page
www.epa.gov

Small Business Gateway
www.epa.gov/smallbusiness

Compliance Assistance Home Page
www.epa.gov/compliance/assistance

Office of Enforcement and Compliance Assurance
www.epa.gov/compliance

Voluntary Partnership Programs
www.epa.gov/partners

Recycled/Recyclable
Printed with Soy/Canola Ink on paper that contains at least 30% post consumer fiber

U.S. EPA SMALL BUSINESS RESOURCES

Hotlines, Helplines & Clearinghouses

(www.epa.gov/epahome/hotline.htm)
EPA sponsors many free hotlines and clearinghouses that provide convenient assistance regarding environmental requirements. A few examples are listed below:

Clean Air Technology Center
(www.epa.gov/ttn/catc or 1-919-541-0800)

Emergency Planning and Community Right-To-Know Act
(www.epa.gov/superfund/resources/infocenter/epcra.htm or 1-800-424-9346)

EPA's Small Business Ombudsman Hotline provides regulatory and technical assistance information.
(www.epa.gov/sbo or 1-800-368-5888)

The National Environmental Compliance Assistance Clearinghouse provides quick access to compliance assistance tools, contacts, and planned activities from the U.S. EPA, states, and other compliance assistance providers
(www.epa.gov/clearinghouse)

National Response Center to report oil and hazardous substance spills.
(www.nrc.uscg.mil or 1-800-424-8802)

Pollution Prevention Information Clearinghouse
(www.epa.gov/opptintr/ppic or 1-202-566-0799)

Safe Drinking Water Hotline
(www.epa.gov/safewater/hotline/index.html or 1-800-426-4791)

Stratospheric Ozone Refrigerants Information
(www.epa.gov/ozone or 1-800-296-1996)

Toxics Assistance Information Service also includes asbestos inquiries.
(1-202-554-1404)

Wetlands Helpline
(www.epa.gov/owow/wetlands/wetline.html or 1-800-832-7828)

State Agencies

Many state agencies have established compliance assistance programs that provide on-site and other types of assistance. Contact your local state environmental agency for more information or the following two resources:

EPA's Small Business Ombudsman
(www.epa.gov/sbo or 1-800-368-5888)

Small Business Environmental Homepage
(www.smallbiz-enviroweb.org or 1-724-452-4722)

Compliance Incentives

EPA provides incentives for environmental compliance. By participating in compliance assistance programs or voluntarily disclosing and promptly correcting violations before an enforcement action has been initiated, businesses may be eligible for penalty waivers or reductions. EPA has two policies that potentially apply to small businesses:

The Small Business Compliance Policy
(www.epa.gov/compliance/incentives/smallbusiness)

Audit Policy
(www.epa.gov/compliance/incentives/auditing)

Commenting on Federal Enforcement Actions and Compliance Activities

The Small Business Regulatory Enforcement Fairness Act (SBREFA) established an SBA Ombudsman and 10 Regional Fairness Boards to receive comments from small businesses about federal agency enforcement actions. If you believe that you fall within the Small Business Administration's definition of a small business (based on your North American Industry Classification System (NAICS) designation, number of employees, or annual receipts, defined at 13 C.F.R. 121.201; in most cases, this means a business with 500 or fewer employees), and wish to comment on federal enforcement and compliance activities, call the SBREFA Ombudsman's toll-free number at 1-888-REG-FAIR (1-888-734-3247).

Every small business that is the subject of an enforcement or compliance action is entitled to comment on the Agency's actions without fear of retaliation. EPA employees are prohibited from using enforcement or any other means of retaliation against any member of the regulated community in response to comments made under SBREFA.

Your Duty to Comply

If you receive compliance assistance or submit comments to the SBREFA Ombudsman or Regional Fairness Boards, you still have the duty to comply with the law, including providing timely responses to EPA information requests, administrative or civil complaints, other enforcement actions or communications. The assistance information and comment processes do not give you any new rights or defenses in any enforcement action. These processes also do not affect EPA's obligation to protect public health or the environment under any of the environmental statutes it enforces, including the right to take emergency remedial or emergency response actions when appropriate. Those decisions will be based on the facts in each situation. The SBREFA Ombudsman and Fairness Boards do not participate in resolving EPA's enforcement actions. Also, remember that to preserve your rights, you need to comply with all rules governing the enforcement process.

EPA is disseminating this information to you without making a determination that your business or organization is a small business as defined by Section 222 of the Small Business Regulatory Enforcement Fairness Act or related provisions.