UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

SEP 28 2012

REPLY TO THE ATTENTION OF:

L-8J

CERTIFIED MAIL
Receipt No. 7004 2510 0001 9615 4618

Michael Mathie, President
Mathie Energy Supply Company, Inc.
7840 South Gale Road
Morrice, Michigan 48857

Re: In the matter of: Mathie Energy Supply Company, Inc.
Docket number: **FIFRA-05-2012-0022**

Dear Mr. Mathie:

I have enclosed the First Amended Complaint filed by the U.S. Environmental Protection Agency against Mathie Energy Supply Company, Inc. under Section 7 of FIFRA, 7 U.S.C. § 136*l*(a), a copy of EPA's FIFRA Enforcement Response Policy, dated December 2009, and a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. Part 22.

As provided in the First Amended Complaint, if you would like to request a hearing, you must do so in your answer to the First Amended Complaint. Please note that if you do not file an answer with the Regional Hearing Clerk (E-19J), U.S. EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604 within 20 days of your receipt of this First Amended Complaint, a default order may be issued and the proposed civil penalty will become due 30 days later. If you choose to file an answer, you also must mail a copy of it to Mark Koller, Associate Regional Counsel (C-14J), U.S. EPA, 77 West Jackson Boulevard, Chicago, Illinois 60604.

Whether or not you request a hearing, you may request an informal settlement conference. If you wish to request a conference, or if you have any questions about this matter, please contact Mark Koller, Associate Regional Counsel, at (312) 353-2591.

Sincerely,

Margaret M. Guerriero
Director
Land and Chemicals Division

Enclosures

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:	)	**Docket No. FIFRA-05-2012-0022**
	)	
Mathie Energy Supply Company, Inc.	)	**Proceeding to Assess a Civil Penalty**
Morrice, Michigan,	)	**Under Section 14(a) of the Federal**
	)	**Insecticide, Fungicide, and Rodenticide**
Respondent.	)	**Act, 7 U.S.C. § 136*l*(a)**
	)	

First Amended Complaint

1. This is an administrative proceeding to assess a civil penalty under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136*l*(a).

2. The Complainant is, by lawful delegation, the Director of the Land and Chemicals Division, United States Environmental Protection Agency (EPA), Region 5.

3. The Respondent is Mathie Energy Supply Company, Inc., a corporation doing business in the State of Michigan.

Statutory and Regulatory Background

4. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states that it is unlawful for any person in any State to distribute or sell to any person any pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

5. The term "person" as defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s), "means any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not."

6. The term "State" as defined in Section 2(aa) of FIFRA, 7 U.S.C. § 136(aa), means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa.

7. The term "to distribute or sell" means "to distribute, sell, offer for sale, hold for

distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver." 7 U.S.C. § 136(gg).

8. A "pesticide" is, among other things, any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest. 7 U.S.C. § 136(u).

9. A "pest" is any insect, rodent, nematode, fungus, weed, or any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism which the Administrator of EPA declares to be a pest under Section 25(c)(1) of FIFRA. 7 U.S.C. § 136(t).

10. An organism is declared to be a pest under circumstances that make it deleterious to man or the environment if it is any plant growing where not wanted, including any alga. 40 C.F.R. § 152.5(c).

11. A substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if the person who distributes or sells the substance claims, states, or implies (by labeling or otherwise) that the substance can or should be used as a pesticide. 40 C.F.R. § 152.15(a)(1).

12. Section 12(a)(2)(B)(i) of FIFRA, 7 U.S.C. § 136j(a)(2)(B)(i), states that it is unlawful for any person to refuse to prepare, maintain, or submit any records required by or under 7 U.S.C. §§ 136c, 136e, 136f, 136i, or 136q.

13. Section 8(b) of FIFRA, 7 U.S.C. § 136f(b), provides that for the purposes of enforcing FIFRA, any producer, distributor, carrier, dealer, or any other person who sells or offers for sale, delivers or offers for delivery any pesticide or device subject to FIFRA, shall, upon request of any officer or employee of the EPA or of any State or political subdivision, duly designated by the Administrator, furnish or permit such person at all reasonable times to have access to and to copy all records showing the delivery, movement, or holding of such pesticide or

device, including the quantity, the date of shipment and receipt, and the name of the consignor and consignee.

14. Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), states that it is unlawful for any person who is a producer to violate any of the provisions of 7 U.S.C. § 136(e).

15. The term "producer" means the person who manufactures, prepares, compounds, propagates, or processes any pesticide or device or active ingredient used in producing a pesticide. 7 U.S.C. § 136(w).

16. A person is considered a producer if the person produces any pesticide, active ingredient, or device (including packaging, repackaging, labeling, and relabeling). 40 C.F.R. § 167.3.

17. The term "establishment" means any place where a pesticide or device or active ingredient used in producing a pesticide is produced, or held, for distribution or sale. 7 U.S.C. § 136(dd).

18. Section 14(a)(1), 7 U.S.C. § 136*l*(a)(1), provides that any registrant, commercial applicator, wholesaler, dealer, retailer or other distributor who violates any provision of FIFRA may be assessed a civil penalty by the Administrator of not more than $5,000 for each offense.

19. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note, and 40 C.F.R. Part 19, the Administrator of EPA may assess a civil penalty against any retailer who violates any provision of FIFRA of up to $7,500 for each offense that occurred after January 12, 2009.

General Allegations

20. Respondent is a "person" as defined at Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

21. Respondent is a retailer.

22. Respondent owned or operated a place of business during calendar year 2009 located at 100 East Grove Street, Kawkawlin, Michigan 48613 (Kawkawlin store).

23. Michigan is a "State" as defined at Section 2(aa) of FIFRA, 7 U.S.C. § 136(aa).

24. The Kawkawlin store is an "establishment" as defined at Section 2(dd) of FIFRA, 7 U.S.C. § 136(dd).

25. Respondent also had a website (www.mathieenergy.com) during calendar year 2010, which allowed consumers to shop online (https://www.mathieenergy.com/index.php/Our-Online-Shop.html).

26. On May 14, 2009, inspectors employed by the Michigan Department of Agriculture (MDA) and authorized to conduct inspections under FIFRA conducted an inspection at Respondent's Kawkawlin store.

27. During the May 14, 2009 establishment inspection at the Kawkawlin store, the MDA inspectors observed "Copper Sulfate" in two five-pound bags in the retail area.

28. During the May 14, 2009 establishment inspection at the Kawkawlin store, the MDA inspectors observed "Red Lake Earth Diatomaceous Earth with Calcium Bentonite" in the retail area.

29. The five-pound bags had a small white label that says, "Copper Sulfate" and includes the Respondent's name, the address for the Kawkawlin store, and an active ingredients list (99% copper sulfate pentahydrate).

30. The "Copper Sulfate" in five-pound bags was also labeled with labeling that states, "Update: Use of Bluestone (Copper Sulfate) for Algae Control."

31. On May 14, 2009, an MDA inspector acquired from the Respondent a copy of the

label "Update: Use of Bluestone (Copper Sulfate) for Algae Control."

32. The labeling "Update: Use of Bluestone (Copper Sulfate) for Algae Control" is a two-page article written by William Wurts, State Specialist for Aquaculture with the Kentucky State University Cooperative Extension Program.

33. The article states: "If a dense bloom of algae has covered most of the pond, copper treatment is not advisable. The treatment will likely cause a sudden, algal die off. An oxygen depletion could result as dead algae decay and the fish will suffocate." Also, "[s]pot treatments can help limit algae problems, particularly in low alkalinity waters, as long as the amount of copper sulfate applied…is small."

34. "Copper Sulfate" is a "pesticide" as defined at Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

35. On May 14, 2009, an MDA inspector acquired a copy of a Mathie pamphlet entitled: "WHAT IS DIATOMACEOUS EARTH?"

36. The pamphlet was available on a shelf near the "Red Lake Earth Diatomaceous Earth with Calcium Bentonite."

37. The pamphlet makes a number of claims, including but not limited to: "Diatomaceous earth is EPA approved against indoor and outdoor crawling insects," "Small ants may require a few applications to completely eliminate them…," "Sprinkled around the house foundation keeps new crawling insects from coming inside," and "Outdoor bugs affected by diatomaceous earth: Ants, fire ants, caterpillars, cut worms, army worms, fleas, ticks, cockroaches, snails, spiders, termites, scorpions, silver fish, lice, mites, flies, centipedes, earwigs, slugs, aphids, Japanese Beetles (grub stage), fruit flies, corn earworm, cucumber beetles, corn borer, sting bugs, squash vine borers, thrips, loopers, etc., etc."

38. Consumers were also able to shop for and purchase "Red Lake Earth Diatomaceous Earth" through Respondent's website.

39. On November 1, 2010, an EPA representative viewed the Respondent's online shop.

40. The "pest control" products included "Red Lake Earth Diatomaceous Earth."

41. The description of "Red Lake Earth Diatomaceous Earth" stated: "Diatomaceous Earth is a natural internal parasite controller fed to a multitude of animals, external animal parasite control, as well as barns, coops, kennels and litter boxes! Use to control insects in the yard, garden and landscape! Read More! Product Details..."

42. EPA's representative clicked "Product Details..." for a description of "Red Lake Earth Diatomaceous Earth," which brought her to a portion of the Respondent's website where claims similar to those in the pamphlet (see Paragraph 37 above) were made.

43. Three sizes of "Red Lake Earth Diatomaceous Earth" were offered for sale: one-half of one pound, one-and-one-quarter pounds, and fifty pounds.

44. "Red Lake Earth Diatomaceous Earth" is a "pesticide" as defined at Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

45. On May 21, 2009, an MDA inspector acquired a copy of a May 3, 2007 invoice from the Respondent identifying Central Farm and Garden, Inc. of Wooster, Ohio as the distributor or seller of four "copper sulfate pails" weighing fifteen pounds apiece and eight "copper sulfate pails" weighing five pounds apiece to the Respondent.

46. The "Copper Sulfate" in five-pound bags was repackaged and relabeled by the Respondent.

47. On May 27, 2009, an MDA inspector telephoned Melissa Mathie of Mathie Energy Supply Company, Inc. and requested copies of sales/shipping records for "Copper Sulfate."

48. The MDA inspector, during the same telephone call, also requested copies of sales/shipping and receiving records for "Red Lake Earth Diatomaceous Earth."

49. Ms. Mathie refused to provide the requested records for "Red Lake Earth Diatomaceous Earth".

50. On June 9, 2009, an MDA inspector telephoned Mike Mathie of Mathie Energy Supply Company, Inc. and requested shipping and receiving records for "Red Lake Earth Diatomaceous Earth."

51. Mr. Mathie refused to provide the requested records.

Count I

52. Complainant incorporates by reference the allegations contained in paragraphs 1 through 51 of this First Amended Complaint.

53. Respondent offered two five-pound bags of Copper Sulfate for sale on May 14, 2009.

54. The Copper Sulfate offered for sale by Mathie Energy Supply Co., Inc. was not registered as a pesticide with EPA under Section 3 of FIFRA, 7 U.S.C. § 136a, on May 14, 2009.

55. Respondent's distribution or sale of the unregistered pesticide Copper Sulfate constitutes an unlawful act pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

Count II

56. Complainant incorporates by reference the allegations contained in paragraphs 1 through 51 of this First Amended Complaint.

57. Respondent offered a forty-pound bag of "Red Lake Earth Diatomaceous Earth" for sale on May 14, 2009.

58. The "Red Lake Earth Diatomaceous Earth" offered for sale by Mathie Energy

Supply Co., Inc. was not registered as a pesticide with EPA under Section 3 of FIFRA, 7 U.S.C. § 136a, on May 14, 2009.

59. Respondent's distribution or sale of the unregistered pesticide "Red Lake Earth Diatomaceous Earth" constitutes an unlawful act pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

Count III

60. Complainant incorporates by reference the allegations contained in paragraphs 1 through 51 of this First Amended Complaint.

61. Respondent offered a one-half of one pound bag of "Red Lake Earth Diatomaceous Earth" for sale on November 1, 2010.

62. The "Red Lake Earth Diatomaceous Earth" offered for sale by Mathie Energy Supply Co., Inc. was not registered as a pesticide with EPA under Section 3 of FIFRA, 7 U.S.C. § 136a, on November 1, 2010.

63. Respondent's distribution or sale of the unregistered pesticide "Red Lake Earth Diatomaceous Earth" constitutes an unlawful act pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

Count IV

64. Complainant incorporates by reference the allegations contained in paragraphs 1 through 51 of this First Amended Complaint.

65. Respondent offered a one-and-one-quarter pound bag of "Red Lake Earth Diatomaceous Earth" for sale on November 1, 2010.

66. The "Red Lake Earth Diatomaceous Earth" offered for sale by Mathie Energy Supply Co., Inc. was not registered as a pesticide with EPA under Section 3 of FIFRA, 7 U.S.C.

§ 136a, on November 1, 2010.

67. Respondent's distribution or sale of the unregistered pesticide "Red Lake Earth Diatomaceous Earth" constitutes an unlawful act pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

Count V

68. Complainant incorporates by reference the allegations contained in paragraphs 1 through 51 of this First Amended Complaint.

69. Respondent offered a fifty-pound bag of "Red Lake Earth Diatomaceous Earth" for sale on November 1, 2010.

70. The "Red Lake Earth Diatomaceous Earth" offered for sale by Mathie Energy Supply Co., Inc. was not registered as a pesticide with EPA under Section 3 of FIFRA, 7 U.S.C. § 136a, on November 1, 2010.

71. Respondent's distribution or sale of the unregistered pesticide "Red Lake Earth Diatomaceous Earth" constitutes an unlawful act pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

Count VI

72. Complainant incorporates by reference the allegations contained in paragraphs 1 through 51 of this First Amended Complaint.

73. Respondent repackaged and relabeled "Copper Sulfate" on or before May 14, 2009.

74. Respondent produced a pesticide in an unregistered establishment in violation of Section 7(a) of FIFRA, 7 U.S.C. § 136e.

75. Producing a pesticide in an unregistered establishment constitutes an unlawful act pursuant to Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L).

Count VII

76. Complainant incorporates by reference the allegations contained in paragraphs 1 through 51 of this First Amended Complaint.

77. Representatives of Respondent, Mike and Melissa Mathie, refused the requests of an MDA inspector for records showing the movement and delivery of the pesticide"Red Lake Earth Diatomaceous Earth."

78. Respondent's refusal to furnish the requested records to the MDA inspector is a violation of Section 8(b) of FIFRA, 7 U.S.C. § 136f.

79. Refusing to submit any records required by or under Section 8(b) of FIFRA constitutes an unlawful act pursuant to Section 12(a)(2)(B)(i) of FIFRA, 7 U.S.C. § 136j(a)(2)(B)(i).

Proposed Civil Penalty

80. Complainant proposes that the Administrator assess a civil penalty against Respondent for the FIFRA violations alleged in this First Amended Complaint as follows:

Count I

Distribution or sale of Copper Sulfate $7,150

Count II

Distribution or sale of Red Lake Earth Diatomaceous Earth.....$7,150

Count III

Distribution or sale of Red Lake Earth Diatomaceous Earth.....$7,150

Count IV

Distribution or sale of Red Lake Earth Diatomaceous Earth.....$7,150

Count V

Distribution or sale of Red Lake Earth Diatomaceous Earth.....$7,150

Count VI

Producing a pesticide in an unregistered establishment $5,670

Count VII

Refusing to submit any records required by or under Section 8(b) of FIFRA $5,670

Total proposed civil penalty $47,090

Complainant determined the proposed civil penalty according to Section 14(a) of FIFRA, 7 U.S.C. § 136*l*(a). In determining the penalty amount, Complainant considered the size of Respondent's business, the effect on Respondent's ability to continue in business and the gravity of the violations. Complainant also considered EPA's FIFRA Enforcement Response Policy, dated December 2009, a copy of which is enclosed with this First Amended Complaint.

Rules Governing this Proceeding

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the Consolidated Rules), at 40 C.F.R. Part 22, govern this proceeding to assess a civil penalty. Enclosed with the First Amended Complaint served on Respondent is a copy of the Consolidated Rules.

Filing and Service of Documents

Respondent must file with the EPA Regional Hearing Clerk the original and one copy of each document Respondent intends as part of the record in this proceeding. The Regional Hearing Clerk's address is:

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Respondent must serve a copy of each document filed in this proceeding on each party pursuant to Section 22.5 of the Consolidated Rules. Complainant has authorized Mark Koller to

receive any answer and subsequent legal documents that Respondent serves in this proceeding. You may telephone Mark Koller at (312) 353-2591. His address is:

Mark J. Koller (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Terms of Payment

Respondent may resolve this proceeding at any time by paying the proposed penalty by sending a certified or cashier's check, payable to "Treasurer, United States of America," to:

U.S. EPA
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

Respondent must include the case name, docket number and billing document number on the check and in the letter transmitting the check. Respondent must simultaneously send copies of the check and transmittal letter to the Regional Hearing Clerk and Mark Koller at the addresses given above, and to:

Estrella Calvo (LC-8J)
Pesticides and Toxics Compliance Section
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Answer and Opportunity to Request a Hearing

If Respondent contests any material fact upon which this First Amended Complaint is based, contends that the proposed penalty is inappropriate, or contends that it is entitled to judgment as a matter of law, Respondent may request a hearing before an Administrative Law Judge. To request a hearing, Respondent must file a written Answer within 20 days of receiving

this First Amended Complaint and must include in that written Answer a request for a hearing. Any hearing will be conducted according to the Consolidated Rules.

In counting the 20-day period, the date of receipt is not counted, but Saturdays, Sundays, and federal legal holidays are counted. If the 20-day period expires on a Saturday, Sunday, or federal legal holiday, the time period extends to the next business day.

To file an Answer, Respondent must file the original written Answer and one copy with the Regional Hearing Clerk at the address specified above and must serve copies of the Answer on the other parties.

Respondent's written Answer must clearly and directly admit, deny, or explain each of the factual allegations in the First Amended Complaint; or must state clearly that Respondent has no knowledge of a particular factual allegation. Where Respondent states that it has no knowledge of a particular factual allegation, the allegation is deemed denied. Respondent's failure to admit, deny, or explain any material factual allegation in the First Amended Complaint constitutes an admission of the allegation.

Respondent's answer must also state:

a. The circumstances or arguments which Respondent alleges constitute grounds of defense;

b. The facts that Respondent disputes;

c. The basis for opposing the proposed penalty; and

d. Whether Respondent requests a hearing.

Settlement Conference

Whether or not Respondent requests a hearing, Respondent may request an informal conference to discuss the facts alleged in the First Amended Complaint and to discuss settlement. To request an informal settlement conference, Respondent may contact Estrella Calvo at (312)

353-8931.

Respondent's request for an informal settlement conference will not extend the 30-day period for filing a written Answer to this First Amended Complaint. Respondent may simultaneously pursue both an informal settlement conference and the adjudicatory hearing process. The Complainant encourages all parties against whom it proposes to assess a civil penalty to pursue settlement through an informal conference. Complainant, however, will not reduce the proposed penalty because the parties hold an informal settlement conference.

Continuing Obligation to Comply

Payment of a civil penalty will not affect Respondent's continuing obligation to comply with FIFRA and any other applicable federal, state or local law.

September 28, 2012
Date

Margaret M. Guerriero
Director
Land and Chemicals Division

CERTIFICATE OF SERVICE

I hereby certify that the original signed copy of the First Amended Complaint involving Mathie Energy Supply Company, Inc. was filed on September 28, 2012 with the Regional Hearing Clerk (E-19J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, and that I mailed by Certified Mail, Receipt No. 7004 2510 0001 9615 4618, a copy of the original to the Respondent:

Mr. Michael Mathie
Mathie Energy Supply Company, Inc.
7840 South Gale Road
Morrice, Michigan 48857

and forwarded copies (intra-Agency) to:

Ann Coyle, Regional Judicial Officer, ORC/C-14J
Mark J. Koller, Counsel for Complainant/C-14J
Eric Volck, Cincinnati Finance/MWD

Estrella Calvo
Pesticides and Toxics Compliance Section
U.S. EPA - Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Docket No. FIFRA-05-2012-0022

FIFRA ENFORCEMENT RESPONSE POLICY

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT

Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

December 2009

FIFRA ENFORCEMENT RESPONSE POLICY

TABLE OF CONTENTS

I. INTRODUCTION

This document sets forth guidance for the U.S. Environmental Protection Agency (EPA or the Agency) to use in determining the appropriate enforcement response and penalty amount for violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA or the Act).[1] The goal of this Enforcement Response Policy (ERP) is to provide fair and equitable treatment of the regulated community, predictable enforcement responses, and comparable penalty assessments for comparable violations. The policy is designed to allow swift resolution of environmental problems and to deter future violations of FIFRA by respondents, as well as other members of the regulated community.

This policy supersedes the "Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)" issued on July 2, 1990 and other FIFRA penalty policies, except for the following policies, which remain in effect: the June 2007 "Enforcement Response Policy for FIFRA Section 7(c), Pesticide Producing Establishment Reporting Requirement"; the September 1997 "FIFRA: Worker Protection Standard (WPS) Penalty Policy – Interim Final"; and the September 1991 "Enforcement Response Policy for the FIFRA Good Laboratory Practices (GLP) Regulations." These policies are to be used as supplements to this policy to determine the appropriate enforcement response for the referenced programs. We have attached these policies as appendices to this document for ease of use.

This guidance applies only to violations of EPA's civil regulatory programs. It does not apply to enforcement pursuant to criminal provisions of laws or regulations that are enforced by EPA. The procedures set forth in this document are intended solely for the guidance of government professionals. 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 this policy and to change it at any time without public notice.

II. OVERVIEW OF THE POLICY

This Enforcement Response Policy is divided into three main sections. The first section, "Determining the Level of Action," describes the Agency's options for responding to violations of FIFRA. The second section, "Assessing Civil Administrative Penalties," elaborates on EPA's policy and procedures for calculating civil penalties to be assessed in administrative cases against persons who violate FIFRA. The third section, the appendices, contains tables to be used in calculating civil penalties for this ERP and the other FIFRA penalty policies that remain in effect. The appendices to this ERP are: (1) Appendix A - FIFRA Violations and Gravity Levels; (2) Appendix B - Gravity Adjustment Criteria; (3) Appendix C - The Summary of Tables; (4) Appendix D - The FIFRA Civil Penalty Calculation Worksheet; (5) Appendix E - "Enforcement Response Policy for FIFRA Section 7(c), Pesticide Producing Establishment Reporting Requirement" (June 2007); (6) Appendix F – "FIFRA: Worker Protection Standard (WPS) Penalty Policy – Interim Final" (September 1997); and Appendix G – Enforcement Response Policy for the FIFRA Good Laboratory Practices (GLP) Regulations.

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[1] For purposes of this Policy and its Appendices, the terms "pesticide" and "pesticide product" include, as applicable, "pesticide," "antimicrobial pesticide," "device," "pesticide product," "pesticidal substance," and/or "plant incorporated protectant" as these terms are defined and used in FIFRA § 2(u), (mm), and (h), and 40 C.F.R. Parts 152 - 174.

III. DETERMINING THE LEVEL OF ACTION

Once the Agency finds that a FIFRA violation has occurred, EPA will need to determine the appropriate level of enforcement response for the violation. FIFRA provides EPA with a range of enforcement options. These options include:

-- Notices of Warning under sections 9(c)(3), 14(a)(2), and 14(a)(4);

-- Notices of Detention under section 17(c);

-- Stop Sale, Use, or Removal Orders under section 13(a);

-- Seizures under section 13(b);

-- Injunctions under section 16(c);

-- Civil administrative penalties under section 14(a);

-- Denials, suspensions, modifications, or revocations of applicator certifications under 40 C.F.R. Part 171;

-- Referral for criminal proceedings under section 14(b); and

-- Recalls.

To ensure national consistency in FIFRA enforcement actions, EPA enforcement professionals should use this ERP as a guide in considering the facts and circumstances of each case and the company's compliance history to ensure an enforcement response appropriate for the particular violations. Each of the potential enforcement responses is discussed below.

A. Notices of Warning

FIFRA §§ 14(a)(2), 14(a)(4), and 9(c)(3) provide EPA with the authority to respond to certain violations of FIFRA with a Notice of Warning (NOW) to the violator. Under FIFRA § 14(a)(2), EPA may not assess a penalty for violations by a private applicator or other person not covered by section 14(a)(1) without having issued a written warning or citation for a prior violation of FIFRA by that person, "except that any applicator not included [in paragraph 14(a)(1)] who holds or applies registered pesticides, or uses dilutions of registered pesticides, only to provide a service of controlling pests without delivering any unapplied pesticide to any person so served . . . may be assessed a civil penalty . . . of not more than $500 for the first offense nor more than $1,000 for each subsequent offense." For all persons not covered by the exception in section 14(a)(2), EPA should issue a Notice of Warning for a first-time violation.

A state citation for a violation that would also be considered a violation under FIFRA, can be used to meet the requirement of a citation for a prior violation under FIFRA § 14(a)(2). For this purpose, the prior citation may be a notice of warning and does not have to include a penalty. The prior citation does not have to be related to the current violation; it may be for any FIFRA violation.

Regions may issue a NOW or assess a penalty of up to $500[2] for the first offense by any applicator within the scope of the exception set forth in section 14(a)(2). Section 9(c)(3) permits EPA to issue a written Notice of Warning for minor violations of FIFRA in lieu of instituting a penalty action if the Administrator believes that the public interest will be adequately served by this course of action. Generally, a violation will be considered minor under this section if the total "gravity adjustment value," as determined from Appendix B of this ERP, is three or less. A Notice of Warning may also be appropriate for certain first-time recordkeeping violations as listed in Appendix A (for example, late Section 7 reports that meet the guidelines of the FIFRA Section 7 ERP). FIFRA § 14(a)(4) provides that EPA may choose to issue a Notice of Warning in lieu of a penalty action if EPA determines that the violation occurred despite the exercise of due care or the violation did not cause significant harm to health or the environment.

B. Notices of Detention

A shipment of a pesticide or device may not be imported into the United States until EPA makes a determination of the admissibility of that shipment. FIFRA § 17 authorizes EPA to refuse admission of a pesticide or device into the United States if EPA determines that the pesticide or device violates any provisions of the Act. EPA may deny entry of a pesticide or device by refusing to accept the Notice of Arrival or by issuing a Notice of Detention and Hearing. Upon receiving a copy of the Notice of Detention, the Department of Homeland Security, through the U.S. Customs and Border Protection (Customs), will refuse delivery to the consignee. If the consignee has neither requested a hearing nor exported the pesticide or device within 90 days from the date of the notice, Customs will oversee destruction of the pesticide or device.

Customs regulations for enforcement of FIFRA § 17(c) (19 C.F.R. Part 12.110 - 12.117) allow Customs to release a shipment to the importer or the importer's agent before EPA inspects the shipment only if (1) the Customs District Director receives a completed Notice of Arrival signed by EPA indicating the shipment may be released and (2) the importer executes a bond in the amount of the value of the pesticide or device, plus duty. When a shipment of pesticides is released under bond, the shipment may not be used or otherwise disposed of until the Administrator has determined the admissibility of that shipment. Should the shipment subsequently be refused entry and the importer or agent fails to return the pesticide or device, the bond is forfeited.

C. Stop Sale, Use, or Removal Orders (SSURO)

FIFRA § 13 provides EPA the authority to issue a Stop Sale, Use, or Removal Order (SSURO) to any person who owns, controls, or has custody of a pesticide or device, whenever EPA has reason to believe on the basis of inspection or tests that:

(1) a pesticide or device is in violation of any provision of the Act;

(2) a pesticide or device has been, or is intended to be, distributed in violation of the Act; or

(3) the registration of a pesticide has been cancelled by a final order or has been suspended.

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[2] Each of the FIFRA penalty amounts referenced in this document has been increased pursuant to the Debt Collection Improvement Act of 1996, which requires federal agencies to periodically adjust the statutory maximum penalties to account for inflation. The inflation adjustment is based on the date of the violation. See 40 C.F.R. Part 19.

EPA should generally seek a civil penalty in addition to the SSURO when EPA confirms that a violation of FIFRA has occurred. EPA has established criteria to ensure judicious use of the authority to stop the sale or use of a pesticide and to order its removal. SSUROs can be a useful enforcement response, particularly for more serious violations and situations that pose a significant risk, as described further below.

1. Issuance of a SSURO

A SSURO is among the most expedient and effective remedies available to EPA in its efforts to prevent illegal sale, distribution, and use of pesticides. Unlike a seizure, EPA does not need to bring action in federal court and does not need to take custody of the materials. The advantages of a SSURO over other responses are that: (1) it may be issued whenever EPA has *reason to believe* that the product is in violation of the Act; (2) it is easier to prepare and issue than a seizure; (3) it governs all of the product under the ownership, custody, or control of the individual receiving the SSURO regardless of where the product is located; (4) it can be written to include future amounts of the product that may come into custody of the respondent; and (5) it can easily be adapted to particular circumstances.

EPA should issue a SSURO against persons who own, control, or have custody of pesticides in the following categories:

-- Pesticides for which there is reason to believe that there is a potential hazard to human health or the environment because they are either not registered or are over-formulated, under-formulated, or adulterated as to present a potentially serious health hazard.[3]

-- Pesticides or devices with labeling that is materially misleading or fraudulent and, if followed by a user, is likely to cause a significant health hazard or serious adverse environmental effect. For example, a pesticide lacking a required restricted use label is an especially serious labeling violation. A SSURO should be issued for labeling on products that: (1) are ineffective for the purposes claimed; (2) are so chemically deficient as to affect the product's efficacy; or (3) bear false or misleading safety claims.

-- Pesticides or devices that are the subject of a recall in instances where the responsible party refuses to remove, is recalcitrant in removing, or is unable to remove the product from the channels of trade.

-- Pesticides or devices that are in violation of FIFRA and for which a civil penalty has been issued but the registrant has not brought the product into compliance.

-- Pesticides that have been suspended under FIFRA § 6.

EPA may also issue a SSURO if a product has been cancelled under any section of FIFRA or suspended under FIFRA §§ 4 or 3(c)(2)(B) and the existing stock deadlines have expired at that level of sale, distribution, or use. In addition, EPA may issue a SSURO to address serious violations that present a threat of harm where there has also been a large volume of sales.

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[3] This may include pesticides packaged in improper or damaged containers, or pesticides that are so inadequately labeled as to make their safe or effective use unlikely or impossible.

When a SSURO is issued to a basic registrant for a registered pesticide product, the issuing office should ensure that the terms of the SSURO are equally applicable to the supplemental registrations of the product, as appropriate. In those cases, the SSURO should separately cite the supplemental registrations and copies should be sent to all known supplemental registrants.

D. Seizures

FIFRA § 13(b) gives EPA the authority to initiate *in rem* condemnation proceedings in U.S. District Court. Once a court grants EPA's request for authority to conduct a seizure, FIFRA § 9(b)(3) authorizes officers or employees designated by the Administrator to obtain and execute warrants for the purpose of seizing any pesticide or device that is in violation of the Act. Seizures may be executed with the assistance of the U.S. Marshals Service.

Under FIFRA § 13(b), EPA may initiate seizure actions in District Court against any pesticide or device that is being transported or, having been transported, remains unsold or in original unbroken packages, or that is sold or offered for sale in any state, or that is imported from a foreign country, if:

(1) a pesticide is adulterated or misbranded;
(2) a pesticide is unregistered;
(3) a pesticide has labeling that does not bear the information required by the Act;
(4) a pesticide is not colored or discolored as required;
(5) a pesticide bears claims or directions for use that differ from those made in connection with its registration;
(6) a device is misbranded; or
(7) a pesticide or device causes unreasonable adverse effects on the environment even when used in accordance with FIFRA requirements.

These circumstances are similar to the circumstances under which EPA would issue a SSURO. Because a SSURO is an administrative action, it can be issued more quickly than a seizure, which requires judicial action. The SSURO is therefore the more expedient enforcement response. Nevertheless, the Agency should consider initiating a seizure in the following circumstances:

- EPA has issued a SSURO but the recipient of the order has not complied with it;
- EPA has reason to believe that a person, if issued a SSURO, would not comply with it;
- The pesticide at issue is so hazardous that it should be removed from the marketplace, place of storage, or place of use to prevent any chance of harm to human health or the environment;
- The seizure will be used to support a recall; or
- It is necessary to dispose of products being held under a SSURO for which the responsible party has indicated it will not take corrective action.

E. Injunctive Relief

FIFRA § 16(c) gives EPA the authority to initiate actions in U.S. District Court seeking permanent injunction, preliminary injunction, or temporary restraining order. Because an injunction is an extraordinary form of relief, the Agency's arguments supporting injunction must be clear and compelling. As a party seeking permanent injunction, EPA would need to demonstrate one of the following: (1) other remedies would be inadequate or not available administratively either in restraining the violation or in preventing unreasonable risk to human health or the environment; (2) the Agency has already diligently exercised all appropriate administrative remedies (such as SSUROs and civil penalties) yet the violation or threat of violation continues unabated; or (3) irreparable injury, loss, or damage will result if the relief sought is not granted.

When seeking a preliminary injunction or temporary restraining order, the U.S. must demonstrate that: (1) immediate and irreparable injury, loss, or damage will result if the requested relief is not granted; and (2) EPA is likely to prevail at trial, based on the facts before the court.

Under FIFRA, a number of specific circumstances may justify injunctive relief. These include:

- Violation of a Section 6 suspension or cancellation order;
- Violation of a SSURO where a civil penalty or criminal prosecution would not provide a timely or effective remedy to deter further violations;
- Continued production, shipment, sale, distribution, or use of an unregistered pesticide after the Agency has taken civil or criminal action;
- A person continues to sell, distribute, or make available for use a restricted use pesticide (RUP) other than in accordance with FIFRA § 3(d), after the Agency has taken an enforcement response;
- A person continues to violate the FIFRA § 17 import or export requirements after the Agency has taken an enforcement response;
- A person continues to use a pesticide in a manner inconsistent with its labeling, in a manner contrary to an experimental use permit, or repeats any violation of FIFRA, after EPA has taken an enforcement response.

F. Civil Administrative Penalties

A civil penalty is the preferred enforcement response for most violations. A civil penalty is appropriate where the violation:

(1) presents an actual or potential risk of harm to humans or the environment,[4] or would impede EPA's ability to fulfill the goals of the statute; and
(2) was apparently committed as a result of ordinary negligence (as opposed to criminal negligence), inadvertence, or mistake; and the violation either:
(a) involves a violation by any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor, or any applicator within the scope of the exception set forth in FIFRA § 14(a)(2) (no prior warning is required by FIFRA for violators in this category); or
(b) involves a private applicator or other person not listed above who has received a prior Notice of Warning or citation for a FIFRA violation (as described in section III.A).

FIFRA § 14(a)(1) provides that a registrant, commercial applicator, wholesaler, dealer, or other distributor may be assessed a civil penalty of up to $5,000 for each violation. FIFRA § 14(a)(2) authorizes the Administrator to assess a private applicator or other person a penalty of up to $1,000 for each violation occurring after the issuance of a Notice of Warning or a citation for a prior FIFRA violation. Additionally, any applicator within the scope of the exception set forth in FIFRA § 14(a)(2) may be assessed a civil penalty of up to $500 for the first offense, and up to $1,000 for each subsequent offense.

Each of these penalty amounts has been increased pursuant to the Debt Collection Improvement Act of 1996, which requires federal agencies to periodically adjust the statutory maximum penalties to account for inflation. EPA has thus increased the maximum penalty amounts for FIFRA violations. For violations of FIFRA § 14(a)(1) that occur on or after January 12, 2009, the maximum civil penalty has increased to $7,500 for each violation. Violations prior to that date may be assessed up to $6,500 for each violation. For violations of FIFRA § 14(a)(2) that occur on or after January 12, 2009, the maximum civil penalty has increased to $1,100 for each violation following the first offense by both private applicators and any applicator within the scope of the exception set forth in FIFRA § 14(a)(2). Additional penalty inflation increases are expected to occur periodically and such increases are incorporated by reference into this ERP.

As the statutory definitions of "distribute or sell" and "commercial applicator" indicate, and as the conference report for the Federal Pesticide Act of 1978[5] confirms, any applicator, including a "for hire" applicator, who holds or applies an unregistered pesticide to provide a service of controlling pests without delivering any unapplied pesticide, will be considered a distributor of pesticides and will be subject to the higher penalties set forth in FIFRA § 14(a)(1) and 14(b)(1). Any applicator, other than a private applicator, who uses or supervises the use of a restricted use pesticide (RUP), whether or not that applicator is certified, is a commercial applicator and is subject to the higher penalties set forth in section 14(a)(1) and 14(b)(1). Any applicator, including a certified applicator, who holds or applies a general use pesticide (GUP) or an unclassified pesticide in violation of FIFRA will be subject to the lower penalties set forth in section 14(a)(2) and 14(b)(2).

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[4] In such cases, the Agency should consider issuing a SSURO or other injunctive relief in addition to a civil penalty.
[5] Senate Report No. 95-1188, September 12, 1978, pp. 44 and 45.

G. Denials, Suspensions, Modifications, or Revocations of Applicator Certifications

Regulations governing certification of pesticide applicators (40 C.F.R. Part 171) authorize EPA to deny, suspend, or revoke a federally issued applicator certification if the holder of the certification violates FIFRA or its regulations. The Agency views enforcement actions affecting certification status as a very strong measure, to be taken only when the "public health, interest, or welfare warrants immediate action," 40 C.F.R. § 171.11(f)(5)(i). Therefore, EPA will deny, suspend, modify, or revoke a federal certification only in response to serious violations or against persons with a history of noncompliance.

1. Suspension

In response to violations by applicators that have previously received a civil complaint for FIFRA violations and where none of the factors for revocation (discussed in paragraph G.2. below) are present, EPA will seek suspension of the individual applicator's federal certification, as well as assess a civil penalty against the employer. EPA may also suspend certifications of commercial applicators who violate restricted use pesticides recordkeeping requirements, 40 C.F.R. § 171.11(c)(7); 40 C.F.R. § 171.11(f)(1)(iii). For purposes of this section of the policy, EPA will not distinguish between commercial and private applicators. A suspension has a more substantial impact on commercial applicators because it affects their primary business activity. Recommended suspension periods are set forth on the chart below.

Recommended Suspension Periods

	First enforcement action	Second enforcement action[6]	Third enforcement action
Enforcement remedy	Penalty action	Penalty action	Penalty action
Base suspension period	N/A	4 months	6 months
Additional suspension time for multiple violations	N/A	2 months for each additional violation (up to a limit of 8 months total)	2 months for each additional violation (up to a limit of 12 months total)

If EPA decides to suspend certification, it must notify the applicator of the grounds upon which the suspension is based and the time period during which the suspension will be in effect. In order for the suspension to function as a deterrent, the suspension should take effect during the time when the applicator is most likely to be applying restricted use pesticides. In cases where the violation involved keeping fraudulent records (*i.e.*, where the violator intentionally concealed or misrepresented the true circumstances and the extent of the use of restricted use pesticides), EPA may revoke the violator's certification in response to the initial infraction.

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[6] For purposes of this section, the second and third enforcement actions must occur within five years of the original civil administrative complaint.

2. Denial/Revocation

The denial or revocation of a certification deprives an applicator of the authority to apply restricted use pesticides and forces the applicator to acquire or re-acquire certification. EPA will not consider an application to acquire or re-acquire certification for at least six months following a denial or revocation. Therefore, EPA will deny or revoke a certification only where:

(1) a violation resulted in a human fatality or created an imminent danger of a fatality;
(2) a violation resulted in severe damage to the environment or created an imminent danger of severe damage to the environment;
(3) a misuse violation has resulted in significant contamination of food and water;
(4) the violator's certification has been suspended as a result of a previous serious violation;
(5) the violator's certification has been suspended three times within the past five years; or
(6) a person has maintained or submitted fraudulent records or reports.

If EPA pursues an action to deny, revoke, or modify an applicator's certification, EPA will notify the applicant or federal certificate holder of:

(1) the ground(s) upon which the denial, revocation, or modification is based;
(2) the time period during which the denial, revocation, or modification is effective, whether permanent or otherwise;
(3) the conditions, if any, under which the individual may become certified or recertified; and
(4) any additional conditions EPA may impose.

EPA must also provide the federally certified applicator an opportunity to request a hearing prior to final Agency action to deny, revoke, or modify the certificate.

H. Recalls

1. Suspended or Cancelled Products

FIFRA § 19(b) gives EPA the authority to recall pesticide products if the registration of a pesticide has been suspended and cancelled and EPA finds that a recall is necessary to protect public health or the environment. Where the product registration has been suspended or cancelled, EPA will request either a voluntary or mandatory recall. When EPA believes that a recall is necessary to protect public health or the environment and the product registration has not been suspended or cancelled, EPA may request an informal recall, which is also voluntary.

EPA should only request a recall where the evidence clearly supports the need for such action. EPA will base the decision that a product should be withdrawn from the market on information in the sample file, including laboratory analyses, staff evaluations and opinions, and other available information. All information supporting a recall decision should be included in the official file.

a. Mandatory Recalls

If a product is suspended and cancelled, a voluntary recall by the registrant and others in the chain of distribution may be sufficient. However, if the Agency believes that a voluntary recall will not ensure protection of human health or the environment, mandatory recall procedures under FIFRA §§ 19(b)(3) and (4) can be used to require registrants, distributors, or

sellers of a cancelled pesticide to:

(1) recall the pesticide;

(2) make available storage facilities to accept and store existing stocks of the suspended and cancelled pesticide;

(3) inform the EPA of the location of the storage facility;

(4) inform the EPA of the progress of the recall;

(5) provide transportation of the pesticide on request; and

(6) take reasonable steps to inform holders of the recall and transportation provisions.

Persons conducting the recall must comply with transportation, storage, and disposal requirements set forth in the recall plan developed and approved under FIFRA § 19(b).

b. Voluntary Recalls

Recalls other than those described in section 1.a., above, are voluntary. A voluntary recall is appropriate if EPA finds that it can be "as safe and effective as a mandatory recall." Voluntary recalls can be used where the cancelled product is either potentially hazardous when used as directed, ineffective for the purposes claimed, or significantly violative in nature. For a voluntary recall, EPA will ask the registrant to develop a recall plan. The effectiveness of these recalls depends on the cooperation of the company involved. The company may seek EPA's assistance in developing or implementing a recall plan, but it is not required to do so.

2. Other Recalls

A product does not have to be suspended or cancelled for EPA to request a recall. The Agency should consider asking the company to do an informal recall of a product when its use as directed by the label is likely to result in:

(1) injury to the user or handler of the product;

(2) injury to domestic animals, fish, wildlife, or plant life;

(3) physical or economic injury because of ineffectiveness or due to the presence of actionable residues; or

(4) identifiable adverse effects on the environment.

For example, EPA may issue an informal recall for an antimicrobial product that fails efficacy testing for a public health organism when the product is distributed to hospitals or other health care facilities.

In cases posing more serious threats, the Agency may monitor the progress of an informal recall and may ask the company to submit progress reports and to notify state officials to ensure that the recall occurs. These informal recalls are generally accompanied by a civil penalty action or a SSURO. In cases where a recall is necessary but the level of potential hazard is not great or when it is unlikely that significant amounts of the defective product remain in the marketplace, the recall may be conducted entirely by the company with no monitoring by EPA or state officials.

I. Criminal Proceedings

FIFRA § 12 specifically lists the unlawful acts that are subject not only to civil and administrative enforcement but also to criminal enforcement. (For further information on criminal enforcement investigations see Chapter 18 of the Pesticides Inspection Manual, "FIFRA

Criminal Enforcement.") Section 14(b) provides the authority to proceed with criminal sanctions against violators, as follows.

- A registrant, applicant for a registration, or producer who knowingly violates the Act is subject, upon conviction, to a fine of not more than $50,000 or imprisonment for up to one year, or both.

- A commercial applicator of a restricted use pesticide, or any other person not described above who distributes or sells pesticides or devices, who knowingly violates the Act is subject, upon conviction, to a fine of not more than $25,000 or imprisonment for up to one year, or both.

- A private applicator or other person not included above who knowingly violates the Act is subject, upon conviction, to a fine of not more than $1,000, or imprisonment for not more than 30 days, or both.

FIFRA § 14(b)(1) and (2) include the requirement that the violation be committed "knowingly." An act is committed "knowingly" by a person who has the general intent to do the action(s) constituting the violation. A specific intent to violate FIFRA or knowledge of its regulations is not a necessary element of the crime. Thus, the government must generally prove that the defendant knew of the conduct that constituted the violation and that the person's action(s) was voluntary and intentional and not the result of an accident or mistake of fact.

In addition, pursuant to the Alternative Fines Act (18 U.S.C. § 3571), the FIFRA criminal fine amounts for an individual or an organization[7] may be substantially increased if the violation results in death. All acts of the regulated community exhibiting actual or suspected criminal conduct should be discussed with EPA's regional or Headquarters Criminal Enforcement Counsel or brought to the attention of the Criminal Investigation Division (CID) for possible investigation.

1. 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 including OECA's Parallel Proceedings Policy (September 24, 2007), is critical to the success of EPA's overall enforcement program. The success of any parallel proceedings 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 civil enforcement managers that an investigation is about to become overt or known to the subject. Similarly, the civil program should notify the criminal

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[7] As used in Title 18 of the United Sates Code, the term "organization" means a person other than an individual.

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.

J. State and Federal Roles in Enforcement of FIFRA

State governments have primary enforcement authority for both civil and criminal pesticide use violations under FIFRA §§ 26 and 27. States are allowed 30 days to commence appropriate enforcement actions for such violations. While Congress delegated to the states primary enforcement authority for pesticide use violations, FIFRA does not create exclusive enforcement jurisdiction in the states. A state may waive its primary enforcement responsibility or make a referral to the United States for federal action.

EPA has primary enforcement authority over violations concerning the sale or distribution of pesticides. Examples of such violations include failure to report a pesticide's unreasonable adverse effects on the environment, distribution of an unregistered pesticide, violations of a cancellation order or an EPA SSURO, and fraudulent labeling, advertising, or registration of a pesticide. FIFRA violations that are not use violations may be investigated and prosecuted on the federal level without waiting for state authorities to exercise their enforcement responsibility. Under most circumstances EPA will inform the state of an EPA investigation being conducted within its borders.

K. Press Releases and Advisories

EPA may, at its discretion, issue a press release or advisory to notify the public of the filing of an enforcement action, settlement, or adjudication concerning a person's violation of FIFRA. A press release can be a useful tool to notify the public of Agency actions for FIFRA noncompliance and to educate the public on the requirements of FIFRA. Some regions routinely issue press releases to inform the public of FIFRA settlements. Issuance of a press release or advisory must not be an item of negotiation during settlement.

IV. ASSESSING CIVIL ADMINISTRATIVE PENALTIES

A. Computation of the Penalty

In determining the amount of a civil penalty, FIFRA § 14(a)(4) requires EPA to consider the appropriateness of the penalty to the size of respondent's business, the effect of the penalty on respondent's ability to continue in business, and the gravity of the violation.

For each type of violation associated with a particular product, the penalty amount is determined in a seven-step process considering the Section 14(a)(4) criteria listed above. These steps are:

(1) determine the number of independently assessable violations [Section IV.A.1. Independently Assessable Violations];

(2) determine the size of business category for the violator, using Table 1 [Section IV.A.2. Size of Business];

(3) determine the gravity of the violation for each independently assessable violation using Appendix A [Section IV.A.3. Gravity of Violation];

(4) determine the "base" penalty amount associated with the size of business (Step 2) and the gravity of violation (Step 3) for each independently assessable violation, using the matrices in Table 2 [Section IV.A.4. Base Penalty Amount];

(5) determine the "adjusted" penalty amount based on case-specific factors using the Gravity Adjustment Criteria in Appendix B and Table 3 [Section IV.A.5. Adjustment for Case-Specific Factors];

(6) calculate the economic benefit of noncompliance [Sections IV.A.6. Economic Benefit of Noncompliance]; and

(7) consider the effect that payment of the total penalty amount plus economic benefit of noncompliance derived from the above calculation will have on the violator's ability to continue in business [Section IV.A.7 Ability to Continue in Business/Ability to Pay].

A civil penalty may be further modified in accordance with Section IV.B.1. Graduated Penalty Calculations, Section IV.B.2. Voluntary Disclosure, and Section IV.B.3. Adjusting the Proposed Civil Penalty in Settlement.

1. Independently Assessable Violations

A separate civil penalty, up to the statutory maximum, will be assessed for each independent violation of the Act. A violation is considered independent if it results from an act (or failure to act) which is not the result of any other violation for which a civil penalty is to be assessed or if at least one of the elements of proof is different from any other violation.

Consistent with the above criteria, the Agency considers violations that occur from each sale or shipment of a product (by product registration number, not individual containers) or each sale of a product to be independent violations.[8] There may also be situations where two unlawful acts arise out of one sale or shipment, such as the sale of a product that is both a misbranded pesticide and an unregistered pesticide. Similarly, under the pesticide use regulations, one application of a pesticide may lead to multiple misuse violations. For example, if an applicator mixes pesticides over the rate prescribed by the label and during the same application allows pesticide to drift onto non-target areas, each of those acts would be a separately assessable violation of FIFRA § 12(a)(2)(G).

Each of these independent violations of FIFRA is subject to civil penalties up to the statutory maximum. For example, when EPA can document that a registrant has distributed a misbranded product (one single EPA product registration number) in four separate shipments, EPA will allege four counts of selling or distributing a misbranded product. Similarly, when EPA can document that a registrant has shipped four separate misbranded products (four separate EPA product registration numbers) in a single shipment, EPA will plead four counts of selling or

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[8] Independent violations which can be documented as both per sale and per shipment are to be calculated only as either per sale or per shipment, whichever is more appropriate based on the supporting documentation.

distributing a misbranded product. In use cases that EPA handles, the Agency will allege three misuse violations when a commercial applicator who misuses a restricted use product on three occasions (either three distinct applications or three separate sites). If a dealer sells a restricted use pesticide (RUP) to six uncertified persons, other than in accordance with FIFRA § 3(d), EPA will plead six violations of FIFRA.

On the other hand, the Agency will assess a penalty for one violation arising from a single event or action (or lack of action) that is an unlawful act under FIFRA for multiple reasons unless the event or action results in two unlawful acts for which at least one element of proof differs. For instance, a person can be assessed a civil penalty of up to the statutory maximum for the sale and/or distribution of an unregistered, cancelled or suspended pesticide under FIFRA § 12(a)(1)(A). If the unregistered pesticide is actually a product whose registration had been cancelled, EPA cannot allege two separate violations of FIFRA § 12(a)(1)(A) since the sale or distribution related to a single event or transaction. However, the Agency could separately allege a violation of a cancellation order under FIFRA § 12(a)(2)(K). In this example, the violation of the cancellation order is independent of the sale and distribution of the unregistered product.

Another example of a dependent violation is multiple misbrandings on a single product label. EPA may assess a count of misbranding each time that a misbranded product is sold or distributed. For example, a registrant who sells or distributes four distinct shipments of a misbranded pesticide product generally may be assessed four counts of misbranding. If a single product label is misbranded in one way or ten ways, as defined by FIFRA § 2(q), it is still misbranding on a single product label and is considered a single violation of FIFRA § 12(a)(1)(E). Note, however, for pesticide use regulations, where the applicator fails to follow two label requirements, for example, does not follow the prescribed application rate and does not provide the prescribed personal protective equipment, there are two separate violations.

When a product label is grossly misbranded such that two or more misbrandings assigned Level 2 in Appendix A are present, the gravity level is adjusted upward to a Level 1 to address the seriousness of the misbranding.

2. Size of Business

In order to provide equitable penalties, civil penalties that will be assessed for violations of FIFRA will generally decrease as the size of the business decreases. Size of business is determined based on an individual's or a company's gross revenues from all revenue sources during the prior calendar year. If 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 three previous years may be used. Further, the size of business and gross revenue figures are based on the corporate family rather than a specific subsidiary or division of the company which is involved with the violation (including all sites owned or controlled by the foreign or domestic parent company) unless the subsidiary or division is independently owned.

As shown in the FIFRA Civil Penalty Matrices in Table 2, the appropriateness of the penalty to the size of the respondent's business is based on three distinct size of business categories. Further, because gross revenues of persons listed in FIFRA § 14(a)(1) [registrants, commercial applicators, wholesalers, dealers, retailers, or other distributors] will generally be higher than gross incomes of persons listed in FIFRA § 14(a)(2) [private applicators and other

persons not listed in 14(a)(1)], the policy has separate size of business categories for Section 14(a)(1) persons and Section 14(a)(2) persons. The size of business categories for FIFRA § 14(a)(1) and Section 14(a)(2) violators are listed in Table 1. Revenue includes all revenue from an entity and all of the entity's affiliates. When no information of any kind is available concerning a respondent's size of business, the penalty should be calculated using the Category I size of business.

TABLE 1

For section 14(a)(1) violators, the size of business categories are:

I - over $10,000,000 a year
II - $1,000,000 - $10,000,000 a year
III - under $1,000,000 a year

For section 14(a)(2) violators, the size of business categories are:

I - over $1,000,000 a year
II - $300,000 - $1,000,000 a year
III - under $300,000 a year

3. Gravity of the Violation

The "gravity level" established for each violation of FIFRA is listed in Appendix A of this ERP. The level assigned to each violation of FIFRA represents an assessment of the relative severity of each violation. The relative severity of each violation considers the actual or potential harm to human health and the environment which could result from the violation and the importance of the requirement to achieving the goals of the statute. The gravity level, which is determined from the chart in Appendix A, is then used to determine a base penalty figure from the FIFRA Civil Penalty Matrices in Step 4 below. In Step 5, the dollar amount derived from the matrix can be adjusted upward or downward depending on the actual circumstances of each violation.

4. Base Penalty Amount

The size of business categories and gravity levels are broken out in the FIFRA Civil Penalty Matrices shown in Table 2. Each cell of the matrix represents the Agency's assessment of the appropriate civil penalty, within the statutory maximum, for each gravity level of a violation and for each size of business category. Because FIFRA imposes different statutory ceilings on the maximum civil penalty that may be assessed against persons listed in FIFRA Section 14(a)(1) and persons listed in Section 14(a)(2), this policy has separate penalty matrices for Section 14(a)(1) violators and Section 14(a)(2) violators.

With the exception of any applicator within the scope of the exception set forth in FIFRA § 14(a)(2), EPA will only use the Section 14(a)(2) penalty matrix for persons falling under FIFRA § 14(a)(2) who have previously been issued a Notice of Warning or prior citation.[9]

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[9] FIFRA § 14(a)(2) states that private applicators are only subject to civil penalties after receiving a notice of warning or following a citation for a prior violation. A notice of warning or citation for a prior

When a civil penalty is the appropriate response for a first-time violation by any applicator within the scope of the exception set forth in FIFRA § 14(a)(2), EPA will seek the statutory maximum civil penalty. Subsequent violations will be assessed using the FIFRA § 14(a)(2) civil penalty matrix below.

TABLE 2

Civil Penalty Matrix for FIFRA § 14(a)(1)

	SIZE OF BUSINESS		
LEVEL OF VIOLATION	**I – over $10,000,000**	**II -- $1,000,000 - $10,000,000**	**III – under $1,000,000**
Level 1	$7,500	7,150	7,150
Level 2	7,150	5,670	4,250
Level 3	5,670	4,250	2,830
Level 4	4,250	2,830	1,420

Civil Penalty Matrix for FIFRA § 14(a)(2) [10]

	SIZE OF BUSINESS		
LEVEL OF VIOLATION	**I – over $1,000,000**	**II -- $300,000 - $1,000,000**	**III – under $300,000**
Level 1	$1,100	1,100	1,100
Level 2	1,100	1,030	770
Levels 3 & 4	1,030	770	650

5. Adjustments for Case-Specific Factors

The Agency has assigned adjustments, based on the gravity adjustment criteria listed in Appendix B, for each violation relative to the specific characteristics of the pesticide involved, the harm to human health and/or harm to the environment, compliance history of the violator,

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violation may include an action by either EPA or a delegated state if the prior violation would be a violation of federal law.

[10] This 14(a)(2) matrix is only for use in determining civil penalties issued subsequent to a notice of warning or following a citation for a prior violation, or in the case of a "for hire" applicator using a registered general use pesticide, subsequent to the issuance of a prior civil penalty.

and the culpability of the violator. Then the gravity adjustment values from each gravity category listed in Appendix B are to be totaled. The dollar amount found in the matrix will be raised or lowered, not to exceed the statutory maximum, based on the total gravity values in Table 3. Once this base penalty amount is calculated, it should be rounded to the nearest $100, in accordance with Amendments to Penalty Policies to Implement Penalty Inflation Rule 2008 - (Nakayama, 2008).[11]

TABLE 3

Total Gravity Value from Appendix B	**Enforcement Remedy**
3 or below	No action or Notice of Warning (60% reduction of matrix value recommended where multiple count violations exist)
4	Reduce matrix value 50%
5	Reduce matrix value 40%
6	Reduce matrix value 30%
7	Reduce matrix value 20%
8	Reduce matrix value 10%
9 to 11	Assess matrix value
12	Increase matrix value 10% **
13	Increase matrix value 20% **
14	Increase matrix value 30% **
15	Increase matrix value 40% **
16	Increase matrix value 50% **
17 or above	Increase matrix value 60% **
** Matrix value can only be increased to the statutory maximum.	

6. Economic Benefit of Noncompliance

The Agency's Policy on Civil Penalties (EPA General Enforcement Policy #GM-21), dated February 16, 1984, mandates the recapture of 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 realizes illegal profits through its noncompliance. A fundamental premise of the 1984 Policy is that economic incentives for noncompliance are to be eliminated. If, after the penalty is paid, violators still profit by violating the law, there is little incentive to comply. Therefore, enforcement professionals should always evaluate the economic benefit of noncompliance in calculating penalties. Note that economic benefit can only be added to the proposed penalty up to the statutory maximum penalty.

An economic benefit component should be calculated and added to the gravity-based penalty component when a violation results in "significant" economic benefit to the violator. "Significant" is defined as an economic benefit that totals more than $10,000 for all violations alleged in the complaint. In the interest of simplifying and expediting an enforcement action, enforcement professionals may use the "rules of thumb" (discussed in section 6.b below) to

[11] http://www.epa.gov/compliance/resources/policies/civil/penalty/amendmentstopenaltypolicies-implementpenaltyinflationrule08.pdf

determine if the economic benefit will be significant. Distribution and sale of unregistered and misbranded pesticides are examples of violations that are likely to result in significant economic benefits. For certain FIFRA requirements, the economic benefit of noncompliance may be relatively insignificant (e.g., failure to submit a report on time).

EPA generally will not settle cases for an amount less than the economic benefit of noncompliance. However, the Agency's 1984 Policy on Civil Penalties explicitly sets out three general areas where settling for less than the economic benefit may be appropriate. Since the issuance of the 1984 Policy, the Agency has added a fourth exception for cases where ability to pay is a factor. The four exceptions are:

- The economic benefit component is an insignificant amount (defined for purposes of this policy as less than $10,000);
- There are compelling public concerns that would not be served by taking a case to trial;
- It is unlikely, based on the facts of the particular case as a whole, that EPA will be able to recover the economic benefit in litigation; and
- The company has documented an inability to pay the total proposed penalty.

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. The violator eventually will spend the money to achieve compliance. Delayed costs are either capital costs (i.e. equipment), if any, or one-time non-depreciable costs (e.g., registration fees for pesticides that are eventually registered).

Avoided costs are expenditures that will never be incurred, as in the case of an unlawfully distributed unregistered pesticide that is subsequently removed from commerce and never registered by the Agency. In this example, avoided costs include all the costs associated with product registration because the product was never registered. Those costs were never and will never be incurred. Those avoided costs might include the registration fees, annual maintenance fees, and costs associated with the testing that would have been required to support a pesticide registration or to support specific claims about the product.

b. Calculation of Economic Benefit from Delayed and Avoided Costs

Since 1984, it has been Agency policy to use either the BEN computer model or "rules of thumb" to calculate the economic benefit of noncompliance. The "rules of thumb" are straight-forward methods to calculate economic savings from delayed and avoided compliance expenditures. They are discussed more fully in the Agency's General Enforcement Policy #GM-22, entitled "A Framework for Statute-Specific Approaches to Penalty Assessments," issued on February 16, 1984, at pages 7-9. The "rule of thumb" methodology is available in a Lotus spreadsheet available to EPA enforcement professionals from the Special Litigation and Projects Division of the Office of Civil Enforcement. Enforcement professionals may use the "rules of thumb" whenever the economic benefit penalty is not substantial (generally under $10,000) and use of an expert financial witness may not be warranted. If the "rules of thumb" yield an amount

over $10,000, the case developer should use the BEN model and/or an expert financial witness to calculate the higher economic benefit penalty. Using the "rules of thumb," the economic benefit of delayed compliance may be estimated at: 5% per year of the delayed one-time capital costs, if any, and/or one-time non-depreciable costs for the period from the date the violation began until compliance was or is expected to be achieved. For avoided annual costs, the "rule of thumb" is the annual expenses avoided until the date compliance is achieved less any tax savings. These rules of thumb do not apply to avoided one-time or avoided capital costs. Enforcement professionals should calculate the economic benefit of avoided one-time and avoided capital costs, if any, by using the BEN model.

The primary purpose of the BEN model is to calculate economic savings 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 professionals wishing to use the BEN model should take the Basic BEN training course offered by the Special Litigation and Projects Division in cooperation with NETI. Enforcement professionals who have questions while running the model can access the model's help system which contains information on how to: use BEN, understand the data needed, and 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 FIFRA and thereby gained an economic benefit. Such evidence should be considered in the assessment of the penalty assessed 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. 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. For example, in a case where credible evidence demonstrates that a respondent sold an unregistered pesticide during the past four years but the specific violations for which EPA has chosen to seek a penalty all occurred within the past two years, the economic benefit should be calculated for the four-year period. In such a case, the economic benefit component of the penalty for the specific sales transactions during the past two years should be based on a consideration of the economic benefit gained for the four-year period, but the total penalty is limited to the statutory maximum for the specific violations alleged and proven.[12]

In most cases, the violator will have the funds gained through non-compliance 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. However, there are exceptions for determining the period of economic benefit when

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[12]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.

using a "rule of thumb." In those instances, the economic benefit is calculated in the manner described in the first paragraph of this subsection.

c. Economic Benefit Gained from Illegal Sales of Unregistered Pesticides

In addition to delayed and avoided costs, an economic benefit may accrue to a violator of FIFRA from the sale of unregistered or misbranded pesticides. The economic benefit derived from sales of unregistered or misbranded pesticides is sometimes referred to as "illegal profits" or "illegal competitive advantage." Illegal profits economic benefit is fundamentally different from the economic benefit calculated by using the BEN model. Unlike the delayed/avoided benefits addressed through BEN, this type of economic benefit is based on the profits generated by violating the law. Care should be taken to insure that any calculation of a benefit derived from illegal profits does not include profits attributable to lawful operations of the facility or delayed or avoided costs already accounted for in the BEN calculation. In most cases, a violator will realize either benefits from delayed/avoided costs or from illegal profits; however, whenever the facts and circumstances of the case provide a sufficient basis to calculate illegal profits and the Region is able to obtain sufficient information, the Region should calculate the benefits due to illegal profits and add it to any other type of economic benefit that has been calculated.

7. Ability to Continue in Business/Ability to Pay

FIFRA § 14(a)(4) requires the Agency to consider the effect of the penalty on the respondent's ability to continue in business when determining the amount of the civil penalty. There are several sources available to assist enforcement professionals in determining a respondent's ability to pay. Enforcement professionals considering a respondent's ability to continue in business should consult "A Framework for Statute-Specific Approaches to Penalty Assessments," (cited above) and EPA General Enforcement Policy PT.2-1 (previously codified as GM-#56), entitled "Guidance on Determining a Violator's Ability to Pay a Civil Penalty" (December 16, 1986). In addition, the Agency has three computer models available to help assess whether violators can afford compliance costs and/or civil penalties: ABEL, INDIPAY and MUNIPAY. INDIPAY analyzes individual taxpayers' claims about inability to pay. MUNIPAY analyzes cities, towns, and villages' ability to pay. These models are designed for settlement purposes only.

ABEL is an EPA computer model that is designed to assess inability to pay claims from corporations and partnerships. The evaluation is based on the firm's excess cash flow. ABEL looks at the money coming into the entity, and the money going out. It then looks at whether the excess cash flow is sufficient to cover the firm's environmental responsibilities (i.e., compliance costs) and the proposed civil penalty. Because the program only focuses on a violator's cash flow, there are other sources of revenue that should also be considered to determine if a firm is unable 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 Fortune 500 company).

The complaint will notify the respondent of its right under the statute to have EPA consider its ability to continue in business 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 the inability to pay as a defense 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 must provide records that conform to generally accepted accounting principles and procedures at its expense. If the proposed penalty exceeds the respondent's ability to pay, the penalty may be reduced to a level consistent with FIFRA § 14(a)(4). If a respondent does not provide sufficient information to substantiate its claim of inability to pay the calculated penalty, then EPA may draw an inference from available information that the respondent has the ability to pay the calculated penalty.[13]

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.[14] In exceptional circumstances, EPA may also consider further adjustment below the calculated ability to pay.

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 or the violator refuses to pay the penalty. However, if the case is generated out of an EPA regional office, the case file must contain a written explanation, signed by the regional authority duly delegated to issue and settle administrative penalty orders under FIFRA, 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 regions should consult with the Waste and Chemical Enforcement Division (WCED).[15]

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[13] Note that 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 ability to continue in 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 continue in business as well as the other statutory penalty factors and that their recommended penalty is supported by their analysis of those factors. EPA may obtain information regarding a respondent's ability to continue in business from the respondent, independent commercial financial reports, or other credible sources.

[14] *See*, 40 C.F.R. § 13.18.

[15] In accordance with the November 1, 1994 memorandum entitled, "Final List of Nationally Significant Issues and Process for Raising Issues to TPED." This final implementation guidance was developed in follow-up to Steve Herman's July 11, 1994 memorandum on "Redelegation of Authority and Guidance on Headquarters' Involvement in Regulatory Enforcement Cases."

B. Modifications of the Penalty

1. Graduated Penalty Calculations

In instances where inspectors or case developers obtain records which evidence multiple sales or distributions for the same violations, the Region may apply a "graduated" penalty calculation. The graduated method should only be applied after a consideration of the actual or potential serious or widespread harm caused by the violations, the toxicity of the pesticides involved, and the culpability of the violator. The graduated penalty method should not be used in cases involving highly culpable violators or violations that caused an actual serious or widespread harm to human health or the environment. In cases involving violations that present *potential* serious or widespread harm to human health or the environment, the Region should decide whether application of the graduated penalty method is appropriate based on the circumstances of the individual case.

In no case is the graduated penalty method mandated and the Agency maintains its statutory right to assess penalties of up to the statutory maximum for each violation, when appropriate. For highly culpable parties the penalty should be calculated at the full value for all violations. After considering the factors described above and determining that a graduated penalty method is appropriate, the Region may calculate the penalty in accordance with Table 4 below. Table 4 provides for three separate graduated systems based on the three "size of business" categories.

TABLE 4

Graduated Penalty Tables

Number of Distributions	CATEGORY I "SIZE OF BUSINESS" RESPONDENTS
1 – 100	100% of calculated per violation penalty
101 – 400	25% of per violation penalty
> 400	10% of per violation penalty

Number of Distributions	CATEGORY II "SIZE OF BUSINESS" RESPONDENTS
1 – 20	100% of calculated per violation penalty
21 – 40	25% of per violation penalty
> 40	10% of per violation penalty

Number of Distributions	CATEGORY III "SIZE OF BUSINESS" RESPONDENTS
1 – 5	100% of calculated per violation penalty
6 – 20	10 % of per violation penalty
> 20	5% of per violation penalty

Graduated penalties should generally be calculated separately for each type of violation and for each product (in other words, on a "per product violation" basis). In cases involving similar product violations (for example, violations involving products that contain the same

active ingredient and the same violative conduct on the part of the respondent), the Agency has the discretion to group together similar product violations for the graduated penalty calculation.

To calculate penalties using the graduated penalty method, the "adjusted" penalty amount must first be determined in accordance with Steps 1-5 of section IV.A Computation of the Penalty, above. The next step is to apply the graduated penalty calculation separately for each product violation, beginning with the first sale/distribution at 100% and proceeding to calculate the reduced penalty depending on the size of business. After the graduated penalty amount is calculated for each separate product violation, the Agency should add together the graduated penalty amounts for all of the product violations.

For example, a Category II business distributes two products with a total of three violations. For Product 1, the Agency is alleging misbranding (a Level 3 violation) and distribution of an unregistered pesticide (a Level 1 violation), each for 61 shipments. For Product 2, the Agency is alleging distribution of an unregistered pesticide (a Level 1 violation) for 90 shipments. After applying the case-specific factors, no adjustments to the base penalties were made. The graduated penalty calculation would proceed as follows:

Product 1, Misbranding (Level 3):		
Violations 1-20 @ 100% =	20 violations @ $ 4,250 =	$ 85,000
Violations 21- 40 @ 25% =	20 violations @ $ 1,063 =	$ 21,260
Violations 41- 61 @ 10% =	21 violations @ $ 425 =	$ 8,925
Product 1, Unregistered (Level 2):		
Violations 1-20 @ 100% =	20 violations @ $ 5,670 =	$113,400
Violations 21- 40 @ 25% =	20 violations @ $ 1,418 =	$ 28,360
Violations 41- 61 @ 10% =	21 violations @ $ 567 =	$ 11,907
Product 2, Unregistered (Level 2):		
Violations 1-20 @ 100% =	20 violations @ $ 5,670 =	$113,400
Violations 21- 40 @ 25% =	20 violations @ $ 1,418 =	$ 28,360
Violations 41- 90 @ 10% =	50 violations @ $ 567 =	$ 28,350

When the graduated penalty method is applied to the example case, the penalty is $438,962, which is significantly lower than the $1,115,420 [(61 x 4,250) + (61 x 5,670) + (90 x 5, 670)] penalty that would be calculated without applying the graduated penalty.

2. Voluntary Disclosure

Facilities that conduct an environmental audit or implement a compliance management system and promptly self-disclose any violations may be eligible for a significant reduction in the gravity-based penalty if they meet the nine criteria established in EPA's Audit Policy (Incentives for Self-Policing: Disclosure, Correction and Prevention of Violations: Final Policy Statement, April 11, 2000). A facility may also be eligible for penalty reductions if they meet the specific criteria outlined in the "Small Business Compliance Policy" (May 11, 2000). If a facility self-discloses violations that do not qualify under the Audit Policy or Small Business Compliance Policy, the Agency may consider a company's willingness to disclose as good faith (see Section IV.B.3.b.i. Good Faith Adjustments).

3. Adjusting the Proposed Civil Penalty in Settlement

Certain circumstances may justify adjustment of the proposed penalty. These circumstances may come to EPA's attention when a respondent files an answer to a civil complaint or during pre-filing settlement discussions under the *Consolidated Rules of Practice Governing Administrative Assessment of Civil Penalties*, 40 C.F.R. Part 22.

a. Factual Changes

EPA will recalculate the proposed penalty if the respondent can demonstrate that the size of business category, the gravity level, or the gravity adjustment criteria (Appendix B) used to derive the penalty is inaccurate. Adjustments to the proposed civil penalty may also be appropriate if the respondent can demonstrate an inability to pay the civil penalty (see Section IV.A.7. Ability to Continue in Business/Ability to Pay). Where additional facts indicate that the original penalty is not appropriate, EPA will calculate a new penalty consistent with the new facts. The burden is on the respondent to raise those factors which may justify the recalculation.

b. Negotiations Involving Only the Amount of the Penalty

In some cases the respondent may admit to all jurisdictional and factual allegations alleged in the complaint and may desire a settlement conference limited to the amount of the proposed penalty. The following sections describe adjustments that EPA may consider during settlement negotiations if the specific case meets the criteria set forth below.

i. Good Faith Adjustments

During the course of settlement negotiations, EPA may consider evidence of significant good faith efforts by the respondent to comply with FIFRA prior to the discovery of the violation(s) by EPA or a state as well as the respondent's good faith efforts to comply with FIFRA expeditiously after the discovery of the violation(s) by EPA or a state. In such instances, EPA may reduce the penalty by as much as 20 percent below the proposed penalty, if such a reduction would serve the public interest. A reduction for good faith efforts to comply is not mandated in any case. Such a reduction in penalty should only occur where there is an appropriate showing by respondent and finding by the Agency. Additionally, no reduction based on good faith efforts of the respondent should extend beyond a total of 20 percent of the proposed penalty without a showing of "special circumstances," as discussed below. No downward adjustment should be made if the Respondent fails to correct the violation(s) promptly after EPA or a state discovers the violation(s). Moreover, no downward adjustment should be made because respondent lacks knowledge concerning either applicable requirements or violations committed by respondent.

ii. Special Circumstances/Extraordinary Adjustments

Should EPA determine in a particular case that equity would not be served by adjusting the proposed penalty by only the allowable 20 percent adjustment for good faith, the FIFRA program manager may approve an adjustment to the proposed penalty for up to an additional 20 percent. In such cases, the case file must include substantive reasons why the extraordinary reduction of the civil penalty was appropriate, including: (1) setting forth the facts of the case; (2) why the penalty derived from the FIFRA civil penalty matrices and gravity adjustment was

inequitable; (3) how all other methods for adjusting or revising the proposed penalty would not adequately resolve the inequity; and (4) the manner in which the adjustment of the penalty effectuated the purposes of the Act. The FIFRA program manager's concurrence in the extraordinary reduction must be included in the case file.

iii. Supplemental Environmental Projects (SEPs)

To further EPA's goals to protect and enhance public health and the environment, certain environmentally beneficial projects, or Supplemental Environmental Projects (SEPs), may be included in the settlement. SEPs are environmentally beneficial projects which a respondent agrees to undertake in settlement of an environmental enforcement action, but which the respondent is not otherwise legally required to perform. In return, 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.

APPENDICES

Appendix A - FIFRA Violations and Gravity Levels

Appendix B - Gravity Adjustment Criteria

Appendix C - Summary of Tables

Appendix D - FIFRA Civil Penalty Calculation Worksheet

Appendix E – Enforcement Response Policy for FIFRA Section 7(c) – Pesticide Producing Establishment Reporting Requirements

Appendix F – FIFRA: Worker Protection Standard (WPS) Penalty Policy – Interim Final

Appendix G – Enforcement Response Policy for the FIFRA Good Laboratory Practices (GLP) Regulations

APPENDIX A

FIFRA VIOLATIONS AND GRAVITY LEVELS

FIFRA SECTION	CODE	VIOLATION	LEVEL
12(a)(1)(A)	1AA	Sold or distributed a pesticide NOT REGISTERED under section 3 or one whose registration was CANCELLED or SUSPENDED, except to the extent authorized by the administrator.	1
12(a)(1)(A)	1AB	Registrant, wholesaler, dealer, retailer, or any other distributor ADVERTISED, or otherwise "offered for sale" in any medium a pesticide that was NOT REGISTERED under section 3 or that was CANCELLED or SUSPENDED, other than in accordance with Agency policy.	2
12(a)(1)(B)	1BA	CLAIMS made for a pesticide as part of its sale or distribution differed substantially from those accepted in connection with registration	2
12(a)(1)(B)	1BB	Registrant, wholesaler, dealer, retailer, or the other distributor ADVERTISED, or otherwise "offered for sale" in any medium a registered pesticide product for an UNREGISTERED USE, other than in accordance with Agency policy.	2
12(a)(1)(C)	1CA	Sold or distributed a pesticide whose COMPOSITION DIFFERED from the composition represented in the registration	2
12(a)(1)(D)	1DA	Sold or distributed a pesticide that has not been COLORED or DISCOLORED pursuant to section 25(c)(5)	2
12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(A)	1EA	Sold or distributed a pesticide or device which is MISBRANDED in that the labeling has a statement, design, or graphic representation that is false or misleading.	2[1]
12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(B)	1EB	Sold or distributed a pesticide or device which is MISBRANDED in that the package or other container or wrapping does not conform to the standards established pursuant to section 25(c)(3) (e.g., not contained in child-resistant packaging or safety containers).	2[1]
12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(C)	1EC	Sold or distributed a pesticide or device that is MISBRANDED in that it is an imitation of, or is offered for sale under the name of, another pesticide.	2[1]
12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(D)	1ED	Sold or distributed a pesticide or device that is MISBRANDED in that the label did not bear the registration number assigned under section 7.	4
12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(E)	1EE	Sold or distributed a pesticide or device that is MISBRANDED in that any words, statements, or other information required by the Act were not prominently placed on the label or labeling in such a way as to make it readable or understandable.	3
12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(F)	1EF	Sold or distributed a pesticide or device that is MISBRANDED in that the label, or labeling accompanying it, did not contain directions for use necessary to make the product effective and to adequately protect health and the environment.	1
12(a)(1)(E)	1EG	Sold or distributed a pesticide or device that is MISBRANDED in	2[1]

FIFRA SECTION	CODE	VIOLATION	LEVEL
12(a)(1)(F) 2(q)(1)(G)		that the label did not contain a warning or caution statement adequate to protect health and the environment (precautionary statements)	
12(a)(1)(E) 2(q)(1)(H)	1EH	Sold or distributed a non-registered pesticide intended for export that is MISBRANDED in that the label did not have a prominently displayed "Not Registered for Use in the United States of America"	2[1]
12(a)(1)(E) 2(q)(2)(A)	1EI	Sold or distributed a pesticide that is MISBRANDED in that the label did not bear an ingredient statement on the immediate container which is presented or displayed under customary conditions of purchase.	3
12(a)(1)(E) 2(q)(2)(B)	1EJ	Sold or distributed a pesticide that is MISBRANDED in that the labeling does not contain a statement of the use classification under which the product was registered	2
12(a)(1)(E) 2(q)(2)(C)	1EK	Sold or distributed a pesticide that is MISBRANDED in that there is not a label affixed to the pesticide container, and to the outside wrapper of the retail package if the required information on the immediate container cannot be clearly read, a label bearing all of the following information: (i) the name and address of the producer, registrant, or person for whom produced (ii) the name brand, or trademark under which the pesticide is sold (iii) the net weight or measure of the contents; and (iv) when required by regulation, the registration number assigned to the pesticide.	 3 4 4 3
12(a)(1)(E) 2(q)(2)(D)	1EL	Sold or distributed a pesticide that is MISBRANDED in that the pesticide is sold in quantities highly toxic to man and the label failed to bear the skull and crossbones, and the word "poison," prominently in red on a contrasting background color, and a statement of practical treatment.	1
12(a)(1)(E) 2(c)(1)-(3)	1EM	Sold or distributed a pesticide that is ADULTERATED in that: (i) the strength or purity falls below the professed standard of quality expressed on the labeling; (ii) any substance has been substituted wholly or in part for the pesticide; or (iii) any valuable constituent of the pesticide has been wholly or in part abstracted.	2
12(a)(2)(A)	2AA	DETACHED, ALTERED, DEFACED, OR DESTROYED, in whole or in part, any LABELING required under the Act.	2
12(a)(2)(B)(i)	2BA	Refused to PREPARE, MAINTAIN, or SUBMIT any RECORDS required under sections 5, 7,[ii] 8, 11, or 19.	2
12(a)(2)(B)(ii)	2BB	Refused to SUBMIT any REPORTS required by or under sections 5, 6, 7,[2] 8, 11, or 19.	2
12(a)(2)(B)(ii)	2BC	A registrant refused to submit REPORTS under section 6(a)(2) regarding UNREASONABLE ADVERSE EFFECTS of their pesticide.	1
12(a)(2)(B)(iii)	2BD	Person refused to allow ENTRY, INSPECTION, COPYING OF RECORDS, or SAMPLING authorized by this Act.	2
12(a)(2)(C)	2CA	Person gave a GUARANTY or undertaking provided for in section	2

FIFRA SECTION	CODE	VIOLATION	LEVEL
		12(b) which was FALSE in any particular.	
12(a)(2)(D)	2DA	Person used their personal advantage or revealed to persons other than those authorized by the Act any INFORMATION acquired under the Act that was CONFIDENTIAL.	3
12(a)(2)(E)	2EA	Registrant, wholesaler, dealer, retailer, or other distributor ADVERTISED a RESTRICTED USE PESTICIDE without indicating that the product was restricted.	2
12(a)(2)(F)	2FA	Person DISTRIBUTED, SOLD, MADE AVALIABLE FOR USE, or USED a RESTRICTED USE PESTICIDE for a purpose other than in accordance with section 3(d) or regulations issued.	~~3~~ 2
12(a)(2)(F)	2FB	Person distributed, sold, or made available for use, or used, a RESTRICTED USE PESTICIDE without maintaining the RECORDS required by regulations (A Notice of Warning should be issued for first-time partial violations. Violations continuing subsequent to the issuance of a civil complaint are to result in a suspension- see "Denials, Suspensions, Modifications, or Revocations of Applicator Certifications" section of this ERP).	2
12(a)(2)(G)	2GA	Person USED a registered pesticide in a manner inconsistent with its labeling.	2
12(a)(2)(H)	2HA	Person USED a pesticide under an EXPERIMENTAL USE PERMIT contrary to the provisions of the permit.	2
12(a)(2)(I)	2IA	Person violated any order issued under section 13 (*i.e.*, STOP SALE, USE, OR REMOVAL ORDER, or SEIZURES.	1
12(a)(2)(J)	2JA	Person violated any SUSPENSION ORDER issued under section 6.	1
12(a)(2)(J)	2JB	Person violated any SUSPENSION ORDER issued under section 3(c)(2)(B) or 4.	2
12(a)(2)(K)	2KA	Person violated any CANCELLATION ORDER issued under the Act on grounds of UNREASONABLE ADVERSE EFFECTS.	1
12(a)(2)(K)	2KB	Person violated any CANCELLATION ORDER issued under the Act on grounds OTHER THAN UNREASONABLE ADVERSE EFFECTS.	2
12(a)(2)(K)	2KC	Person failed to submit a SECTION 6(g) NOTICE when required.	2
12(a)(2)(K)	2KD	Person submitted a NOTABLY LATE SECTION 6(g) NOTICE.	3
12(a)(2)(K)	2KE	Person submitted an INCOMPLETE or INCORRECT SECTION 6(g) NOTICE.	3
12(a)(2)(L) 7(a)[2]	2LA	PRODUCED a pesticide or active ingredient subject to the Act in an UNREGISTERED ESTABLISHMENT.	2
12(a)(2)(L) 7(c)(1)[2]	2LB	Producer FAILED TO SUBMIT, or submitted NOTABLY LATE, a REPORT to the administrator, under SECTION 7, which indicates the types and amounts of pesticides or active ingredients which they are currently producing, which they produced during the year, and which they sold or distributed during the past year.	2
12(a)(2)(L) 7(c)(1)[2]	2LC	Producer submitted a LATE REPORT to the administrator, under SECTION 7, which indicates the types and amounts of pesticides or active ingredients which they are currently producing, which they produced during the year, and which they sold or distributed during	4

FIFRA SECTION	CODE	VIOLATION	LEVEL
		the past year (civil complaint issued only if the producer does not respond to a Notice of Warning or there is a subsequent violation within three year timeframe from the first violation).	
12(a)(2)(L) 7(c)(1)[2]	2LD	Producer submitted an INCOMPLETE SECTION 7 REPORT with MINOR OMISSIONS of the required information (civil complaint issued only if the producer does not respond to a Notice of Warning or there is a subsequent violation within three year timeframe from the first violation).	3
12(a)(2)(L) 7(c)(1)	2LE	Producer submitted an INCOMPLETE or a FALSE SECTION 7 REPORT with MAJOR OMISSIONS or ERRORS of the required information.	2
12(a)(2)(L) 7(c)2	2LF	Upon request of the administrator for the purposes of the issuance of a section 13 Stop Sale Orders, a PRODUCER FAILED TO PROVIDE the names and addresses of any recipients of any pesticides produced in any of his registered establishments.	1
12(a)(2)(M)	2MA	Person KNOWINGLY FALSIFIED all or any part of an application for registration, application for an experiment use permit, any information submitted under section 7, any records required to be maintained by the Act, any reports filed under the Act, or any information marked as confidential and submitted to the administrator under any provision of the Act.	1
12(a)(2)(N)	2NA	A registrant, wholesaler, dealer, retailer, or other distributor FAILED TO FILE REPORTS (other than reports addressed in the section 7(c) ERP) required by the Act.	2
12(a)(2)(O)	2OA	Person ADDED A SUBSTANCE TO or TOOK any substance from a pesticide in a manner that may defeat the purpose of the Act.	2
12(a)(2)(P)	2PA	Person USED a pesticide in TESTS ON HUMAN BEINGS in violations of the conditions specified by the Act.	1
12(a)(2)(Q)[3]	2QA	Person FALSIFIED INFORMATION RELATING to the TESTING of any pesticide (or any of its ingredients, metabolites, or degradation products)that the person knows will be furnished to the administrator, or will become a part of any records required to be maintained by the Act	1
12(a)(2)(Q)[3]	2QB	Person falsely represented compliance with the FIFRA Good Laboratory Practice (GLP) regulations as a result of a HIGH LEVEL GLP violation.	2
12(a)(2)(Q)[3]	2QC	Person falsely represented compliance with the FIFRA Good Laboratory Practice (GLP) regulations as a result of a MID LEVEL GLP violation.	3
12(a)(2)(Q)[3]	2QD	14(a)(1) person falsely represented compliance with the FIFRA Good Laboratory Practice (GLP) regulations as a result of a LOW LEVEL GLP violation.	4
12(a)(2)(Q)[3]	2QE	14(a)(2) person falsely represented compliance with the FIFRA Good Laboratory Practice (GLP) regulations as a result of a LOW LEVEL GLP violation.	3
12(a)(2)(R)[3]	2RA	Person submitted DATA KNOWN TO BE FALSE in support of registration.	1

FIFRA SECTION	CODE	VIOLATION	LEVEL
12(a)(2)(S)[4]	2SA	Person sold, distributed, or used an UNREGISTERED pesticide in violation of a REGULATION ISSUED UNDER SECTION 3(a).	
12(a)(2)(S)[4]	2SB	Person violated any REGULATION ISSUED UNDER SECTION 19.	

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[1] If a label has two or more Level 2 misbranding violations, the appropriate gravity level is increased to Level 1.

[2] Section 7(c)(1) violations are covered in the Enforcement Response Policy for FIFRA Section 7(c), Pesticide producing Establishment Reporting requirement dated June 2007.

[3] Violations regarding laboratory practice are covered in the FIFRA Good Laboratory Practice (GLP) Regulations dated September 30, 1991.

[4] Gravity levels for these violations will be assigned in subsequent ERPs.

APPENDIX B

GRAVITY ADJUSTMENT CRITERIA[1]

VIOLATION GRAVITY OF HARM	VALUE	CIRCUMSTANCES
Pesticide	3	Toxicity - Category I pesticides, signal word "Danger," restricted use pesticides (RUPs), pesticides with flammable or explosive characteristics (*i.e.*, signal words "Extremely Flammable" or "Flammable"), or pesticides that are associated with chronic health effects (mutagenicity, oncogenicity, teratogenicity, etc.) or pesticide is unregistered and the ingredients or labeling indicate Category I toxicity.
	2	Toxicity - Category II, signal word "Warning" or pesticide unregistered and unknown, but not expected to meet Category I toxicity criteria.
	1	Toxicity – Category III or IV, signal word "Caution" or pesticide unregistered and ingredients lower or minimum risk category.
Harm to Human Health	5	Actual serious or widespread[1] harm to human health.
	3	Unknown or potential serious or widespread harm to human health
	1	Minor[2] potential or actual harm to human health.
	0	Negligible[3] harm to human health anticipated.
Environmental Harm	5	Actual serious or widespread[1] harm to the environment (*e.g.*, crops, water, livestock, wildlife, wilderness, or other sensitive natural areas).
	3	Unknown or potential serious or widespread[1] harm to the environment health
	1	Minor[2] potential or actual harm to the environment.
	0	Negligible[3] harm to the environment anticipated.
Compliance History[4]	4	Violator with more than one prior violation of FIFRA.
	2	Violator with one prior violation of FIFRA.
	0	No prior FIFRA violations.
Culpability[5]	4	Knowing or willful violation of the statute.[6] Knowledge of the general hazardousness of the activity.
	2	Culpability unknown or violation resulting from negligence.
	1	Violation resulted from negligence. Violator instituted steps to correct the violation immediately after discovery of the violation.
	0	Violation was neither knowing nor willful and did not result from negligence. Violator instituted steps to correct the violation immediately after discovery of the violation.

APPENDIX B NOTES

[1] For the purposes of this ERP, serious or widespread harm refers to actual or potential harm which does not meet the parameters of minor harm or negligible harm, as described below.

[2] For the purposes of this ERP, minor harm refers to actual or potential harm which is, or would be of short duration, no lasting effects or permanent damage, effects are easily reversible, and harm does not, or would not result in significant monetary loss.

[3] For the purposes of this ERP, negligible harm refers to no actual or potential harm or actual or potential harm which is insignificant or unnoticeable and has no lasting effects or permanent damage or monetary loss.

[4] The following considerations apply when evaluating compliance history for the purposes of Appendix B:

(a) In order to constitute a prior violation, the prior violation must have resulted in: (1) a final order, either as a result of an uncontested complaint, or as a result of a contested complaint which is finally resolved against the violator; (2) a consent order, resolving a contested or uncontested complaint by the execution of a consent agreement; (3) the payment of a civil penalty by the alleged violator in response to the complaint, whether or not the violator admits to the allegations of the complaint; or (4) conviction under the FIFRA's criminal provisions.

A notice of warning (NOW) will not be considered a prior violation for the purposes of the gravity adjustment criteria, since no opportunity has been given to contest the notice. Additionally, a stop sale, use, or removal order (SSURO) issued under FIFRA section 13 will not be considered as compliance history.

(b) To be considered a compliance history for the purposes of Appendix B, the violation must have occurred within five years of the present violation. This five-year period begins on the date of a final order, consent order, or payment of a civil penalty.

(c) Generally, companies with multiple establishments are considered as one when determining compliance history. If one establishment of a company commits a FIFRA violation, it counts as history when another establishment of the same company, anywhere in the country, commits another FIFRA violation

(d) An enforcement action or citation issued by a state lead agency will count as a prior violation if all the above considerations are met.

[5] EPA enforcement officials are not required to determine culpability at the time the complaint is issued (especially if this information is not readily available). EPA enforcement officials may instead assign a weighting factor of 2 (culpability unknown), at the time of the issuance of the complaint. Culpability adjustments may be reconsidered during settlement negotiations.

[6] The Agency may also consider criminal proceedings for "knowing and willful" violations. See the "Criminal Proceedings" section of this ERP.

TABLE 1

SIZE OF BUSINESS CATEGORIES

Section 14(a)(1) violators:

I - over $10,000,000 a year
II - $1,000,000 - $10,000,000
III - under $1,000,000

Section 14(a)(2) violators:

I - over $1,000,000 a year
II - $300,000 - $1,000,000
III - under $300,000

TABLE 2

FIFRA CIVIL PENALTY MATRICES

Civil Penalty Matrix for FIFRA § 14(a)(1)

	SIZE OF BUSINESS		
LEVEL OF VIOLATION	**I – over $10,000,000**	**II - $1,000,000 - $10,000,000**	**III – under $1,000,000**
Level 1	$7,500	7,150	7,150
Level 2	7,150	5,670	4,250
Level 3	5,670	4,250	2,830
Level 4	4,250	2,830	1,420

Civil Penalty Matrix for FIFRA § 14(a)(2) *

	SIZE OF BUSINESS		
LEVEL OF VIOLATION	**I – over $1,000,000**	**II - $300,000 - $1,000,000**	**III – under $300,000**
Level 1	$1,100	1,100	1,100
Level 2	1,100	1,030	770
Level 3 & 4	1,030	770	650

* This 14(a)(2) matrix is only for use in determining civil penalties issued subsequent to a notice of warning or following a citation for a prior violation, or in the case of a "for hire" applicator using a registered general use pesticide, subsequent to the issuance of a prior civil penalty.

TABLE 3

GRAVITY ADJUSTMENT CRITERIA

Total Gravity Value from Appendix B	Enforcement Remedy
3 or below	No action or Notice of Warning (60% reduction of matrix value recommended where multiple count violations exist)
4	Reduce matrix value 50%
5	Reduce matrix value 40%
6	Reduce matrix value 30%
7	Reduce matrix value 20%
8	Reduce matrix value 10%
9 to 11	Assess matrix value
12	Increase matrix value 10% **
13	Increase matrix value 20% **
14	Increase matrix value 30% **
15	Increase matrix value 40% **
16	Increase matrix value 50% **
17 or above	Increase matrix value 60% **

** Matrix value can only be increased to the statutory maximum.

APPENDIX D
FIFRA CIVIL PENALTY CALCULATION WORKSHEET

Respondent: **Docket No.:**	**Brief Description of Violation**
APPENDIX A 1. Violation	
2. FTTS Code & Violation Level	
TABLE 1 3. Violator Category & Size of Business Category	
APPENDIX A 4. Gravity of the Violation	
TABLE 2 5. Base Penalty	
APPENDIX B 6. Gravity Adjustments a. Pesticide Toxicity	
b. Harm to Human Health	
c. Environmental Harm	
d. Compliance History	
e. Culpability	
f. Total Gravity Adjustment (Add 6a - 6e)	
TABLE 3 7. Percent & Dollar Adjustment	
8. Economic Benefit	
TABLE 4 9. Graduated Penalty	
10. Final Penalty	

Case Development Officer

Date

Example
FIFRA CIVIL PENALTY CALCULATION WORKSHEET

Respondent: **Docket No.:**	**Brief Description of Violation**
APPENDIX A 1. Violation	§12(a)(1)(C)
2. FTTS Code & Violation Level	1CA / 2
TABLE 1 3. Violator Category & Size of Business Category	§14(a)(1) / Category I
APPENDIX A 4. Gravity of the Violation	2
TABLE 2 5. Base Penalty	$7,150
APPENDIX B 6. Gravity Adjustments a. Pesticide Toxicity	1
b. Harm to Human Health	3
c. Environmental Harm	3
d. Compliance History	0
e. Culpability	2
f. Total Gravity Adjustment (Add 6a - 6e)	9
TABLE 3 7. Percent & Dollar Adjustment	Assess Matrix Value
8. Economic Benefit	
TABLE 4 9. Graduated Penalty	Not applied
10. Final Penalty	**$7,150 x 10 Violations = $71,500**

Case Development Officer

Date

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

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

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

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

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

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

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

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

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

Subpart A—General

Sec.

Subpart B—Parties and Appearances

Subpart C—Prehearing Procedures

Subpart D—Hearing Procedures

Subpart E—Initial Decision and Motion to Reopen a Hearing

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

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

Subpart A—General

§ 22.1 Scope of this part.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 22.2 Use of number and gender.

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

§ 22.3 Definitions.

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

Act means the particular statute authorizing the proceeding at issue.

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

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

Agency means the United States Environmental Protection Agency.

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

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

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

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

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

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

Consolidated Rules of Practice means the regulations in this part.

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

Final order means:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) Administer oaths and affirmations and take affidavits;

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

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

(6) Admit or exclude evidence;

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

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

(9) Issue subpoenas authorized by the Act; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

confidential shall be filed with the Regional Hearing Clerk:

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

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

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

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

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

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

§ 22.7 Computation and extension of time.

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

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

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

§ 22.8 Ex parte discussion of proceeding.

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

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

§ 22.9 Examination of documents filed.

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

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

Subpart B—Parties and Appearances

§ 22.10 Appearances.

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

§ 22.11 Intervention and non-party briefs.

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

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

§ 22.12 Consolidation and severance.

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

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

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

Subpart C—Prehearing Procedures

§ 22.13 Commencement of a proceeding.

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

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

§ 22.14 Complaint.

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

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

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

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

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

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

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

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

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

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

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

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

(8) Instructions for paying penalties, if applicable.

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

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

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

§ 22.15 Answer to the complaint.

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

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

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

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

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

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

§ 22.16 Motions.

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

(1) Be in writing;

(2) State the grounds therefor, with particularity;

(3) Set forth the relief sought; and

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

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

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

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

§ 22.17 Default.

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

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

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

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

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

§ 22.18 Quick resolution; settlement; alternative dispute resolution.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) Settlement of the case;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Exclude the information from evidence; or

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

§ 22.20 Accelerated decision; decision to dismiss.

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

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

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

Subpart D—Hearing Procedures

§ 22.21 Assignment of Presiding Officer; scheduling the hearing.

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

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

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

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

§ 22.22 Evidence.

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

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

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

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

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

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

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

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

§ 22.23 Objections and offers of proof.

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

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

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

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

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

§ 22.25 Filing the transcript.

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

§ 22.26 Proposed findings, conclusions, and order.

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

Subpart E—Initial Decision and Motion To Reopen a Hearing

§ 22.27 Initial Decision.

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

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

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

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

(1) A party moves to reopen the hearing;

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

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

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

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

§ 22.28 Motion to reopen a hearing.

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

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

Subpart F—Appeals and Administrative Review

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

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

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

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

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

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

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

§ 22.30 Appeal from or review of initial decision.

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

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

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

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

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

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

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

Subpart G—Final Order

§ 22.31 Final order.

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

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

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

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

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

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

§ 22.32 Motion to reconsider a final order.

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

Subpart H—Supplemental Rules

§ 22.33 [Reserved]

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

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

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

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

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 1361(a)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

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

§ 22.36 [Reserved]

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

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

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

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

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

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

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

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

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

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

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

§ 22.40 [Reserved]

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

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

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

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

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

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

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

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

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

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

(1) The docket number of the order;

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

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

(4) A description of the violations;

(5) The penalty that was assessed; and

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

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

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

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

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

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

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

[65 FR 30904, May 15, 2000]

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

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

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

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

(i) The docket number of the proceeding;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(C) Provide public notice of the order.

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

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

§§ 22.46–22.49 [Reserved]

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

§ 22.50 Scope of this subpart.

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

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

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

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

§ 22.51 Presiding Officer.

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

§ 22.52 Information exchange and discovery.

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

PART 23—JUDICIAL REVIEW UNDER EPA—ADMINISTERED STATUTES

Sec.

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

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

§ 23.1 Definitions.

As used in this part, the term:

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

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

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

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

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

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