

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

**IN THE MATTER OF:** )  
 )  
**THE BARDEN CORPORATION,** ) **Docket No. CAA-1-2000-0070**  
 )  
**Respondent.** )

**INITIAL DECISION**

Respondent is found to have violated Section 112 of the Clean Air Act (42 U.S.C. § 7412) and Federal and State regulations promulgated pursuant thereto (40 C.F.R. §§ 63.460-.469 (1998) and CONN. AGENCIES REGS. § 22a-174-20), by its failure to: (1) comply with hoist rates; (2) comply with labeling requirements; (3) submit initial notifications for solvent cleaning machines; (4) submit initial statements of compliance; (5) submit semi-annual solvent exceedance reports; (6) maintain logs of solvent additions and deletions; (7) perform emissions calculations; and (8) comply with alternative emission limits. A civil administrative penalty in the amount of \$ 281,050 is imposed on the Respondent for these violations.

**Before:** Susan L. Biro  
Chief Administrative Law Judge

**Issued:** August 9, 2002

**Appearances:**

For Complainant: Peter DeCambre, Esq., Senior Enforcement Counsel  
Catherine Garypie, Esq., Enforcement Counsel  
Karen McGuire, Esq., Enforcement Counsel  
United States Environmental Protection Agency  
Region 1 - New England  
One Congress Street, Suite 1100 (Mailcode SES)  
Boston, MA 02114-2023

For Respondent: Nicholas J. Harding, Esq.  
Mary McQueeney, Esq.  
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## **I. PROCEDURAL HISTORY**

On October 2, 2000, this action was commenced by the United States Environmental Protection Agency, Region 1 - New England, ("Complainant" or "EPA") by the filing of a Complaint under the authority of Section 113(d) of the Clean Air Act (42 U.S.C. § 7413(d)). The Complaint alleges that The Barden Corporation ("Respondent" or "Barden") violated Section 112 of the Clean Air Act (42 U.S.C. § 7412), and Federal and state regulations for operating halogenated solvent cleaning machines promulgated pursuant thereto (40 C.F.R. §§ 63.460-.469 (1998) and CONN. AGENCIES REGS. § 22a-174-20), by its failure to: (1) comply with hoist rates; (2) comply with labeling requirements; (3) submit initial notifications for solvent cleaning machines; (4) submit initial statements of compliance; (5) submit yearly solvent emissions reports; (6) submit semi-annual solvent exceedance reports; (7) maintain logs of solvent additions and deletions; (8) perform emissions calculations; and (9) comply with alternative emission limits. The Complaint proposed an aggregate penalty for the nine alleged violations in the amount of \$310,750.<sup>1</sup>

Respondent, through counsel, filed an Answer to the Complaint on November 21, 2000. In its Answer, Respondent admitted certain allegations, denied other allegations, raised affirmative defenses, and requested a hearing.<sup>2</sup>

A hearing was held in the instant matter in New Haven, Connecticut on November 27<sup>th</sup> and 28<sup>th</sup>, 2001, during which each party put forth and cross-examined witnesses and introduced documentary evidence. Complainant's witnesses were: Douglas H. Koopman, Steven J. Calder and Dr. Mary Elizabeth Smuts, all EPA employees. Respondent's witnesses were: Janice E. Zuvich, John C. Morrison, Irma Arboleda, and Sandra Enright - all Barden employees, as well as Matthew Fraga, from Air Tox Environmental Company, Inc. During the hearing, Complainant submitted twenty-five exhibits, all of which were received into evidence (hereinafter cited as "C's Ex. \_\_\_").<sup>3</sup> Six exhibits were proffered and received into evidence from the Respondent

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<sup>1</sup> Complainant subsequently indicated in its Prehearing Exchange that it was reducing its proposed penalty to \$288,750 in light of the size of Respondent's business. *See*, Complainant's Initial Prehearing Exchange at 9, dated June 1, 2001.

<sup>2</sup> Respondent's Answer raised two "affirmative defenses;" however, in its Prehearing Exchange Barden withdrew its first affirmative defense which alleged that CAA § 112 and the Federal regulations related thereto "constitute an unconstitutional delegation of legislative authority to the executive branch of government." *See*, Answer at 14 and Respondent's Prehearing Exchange at 6, dated July 12, 2001. Respondent's second "affirmative defense," that the "proposed penalties are excessive," is not an affirmative defense to liability under any count, but relates solely to the amount of penalty to be assessed in light of the facts of this case.

<sup>3</sup> The parties' stipulations of facts were admitted into evidence as Complainant's Exhibit 24. Tr. 6-7, 16-17. Further, by Order dated November 20, 2001, the undersigned granted  
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(hereinafter cited as “R’s Ex. \_\_\_”).

The transcript of the hearing was received by the undersigned on January 4, 2002 (hereinafter cited as “Tr. \_\_\_”). Respondent and Complainant each filed an Initial Post Hearing Brief and a Reply Brief. The record closed on April 3, 2002, with the receipt of Respondent’s Post Hearing Reply Brief.

## **II. THE CLEAN AIR ACT PROVISIONS**

First enacted in 1955, the Clean Air Act was extensively amended in 1990. 42 U.S.C. §§ 7401 to 7671q. In regard to reducing hazardous air pollutants, the 1990 amendments changed the regulatory approach from one that focused on issuing end goal oriented, risk-based, health standards, that was deemed to be too slow, to one that was means oriented and focused on obtaining the lowest level of emissions achievable by utilizing currently available “best technology,” with the expectation that tighter standards could, if warranted, be put into place in the future. Tr. 222-23. Specifically, the 1990 amendments required EPA to issue “national emissions standards” for new and existing sources of “hazardous air pollutants” (NESHAPS) that reflect “the maximum degree of reduction in emissions . . . that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable . . .” CAA §112(d)(2); 42 U.S.C. § 7412(d)(2); Tr. 30-31, 192. This came to be known as the MACT - “Maximum Achievable Control Technology” standard for NESHAPS. Tr. 31, 194-95.

Approximately seven years ago, on December 2, 1994, EPA issued a NESHAP in regard to halogenated solvent cleaning. *See*, National Emission Standards for Hazardous Air Pollutants: Halogenated Solvent Cleaning, 59 Fed. Reg. 61,801, 61,805 (Dec. 2, 1994) (codified at 40 C.F.R. §§ 63.460-.470). That NESHAP applies to cleaning machines, also known as “degreasers,”<sup>4</sup> which use certain halogenated solvents,<sup>5</sup> such as trichloroethylene (TCE)<sup>6</sup>, in a

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<sup>3</sup>(...continued)

Complainant’s request to take official notice of two of its Prehearing Exchange exhibits (Nos. 27 and 28) consisting of relevant Federal and state regulations, including two letters incorporated by reference into the Federal regulations. C’s Prehearing Exchange Ex. 28 was admitted into the record at hearing as C’s Ex. 18.; Tr. 7, 16-17. Although this court takes notice of regulations in C’s Ex. 28, this order will cite the more recent version of the Abatement of Air Pollution Regulations (AAPR) amended in 1996. The amendments with regard to the sections at issue in this case were minor and did not effect the substantive meaning of the provisions.

<sup>4</sup> Solvent cleaning machines can either be “batch” or “in-line” machines and use either “vapor” or “cold” processing. A machine is a “batch” machine if new parts or baskets of parts are introduced into the machine after the cleaning of previous parts or baskets of parts is

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concentration greater than 5 percent by weight. 40 C.F.R. § 63.460; C's Ex. 19 at 1-1; Tr. 32. The Regulations require owners and/or operators of such machines to achieve compliance with the NESHAP's provisions no later than December 2, 1997. 40 C.F.R. § 63.460.

One of the provisions imposed by the NESHAP on owner/operators of degreasers is to file with EPA, for *each such machine*, an "initial notification report" as well as an "initial statement of compliance." 40 C.F.R. § 63.468. Through these filings, owner/operators provide to EPA information regarding the location and identity of machines covered by the NESHAP, their age and design, an estimate of annual solvent consumption, and which compliance approach(es) the owner/operator anticipates employing to reduce the risk of harmful machine emissions. *Id.*, Tr. 40; C's Ex. 19 at 2-37; C's Ex. 25.

Under the halogenated solvent NESHAP, owner/operators are given the option to choose,

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<sup>4</sup>(...continued)

completed. A "in-line" machine has a conveyor that carries parts continuously in, through and out of the machine. A machine is a "vapor" machine if it heats the solvent enough to create vapor, otherwise it is a "cold" cleaning machine. C's Ex. 19 at 2-4 to 2-5.

<sup>5</sup> "Halogenated" means mixed with "[a]ny of a group of five chemically related nonmetallic elements including fluorine, chlorine, bromine, iodine, and astatine." Webster's II New Riverside University Dictionary 560 (1988). A "solvent" is something capable of dissolving another substance. *Id.* at 1107.

<sup>6</sup> TCE is a non naturally occurring volatile organic chemical, which is liquid at room temperature. It was historically used as a general anesthetic, refrigerant, and in dry cleaning processing, but now is most commonly used as a solvent degreaser because it is capable of removing fats and resins. Tr. 205-06. TCE enters the environment through evaporation. Exposure to TCE can have negative health effects and so, because of that and its concentration, it was designated as one of 189 listed hazardous air pollutants under the CAA as well as one of 33 urban air toxics as to which the EPA undertook to develop a strategy for exposure reduction. Tr. 195, 207-08. The strategy developed initially involved the creation of inventories, assessments of inventories, and modeling exercises to discover the concentration levels, and then subsequently reevaluating whether there are any residual risks leftover from the control technologies put into place by the initial CAA MACT standards. Tr. 195. The MACT standards will then be re-evaluated and tightened if the residual risks are excessive. *Id.* In 1987, a reference concentration in inhalant exposure and reference dose for oral ingestion was established for TCE within EPA's Integrated Risk Information System (IRIS) database. A reference concentration is a benchmark figure which estimates the level of humans exposure that can occur without appreciable health risks. Tr. 200-01, 203. However, that reference was subsequently withdrawn for re-evaluation based on new studies. Tr. 202-03. As a result, currently each EPA division is responsible for setting its own limit and EPA's Air Division for the National Scale Assessment uses .1 parts per million as the inhalation reference concentration for TCE. Tr. 209.

for each degreaser, one of three specified compliance approaches set forth therein which are geared towards reducing solvent emissions. The three approaches are known as: (1) the control combinations/basic equipment standard; (2) the idling emissions standard; and (3) the alternative standard. Tr. 32, 479; C's Ex. 19 at 2-9; C's Ex. 25. The first two compliance approaches - the control combinations and the idling emissions standards, require that degreasers meet certain base design requirements<sup>7</sup> and owners/operators utilize certain work and operational practices.<sup>8</sup> 40 C.F.R. § 63.463(a); Tr. 36-39, 427-28; C's Ex. 19 at 2-9; C's Ex. 25. The control combination standard then mandates that, in addition to the base design and work/operational practices, the owners/operators also employ other more restrictive specific equipment controls, identified on tables set forth in the regulation, depending on the machine type, size, and age.<sup>9</sup> 40 C.F.R. § 63.463(b); Tr. 36-37, 411-12; C's Ex. 19 at 2-9. The second approach, the idling emissions standard, requires that in lieu of such additional equipment controls, the owner or operator can choose to have its machine pass a "Method 307" test indicating that it meets a certain idling emissions limit and maintain it operating in compliance with such limit.<sup>10</sup> 40 C.F.R. § 63.463(b). The third compliance approach, the alternative standard, sets only a maximum monthly emissions limit, but does not specify for the owner/operator any base design, work practices, or other operational requirements.<sup>11</sup> 40 C.F.R. § 63.464; C's Ex. 19 at 2-9; C's Ex. 25.

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<sup>7</sup> Base design requirements include requiring machines to have a cover, a minimum freeboard ratio of .75 or higher (freeboard is the area from the liquid solvent or vapor to the top or lip of tank), an automated parts handling system such as a motorized hoist, a primary condenser, *etc.* 40 C.F.R. § 63.463(a)-(c); Tr. 37.

<sup>8</sup> Work and operational practices include maintaining equipment as recommended by the manufacturer, minimizing in room air disturbances, minimizing solvent loss due to spraying, reducing solvent pooling on parts, following proper startup and shutdown procedures, *etc.* 40 C.F.R. § 63.463(d); C's Ex. 19 at 2-28 - 2-31; Tr. 37-38.

<sup>9</sup> For example, under the control combinations standard, a machine would meet the base design requirements if it had a freeboard ratio of .75, but it could comply with the additional control option under this standard by having a greater freeboard ratio of 1.0. 40 C.F.R. § 63.463(b); C's Ex. 19 at 2-16.

<sup>10</sup> The idling emission standard requires machines to meet a certain emission limit while idling (*i.e.*, turned on but not actively cleaning parts). For batch vapor machines, the idling emission rate is .22 kg per hour per square meter of solvent air interface. 40 C.F.R. § 63.463(b). The regulations provide that a procedure known as a "Method 307" test be performed to determine the idling emission rate. 40 C.F.R. § 63.465; C's Ex. 19 at 2-17.

<sup>11</sup> Under the alternative standard, emissions for a batch vapor degreaser must be maintained below 150kg/M<sup>2</sup> per month (30.7 lbs/ft<sup>2</sup> per month), as calculated using a 3-month rolling average of emissions. 40 C.F.R. § 63.464(a)(1)(ii).

All three of the approaches provided for under the NESHAP require some form of monitoring, record keeping, and reporting to demonstrate on-going compliance. 40 C.F.R. §§ 63.466-.468; Tr. 412-13, 418. Compliance with the control combinations standards requires that the equipment used to comply with that standard, such as refrigeration devices, be monitored to establish that the devices are operating properly, and that records be maintained of such monitoring. Tr. 398, 413-14. Compliance with the idling emission standard requires similar equipment monitoring and record keeping as well as evidence of the equipment passing the Method 307 emission test upon which compliance with that standard is based. Tr. 38-39, 396-97, 427-28. Compliance with the alternative standard is demonstrated by maintaining records of solvent additions and deletions and using that data to determine the extent of emissions for each machine on a monthly and 3-month rolling average basis. Tr. 32-33, 39-40, 55.<sup>12</sup> Furthermore, regardless of the selected compliance approach, after the initial filings, owner/operators of solvent cleaning machines must submit certain additional reports including annual compliance reports and semi-annual exceedance reports. *See*, 40 C.F.R. § 63.468; Tr. 39-40. In these reports, the owner/operator indicates, among other things, the compliance method being utilized.<sup>13</sup> Tr. 160.

Along with the Federal regulatory requirements, owner/operators of degreasers situated in the State of Connecticut are also subject to certain provisions of that state's Abatement of Air Pollution Regulations (AAPR) (CONN. AGENCIES REGS. § 22a-174-20(1)), which are part of the State Implementation Plan (SIP) adopted pursuant to CAA § 110 (42 U.S.C. § 7410). Tr. 31.

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<sup>12</sup> In its Initial Post-Hearing Brief, Complainant points out that the monitoring, recordkeeping, and reporting requirements under the alternative standard are less burdensome than under the other options and it is intended to provide an incentive for regulated entities to use innovative strategies to limit solvent use. C's Initial Brief at 5, citing National Emission Standards for Hazardous Air Pollutants: Halogenated Solvent Cleaning, 58 Fed. Reg. 62,566, 62,583 (Nov. 29, 1993) (preamble to NESHAP regulations for halogenated solvent cleaning).

<sup>13</sup> Complainant's expert witness, Dr. Smuts, opined that all three compliance approaches are intended to achieve the same level of risk reduction under the MACT. Tr. 223-24. However, Respondent's expert witness, Mr. Fraga, testified that the alternative standard is considered by some to be "tighter," *i.e.*, more limiting in terms of emissions, than the other two approaches because, even though it has no equipment requirements, the alternative standard sets a certain emission limit, which degreasers using the other approaches may actually exceed and still be considered in compliance. Tr. 480-81. *See also*, C's Initial Brief at 5, citing National Emission Standards for Hazardous Air Pollutants: Halogenated Solvent Cleaning, 58 Fed. Reg. 62,566, 62,583 (Nov. 29, 1993) (preamble to NESHAP regulations wherein EPA notes that the alternative emission limit could be more "stringent" than the other options). Therefore, Mr. Fraga opined that owner/operators of degreasers capable of meeting the base design requirements and work and operational practices would generally prefer to opt in under the control combinations or idling emissions compliance standard, rather than the alternative standard. Tr. 481.

EPA has approved Connecticut's SIP (*see*, 40 C.F.R. § 52.370) and, as such, has authority to enforce it under CAA § 113 (42 U.S.C. § 7413). *See also*, Tr. 25. Connecticut's regulations regarding degreasers impose additional compliance requirements upon owner/operators such as mandating the posting of operating requirements on or near each machine and limiting to 11 feet per minute the speed at which parts are moved into and out of degreasers. CONN. AGENCIES REGS. § 22a-174-20(1)(4)(N) & (F)(ii). *See also*, Approval and Promulgation of Air Quality Implementation Plans; Connecticut; Revised Regulations Controlling Volatile Organic Compounds, 56 Fed. Reg. 52,205 (Oct. 18, 1991) (reporting EPA's approval of Connecticut's revised AAPR).

### **III. FACTUAL BACKGROUND**

Respondent, The Barden Corporation, is a corporation organized under the laws of the State of Connecticut. C's Ex. 24 (stip. 1). Barden has been in operation since at least 1957 and has a net worth of approximately \$53 million. C's Ex. 20; Tr. 110-11. Currently, it is a subsidiary of Fischer A. G. Bearing Corporation, a German company. Tr. 230; C's Ex. 20. Respondent owns and operates a manufacturing facility located at 200 Park Avenue in Danbury, Connecticut. C's Ex. 24 (stip. 2); Tr. 226; C's Ex. 20. The facility is in a mostly commercial neighborhood on the outskirts of town. Tr. 328. At this facility, Barden employs approximately 475 persons. C's Ex. 20. In its facility, Respondent manufactures, cleans, and prepares a variety of sizes of super precision ball bearings for the aerospace and other industries. C's Exs. 20, 24 (stip. 4); Tr. 226-27. In connection with the cleaning aspect of its ball bearing production, during the time period relevant hereto, Respondent operated six batch, vapor, solvent cleaning machines or degreasers, ranging in size from 10 gallons to 140 gallons, which used TCE as a cleaning agent in a concentration greater than five percent by weight.<sup>14</sup> C's Ex. 20, 24 (stip. 5). Four of the degreasers, designated as EMU-9, EMU-11, EMU-14 and EMU-16, were installed at the facility prior to or during 1991. C's Ex. 24 (stip. 9). The remaining two degreasers, designated as EMU-10 and EMU-12, were installed in the facility in or about October 1997 and March 1998, respectively. C's Ex. 24 (stip. 10).

At all times relevant hereto, Barden has had one employee, Janice Zuvich, responsible for its environmental compliance. Tr. 321, 325-26. Although Ms. Zuvich has not personally received any training in the NESHAP regulations or state or Federal regulations under subpart T, Barden has from time to time since the mid-1990s hired trained consultants to assist in its compliance with the NESHAP regulations. Tr. 321-22. Moreover, since the early 1990s, Barden has provided periodic training and retraining classes to its employees regarding vapor degreaser

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<sup>14</sup> Testimony given at the hearing indicated that Barden is sometimes required to use TCE in its processing pursuant to a "frozen process" received from a customer, which means that a customer has specified that in manufacturing parts for it, Barden is obliged to use TCE. Thus, in order to cease using TCE in processing those parts, Barden has to obtain permission from its customer to change the job specifications. Tr. 230-31.

operation. Tr. 331, 335-36, 347-48, 368-69, 375, 379-82; R's Ex. 4.

Pursuant to the Federal regulations, on or about August 28, 1995, Barden filed with EPA Initial Notification Reports, Initial Statements of Compliance for Machines Complying with the Alternative Standard, and Exceedance Reports, for the solvent vapor cleaning machines then in use at its facility. C's Exs. 7, 8, and 9. Respondent represented in those filings that it was and/or would be using the alternative standard to demonstrate compliance with NESHAP for all of its machines.<sup>15</sup> *Id.*; Tr. 41-43, 441.

Approximately two and a half years later, Barden hired Air Tox Environmental Company (Air Tox), a consulting company specializing in air emission regulatory compliance, to perform Method 307 tests on a number of its degreasers, which is a prerequisite to compliance with air emission limits under the idling emissions standard. Tr. 383, 388, 390. In January/February of 1998, Air Tox performed a Method 307 test on EMU-9 (a/k/a D35 Baron Blakeslee) and EMU-11 (a/k/a D38 Branson) and both of those machines passed the test. However, other degreasers tested at the facility at that time did not.<sup>16</sup> *See*, R's Ex. 5; Tr. 389-90, 391-96. In its report on the results of the tests, Air Tox advised Barden that to be in full compliance with the idling emission standard, in addition to passing the Method 307 test, the degreasers would have to meet the base design and workplace practices set forth in the regulations. R's Ex. 5; Tr. 324-25, 390-91, 438-39. Subsequently, despite the positive results of some of the Method 307 tests, Ms. Zuvich testified that Barden's management decided to continue to utilize the alternative standard rather than the idling emissions standard as its method of compliance for all of its machines. Tr. 60-61, 176-77, 322-25, 340-41.

In March of 1998, again with the assistance of Air Tox, Barden submitted an application for a Title V permit under the Clean Air Act (42 U.S.C. § 7661(a)-(f)) to the State of Connecticut's Department of Environmental Protection. Tr. 388-89, 436; C's Ex. 15. Obtaining a Title V permit allows the permittee to engage in certain activities involving air emissions consistent with Federal and state law.<sup>17</sup> Tr. 62. In connection therewith Barden submitted a "Compliance Certification," wherein it represented that its compliance method for its degreasers

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<sup>15</sup> One of the exceedance reports filed at that time reflects that in July 1995, one of Barden's degreasers had exceeded the regulatory emissions threshold level. *See*, C's Ex. 6. However, that exceedance is not at issue in this case.

<sup>16</sup> The units that failed the Method 307 test were subsequently removed from Barden's facility prior to the inspection at issue here. Tr. 395-96, 416-17.

<sup>17</sup> Section 502(a) of the CAA makes it "unlawful" for "any person" to "operate" an emissions' source required to have a permit "except in compliance with a permit issued by a permitting authority under this title." 42 U.S.C. § 7661a(a). The permit system under the CAA came into being with the 1990 Amendments. CAA Section 504(f) provides that a person complying with a permit issued in accordance with the act is deemed in compliance with Section 502. 42 U.S.C. § 7661c(f).

was “recordkeeping of solvent usage” and “determination of emission rates.” Further, Barden indicated that “[r]ecords of solvent use in degreasers [are] kept to demonstrate compliance with RCOSA Section 22a-174-20 as well as 40 C.F.R. 63, Subpart T” and that “Method 307 was used to determine compliance with the idling emission limit . . . for those degreasers *not meeting the alternative emission limit.*” C’s Ex. 15 (italics added); Tr. 43-44.

Subsequently, Barden’s facility was targeted for a Clean Air Act compliance inspection by an EPA Compliance Targeting Team. As a result, on January 26, 1999, two EPA inspectors, Douglas Koopman and Steve Calder, along with Lou Santos, a representative from the Connecticut Department of Environmental Protection, conducted a CAA compliance inspection of Respondent’s facility.<sup>18</sup> C’s Ex. 24 (stip. 15); Ex. 6; Tr. 30, 139, 170, 236-37. Prior to the inspection, the inspectors reviewed the filings previously submitted by Barden including its initial notification reports, initial statements of compliance, exceedance reports and Title V application. Tr. 26-27, 40-43. In the opening conference, prior to the physical inspection of the facility, Janice Zuvich, then Barden’s Senior Environmental Safety Engineer (R’s Ex. 2), represented to the inspectors that Barden was using the alternative standard to evidence compliance with the NESHAP emission limits in connection with *all of its* degreasers. C’s Ex. 20; Tr. 44-46, 139-41, 171-72, 238, 262-63, 273. At no time during the inspection, did Barden ever indicate that it was complying with any other NESHAP standard or compliance approach. Tr. 143, 238. Therefore, based upon this and Respondent’s representations in its prior filings, the inspectors conducted their subsequent physical inspection of Barden’s facility and equipment with an eye towards determining whether Respondent was in compliance with the CAA’s alternative standard and applicable state regulations. Tr. 50-51, 53-55, 139-41. The inspectors did not evaluate whether Barden’s equipment, work practices and records, could have satisfied some other compliance standard. Tr. 134-36. However, where the inspectors noticed something of significance relative to regulatory compliance, such as a degreaser without a cover in place, it was noted. Tr. 138.

During the inspection, Respondent admitted that, after filing its initial set of notification reports and initial set of statements of compliance in 1995, it subsequently put into operation in two new degreasers (EMU-10 and EMU-12), but had not submitted such initial documentation for those units. Tr. 47-48; C’s Ex. 24 (stips. 25 & 27). Further, Respondent acknowledged that it had not filed the requisite solvent emission reports for 1998 or its semi-annual solvent exceedance reports due in July 1998, or those due in 1999. Tr. 94. Likewise, during the inspection Barden admitted that it was not performing monthly calculations of emissions or 3-month rolling average emission calculations evidencing compliance with the alternative standard emission limit. Tr. 55-57, 59-60, 263. Moreover, although Respondent did produce for the inspectors some records regarding solvent additions and deletions (C’s Ex. 13), Ms. Zuvich indicated to the inspectors that she could not represent to them at that time that such records were complete and could be relied upon to accurately calculate emission levels. Tr. 55-59, 254,

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<sup>18</sup> Mr. Santos did not stay throughout the whole inspection and he did not testify at the hearing. Tr. 237, 238.

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During the walk-through inspection of Respondent's facility, the inspectors measured the speed of the hoists used by Barden to move parts into and out of its degreasers. Tr. 124. From such measurements, EPA concluded that the hoist used in connection with the degreaser identified as EMU-12 was moving at a rate of 16 feet per minute. C's Ex. 24 (stip. 22). The inspectors further observed that not all of Respondent's degreasers had operating requirements posted on or near them. Tr. 63, 175; C's Exs. 20, 6.

The inspectors held a closing conference with Ms. Zuvich at the conclusion of the inspection. At that time, Barden was advised that the company was not creating and maintaining the requisite records for compliance with the alternative standard. The inspectors suggested to Ms. Zuvich that the company could consider complying with one of the other standards, to which Ms. Zuvich responded that her company had considered and rejected such an option previously. Tr. 60-61, 176-77. At the end of the conference, the inspectors requested that Barden provide EPA with copies of the logs evidencing solvent additions and deletions and submit the missing emissions reports.<sup>19</sup> Tr. 61.

On February 9, 1999, Mr. Koopman drafted an inspection report (C's Ex. 20) memorializing his findings during the inspection (Tr. 63, 114-117) and on June 18, 1999, he created a memorandum detailing the methodology he had employed to measure hoist rates during the inspection. C's Ex. 21. These documents were not contemporaneously forwarded to Barden. Tr. 123.

However, based upon the results of the inspection, about eight months thereafter, on September 28, 1999, EPA issued to Barden a "Notice of Violation, Administrative Order and Reporting Requirement," (NOV), pursuant to CAA §§ 113 and 114 (42 U.S.C. §§ 7413 & 7414). C's Ex. 5; Tr. 63-64, 118-19. The NOV set forth the alleged violations found during the inspection, required Barden to take action to come into compliance with the regulations within 60 days, and to provide to EPA, within 30 days, *inter alia*, a detailed plan regarding coming into and maintaining future compliance. Tr. 66, 168; C's Ex. 5.

To assist it in preparing its response to the NOV, Barden again hired Air Tox. Tr. 257-

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<sup>19</sup> Ms. Zuvich testified that on January 27, 1999, the day after the EPA inspection, the Connecticut Department of Environmental Protection, unaware of the EPA inspection, also conducted an air compliance inspection of Barden's facility. The State inspection did not result in the issuance of a notice of violation or the institution of any enforcement action by the state regarding the degreasers. However, the state authorities did require Barden to prepare a permit application for its generators, which Ms. Zuvich testified that state had previously indicated was not required. Tr. 254-56. The Inspection Report (C's Ex. 20) indicates, however, that during the inspection Ms. Zuvich had represented to EPA that she had applied to the state for permits regarding the generators but had not yet received a response.

58, 383. In November 1999, with Air Tox's assistance, Barden submitted a Compliance Plan explaining how the company was going to meet the requirements of the administrative compliance order. C's Ex. 10; Tr. 65, 67, 400-01. In the Plan, Barden represented: (a) that it was choosing new compliance methods for some (EMUs-9, 10, 13, 14 and 16), but not all, of its degreasers, and that those degreasers met their newly elected standard; (b) that it had removed from operation one of its degreasers (EMU-11); (c) that the hoist on EMU-12 had been replaced with a hoist with an appropriated speed; and (d) that operating instructions were posted near or on degreasing units missing such instructions on January 25, 1999 (EMUs-12 and 16). In addition, Barden submitted initial notification reports for EMUs-9, 13 and 14 dated November 1, 1999, as well as copies of various blank forms, including a log sheet for recording hoist speed, vapor degreaser operating requirements, and a vapor degreaser log to be used for recording TCE additions and deletions.

On December 6, 1999, again with the assistance of Air Tox, Barden submitted to EPA its "Second Required Submittal In Response To Notice of Violation." C's Ex. 11; Tr. 65, 67, 401. Attached thereto, being submitted for the first time, were initial notification reports and initial statements of compliance for EMUs-10 and 12, which indicated that Barden had selected to use idling emissions limit and control combinations standards, respectively, for those degreasers. Tr. 401-02. Barden also filed at that time, its 1998 annual solvent emission reports and semiannual exceedance reports. In addition, Barden represented therein that it was maintaining complete logs for each solvent cleaning machine and calculating monthly and 3-month rolling emission averages. Moreover, based upon the calculations it was performing, Barden represented that there was no evidence that emission exceedances were occurring. Further, Barden reported to EPA that in November 1999, it had had conducted additional idling emission tests to show compliance with that standard for EMUs-10, 13 and 14 and attached copies of the Method 307 testing reports. Tr. 312-14, 402-04. Finally, Barden noted in its second submittal that it was also taking a number of steps to be proactive to maintain compliance with all applicable regulations, including looking for alternatives to TCE usage in its cleaning processes. C's Ex. 11.

After receiving Barden's two submittals, Mr. Koopman wrote a summary of the case for the file. In the summary, he noted that Barden had submitted a compliance plan which indicated that, instead of the alternative standard, it had selected to have all of its remaining vapor degreasers, except for one (EMU-16), comply with the idling emissions (EMUs-9, 10, 13, and 14) or control combination (EMU-12) standard from then on. C's Ex. 23; Tr. 131-32, 273. At the hearing, Mr. Koopman testified that he deemed such a new election of compliance methods as lawful and appropriate, and noted that Barden would be required to report the methodology in the reports submitted subsequent to the election of a new method. Tr. 133-34, 145, 160.

On April 12, 2000, Barden made an additional submittal to EPA, in response to a request of Mr. Koopman. C's Ex. 12; Tr. 65, 67-68, 465. In its third submittal, Respondent provided an initial statement of compliance for EMUs-9, 13 and 14 and initial notification reports for two new batch vapor degreasers (EMUs-21 and 22). C's Ex. 12.

The Complaint, seeking an administrative penalty for the violations at issue here, was

filed subsequently, on October 2, 2000.<sup>20</sup> Tr. 65.

#### **IV. VIOLATIONS ALLEGED**

The Complaint contains nine counts, all of which charge Respondent with violating Section 112 of the Clean Air Act (42 U.S.C. § 7412) and the National Emission Standards for Halogenated Solvent Cleaning (40 C.F.R. §§ 63.460-.469) and/or the Connecticut Abatement of Air Pollution Regulations (AAPR) (CONN. AGENCIES REGS. § 22a-174-20), promulgated pursuant thereto. Count I of the Complaint alleges a violation arising from Respondent's use of a hoist in connection with one of its vapor degreasers (EMU-12) which moved at a speed greater than the 11 feet per minute maximum limitation rate set forth in AAPR § 22a-174-20(1)(4)(F)(ii). Count II alleges Respondent failed to permanently post conspicuous labels with operating requirements on or near all of its degreasers in violation of AAPR § 22a-174-20(1)(4)(N). Count III alleges Respondent failed to submit to EPA initial notification reports of two new solvent cleaning machines in violation of 40 C.F.R. § 63.468(b). Count IV alleges Respondent failed to submit to EPA initial statements of compliance for two of its solvent cleaning machines in violation of 40 C.F.R. § 63.468(e). Count V alleges Respondent failed to submit to EPA its yearly solvent emission reports for 1998 in violation of 40 C.F.R. § 63.468(g). Count VI alleges Respondent failed to submit to EPA its semi-annual solvent exceedance reports in July 1998, January 1999, and July 1999, in violation of 40 C.F.R. § 63.468(h). Count VII alleges Respondent failed to properly maintain records of solvent additions and deletions from December 2, 1997 through January 26, 1999 in violation of 40 C.F.R. § 63.464(a)(1)(i). Count VIII alleges Respondent failed to perform monthly calculations of emissions in violation of 40 C.F.R. § 63.464(a)(1)(ii). And, finally, Count IX alleges Respondent failed to comply with alternative standard emission limits with regard to its solvent cleaning machines in violation of 40 C.F.R. § 63.464(a)(1)(ii). Complainant currently seeks the imposition of a total combined penalty in the amount of \$288,750 for these alleged violations of the Clean Air Act.

Respondent has conceded liability as to Counts III, IV, V, and VI. *See*, Answer ¶¶ 33 and 39 and R's Initial Brief at 23. However, it contests its liability on the remaining counts and challenges the appropriateness of the penalty proposed by Complainant on all counts.

#### **V. DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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<sup>20</sup> In light of the fact that the first alleged date of the violations occurred more than 12 months prior to the initiation of this administrative action and the total penalty sought was in excess of \$200,000, pursuant to Section 113(d) of the Clean Air Act (42 U.S.C. § 7413(d)), Complainant sought and obtained approval from the Department of Justice prior to proceeding with this administrative action. *See*, C's Exs. 3, 4, and 24 (stips. 18-20).

A. Count I - Failure to Comply with Hoist Rates - AAPR § 22a-174-20(1)(4)(F)(ii)

Count I of the Complaint alleges that Respondent violated Section 22a-174-20(1)(4)(F)(ii) of Connecticut’s Abatement of Air Pollution Regulations (CONN. AGENCIES REGS. § 22a-174-20(1)(4)(F)(ii)) by using an electric hoist which operated at a speed greater than 11 feet per minute to move parts in and out of its open top vapor degreaser identified as “EMU-12.”<sup>21</sup> See, Complaint ¶¶ 22-26.

AAPR § 22a-174-20(1)(4)(F)(ii) provides in pertinent part as follows:

(l) Metal cleaning.

\* \* \*

(4) The owner or operator of *any* open top vapor degreaser shall meet the requirements of this subdivision.

\* \* \*

(F) Minimize solvent carryout by:

\* \* \*

(ii) moving parts in and out of the degreasing unit at less than 3.3 meters per minute (11 feet per minute)

CONN. AGENCIES REGS. § 22a-174-20(1)(4)(F)(ii) (emphasis added).<sup>22</sup>

The parties have stipulated that “[d]uring the inspection, EPA measured the hoist speed of EMU-12 and concluded it was traveling at 16 feet per minute.” C’s Ex. 24 (stip. 22). Nevertheless, Respondent challenges its liability on this count based on the excessive speed of EMU-12’s hoist on four grounds. First, it asserts the Agency’s interpretation of the state regulation is incorrect because it fails to factor “dwell time” in the calculation of hoist speed. Second, Barden argues, even if the Agency’s interpretation of the regulation is correct, it did not have “fair notice” that the speed referred to in the Connecticut regulation would be calculated

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<sup>21</sup> The degreaser referred to as EMU-12, is located within Department 21 of Respondent’s facility, and has a capacity of 13 gallons. C’s Ex. 10; Complaint ¶ 14 and Answer ¶ 14.

<sup>22</sup> This state regulation is applicable to *all* open top vapor degreasers regardless of which compliance approach is selected. CONN. AGENCIES REGS. § 22a-174-20(1)(4). However, under the Federal regulations, having an automated parts handling system, *i.e.*, a motorized or manual hoist whose speed is “3.4 meters per minute (11 feet per minute) or less” is one of the *base design requirements* only applicable if an owner/operator choose to comply with the control combination standard under the NESHAP, but is not applicable under the Federal Regulations to owner/operators choosing the alternative standard. See, Tr. 459; 40 C.F.R. § 63.463(a)(3); C’s Ex. 19 at 2-11. An “automated parts handling system” is defined under the Federal regulations as one that carries parts from initial loading through part removal at a “controlled speed.” 40 C.F.R. § 63.461.

without factoring in dwell time, that such an interpretation was not obvious, and that it reasonably interpreted that the correct methodology for calculating hoist rate would include the dwell time. Third, Barden argues that the test of hoist speed Mr. Koopman performed during the inspection does not constitute sufficient proof of the hoist speed over one minute because he measured the speed for only 15 seconds and there was no evidence that the hoist moved at a consistent rate. Fourth, Respondent claims there is no evidence in the record that the degreaser was in operation on the day of the inspection. Each of these arguments will be addressed *in seriatim*.

#### 1. Regulatory Interpretation

EPA asserts that the speed referred to in AAPR § 22a-174-20(1)(4)(F)(ii) of 3.3 meters per minute or 11 feet per minute is measured “by dividing the distance traveled by the amount of time it took to travel that distance” and that “the time a part dwells is not included in the determination of the speed of a hoist.”<sup>23</sup> C’s Brief at 19. Respondent disagrees. R’s Brief at 16. “Dwell” is defined as the process of “allow[ing] solvent to drain from the parts or parts basket back into the solvent cleaning machine.” 40 C.F.R. § 63.461. “Dwell time” is defined in the regulations as “the required minimum length of time that a part must dwell, as determined by Section 63.465(d).” *Id.* Section 63.465(d) states that the appropriate “dwell time for parts to remain in the freeboard area above the vapor zone is no less than 35 percent of the time” it takes for each part or parts basket to cease dripping once removed from the vapor zone. 40 C.F.R. § 63.465(d)(1)-(2). Dr. Smuts testified that dwell time is used to prevent “drag out,” which occurs when TCE vapors are dragged out of the machine along with the parts being removed. Dwell time allows parts to dry and become free of TCE, thereby reducing emissions. Tr. 220-21.

To adequately grasp the significance of including or excluding “dwell time” in determining the speed at which parts move in and out of a degreaser, it helps to understand exactly how a degreaser is operated. Two of Respondent’s NDT inspectors, Irma Arboleda and Sandra Enright, testified in this regard at the hearing as did Barden’s Facilities Manager, Janice Zuvich.<sup>24</sup> Ms. Arboleda testified that she has used a Barden degreaser at work, every day, for the past 10-11 years and Ms. Enright testified that she operates a vapor degreaser occasionally. Tr. 346-47 (Arboleda); Tr. 366-67, 373 (Enright).

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<sup>23</sup> Federal Regulations define a “hoist” as a “mechanical device that carries the parts basket and the parts to be cleaned from the loading area into the solvent cleaning machine and to the unloading area at a controlled speed. A hoist may be operated by controls or programmed to cycle parts through the cleaning cycle automatically.” 40 C.F.R. § 63.461. The state regulation appears applicable regardless of whether parts are moved in and out of the degreaser manually or by utilizing a mechanical device such as a hoist; however, in this case, its application where an electric hoist was used is at issue.

<sup>24</sup> Mr. Koopman testified that he never observed any of the degreasers cleaning parts. Tr. 131, 148.

Ms. Arboleda, Ms. Enright, and Ms. Zuvich consistently described the operation of a Barden open top vapor degreaser with an electric hoist, such as EMU-12, as follows: first, the employee places a wire or “semi-fit” basket on a movable work table called a “low boy” and fills it with the metal parts intended to be cleaned. The low boy is then moved adjacent to the vapor cleaning machine. Above the machine, on a rail attached to the ceiling is a hoist, from which hangs a chain with a hook on the end. The hoist is operated with mechanical controls. The employee operates the controls to lower the hook on the hoist down to the basket and attaches the hook to the handles on the basket. Then the filled basket is moved over and above the vapor cleaning machine. The employee then opens the rectangular lid on the top of the machine and operates the hoist controls to lower the basket into the machine. Initially the parts are lowered by the hoist into the vapor zone area within the machine for cleaning. While the parts are in the vapor zone, Ms. Arboleda testifies that she reaches into the machine and sprays additional cleaning solution on the parts with a wand. Tr. 354, 360-62. Ms. Enright testified that the parts she works with do not require spraying because of their miniature size. Tr. 371. Ms. Arboleda stated that she leaves the parts to clean in the vapor zone until she no longer sees “any oil coming out of the parts.” Tr. 354. Ms. Enright stated that she looks at a clock and measures the time until the parts stop “condensing.” Tr. 370. After the cleaning process is complete, the hoist is operated to raise the parts basket up slightly within the machine into what is called the “freeboard” or cooling area above the vapor zone, where it stays until the parts and parts basket are dry. It is in this freeboard area where the parts “dwell” for a period of time. Ms. Arboleda stated that, consistent with her recollection of the training course she took at Barden, she does not time this dwell period, but visually decides that sufficient time has elapsed when the parts appear to her to be dry. Tr. 359-60. Ms. Enright stated that she allows the parts she cleans to dwell for at least half the time it took them to clean. Tr. 370. When the process is completed, the employee then operates the hoist controls to raise the parts basket out of the machine, over to the low boy, and down to be emptied. The final step in the process is to replace the lid on the machine. Tr. 242-44, 318-19 (Zuvich); Tr. 348-55, 359 (Arboleda); Tr. 369-71, 374 (Enright).<sup>25</sup>

Douglas Koopman testified at the hearing that during his inspection he measured the rate of speed of the hoists operating in connection with Respondent’s various degreasers. Tr. 49, 72.

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<sup>25</sup> During the hearing, Mr. Koopman testified regarding the operation of a degreaser with an electric hoist consistently with the testimony given in this regard by Barden’s employees. Moreover, he characterized the hoist on EMU-12 as a “chain fall” type - which is “mounted up in the overhead above the machine.” He further stated that “[i]t’s an electric motor with a wheel with a chain going over it, and there is a little basket where you could hold additional chain – as the hook is lowered down to the ground it pulls a chain out of this basket, around the wheel, and down to the ground. Hanging down from the motor, on a cable, is a box with a start and stop switch to raise the hoist or to lower the hoist.” Tr. 70. He also testified consistently with Barden’s witnesses that dwell time is the time parts are held in the freeboard area above the vapor zone, to allow them to stop dripping and that there is a regulation for determining the amount of dwell time to be applied. Tr. 73.

He testified that the method he used to test the speed was as follows: first, he lowered the hook on the hoist so that it was touching a flat surface, such as a floor or a table, and then he operated the hoist controls so that the hook moved in a upward direction for 15 seconds. At that point, he stopped the movement and measured the distance the hoist traveled in the 15 seconds and multiplied that distance by four (4), so as to calculate the number of feet per minute. Tr. 71, 153. *See also*, C's Ex. 21. Employing this methodology, Mr. Koopman testified that he determined that all of Respondent's hoists, except for the one being used in connection with EMU-12, moved at less than 11 feet per minute. Tr. 124. As to EMU-12, Mr. Koopman found the hoist's speed was 16 feet per minute and therefore concluded it exceeded the 11 feet per minute limit referred to in the Connecticut regulation. Tr. 71-72, 143; C's Ex. 24 (stip. 22). Mr. Koopman testified at the hearing that his calculations of hoist speed did not include any period of "dwell time." Tr. 71, 143-44. He explained that dwell time varies depending on the parts put in the machine and opined that it is not used in calculating hoist speed under the Connecticut regulation. Tr. 72-73, 124-25, 145, 154. Mr. Koopman indicated that, in his opinion, hoist speed is the set speed at which the hoist itself moves, not an average speed over time or distance. Tr. 153.

On its face, the subsection of the Connecticut regulation at issue here (CONN. AGENCIES REGS. § 22a-174-20(1)(4)(F)(ii)) does not explicitly refer to "dwell" or "dwell time," to either include or exclude it being taken into account in calculating the speed referred to therein. Further, it does not appear that Connecticut has issued any formal or informal guidance as to measuring the speed referred to in the phrase "moving parts in and out of the degreasing unit at less than 3.3 meters per minute (11 feet per minute)" in § 22a-174-20(1)(4)(F)(ii).<sup>26</sup>

As a result, in order to determine whether "dwell" time is, or is not, to be included in the calculation of speed referred to the state regulation, it is necessary to turn to the generally accepted rules of statutory interpretation for guidance. "When construing an administrative regulation, the normal tenets of statutory construction are generally applied. The plain meaning

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<sup>26</sup> Federal regulations, however, do contain some guidance on measuring "hoist speed." Specifically, 40 C.F.R. § 63.466(c)(1) provides that "hoist speed" is to be determined "by measuring the time it takes for the hoist to travel a measured distance. The speed is equal to the distance in meters divided by the time in minutes (meters per minute)." This definition is applicable in connection with the requirement for owners and operators of solvent cleaning machines complying with the control combination standard (Tr. 458-59) to use automated parts handling systems such as hoists which are "capable of moving parts or parts baskets at a speed of 3.4 meters per minute (11 feet per minute) or less from the initial loading of parts through removal of cleaned parts." 40 C.F.R. § 63.463(a)(3). Further, EPA issued a guidance document in April 1995 which indicates that the "maximum" allowable hoist rate is 3.4 meters per minute (11 feet per minute). C's Ex. 19 at C-4. In addition, the forms promulgated by EPA to be used in connection with documenting compliance with the Federal regulations regarding hoist speed do not provide for accounting for dwell time, and the forms regarding dwell times do not refer to hoist speed. *Id.* at C-7.

of words is ordinarily the guide to the definition of a regulatory term. Additionally, the regulation must, of course, be ‘interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements.’” *Bil-Dry Corporation*, RCRA (3008) Appeal No. 98-4, slip op. at 27-28, 2001 EPA App. LEXIS 1 (EAB, January 18, 2001)(citations omitted).

To obtain the plain meaning of the phrase at issue - “moving parts in and out of the degreasing unit at less than 3.3 meters per minute (11 feet per minute)” - it is appropriate to consult a dictionary to the extent possible. *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1349 (Fed. Cir. 2001). The dictionary definition of the word “moving” is “changing or capable of changing position[;] causing or producing motion.” The American Heritage Dictionary, New College Edition, at 859 (1976). “Meters” and “feet” are both defined as units of measurement of length, one under the metric system, the other under the United States system. *Id.* at 812. Minutes is a unit of measuring time, “to record exactly, as speed or time elapsed.” *Id.* at 837. “Meters per second or minute” is a “scientific unit” measuring velocity. *Id.* at 813. “Velocity” in turn is defined as “speed,” as “the distance traveled in a specified amount of time.” *Id.* at 1420. These definitions and the phrasing of the state regulation’s subsection as a whole suggest what is anticipated as being measured is definite, steady, and continuous velocity, over a period of time. Nothing in the phrase suggests that a period of non-movement or “dwell” is factored into the calculation.

Nevertheless, Barden argues that dwell time is meant to be included in calculating speed and in support thereof points out that all of the other subsections of the regulation regarding minimizing solvent carryout are dependent “on the operator of the machine.” Tr. 126-27. Therefore, Respondent argues, to read subsection (ii) consistently, hoist speed would not just be a matter of how fast the hoist could go, but rather would depend on the operator’s control over the machine, by factoring in dwell time. Barden’s Initial Brief at 16.

The regulatory provision as a whole referred to by Respondent reads as follows:

(F) Minimize solvent carryout by:

- (i) Racking parts to allow complete drainage;
- (ii) ***moving parts in and out of the degreasing unit at less than 3.3 meters per minute (11 feet per minute)***;
- (iii) holding the parts in the vapor zone at least thirty (30) seconds or until condensation ceases, whichever is longer;
- (iv) tipping out any pools of solvent on the cleaned parts before removal from the vapor zone; and

- (v) allowing parts to dry within the degreasing unit for at least fifteen seconds or until visually dry, whichever is longer.

CONN. AGENCIES REGS. § 22a-174-20(l)(4)(F)(emphasis added).

I am not persuaded that reading the subsection in the context of the section as a whole supports the interpretation that dwell time is necessarily included in the velocity calculation referred to in subsection (ii). First, while compliance with the other provisions in the section regarding minimizing solvent carryout may be dependent upon the actions of the operator of the batch degreaser, there is nothing in the structure of the regulation that suggests that compliance with every subsection therein would *always* have to be dependent on the operator's discretion. In this case, the speed limitation of section (ii) would appear to apply regardless of whether an electric hoist with a singular speed setting was or was not used to move parts. If a hoist was not used, or a hoist of such a type was not used, then correctly controlling and limiting the speed of movement *would be* operator dependent. Second, I note that while "dwell time" is a defined term and concept used in the regulations regarding moving parts into, through, and out of degreasers, and the Connecticut regulation refers to the "holding" of parts, the specific subsection of the regulation does not in any way, directly or indirectly, refer to "dwell time," or part "holding" in regard to the speed at which parts move. Third, the regulation states that parts are to be moved "at *less than* 3.3 meters per minute (11 feet per minute)." *Id.* (emphasis added). This suggests that 3.3 meters is a *maximum* speed limit applicable at *all* times and not an average speed limit. Fourth, interpreting the speed as being a maximum of 3.3 meters (11 feet per minute) at all times would be consistent with the Federal regulations regarding hoist speed, applicable as a base design requirement, where the Agency has issued guidance indicating that the 3.4 meters per minute (11 feet per minute) is the "maximum" speed at which hoists may operate at any point and that provision does not appear to take dwell time into account either.<sup>27</sup> *See*, 40 C.F.R. § 63.463(a)(3); C's Ex. 19 at 2-11.

In addition, adopting Respondent's interpretation regarding speed measurement would not serve the end purpose of regulation in that it would potentially allow the parts to be lawfully moved at times significantly faster than 3.3 meters per minute into, through, and out of, the degreaser so long as the parts dwelled a period of time sufficient to offset the higher speed when averaged together. Mr. Koopman testified at the hearing that the purpose of the regulatory speed limit was to minimize solvent carryout by keeping solvent vapors in the machine. A hoist traveling over the regulatory limit is more likely to pull or drag vapors up and out of the machine along with the parts. Tr. 69, 144. Mr. Koopman opined that less vapor would be dragged out of

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<sup>27</sup> It is recognized that the Connecticut regulation refers to the speed at issue using the metric system as 3.3 meters per minute, while the Federal regulation refers to the speed as 3.4 meters per minute, although both regulations convert the speed to the same number - 11 feet per minute, using the United States system of measurement.

the machine by a hoist operating slowly and constantly rather than moving quickly, stopping, then moving quickly again.<sup>28</sup> Tr. 155.

Upon consideration of all the foregoing, I find no support for the proposition that a proper interpretation of CONN. AGENCIES REGS. § 22a-174-20(1)(4)(F)(ii) requires the inclusion of “dwell time” in the calculation of the speed at which parts are to be moved in and out of the degreaser.

## 2. Fair Notice

It is well established that “[c]itizens, including corporate citizens who regularly deal with the government, are charged with full knowledge of the applicable law.” *B.J. Carney Industries, Inc.*, 7 E.A.D. 171, 201 (EAB 1997). However, it is also true that “[b]efore a party may be deprived of property, for example, by having a penalty imposed on it, it must receive fair notice of the conduct required or prohibited by the Agency.” *Advanced Electronics, Inc.*, 10 E.A.D. \_\_\_, slip op. at 25 (EAB, March 11, 2002), citing *CWM Chemical Services, Inc.*, 6 E.A.D. 1, 20 (EAB 1995)(“where penalties are being sought, the principles of due process require that the language of the regulation itself . . . provide fair notice to the regulated entity of the conduct required or prohibited by the Agency.”). Thus, where a regulation is not sufficiently clear to warn a party about what is expected of it, the Agency may not deprive a party of property by imposing a penalty. *General Elec. Co. v. United States E.P.A.*, 53 F.3d 1324, 1328 (D.C. Cir. 1995)(“*GE*”). In *GE*, the Court noted that sometimes the Agency provides notice to a specific regulated entity prior to enforcement, such as notifying of the need for a permit. In other cases,

the agency will provide no pre-enforcement warning, effectively deciding “to use a citation [or other punishment] as the initial means for announcing a particular interpretation” – or for making its interpretation clear . . . . In such cases, we must ask whether the regulated party received, or should have received, notice of the agency’s interpretation in the most obvious way of all: by reading the regulations. If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify with “ascertainable certainty,” the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency’s interpretation.

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<sup>28</sup> I note that there is no evidence in the record that suggests that even if dwell time had been taken into account, then average speed at which Barden moved parts in and out of EMU-12 would have been less than the regulatory limit. Further, Federal regulations provide that dwell time is to be calculated as 35% of the time that it takes the parts to cease dripping. 40 C.F.R. § 63.465(d). Having to add in a factor for hoist speed into the length a time parts dwell, in order to move the parts at an average speed of no more than 11 feet per minute, would completely complicate and change this calculation of dwell time.

*GE*, 53 F.3d at 1329 (citations omitted).

The EAB's recent decision in *Advanced Electronics* well illustrates the application of fair notice. That case involved a Clean Water Act permit which, *inter alia*, listed two values adjacent to each other in a chart as to maximum metal discharges as well as a provision suggesting both monthly and semiannual filing deadlines for reports. The EAB found there was some facial ambiguity in the permit since it did not indicate what the two values on the chart represented. However, EAB noted that the respondent's conduct in reporting its metal discharges evidenced that it understood that it was subject to the first limit indicated and that such reporting is incongruous with its claim that it did not understand which limit applied. Thus, the EAB found that "notwithstanding the facial ambiguity in the Permit, [the respondent] received fair notice of and/or clearly understood the provisions of the Permit . . ." *Advanced Electronics*, slip op. at 28. As to the permit's monitoring requirements, the EAB found that the respondent was not given fair notice of EPA's and the local permitting authority's interpretation that the monitoring reports be submitted monthly, given that respondent's submission of semi-annual reports was tacitly approved by the local permitting authority and that the permit language was "sufficiently ambiguous that imposition of a penalty [for violations preceding the notification regarding the interpretation] would be manifestly unfair." *Id.*, slip op. at 34.

In this case, Respondent asserts that it did not receive "fair notice" that the speed calculation referred to in AAPR § 22a-174-20(1)(4)(F)(ii) would not include dwell time. I am not persuaded that there is a facial ambiguity in the regulations which would support Respondent reasonably interpreting speed to include a factor for "dwell time." As noted above, "dwell time" is a defined term and concept in the Federal degreaser regulations, yet it is not mentioned in the provision at issue regarding speed of moving parts in and out of the machine, nor is the term or concept of "holding" parts otherwise used in that section. Further, I note that the Federal regulations, specifically 40 C.F.R. § 63.466(c)(1), provide that hoist speed is to be determined "by measuring the time it takes for the hoist to travel a measured distance" and provide that "[t]he speed is equal to the distance in meters divided by the time in minutes (meters per minute)." This definition too lacks any reference to "dwell time." In addition, EPA's Guidance Document for the Halogenated Solvent Cleaner NESHAP (C's Ex. 19), published in April of 1995, indicates that hoist speed is calculated by dividing the distanced traveled by the amount of time it took to travel the distance and that this can be demonstrated "by showing that the gearing of the hoist makes it physically impossible to move it fast enough to exceed . . . 11 feet per minute[]." C's Ex. 19 at 2-12, 2-13. Moreover, the Agency published separate sample forms for the regulated community to use, for recording dwell time on one form, and hoist speed on the other, and the forms make no reference to each other. C's Ex. 19 at C-4, C-7. Finally, Respondent has not identified a single reference where dwell or holding time is factored into hoist or other speed calculations to be made with regard to degreasers or otherwise.

However, even assuming *arguendo* that the Connecticut regulation was facially ambiguous, it is clear that prior to the institution of this case, Barden shared the Agency's interpretation of how to measure hoist speed and acted consistently therewith, and not consistent with its own interpretation proffered subsequently in connection with this case. In fact, not one

of Barden's witnesses testified that in calculating hoist speed they ever factored in dwell time in order to comply with the regulatory limit of 11 feet per minute on part movement. *See e.g.*, Tr. 374. Further, none of Barden's training forms mention the inclusion of dwell time in regard to the speed at which parts are to be moved in and out of the machine and neither Mr. Morrison (who established and operated Barden's training program) nor Ms. Zuvich made any mention of employees being trained to take into account dwell time when determining hoist speed. *See*, R's Ex. 4 at 020003, 32, 34, 35 (note overhead forms used in instructing Barden employees four times refer to a "MAXIMUM" hoist speed of 11 feet per minute (emphasis in original) or that the hoist "can only move at < 11 feet per minute," but contain *no* reference to calculating this rate using dwell time); Tr. 242, 284-85. Rather, Ms. Zuvich admitted at the hearing that it is her understanding that "hoist speed is one thing and dwell time's another." Tr. 285-86. Further, Ms. Zuvich also admitted at the hearing that she accompanied the inspectors while the hoist speeds were being measured without any inclusion of dwell time, and she never advised them that Barden was including "dwell time" in their calculations of hoist rates, even when she was advised by the inspectors that the speed of the hoist used with EMU-12 was over the regulatory limit. Tr. 150. To the contrary, Ms. Zuvich testified that after the inspector measured the speed of the hoist on EMU-12 as 16 feet per minute, she had it "changed out within an hour, because I made a call right then and there because . . . we knew it was not correct . . . for any[one's] standards . . . it wasn't the correct hoist that we had installed originally." Tr. 252-53.

Moreover, in Barden's first submission in response to the NOV, prepared with the assistance of its consultant specializing in compliance with air regulations, Barden did not challenge the Agency's hoist rate calculation. To the contrary, Barden said, "On day of initial inspection (1/25/99), it was discovered that the hoist speed for EMU-12 exceeded the eleven (11) feet per minute limit . . . This hoist was changed out on 1/25/99 and is now running at less than 11 feet per minute." C's Ex. 10.

Finally, it is noted that although Ms. Zuvich testified that prior to the inspection Barden was monitoring "hoist rates" and that the records containing the results of such monitoring were maintained by the company, Respondent never proffered any such records.<sup>29</sup> Such records could have shown the methodology Barden was using to calculate the speed at which parts were being moved in and out of the machine. Tr. 265, 308-09.

Therefore, I conclude that Respondent, by reviewing the applicable regulations and other statements and guidance issued, acting in good faith, would have been able to identify with "ascertainable certainty" that dwell time was not to be included in the calculation of the speed limit provided in AAPR § 22a-174-20(1)(4)(F)(ii) and thus, I find no merit in Respondent's fair notice argument.

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<sup>29</sup> Mr. Koopman acknowledged not asking for such records even in regard to the hoist used in connection with EMU-12. Tr. 149-50. Ms. Zuvich testified that she did not provide such records because they were not requested. Tr. 265.

### 3. Invalidity of Speed Test

In its Initial Brief, Respondent also challenges the inspector's calculations as performed arguing that, absent evidence that the hoist speed is consistent, a fifteen second test is insufficient to establish the hoist's per minute speed and therefore, cannot establish a violation of AAPR § 22a-174-20(1)(4)(F). Barden's Initial Brief at 18. I note that Respondent did not raise this issue in its Prehearing Exchange wherein it was asked to provide a narrative explanation of its defenses to this count, although it was aware at the time of the methodology Mr. Koopman had employed to determine hoist speed. *See*, Prehearing Order, ¶ 3(A), dated April 17, 2001 and Respondent's Initial Prehearing Exchange, dated July 12, 2001. Mr. Koopman testified at the hearing that he measured the hoist rate in a 15 second interval because of practical difficulties measuring 16 feet of distance with a tape measure, especially since he did not have a stepladder available to him at the time. Tr. 152. In response, Barden argues the inspector could have simply attached one end of the tape measure to the hoist and let it run for a minute and then checked the tapes' length. Respondent's Initial Brief at 18. Regardless of what the inspector could have done, there is simply no factual basis in the record for the factual assumption upon which this legal argument is based -- that the hoist used in connection with EMU-12 could and did move at variable speeds. Further, there is testimony in the record which supports a finding that the hoist's speed was *not* variable. Mr. Koopman testified at the hearing that "[t]hat specific hoist [EMU-12] traveled at that speed [16 feet per minute]. As soon as you start and stop that hoist, it's going to travel at 16 feet per minute, whether it moves an inch or six feet." Tr. 131. *See also*, Tr. 71-72, 370-71 (wherein Mr. Koopman noted only that the hoist had a button that has "up, down, right, left"). Further, Ms. Zuvich testified that when Barden buys equipment it buys the "whole package," not just components and ". . . we knew we wanted a *certain speed hoist*." Tr. 253 (emphasis added). Moreover, Mr. Koopman testified at the hearing that during the inspection, he observed that the hoist used with EMU-12 had a distinctive feature: a metal plate mounted on it, on which was stamped, in the metal, a notation that the hoist's speed was 16 feet per minute. Mr. Koopman stated that it was his impression that the nameplate came with the hoist from the manufacturer. Tr. 71, 151. This is the same speed at which Mr. Koopman calculated the hoist as operating. Tr. 151. All of this evidence strongly supports the conclusion that the speed on the hoist used in connection with EMU-12 was not variable. Thus, I find no basis for suggesting that the methodology Mr. Koopman employed to measure the hoist speed did not accurately determine what its speed would be over a period of a minute.

### 4. Degreaser not in operation

Lastly, Respondent argues that it cannot be held liable on this count because there is no evidence that EMU-12, with its fast hoist, was ever in operation on the day of the alleged violation or any other day. Mr. Koopman admitted at the hearing that he never observed EMU-12 in actual operation. Tr. 131. Again, although requested to set forth all its defenses, Respondent did not raise this argument in its Prehearing Exchange, there is no factual testimony at hearing or documentary evidence presented which supports this argument, and there is evidence which contradicts it. As indicated above, Ms. Zuvich testified at the hearing that when

Mr. Koopman measured the speed of the hoist on the day of the inspection, she immediately recognized it as wrong and had it changed. Moreover, while she was given an opportunity during the inspection to discuss with the inspectors whether the machine was in use, she never indicated that it was not, *although Mr. Calder's inspection notes indicate that Barden did make such a representation with regard to another unit* (EMU-11). Tr. 47, 49, 179-80; C's Ex. 6. Furthermore, nothing in any of the written submittals Barden made to EPA after the inspection suggests that EMU-12 hoist was not intended to be operated on the day of the inspection or subsequently. *See*, C's Ex. 10 at 2 (noting that EMU-12's "hoist was changed out on 1/25/99 and now is running at less than 11 feet per minute."); C's Ex. 11 (attaching thereto an Initial Notification Report for EMU-12 noting its start up date of March 1998 containing no indication of any period of non-use); and C's Ex. 12. Finally, at no time during the hearing did any witness for Respondent ever assert that EMU-12, and the hoist used in connection therewith, had not been in operation or would not be in operation on the day of or the days before or after the inspection.

Therefore, having considered all of the foregoing, I find Respondent liable for the violation set forth in Count I of the Complaint.

B. Count II - Failure to Post Operating Requirements - CONN. AGENCIES REGS. § 22a-174-20(1)(4)(N)

Count II alleges a violation arising from Respondent's failure to provide a permanent, conspicuous label summarizing the applicable operating instructions on or near degreasers EMU-11, EMU-12 and EMU-16, in violation of Connecticut's AAPR § 22a-174-20(1)(4)(N). *See*, Complaint ¶¶ 27-30.

CONN. AGENCIES REGS. § 22a-174-20(1)(4)(N) states as follows:

(l) Metal cleaning.

\* \* \*

(4) The owner or operator of any open top vapor degreaser shall meet the requirements of this subdivision.

\* \* \*

(N) Provide a permanent, conspicuous label on or posted near each unit summarizing the applicable operating requirements

Mr. Koopman testified at the hearing that posted operating instructions provide degreaser operators with information such as how to orient the parts so they do not collect solvent, to leave the parts in the machine until they stop dripping, to turn on the primary condenser prior to turning on the heater, to shut the heater off before turning off the primary condenser, *etc.* Tr. 73-74. He considered the requirements posted "near" the unit if they were in the operators' line of

sight. Tr. 156-57. He noted during his inspection that Respondent's degreasing units EMU-9 and EMU-10 had operating instructions posted on or near them, but the other units did not. Tr. 75-76. Although some of the units without operating instructions posted on or near them had posted engineering diagrams of a vapor degreaser, Mr. Koopman opined that such diagrams or pictures alone were insufficient to comply with the regulation regarding posting operating instructions. Tr. 76.

Mr. Koopman's inspection report describes EMU-11, but does not refer to the existence or absence of any operating instructions. C's Ex. 20 at 4. With regard to EMU-12, the report states "[t]here are no operating instructions posted on this degreaser" and as to EMU-16 that it "does not have a sign posted with operating instructions." C's Ex. 20 at 4, 5. The report further indicates that during the closing conference, Mr. Koopman advised Barden that only EMU-9 and EMU-10 had operating instructions posted. Tr. 119-20; C's Ex. 20 at 6.

As indicated above, Mr. Koopman was accompanied during the inspection by Mr. Calder. Mr. Calder's notes taken contemporaneously with the inspection indicate "Posted Equipment" for EMU-11; "Specks on Wall" for EMU-12 and "No Operating Instructions" for EMU-16. C's Ex. 6. At the hearing, Mr. Calder could not recall exactly what the posting was near EMU-11 to which his notes refer, *i.e.*, whether there was merely a diagram of the degreaser or operating instructions, nor what his notation "Specks on Wall" meant. Tr. 174, 181.

At the hearing, Ms. Zuvich testified generally that Barden's degreasers all had colored posters with pictures of the degreasers similar to C's Ex. 26 on or near them. In addition, the machines had on them a sticker with operating instructions which came from the manufacturer with the machine. Tr. 327. However, Ms. Zuvich could not testify with certainty that those stickers continued to remain on the machine at all times. Tr. 328. Ms. Zuvich indicated that the "signs" Barden had on the degreasers were "kind of awkward, as we've seen them fall." Tr. 246.

With regard to the specific degreasers at issue here, Ms. Zuvich testified that she could not recall if there was a sign with operating instructions on EMU-11 in Department 38 (small bearings) at the time of the inspection. Tr. 248.

As to EMU-12 in Department 21 (x-ray), Ms. Zuvich testified at the hearing that there were operating instructions posted on the wall adjacent to the machine, estimating the distance to be 23 inches from the side of the degreaser. This was the wall the operator would be facing as he or she approaches the degreasers. Tr. 250-51, 280. This testimony was consistent with a letter Ms. Zuvich had prepared for her counsel in October 17, 2000 regarding the "postings." *See*, R's Ex. 4; Tr. 275-77, 298-99. However, on cross examination, Ms. Zuvich acknowledged that in the report prepared by Air Tox in response to the NOV (C's Ex. 10), which she read for errors prior to its submittal, Barden had indicated that on the day of the inspection it had been discovered that no operating instructions were posted on or near this unit. Tr. 282.

As to EMU-16, Ms. Zuvich testified at the hearing that that unit is in Barden's chem lab located in Department 72. She seemed to distinctly recall that a "sign" with operating

instructions were posted “on or near” the machine. Specifically, Ms. Zuvich stated that -

Q Do you recall if there was a sign on that degreaser?

A The degreaser is a little bit different shape. It’s a long stainless unit and they always had the signs on the front. I recall that they had these plastic pockets that you’ve seen to put literature in. I remember that I thought it was in this plastic thing, and I pulled it; I thought it was a magnet, and I ripped it. That I remember. I ripped it. Not in half, but –

Q During the inspection?

A I believe it was, yes. But I remember pulling it off right there.

Q Why did you pull it off of there?

A Because I thought it was a magnet like most of the things we have on there, and it was taped.

Q No, but did you have a conversation with the inspector about - -

A We were talking about the postings and that they weren’t up here, that it was here.

Q So you were trying to move the posting to another location?

A No, I was just trying to show him where it was and just – I guess I got overzealous.

Tr. 246-47.

Based upon the testimony of Mr. Koopman regarding the lack of operating instructions on EMU-11 at the time of the inspection, uncontradicted by any specific testimony in the record, it is hereby concluded that at least one of Barden’s degreasers did not have operating instructions posted on or near it at the time of the inspection. Therefore, Respondent is found liable on this count.

C. Count III - Failure to Submit Initial Notification Reports - 40 C.F.R. § 63.468(b)

Count III alleges a violation arising from Respondent’s failure to submit to EPA initial notification reports of its two new solvent cleaning machines in violation of 40 C.F.R. § 63.468(b). *See*, Complaint ¶¶ 31-34.

Section 63.468(b), 40 C.F.R. provides that

Each owner or operator of a new solvent cleaning machine subject to the provisions of this subpart shall submit an initial notification report to the Administrator. . . . New sources for which the construction or reconstruction commenced after Dec. 2, 1994, shall submit this report as soon as practicable before the construction or reconstruction is planned to commence. . . .

Respondent has admitted that at the time of the inspection in January 1999, it had not submitted initial notifications for EMU-10, installed in October 1997, and EMU-12, installed in March 1998. *See*, Complaint ¶ 33 and Answer ¶ 33; C's Ex. 24 (stip. 25). Further, it has raised no defense to its liability for this violation at the hearing or in its brief. Tr. 300; R's Initial Brief at 23.

Therefore, Respondent is found liable as to the violations alleged in Count III.

D. Count IV - Failure to Submit Initial Statements of Compliance - 40 C.F.R. § 63.468(e)

Count IV alleges a violation arising from Respondent's failure to submit to EPA initial statements of compliance for two of its solvent cleaning machines in violation of 40 C.F.R. § 63.468(e). *See*, Complaint ¶¶ 35-40.

Section 63.468(e), 40 C.F.R., provides in pertinent part that:

Each owner or operator of a batch vapor or in-line solvent cleaning machine complying with the provisions of § 63.464 shall submit to the Administrator an initial statement of compliance for each solvent cleaning machine. . . . For new sources, this report shall be submitted to the Administrator no later than 150 days after startup.

*See also*, Tr. 442.

Respondent has admitted that at the time of the inspection, it had not submitted initial statements of compliance within 150 days after startup of EMU-10 and EMU-12. *See*, Complaint ¶ 39 and Answer ¶ 39; C's Ex. 24 (stip. 27). Further, it has raised no defense to its liability for this violation at the hearing or in its brief. Tr. 300; R's Initial Brief at 23.

Therefore, Respondent is found liable as to the violations alleged in Count IV.

E. Count V - Failure to Submit Solvent Emission Reports - 40 C.F.R. § 63.468(g)

Count V alleges a violation arising from Respondent's failure to submit to EPA solvent emission reports for its solvent cleaning machines for the 1998 calendar year in violation of 40 C.F.R. § 63.468(g). *See*, Complaint ¶¶ 41-45.

Section 63.468(g), 40 C.F.R., provides in pertinent part that:

Each owner or operator of a batch vapor or in-line solvent cleaning machine complying with the provisions of § 63.464 shall submit a solvent emission report *every year*. This solvent emission report

shall contain . . .

\* \* \*

- (2) The average monthly solvent consumption for the solvent cleaning machine in kilograms per month.
- (3) The 3-month monthly rolling average solvent emission estimates calculated each month using the method as described in § 63.465(c).

40 C.F.R. § 63.468(g) (emphasis added).

Mr. Koopman testified that Barden was required to submit solvent emission reports for 1998 in regard to EMUs-9, 10, 11, 12, 14 and 16. Tr. 94. Respondent submitted its annual solvent emission reports for 1998, dated December 3, 1999, as an attachment to its Second Submittal in response to the Notice of Violation on December 6, 1999. C's Ex. 11.

The Complaint alleges that these filings were late and that solvent emissions reports “are due *February 1* of the year following the one for which reporting is being made.” Complaint ¶ 43 (emphasis added). Complainant bases this allegation on the fact that the regulations indicate that the reports required by 40 C.F.R. § 63.468(f) (annual reports) and § 63.468(g) (emissions reports) “*can be combined into a single report for each facility*” (emphasis added) and that Section 63.468(f) requires the owner or operator to “submit an annual report by February 1 of the year following the one for which the reporting is being made.” 40 C.F.R. §§ 63.468(g)(4) and 63.468(f)(3). Mr. Koopman acknowledged that there is no specific filing deadline set forth in the regulation other than to submit such a report every year. Tr. 158. He also testified that it was industry practice to submit all such reports by February 1. Tr. 157-58.

Upon review of the regulatory provision at issue, it fails on its face to specify an exact filing deadline for emissions reports. Further, while the regulations permit emission reports to be combined with the annual report, the latter of which has a filing deadline of “February 1,” such combination is not required. Thus, the only time reference in the regulations regarding filing emissions reports is that one be filed “every year.” It is not appropriate to impose a specific filing deadline where none is provided by regulation. *Gates & Fox, Inc. v. OSHRC*, 790 F.2d. 154 (D.C. Cir. 1986) (declining to uphold agency’s interpretation of a standard to include a requirement where the language itself was ambiguous); *PPG Industries, Inc. v. Costle*, 659 F.2d. 1239, 1250 (D.C. Cir. 1981) (declining to uphold requirement that was not supported by the regulatory language but that was supported merely by a guideline neither contained in the regulation nor incorporated by reference). Respondent filed its 1998 emission reports before the end of the 1999 calendar year. There is no evidence in the record that it failed to file an emission report “every year.” Therefore, Respondent is found *not* to be liable on Count V.<sup>30</sup>

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<sup>30</sup> There is evidence in the record, however, that at the time of the hearing held in November 2001, Barden had still not filed its annual reports for 1999, which even given the

(continued...)

F. Count VI - Failure to Submit Exceedance Reports - 40 C.F.R. § 63.468(h)

Count VI alleges a violation arising from Respondent's failure to submit to EPA solvent exceedance reports for its solvent cleaning machines in violation of 40 C.F.R. § 63.468(h). *See*, Complaint ¶¶ 46-49. More specifically, EPA alleges that: "Respondent failed to submit the required exceedance reports for units EMU-9, EMU-10, EMU-11, EMU-12, EMU-14 and EMU-16 on the following dates: July 30, 1998, January 30, 1999, and July 30, 1999." *See*, Complaint ¶ 48.

Section 63.468(h), 40 C.F.R. provides in pertinent part that:

Each owner or operator of a batch vapor or in-line solvent cleaning machine shall submit an exceedance report to the Administrator semi-annually except when . . . an exceedance occurs. Once an exceedance has occurred the owner or operator shall follow a quarterly reporting format until a request to reduce reporting frequency under paragraph (i) of this section is approved. Exceedance reports shall be delivered or postmarked by the 30<sup>th</sup> day following the end of each calendar half or quarter, as appropriate.

Mr. Koopman testified at the hearing that Barden had failed to submit its semi-annual exceedance reports due July 30, 1998, January 30, 1999, and July 30, 1999, in a timely manner. Specifically, he stated that the reports due July 30, 1998 and January 30, 1999, covering the 1998 calendar year, were submitted on December 6, 1999, with Barden's Second Submittal in response to the NOV (C's Ex. 11). Tr. 83-84. Further, Mr. Koopman testified at the hearing that Barden never submitted the semi-annual exceedance reports due July 30, 1999, referred to in the Complaint, nor the reports for the second half of 1999, due January 30, 2000, not at issue here. Tr. 84-87.

Respondent admitted at the hearing that Barden submitted its semi-annual exceedance reports for 1998, due July 30, 1998 and January 30, 1999, respectively, on December 6, 1999, with its Second Submittal in response to the NOV. Tr. 425-26; C's Ex. 11. Ms. Zuvich further testified that she thought Barden had submitted its semi-annual exceedance reports for 1999, but was not sure when they were submitted since she did not handle them. Tr. 426. However, the

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<sup>30</sup>(...continued)

liberal regulatory interpretation here, would have been due by the end of calendar year 2000. Tr. 84, 94-95. However, these violations are not at issue in this action. Tr. 95. Moreover, in its Brief Respondent indicated that after the hearing no record of submission was found and the reports were resubmitted in January 2002 with the reports for the year 2001. R's Initial Brief at 24 n.11.

record does not appear to contain any semi-annual exceedance reports for 1999 and in its Post-Hearing Brief Respondent acknowledges that subsequent to the hearing it could not find any evidence of these submissions and so in January 2002, it “re-submitted” them “as a protective measure.” Respondent’s Initial Brief at 24 n.11.<sup>31</sup>

Based upon the foregoing, Respondent is found liable as to the violations alleged in Count VI for failing to timely file its semi-annual exceedance reports for the 1998 calendar year (due July 30, 1998 and January 30, 1999) and the first half of the 1999 calendar year (due July 30, 1999).

G. Count VII- Failure to Properly Maintain Complete & Adequate Records - 40 C.F.R. § 63.464(a)(1)(i)

Count VII alleges a violation arising from Respondent’s failure to properly maintain records of solvent additions and deletions for a 14-month period beginning December 2, 1997 through January 26, 1999, for all of its solvent cleaning machines, in violation of 40 C.F.R. § 63.464(a)(1)(i). *See*, Complaint ¶ 53.

Section 63.464(a), 40 C.F.R., provides in pertinent part that:

As an alternative to meeting the requirements in § 63.463 [setting forth the control combinations and idling emission standards], each owner or operator of a batch vapor or in-line solvent cleaning machine can elect to comply with the requirements of § 63.464 [the alternative standard]. [Those who so elect] shall comply with the requirements specified in either paragraph (a)(1) or (a)(2) of this section.

(1) If the cleaning machine has a solvent/air interface, . . . the owner or operator shall comply with . . . paragraphs (a)(1)(i) and (a)(1)(ii) of this section.

(i) Maintain a log of solvent additions and deletions for each solvent cleaning machine.

Respondent does not dispute that Barden’s degreasers had solvent/air interfaces; its initial notification reports and statement of compliance forms reflect this to be the case. C’s Exs. 7, 8, 10, 11, 12. Further, while it concedes that at the time of inspection it could not confirm that its records were complete, Barden represents that it did “in fact provide[] EPA with complete records of addition and deletion of TCE in response to the NOV.” R’s Initial Brief at 26. Thus, it argues, EPA did not demonstrate at trial that the records were not kept. Further, Respondent argues that

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<sup>31</sup> Mr. Fraga, Respondent’s expert, noted at the hearing that exceedance reports must be submitted regardless of the standard of compliance selected. Tr. 425.

such logs are required only because it wrongly elected to comply with the alternative standard, and that it could have elected and would have met the other standards for most of its degreasers at the time of the inspection, and thus would not have been required to keep such records. Thus, Barden argues its error is “*in electing* the incorrect standard, *not in failing* to keep records under 40 C.F.R. § 63.464 for EMU-9, 10, 11, 12, 13, 14.” R’s Initial Brief at 26.

Mr. Koopman testified at the hearing that while Barden maintained and presented to EPA during the inspection a handwritten log of solvent additions and deletions apparently covering the period at issue (C’s Ex. 13), the log produced at that time did not meet the regulatory requirement because the log did not reflect *all* liquid solvent additions to the machines and *all* liquid solvent deletions either removed from the machines or removed in the waste stream, and thus the log could not be relied upon to accurately calculate Barden’s total solvent emissions on a monthly basis. Tr. 55-59, 87-89, 158-59. Mr. Koopman further testified that he discussed with Ms. Zuvich during the closing conference the issue of the logs required and, at that point, Ms. Zuvich represented to him that she was unsure if Barden’s log (C’s Ex. 13) was complete, explaining that Barden was having difficulty tracking solvent additions and deletions because, although some of the machines were “hard-piped” to a TCE source and metered, there were spigots on the pipe between the meter and the machine, from which TCE could be drawn off in order to be added to a non hard-piped machine. Thus, Barden could not be certain that all of the TCE metered went into the machine to which it was hard-piped. Further, Ms. Zuvich explained that solvent deletions were also hard to track because the solvent was being removed, reclaimed, and reused. Tr. 57-59.

Mr. Koopman further testified that at a later point, after the inspection, Barden provided to him not a log, but a table, from which he calculated emission levels. Tr. 159-60. He assumed that the table Barden provided to him at that time was complete. *Id.*

The notes taken contemporaneously with the inspection confirm Mr. Koopman’s testimony regarding Ms. Zuvich’s representations at the time. Those notes reflect that the inspectors were told that “most Adds are logged but not sure if all are for all machines;” “not keeping records of first of month add.” C’s Ex. 6. In addition, Mr. Koopman’s inspection report prepared in February 1999, a month after the inspection, similarly reflects that Ms. Zuvich acknowledged to him during the inspection that when TCE is drawn off in to five gallon containers to fill smaller, non hard-piped units, “it is not always being recorded.” C’s Ex. 20. Further, the report indicates that Ms. Zuvich told Mr. Koopman at the time of the inspection that Barden “estimates” how much TCE is removed from the degreasers. *Id.*

At the hearing, Ms. Zuvich testified that, while Barden provided log sheets and meters to aid its employees in recording TCE additions and deletions, she “could not be 100 percent sure that every [TCE addition and deletion] was accurately documented on those logs every time.” Tr. 254, 302. She acknowledged that in order to fill degreaser units that were not hard-piped to a TCE source, a Barden employee would draw TCE from a spigot from another unit which was hard piped. Ms. Zuvich said the employee would be required to then write down the information concerning this TCE withdrawal and addition. However, she admitted that she was uncertain if every person who engaged in this transfer process actually logged the information. Tr. 301-06.

Respondent's expert witness, Mr. Fraga, testified that he had inspected Barden's records of TCE additions and deletions and he found the records were "adequate" to determine emissions from the units. Tr. 434.

The handwritten log of solvent additions and deletions presented by Barden to the inspectors for the period at issue (C's Ex. 13) is a singular log, combining entries reflecting solvent additions and deletions to all machines, rather than a log for each machine as is required by the regulatory language that owners/operators "[m]aintain a log of solvent additions and deletions for *each* solvent cleaning machine." 40 C.F.R. § 63.464(a)(1)(i) (*italics added*). The combined log's entries also suggest that there were practical difficulties in accurately and contemporaneously recording solvent additions and deletions to numerous machines which are spread among various departments, in that all the entries on the log are not in chronological order. For example, the log contains an entry dated "January 7, 1998" *after* one dated "January 8, 1998" and an entry for "February 11, 1998" *after* one for "February 12, 1998," and so on. The entries are also at irregular intervals, so it is facially difficult to determine the log's completeness. Even more importantly, Barden's log does not reflect *any* TCE additions or deletions for EMU-16 in Department 72, which the inspection report indicated that Barden filled with TCE siphoned off from somewhere else in the facility using a portable 5 gallon container.<sup>32</sup> C's Ex. 20. This confirms the accuracy of Ms. Zuvich's concern that siphoned TCE may not have been consistently and reliably recorded.

Further, it is noted that in its initial response to the NOV, Barden acknowledged that solvent additions and deletions were not being recorded on a log consistently for each degreaser, and submitted new log forms which it intended to use to correct this problem. C's Ex. 5, ¶ 27. The forms indicate that a separate form would be used for each degreaser. C's Ex. 10. In its subsequent response, Barden represented that it was maintaining complete logs for each degreaser. C's Ex. 11. At no point in any of its three responses to the NOV, did Barden ever represent that the NOV's charge of failure to maintain the requisite logs was erroneous. *See*, C's Exs. 10, 11, and 12.

Finally, while Barden did submit to EPA typewritten tables of solvent supplied to and removed from each degreaser with its Second Submittal to EPA in response to the NOV in December 1999, the chart indicates that it is based on "meter readings" except as to EMU-16, which has no meter. C's Ex. 11. The chart states that additions to EMU-16 are logged at the machine as they occur, however, no logs for EMU-16 appear to have ever been submitted to EPA or into the record in this case. Further, the table contains no entries for EMU-14 in Department 25, although the handwritten logs indicate TCE was added and removed from the machine at least once during the relevant period in August 1998. C's Ex. 13.

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<sup>32</sup> Respondent acknowledges in its Brief that Barden did not elect the "wrong standard" for EMU-16, that that machine did not meet a standard other than the alternative standard, and therefore, at all times Barden would be required to maintain logs of TCE additions and deletions for this unit. R's Initial Brief at 26.

Upon consideration, I do not find either the handwritten logs or the charts subsequently submitted by Barden to satisfy the regulatory requirement. From the testimony and the documents submitted, it is clear that the log and charts do not completely reflect all solvent additions and deletions for each and every one of Respondent's degreasing machines. The testimony concerning TCE being drained from a spigot on a pipe hard metered into a machine also makes it clear that meter readings alone, such as those used to provide data on TCE additions and deletions by unit in the typewritten table, could not be relied upon to determine the TCE usage by the machine to which it was piped.

Barden's assertion that this record keeping requirement is only applicable to the alternative standard, with which it need not have complied except as EMU-16, and that it could have elected and would have met the other standards for most of its degreasers at the time of the inspection, does not shield it from liability. As indicated above, at least as to one unit, EMU-16, Respondent has acknowledged that the alternative standard was the appropriate one.

Moreover, Mr. Fraga, Respondent's expert witness, testified that to be in compliance with either the control combinations or idling emission standard, Barden would have to engage in monitoring and record keeping. Tr. 396-98. He further maintained that *had they* done the record keeping for those other standards, Barden would have met the requirements of subpart T. Tr. 398, 429. He admitted that "there may have been some recordkeeping gaps." Tr. 457. The fact that Respondent could have been in compliance with another standard, or was substantially or theoretically in compliance, but did not in fact satisfy the standards for compliance, is simply meaningless. Just as one cannot be a little bit pregnant or theoretically pregnant, one cannot be a little bit out of compliance or theoretically in compliance; one is either in compliance or not in compliance. *See, Fordham University v. Brown*, 856 F. Supp. 864, 895 (D. D.C. 1994)(rejecting a de minimis argument). On cross examination, Mr. Fraga acknowledged that each of the three compliance standards has a group of individual requirements which must be met and failing to meet any *one* of the individual requirements results in non-compliance with that standard. Tr. 448. As Mr. Koopman testified at the hearing, Barden was not otherwise in compliance with the control combination methods; while its machines may have met the base design and work practices requirements that are a part of that option, Barden had not chosen the additional control combination required nor was it performing the record keeping and reporting as required by that option. Tr. 141-42. In addition, he indicated that Barden was never in full compliance with the idling emission option for any unit because it was not conducting tests of idling emissions or monitoring required or the related record keeping and performance. Tr. 142-43. This is not a situation where a Respondent has violated a certain standard, but can show as an affirmative defense that it was in compliance with another equally valid standard at the time the violations were found. Instead, it is simply a case where Respondent met none of the standards and at best, theorizes that, had it decided to, it could have and would have met some other standard.<sup>33</sup>

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<sup>33</sup> It seems that Respondent's quote in its Brief from Lewis Carroll's *Through the Looking Glass* applies well to this situation. *See, R's Initial Brief* at 17 n.6.

Thus, the argument that Barden could have avoided the requirement to keep logs of additions and deletions for some of its degreasers<sup>34</sup> had it initially selected another method of compliance cannot defeat a finding of liability on this count.

Therefore, I find Respondent liable for a violation alleged under Count VII.

H. Count VIII - Failure to Perform Calculations - 40 C.F.R. § 63.464(a)(1)(ii)

Count VIII alleges a violation arising from Respondent's failure to perform monthly calculations of emissions for all its solvent cleaning machines in violation of 40 C.F.R. § 63.464(a)(1)(ii). Specifically, Complainant alleges that "[a]t the time of the inspection, Respondent failed to perform the monthly calculations under § 63.464(a)(1)(ii) to show emissions from each degreaser were below the batch vapor degreaser limit of 150kg/M<sup>2</sup> per month (30.7 lbs/ft<sup>2</sup> per month). In addition, Respondent failed to perform the 3-month rolling average calculations." Complaint ¶ 57.

Section 63.464(a)(1)(ii), 40 C.F.R., requires the owner or operator using the alternative standard to –

Ensure that the emissions from each solvent cleaning machine are equal to or less than the applicable emission limit presented in table 5 of this subpart as determined using the procedures in § 63.465(b) and (c).

Table 5, in turn, indicates that owners/operators of batch vapor degreasers must ensure that the emissions from each unit are equal or less than 150kg/M<sup>2</sup> per month (30.7 lbs/ft<sup>2</sup> per month), using the procedure of a three month rolling average.

Mr. Koopman testified that to show compliance under the alternative standard, a regulated entity must have emissions below the limit set in the standard. If a regulated entity does not perform the calculations, then it cannot tell if it is meeting the emission limit and thus cannot determine if it is in compliance with the alternative standard. Tr. 89. These calculations have to

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<sup>34</sup> In addition, I note that Ms. Zuvich represented to the inspectors that Barden was required to perform emissions calculations for the annual state emission report regardless of the Federal compliance method selected. C's Ex. 20; *see also*, CONN. AGENCIES REGS. § 22a-174-20(l)(4)(O) ("Maintain a monthly record of the amount of solvent added to each unit and keep such record for a minimum of two (2) years after such record is made."). Respondent's expert witness Mr. Fraga confirmed this to be the case at the hearing, testifying that Barden would have had to keep records of solvent emissions and deletions no matter what compliance method was chosen in order to be able to submit a state emissions report. Tr. 437-38. Under any circumstance, Barden would have to maintain logs as to EMU-16.

be performed for each machine, each month. Mr. Koopman testified that Barden admitted to him at the time of the inspection that it had not done so. Tr. 90. Mr. Koopman's inspection report and the notes taken contemporaneously with the inspection confirm that Barden acknowledged to the inspectors that it was not performing monthly or tri-monthly emissions calculations. C's Exs. 6 and 20.

At the hearing, Ms. Zuvich admitted that Barden advised the inspectors that it was using the alternative compliance method for all degreasers. Further, she acknowledged that Barden had not performed the monthly calculations necessary to show emissions from each degreaser were below the batch vapor limit nor the three-month rolling average prior to the issuance of the NOV. Tr. 263.

The only issue Respondent raises in its Brief regarding liability on this count is that this violation results from its initial error in choosing to comply with the alternative standard, rather than the idling emission standard, for example, which would not have required such calculations. R's Initial Brief at 27. As discussed above, this argument has no merit. Under any circumstances Respondent would have had to do some monthly and tri-monthly emissions calculations to be in compliance with Federal law and regulations, and it acknowledged it failed to perform any.

Therefore, Respondent is found liable for the violations alleged in Count VIII.

I. Count IX - Failure to Comply with Alternative Standard Emission Limits - 40 C.F.R. § 63.464(a)(1)(ii)

Count IX alleges a violation arising from Respondent's failure to comply with alternative standard emission limit with regard to its solvent cleaning machines in violation of 40 C.F.R. 63.464(a)(1)(ii). Specifically, Complaint ¶ 60 states that

Respondent's average halogenated solvent emissions exceeded the Alternative Standard Emission Limits of 40 C.F.R. § 63.464(a)(1)(ii). Emission calculations were based on TCE usage information submitted by Respondent in response to a reporting requirement. The information covered the period of time from 1/1/98 through 12/31/98.

At the hearing, Mr. Koopman testified that this count applies only to the excess emissions from EMU- 9. Tr. 98; *see also* EPA's Initial Brief at 35 (referring only to EMU- 9 in regard to this count). Further, he testified that in 1998, EMU-9 had, on an annual basis, emitted over 10 tons of TCE above the limit. Moreover, the highest 3-month average evidenced that EMU-9 had emitted 127 pounds per square foot, which was over three times (313%) above the 30.7 pounds per square foot, per month, limit. Tr. 91-93.

Respondent does not challenge the Agency's calculations regarding the exceedances, nor

the data upon which those calculations are based. Rather, Respondent's defense to this count is that while EMU-9 may not have met the alternative standard emission limit, it was capable of complying with one of the other standards at the time of the inspection. R's Ex. 6. Specifically, Respondent argues that EMU-9 could have met the idling emission standard at the time of the inspection. The general argument that Respondent could have met the idling emission standard or the control combinations standard, was addressed and rejected above. The specific argument with respect to EMU-9 follows.

At the hearing, Respondent elicited testimony primarily from Respondent's expert, Mr. Fraga, in support of this "defense," consistent with the report the expert submitted to Barden's counsel in November 8, 2000. R's Ex. 6. Specifically, Mr. Fraga testified that in order to meet the idling emissions standard, a vapor degreaser has: (1) to pass a Method 307 test; (2) be in compliance with the NESHAPS base design and work and operational practice requirements; and (3) engage in the requisite on-going monitoring and record keeping requirements. Tr. 396, 428, 438, 443-44. There is no emission limit in terms of pounds per square foot applicable to the idling emissions standard. Tr. 431. Mr. Fraga testified that EMU-9 (the D35 Baron Blakeslee unit) underwent an idling emissions test in January 1998 and passed, and was not modified after that date.<sup>35</sup> Tr. 390-94; 416-17, R's Ex. 5. He opined that the unit, with its cover and hoist, met the base design requirements specified in 40 C.F.R. § 63.463(a). R's Ex. 6; Tr. 467-69. Based upon these two factors, Mr. Fraga suggested that in January of 1998, Barden could have chosen to comply with the idling emission standard for this unit and, under this standard, would not be in violation of the emissions limit because none is applicable. Tr. 416-18, 429-30.

However, Mr. Fraga also testified at the hearing, that, once having chosen the idling emissions standard, to maintain compliance with it, Barden would have to meet on-going monitoring and reporting requirements. Tr. 396, 428. Specifically, under this option, in order to reduce the possibility for excess emissions, Barden would have to monitor the emissions equipment that was on the unit as of the time of the Method 307 test. Tr. 447. In this case, that would mean Barden would have had to make a monthly check of the condition of the units cover to make sure it was free of cracks, holes, or defects, and the hoist's speed. Tr. 397, 416-18.<sup>36</sup> Mr. Fraga testified that the inspection report indicated that there was no defect found with regard to the cover or hoist speed on the date of inspection. Tr. 467. Therefore, based upon this, Mr. Fraga opined that, had Barden undertaken the necessary periodic monitoring and record keeping,

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<sup>35</sup> Mr. Fraga testified at the hearing that EMU-9 is no longer in operation at Barden's facility. Tr. 395.

<sup>36</sup> Mr. Fraga testified that other than a hoist and cover, EMU-9 did not have any additional control equipment at the time of testing and never had additional control equipment on it. Tr. 397. Mr. Fraga also testified that Barden had to submit annual filings to EPA and the Connecticut DEP of annual emissions and in connection therewith would have had to keep records of solvent emissions and deletions. Tr. 437-38. This suggests that Barden knew or should have know of its excess emissions level with regard to EMU-9 at various times.

EMU-9 would have met the idling emission standard and been found in compliance in January 1999, when the inspection was conducted. Tr. 398.<sup>37</sup>

As noted above, Mr. Fraga acknowledged that each of the three compliance standards has a group of individual requirements which must be met and failing to meet any *one* of the individual requirements results in non-compliance with that standard. Tr. 448. He further acknowledged that he had never observed Barden employees engaging in the monitoring and record keeping related to idling emission standard and had no personal knowledge as to whether they had done so. Tr. 455, 457. Thus, he acknowledged that, in fact, with regard to EMU-9, he could not say Barden was not in complete compliance with the idling emission standard's requirements at any point. Ms. Zuvich testified that she could not recall if Barden was keeping records of cover condition prior to the issuance of the NOV. Tr. 306-08. Further, she acknowledged that Barden had not checked temperature of the air blanket zone in units with refrigeration systems and maintained records of those checks until after the NOV was issued. Tr. 309-10.

I conclude that the argument that EMU-9 could have been in compliance with the idling emission standard at the time of the inspection does not constitute a defense to liability on this count for being in violation of the alternative standard emission limit. First, it is clear that at no point after EMU-9 passed the Method 307 test in January 1998, did Respondent ever indicate either to its own employees, its own consultants, or to state or Federal officials, any intent to comply with the idling emission standard, instead of the alternative standard.<sup>38</sup> The fact is that at all times prior to the inspection, Barden represented to EPA that it was intending to comply with the alternative standard. Second, the record evidences that, in fact, prior to the inspection, Barden never even attempted to undertake any steps to fulfill the monitoring and record keeping requirements of the idling emission standard. Third, because of this, Barden cannot show it was actually in compliance with an otherwise equally valid standard under the NESHAP.

Therefore, I find Respondent liable for the violation alleged in Count IX.

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<sup>37</sup> Mr. Fraga testified that EMU-9 would not meet criteria for control combinations without the addition of a freeboard refrigeration device and/or possibly other modifications. Tr. 397-98.

<sup>38</sup> Mr. Fraga testified on direct that to change from one option to another Barden did not need to report (Tr. 417), but on cross-examination acknowledged that the initial statement of compliance is where compliance method indicated. Tr. 441. Barden submitted an initial statement of compliance for EMU-9 in August of 1995, indicating that it would comply with the Alternative Standard. C's Ex. 7. Barden did not submit another initial statement of compliance for EMU-9 until after the NOV was issued. C's Ex. 10. It was only after the NOV was issued that Barden elected a standard other than the alternative standard for EMU-9. *Id.*

## VI. PENALTY

### A. Regulatory Provisions

Section 22.27(b) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, provides with regard to determining civil penalties that:

. . . the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act.

40 C.F.R. § 22.27(b).

### B. Statutory Provisions

The assessment of civil administrative penalties for violations of the Clean Air Act is authorized by Section 113(d)(1) of the Act. 42 U.S.C. § 7413(d)(1). Under that section, penalties for violations, such as those alleged in this case, cannot exceed \$27,500 per day, per violation. 42 U.S.C. § 7413(d)(1), tr. 100.<sup>39</sup> Moreover, Section 113(e)(1) provides that in determining the amount of any penalty –

the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence . . . , payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

42 U.S.C. § 7413(e)(1).

The Rules of Practice state that “the complainant has the burdens of presentation and

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<sup>39</sup> 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), each Federal agency is required to issue regulations adjusting for inflation the civil monetary penalties that can be imposed pursuant to such agency's statutes. On December 31, 1996, EPA issued final regulations modifying the statutory maximum recoverable per day for violations under CAA §113(d)(1) from \$25,000 to \$27,500, applicable to all violations occurring after January 30, 1997. *See*, 61 Fed. Reg. 69,360-366 (1996) (codified as 40 C.F.R. Part 19).

persuasion that the violation occurred as set forth in the complaint and the relief sought is appropriate.” 40 C.F.R. § 22.24(a). The standard of proof under the Rules of Practice is a preponderance of the evidence. 40 C.F.R. § 22.24(b). Complainant, therefore, has the burden of demonstrating the appropriateness of its proposed penalty.

### C. Agency Penalty Policies

On October 25, 1991, EPA issued its Clean Air Act Stationary Source Civil Penalty Policy to provide a methodology for calculating a penalty under the CAA (“Policy”). C’s Ex. 17. The Policy is based upon EPA’s 1984 general Policy on Civil Penalties (GM-21) and its guidance entitled Framework for Statute-Specific Approaches to Penalty Assessments (GM-22). C’s Ex. 17. In calculating a penalty, the Policy requires consideration of the same factors listed in Section 113(e) of the CAA. Tr. 100. In this regard, the Environmental Appeals Board has approved of the Policy’s framework because it “reasonably implements the statutory criteria” in Section 113(e). *House Analysis & Associates & Fred Powell*, 4 E.A.D. 501, 508-09 (EAB 1993).

Nevertheless, as shown by the EAB’s decision in *Employer’s Insurance of Wausau and Group Eight Technology, Inc.*, one cannot apply the penalty policy unquestionably as if the policy were a rule with binding effect, because such policy has not been issued in accordance with the Administrative Procedure Act (“APA”) requirements for rulemaking. 6 E.A.D. 735, 761 (EAB 1997) (emphasis omitted). Furthermore, the EAB has held that the ALJ has “the discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant.” *DIC Americas, Inc.*, 6 E.A.D. 184, 189 (EAB 1995). The purpose of penalty policy guidelines is merely to supply a framework for the uniform application of the statutory penalty criteria. Moreover, the penalty policies provide a coherent, reviewable explanation of the penalty determination. *Great Lakes Division of National Steel Corp.*, 5 E.A.D. 355, 374 (EAB 1994); Tr. 100. The language of Section 22.27(b) makes this non-binding aspect clear by only requiring the ALJ to *consider* any applicable civil penalty policy. After the ALJ considers the penalty policy, the ALJ has full discretion to assess a penalty different from any proposed penalty calculated pursuant to a penalty policy, provided the reasons for departure are explained adequately. *A.Y. McDonald Industries, Inc.*, 2 E.A.D. 402, 424 (CJO, July 23, 1987).

The Policy sets out a penalty calculation method consisting of two primary components. The first step involves determining the “economic benefit” from noncompliance. The second step calls for computing the “gravity” of the violation, which reflects the seriousness of the violation. These two components combined yield the “preliminary deterrence amount” (PDA). C’s Ex 17 at 3-4. In order to achieve a fair and equitable penalty, adjustment factors may increase or decrease the penalty, according to the specific situation.

#### A. Economic Benefit Component

The economic benefit component is used to assess a penalty for any economic benefit a violator may have obtained as a result of not complying with the Clean Air Act. Mr. Koopman

testified at the hearing that in order to be in full compliance with the alternative standard all Barden would have to have done was to “make some minor typing changes and maybe institute some better record keeping to keep track of their solvent.” Tr. 162-63. He did not anticipate that these efforts would involve a large expenditure of funds, something above \$5,000. The Policy provides that if economic benefit calculates to less than \$5,000 it does not need to be included. Tr. 163. Therefore, no penalty was proposed by Complainant for the economic benefit component in this case. Tr. 101.

## B. Gravity Component

The Policy indicates that the objective of the gravity component is to measure the seriousness of the violations and reflect the other statutorily mandated factors in Section 113(e). C’s Ex. 17 at 9-10. Specifically, this component consists of penalties representing: (1) actual or possible harm (considering the amount of pollutant emitted, toxicity of the pollutant, sensitivity of the environment, and length of time of violation); (2) importance to the regulatory scheme; (3) size of the violator; and (4) adjustment factors, such as degree of willfulness or negligence (upward adjustment), degree of cooperation (downward adjustment), history of noncompliance (upward adjustment) and environmental damage (upward adjustment). The Policy provides that adjustments to the final Preliminary Deterrence Amount combining the economic benefit and gravity component can be made for such factors as litigation risks, ability to pay, payments made to other governmental authorities for the same violation, multiple violations, and multiple defendants. C’s Ex. 17 at 19-24.

In this case, EPA calculated a proposed penalty for each count based only upon three factors of the gravity component under the Policy (actual or possible harm, importance to the regulatory scheme, and the size of the violator), which together totals \$288,750. C’s Ex. 22; Tr. 102-03. EPA made no adjustments to the penalties for degree of willfulness or negligence, degree of cooperation, history of noncompliance, or environmental damage. C’s Ex. 22. EPA’s assessment for the third factor of the gravity component, size of the violator, was based on an assessment of \$53 million as Respondent’s net worth, which under the Policy yields a one-time addition onto the penalty of \$50,000, adjusted upward to \$55,000 for inflation. Tr. 110-11; C’s Ex. 17 at 14. EPA did not adjust the PDA based upon factors such as the litigation risks, ability to pay, payments made to other governmental authorities for the same violation, multiple violations, or multiple defendants. Tr. 111-12.

### Count I

EPA proposed a gravity based penalty of \$19,250 for Respondent’s failure to comply with the hoist rate limit in regard to EMU-12, consisting of \$5,000 representing the actual or potential harm plus \$12,500 representing importance to the regulatory scheme, plus an adjustment for inflation.

Specifically, under the factor of actual or potential harm, EPA did not consider the elements of amount of pollutant, sensitivity of the environment, or toxicity of pollutant, as those factors are applicable to emissions violations only. Therefore, the sole element under this factor was the length of violation, which EPA assumed to be one day. C's Ex. 22; Tr. 103-04. The Policy designates a penalty of \$5,000 under this factor for a violation of this length (from 0-1 month). C's Ex. 17 at 12.

Under the factor "importance to the regulatory scheme," the Policy provides that a failure to perform a work practice requirement is considered "very significant" to the regulatory scheme and therefore warrants an additional penalty of \$10,000-\$15,000. Mr. Koopman testified that this violation is significant in that a limited hoist speed prevents drag out, that is, the dragging out of the unit TCE vapors along with the parts being removed. Tr. 144. He testified that in regard to this violation he increased the penalty for this factor by \$12,500 because just one hoist exceeded the hoist rate. Tr. 104. This yielded a total penalty of \$17,500, upon which the Agency added a 10% inflation adjustment factor or \$1,750 to bring the total penalty up to \$19,250. *Id.*; *see also*, C's Ex. 22.

The Agency did not further adjust the penalty for this specific violation for other factors, such as degree of willfulness or negligence, degree of cooperation, history of violation, or environmental damage. Nevertheless, it seems appropriate to consider some of these factors in regard to this count.<sup>40</sup> While there is no evidence of willfulness, despite Barden's claim to the contrary (R's Initial Brief at 13), it seems clear from the testimony that Barden's use of a hoist that was clearly marked as exceeding the statutory limit was, at least, negligent. Barden had control over the hoists in its facility, should have foreseen the violation from the speed indicated on the metal plate on the hoist, was moderately sophisticated regarding compliance, and knew of the legal requirement. However, when the inspector pointed out erroneous hoist rate, much to her credit Ms. Zuvich immediately recognized and rectified the problem, changing out the hoist immediately. Tr. 252-53. Therefore, despite the negligence involved in causing the violation, I conclude that this honest, essentially instantaneous correction of the violation, warrants a modest downward adjustment in the penalty of 20%, to \$15,400.<sup>41</sup>

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<sup>40</sup> There is no evidence in the record that Barden has a history of similar violations or that any violation resulted in "severe environmental damage" warranting an upward adjustment based upon those factors.

<sup>41</sup> As indicated above, I find extremely unpersuasive Barden's assertion that this violation results from a different good faith interpretation of the regulation regarding hoist speed. R's Initial Brief at 13. There is absolutely no evidence in the record that Barden was using this alternative method of calculating hoist speed prior to the institution of this litigation. To the contrary, Ms. Zuvich's actions indicate that Barden interpreted hoist speed the same way EPA did. Thus, this downward adjustment is being given even though the defensive argument made in this case regarding calculation of a hoist rate using dwell time was rejected, as such defense is (continued...)

## Count II

EPA proposes a gravity based penalty of \$19,250 for Respondent's failure to provide a permanent, conspicuous label posted on or near each of its units summarizing the applicable operating requirements. C's Ex. 22. Again, as with Count I, under the factor of actual or potential harm, EPA did not consider the elements of amount of pollutant, sensitivity of the environment, or toxicity of pollutant, as those factors are applicable to emissions violations only. Further, EPA also assumed to the benefit of Respondent that it was a single non-posting violation and that the length of violation was one day, which warrants a \$5,000 penalty under the Policy. Tr. 105. Once again, in that this too was a work practice violation, the Policy provided that it warranted an additional penalty amount from a range of \$10,000-\$15,000. As with Count I, Mr. Koopman testified that he chose a mid-range value of \$12,500 for this count to represent the level of importance to regulatory scheme, and imposed a 10% inflation factor. Tr. 104-06; C's Ex. 22.

While obviously not meeting the regulatory requirement with regard to posting instructions at all times on each and every machine suggests a certain level of negligence, the evidence in the record does not clearly establish that Barden lapsed in this regard except on a single machine. Moreover, Ms. Zuvich testified that when Mr. Koopman advised her of the lack of posted instructions during the closing conference after the inspection, she immediately fixed that violation. Tr. 299. However, at the time Mr. Koopman chose to impose a mid-range value of \$12,500 for workplace practice violation, he understood the number of instances of violation to be far greater. Therefore, a downward adjustment in the penalty for this count of 20% is also deemed warranted. The penalty imposed for Count II is \$15,400.

## Counts III, IV, and VI

Counts III, IV, and VI arise out of Respondent's failure to submit initial notification reports, initial statements of compliance, and semiannual exceedance reports, all of which are reporting violations. At the hearing, Mr. Koopman testified that initial notification reports and initial statements of compliance are important because they identify for the regulating agency the "universe of facilities or universe of degreasers" being regulated, including size and compliance approach. Tr. 79, 80-81. The Agency uses these statements to target inspections and track solvent usage. *Id.* In this case, Barden failed to file its initial notification report and initial statements for EMU-10 and EMU-12 in a timely manner. *Id.* EMU-10 was installed in October of 1997 and its initial report was due "as soon as practicable before startup." Tr. 48, 80; 40 C.F.R. § 63.468(b). The initial statement of compliance was due "no later than 150 days after startup in March 1998." 40 C.F.R. § 63.468(e). Barden filed those forms only after the inspection and after the issuance of the NOV, with its second response to the Administrative

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<sup>41</sup>(...continued)  
credited to Barden's counsel rather than its staff.

Order in December 1999. Tr. 79-80, 300. Thus, the initial report on EMU-10 was at least two years late and the initial statement was a year and a half late. As to EMU-12, it was installed in March of 1998 and thus the initial report was due then and its initial statement was due within 150 days later, in or about August 1998. Those forms too were filed in December 1999. Tr. 79-82, 300. Thus, these forms were also filed, respectively, a year and a half late and a year late. However, with its third submittal in April 2000 Barden did submit initial notification reports for EMU-21 and EMU-22, two degreasers that had not yet been installed in the facility but which Barden expected would be installed in May and June of 2000.<sup>42</sup> Tr. 96. On the other hand, Mr. Koopman testified at the hearing in November 2001 that to date Barden had not filed the initial statements of compliance for those units. Tr. 96-97.

As to the solvent exceedance reports (Count VI), Mr. Koopman testified that such reports provide regulators with information on occurrences of solvent exceedances and what action the regulated entity has taken to correct exceedances. Tr. 84-85. Exceedance reports must be filed for each degreaser separately and are due semiannually, 30 days after the end of the calendar year and half year, *i.e.*, on July 30<sup>th</sup> and January 30<sup>th</sup>. 40 C.F.R. § 468(h). Barden filed its 1998 exceedance reports due July 30<sup>th</sup> 1998 and January 30, 1999 in December 1999, with Barden's second submittals in response to the NOV. Thus, those reports were filed almost a year and a half, and almost a year late, respectively. Tr. 85-86. Mr. Koopman testified at the hearing held in November 2001, that as of that date, Barden had still not filed its exceedance reports for EMUs-9, 10, 11, 12, 14 and 16, due on July 30, 1999 (covering the period from January - June 30, 1999) at issue here, nor its reports on those units for the second half of the 1999 year, violations not charged here. Tr. 87, 95-96.

EPA proposed a total combined penalty of \$33,000 for all of the reporting violations set out in the Complaint, including the three for which Respondent is found liable, as well as Count V, for which, as indicated above, Respondent is found not liable. Complainant provided no breakdown between the counts for these violations, so the penalty proposed in relation to the three out of four counts cannot be determined. Further, again, as with Count I, under the factor of actual or potential harm, EPA did not consider the elements of amount of pollutant, sensitivity of the environment, or toxicity of pollutant, as those factors are applicable to emissions violations only. In this case, EPA took the violation with the most missed deadlines, which was Barden's failure to file its semi-annual exceedance reports on three occasions, and assessed a \$5,000 penalty for each missed deadline. As to importance to regulatory scheme, EPA characterized these violations as a "failure to report or notify" violation warranting an additional \$15,000 penalty under the Policy. These factors combined to total \$30,000 upon which a 10% inflation factor was applied, to reach the final figure of \$33,000. Tr. 106-07; C's Ex. 22.

The Policy does not provide for the extent of the penalty combining provided here. To the

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<sup>42</sup> Ms. Zuvich testified at the hearing that at the time the reports were filed estimating annual TCE consumption, Barden had not decided whether EMUs-21 and 22 would use TCE, but filed the papers nevertheless as an excess of caution. Tr. 310-11, 316-17.

contrary, the Policy states that:

Each separate violation under this [gravity] section should be assessed the corresponding penalty. For example, a NSPS source may be required to notify EPA at the start up and be subject to a separate quarterly reporting requirement thereafter. If the source fails to submit the initial start-up notice and violates the subsequent reporting requirement, then the source should be assessed \$15,000 under this section for each violation. In addition, the length of violation figure should be assessed for each violation based on how long each has been violated.

\* \* \* \* If, however, the source violates the same reporting requirement over a period of time, for example by failing to submit quarterly reports for one year, the source should be assessed one \$15,000 penalty under this section for failing to submit a report. In addition, a length of violation figure of \$15,000 for 12 months of violation . . . should be assessed.

C's Ex. 17 at 14.

Thus, while it is appropriate under the Policy to combine the penalties for all violations in Count VI regarding missed semi-annual solvent exceedance reports, the Policy does not specifically authorize the combination of the failure to submit the initial notification reports for the two different new units spread over a period of time as well as the initial statements of compliance. However, such penalty falls within the enforcement discretion of the Agency and because it works to the benefit of the Respondent, it will not be disturbed. If calculated individually, each reporting violation for which Respondent was found liable could arguably last at least 0-1 month, some far more, warranting a minimum penalty of \$5,000 based upon length of violation, and could be considered a failure to report warranting a \$15,000 penalty under the factor of importance to the regulatory scheme. This would total a combined penalty for such violations far in excess of the \$33,000 proposed here.

With regard to the adjustment factor of wilfulness, Ms. Zuvich testified that she was unaware that during the period between 1995 and 1999 that Barden owed any reports to EPA regarding the degreasers it was operating during that period. Tr. 300-01. While this may be factually true to the extent that she was responsible for Barden's environmental compliance, it certainly suggests a level of negligence on the part of the company.

Nevertheless, it seems appropriate here to reduce the penalty somewhat to account for Respondent's lack of culpability on Count V. However, whatever reduction that might be appropriate is more than offset by a corresponding increase warranted by Respondent's failure to come into compliance with its filing requirements even after the inspection, issuance of the NOV and the Complaint. These actions evidence a lack of good faith on the part of Respondent. Therefore, the penalty remains unchanged.

## Count VII

Count VII involves Barden's failure to maintain complete and adequate records of TCE

additions and deletions from December 1997 through January 1999. Mr. Koopman testified at the hearing that under the alternative standard, Barden was required to maintain records of its solvent additions and deletions in the form of liquid solvent removed and also solvent removed in the waste stream. Tr. 87-88. Mr. Koopman testified that while Barden maintained some logs regarding solvent additions and deletions, the logs maintained were not complete and as a result could not be used to calculate the monthly emission data or three month rolling average emissions with any certainty. Tr. 87-89. Eventually, but only in response to the NOV, Barden provided such data to EPA, which Mr. Koopman was able to use to calculate its TCE usage. Tr. 90-91, C's Ex. 14.

EPA proposes a total penalty of \$30,250 for Respondent's failure to maintain complete and adequate records of TCE additions and deletions from December 1997 through January 1999. Since this was not an emissions violation, only the length of violation was considered under the factor of actual or potential harm, and the length was determined to be 14 months. Under the Policy, a length between 13 and 18 months warrants a penalty of \$20,000. Under the factor of importance to the regulatory scheme, failure to maintain records is assessed an additional \$15,000, but maintaining incomplete records has a range of \$5,000 to \$15,000. In this case, EPA used the more flexible failure to maintain complete records and assessed a mid-range penalty of \$7,500 for the importance to the regulatory scheme factor. Mr. Koopman testified that he assessed a penalty in this way because Barden did maintain some records. This came to a total of \$27,500, upon which a 10% inflation factor was added. Tr. 107-08; C's Ex. 22.

The penalty was not increased for wilfulness or negligence, although the facts certainly would warrant such. The evidence proffered at the hearing clearly showed that Respondent had, prior to the initiation of this action, consistently represented that it was abiding by the alternative standard, which required this type of record keeping and little else. It then failed to meet even this burden of keeping these records. Ms. Zuvich testified that Barden provided log sheets to record TCE additions and deletions as well as meters on all degreasers which were hard piped to a TCE source. In addition, there were meters on pipes from which TCE would be drawn to fill degreasers that were not hard-piped to a TCE source. Tracking of TCE usage from pipes into machines that were not hard-piped required Barden employees to record information about how much TCE was drawn out of the source and the machine the TCE was added into. It was this monitoring that Ms. Zuvich, to her credit, honestly admitted to the inspectors, that she could not in good faith represent was being consistently, properly, done. Tr. 303-06.

Respondent argues that these paperwork violations flow from Barden's wrong choice of compliance method. R's Brief at 3. However, as noted above, Respondent's expert witness, Mr. Fraga, testified that the company would have had to keep records under all three compliance options, as well as for annual emission reports to the Connecticut DEP. Tr. 436-38. Had Barden chosen another method of compliance, it would have had other record keeping obligations under that method and there is no suggestion that it did or would have complied with those alternative obligations.

Therefore, I find the penalty proposed for this count of \$30,250 to be appropriate.

## Count VIII

This count involves Respondent's failure to perform emissions calculations to show that the emissions from each degreaser were below the batch vapor degreasers limit of 30.7 pounds per square foot per month. Mr. Koopman testified that for an entity to show that it is in compliance with the alternative standard, it must be able to prove its emissions are below the limit set in the standard. If a regulated entity does not perform emissions calculations, then it cannot tell if it is meeting the emission limit and thus whether it is in compliance. Tr. 89. These calculations must be performed for each machine complying with the alternative standard. Tr. 89-90. Prior to the issuance of the NOV, Barden was not performing these required emissions calculations. However, in response to the NOV, Barden provided information on solvent additions and deletions from which EPA was able to do requisite emissions calculations. Tr. 90-91, C's Ex. 14.

EPA proposes a total penalty of \$38,500 for Respondent's failure to perform emissions calculations intended to show that the emissions from each degreaser were below the limit for batch vapor degreasers. Again, because this was not explicitly an emissions violation, only the length of the violation was considered under the factor of actual or potential harm. The Agency charged Respondent with failing to perform these calculations for 13 months, from January 1, 1998 until January 31, 1999, warranting a penalty under the Policy of \$20,000. Mr. Koopman testified that this period was selected because it represented the time period for which the calculations should have been made for the year prior to the inspection in January 1999. Tr. 108-09. Further, Mr. Koopman said he considered this a record keeping violation warranting an increase of \$15,000 under the factor of importance to the regulatory scheme. To this total of \$35,000, an inflation factor of 10% was added resulting in a total of \$38,500. Tr. 108-09; C's Ex. 22.

No alterations were made to the penalty for wilfulness or degree of cooperation. There is evidence in the record reflecting that Respondent did keep some records which were eventually used to perform calculations of emissions.

Respondent argues that penalties should be adjusted under "such other factors as justice may require" because Barden erred in electing the alternative standard as a method of compliance and that, with exception of EMU-16, Barden's degreasers physically met design criteria for idling emission or control combinations standard. R's Initial Brief at 2-3. On this basis, Respondent's expert witness, Mr. Fraga, testified there was no harm to the environment from the excess emissions. Tr. 433. I am not persuaded by this assertion, because even if Respondent's units were equipped with the requisite control technology to meet either the idling emissions or control combinations standard, there is no evidence in the record that over the period at issue here Respondent would have complied with all of the workplace practices and record keeping requirements pertinent to those other standards. Also, it is clear that Respondent selected the alternative standard and, as such, damage to the environment should be measured according to whether Respondent met the requirements of the standard by which it chose to have its compliance judged. Therefore, I find the proposed penalty appropriate.

## Count IX

Count IX arises from Respondent's failure to comply with the alternative standard's emissions limit for the 1998 calendar year in regard to EMU-9. Mr. Koopman testified at the hearing that, based upon the calculations he performed on the data for solvent emissions and deletions provided to him by Barden after the inspection, he determined that, in 1998, EMU-9 emitted 10 tons of TCE above the regulatory limit. Tr. 92. The highest 3-month average emission for that unit was 127 per square foot per month, or more than three times the limit of 30.7 pounds per square foot per month. Tr. 93. The total excess emissions for the year for the unit was 722 pounds per square foot. Tr. 99.

EPA proposes a total penalty of \$93,500 for Respondent's failure to comply with the alternative emissions standard emissions limit for the 1998 calendar year in regard to EMU-9.<sup>43</sup> Because it is an emissions violation, Mr. Koopman testified that he applied the elements under the factor of amount of pollutant. Tr. 110. Mr. Koopman concluded that the Respondent's emission level was 313% above the standard. *Id.* Under the Policy, this degree of violation warrants a penalty of \$55,000.<sup>44</sup> C's Ex. 17 at 10. Under toxicity of the pollutant, Mr. Koopman assessed the \$15,000 provided for by the Policy for TCE. *Id.* at 11. No additional penalty was applied for sensitivity of the environment. Because Respondent failed to perform these calculations for a year, the Policy calls for an addition of \$15,000. No additional penalty was assessed for importance to the regulatory scheme as emissions are not considered thereunder. To this total of \$85,000, an inflation factor of 10% or \$8,500 was added for a total penalty of \$93,500. Tr. 109-10; C's Ex. 22 at 12.

The amount proposed for this violation by the Agency is significantly larger than that proposed for the others. However, of all the violations charged in this action, I believe this to be the most serious because by failing to perform the requisite calculations Barden kept *itself*, as well as EPA, ignorant of data relevant to the health and welfare of its employees. Dr. Smuts testified persuasively at the hearing regarding the risks from TCE and the increased health risks

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<sup>43</sup> Mr. Koopman testified at the hearing that some of Barden's other units also had emissions in excess of regulatory limit in 1998. Unit 10 had excess emissions of 0.2 tons or 200-400 pounds, Unit 11 had excess emissions of 0.35 tons or 700 pounds of excess emissions, and Unit 12 had 0.04 ton of excess emissions. Tr. 98. However, the Agency used its enforcement discretion and decided not to charge Barden with violations for the other units' excess emissions in the case. Tr. 98-99. As to EMUs-14 and 16, Mr. Koopman stated he never received from Barden any information regarding EMU-14's emissions upon which he could calculate compliance levels and that, based upon the numbers he had received, EMU-16 appeared to be in compliance. Tr. 161-62.

<sup>44</sup> Because the emission level was at least 300% above the limit, \$50,000 is to be assessed under the Policy, with an addition of \$5,000 for each 30% or fraction thereof above the 300%. C's Ex. 17 at 10.

from additional exposure. Tr. 214. The doctor holds an M.S. from Harvard School of Public Health and a Ph.D. from Temple University in cell and developmental biology. Tr. 187. Since 1990 she has been employed by EPA as an environmental scientist and in that capacity she provides technical information regarding the health effects of hazardous air pollutants. Tr. 191-92. At the hearing, Dr. Smuts testified that TCE was characterized as one of the 188 “hazardous air pollutants” identified under the Clean Air Act and also one of 33 air pollutants designated as “urban HAPs” because of its concentration and potential threat to public health. She indicated that the Agency has focused on these 33 HAPs in terms of evaluating the effectiveness of the Maximum Achievable Control Technology. Through this process, the Agency is attempting to identify “any leftover risks” from the control technologies in place and requiring that standards be reevaluated and tightened to eliminate such risks. Tr. 195.

Regarding TCE and its effects, Dr. Smuts testified at the hearing that exposure to TCE can occur through inhalation, ingestion, or dermally - through contact with the skin. Tr. 206. Once TCE enters the body, it goes into the bloodstream and circulates through the body. Tr. 207. A short term inhalation exposure can result in what industrial hygienists refer to as the “degreaser’s flush,” which involves a flushing of the skin on the face, hands, and upper body. *Id.* The chemical then affects the nervous system, resulting in short term effects such as dizziness, confusion, sleepiness, and sometimes liver damage. *Id.* Higher exposures can lead to “tachycardia – acceleration of the heart – and ultimately death.” *Id.* Long term or chronic exposure (more than one year) to TCE causes long term memory loss, chronic headaches, as well as liver and kidney damage. Tr. 207-08, 211. Dr. Smuts testified that the NESHAP was established to control and reduce exposure to HAPs used in halogenated cleaning, and that the regulations were designed to give an adequate margin of safety. Tr. 212, 220. However, Dr. Smuts also testified that with the extent of Barden’s emissions above the standard of 30.7 pounds per square foot per month, to a reasonable degree of scientific certainty it was more probable than not that there was an increased risk to human health. Tr. 214.

This issue of increased risk to human health is directly pertinent in this case. At least some of Barden’s employees frequently come in contact with degreasers utilizing TCE. At the time relevant hereto, Barden had a number of such machines spread throughout its facility. C’s Ex. 20. Ms. Arboleda testified that she has operated a degreaser on a daily basis for a decade. Tr. 346-47. She further testified that as part of her job she reaches into the machine and sprays the parts being cleaned with additional TCE solution. Tr. 354, 360-62. Both she and Ms. Enright testified as to looking into the machine to determine if the parts cleaned with TCE were still dripping with the chemical or were dry. Tr. 354, 370. Although Ms. Enright stated that Barden’s employees wear safety glasses, she indicated that they are not required to wear any masks to protect against TCE inhalation or gloves to ward off dermal exposure. Tr. 376. Moreover, she indicated that she had not undergone any particular health or safety training regarding degreaser operations and the degreaser training forms Barden proffered in this case make no mention of the health risks of TCE exposure. Tr. 377-78; R’s Ex. 4.

Respondent argues that this violation is not really significant because EMU-9 could have met the idling emissions standard, due to that compliance approach not having monthly emission

limits.<sup>45</sup> R's Initial Brief at 28. However, Mr. Fraga testified that the idling emission standard requires recordkeeping with regard to the condition of the control equipment in place at the time the unit passed the idling emission test. Tr. 397. This includes a monthly check of the cover on the unit for cracks, holes, and defects (through which presumably TCE could escape) and of the hoist speed. *Id.* These additional standards are required in order to assure that the level of emissions from the unit does not exceed the acceptable level measured at the time the idling emission test was performed. For example, measurement of hoist speed is required to prevent drag out. Tr. 221. Ms. Zuvich testified that she could not say whether records were being kept on the conditions of the degreaser covers or measurement of the hoist speeds before issuance of the administrative order. Tr. 307. Thus, Respondent did not demonstrate that EMU-9 was in compliance with the idling emissions standard during the relevant time period and, in fact, there is no way to know that the unit would not have had excess emissions had Barden been attempted to comply with that standard. For these reasons, this argument fails.

### Size of Violator

Consistent with the Policy, the Agency calculated the third factor under the gravity component, *i.e.*, the size of business, once for all violations. Relying on a July 15, 2001 Dun and Bradstreet Report evidencing that Respondent had a net worth of \$53,064,000, pursuant to the Policy it fell within the size of business of \$40 million - \$70 million warranting a \$50,000 penalty, which EPA adjusted for inflation to an amount of \$55,000. Tr. 110-11. Respondent has not raised any challenges to the factual basis upon which this portion of the penalty was calculated.

### Adjustment factors

As indicated above, the Policy provides that adjustments to the final Preliminary Deterrence Amount, made up of the economic benefit and gravity component, can be made for factors such as litigation risks, ability to pay, payments made to other governmental authorities for the same violation, multiple violations, and multiple defendants. C's Ex. 17. EPA did not make any adjustments to its proposed penalty based upon these factors. Tr. 111. Barden has not raised as a defense in this case the inability to pay the proposed penalty, nor presented any facts warranting a downward adjustment of the penalty based upon any other factors identified above. C's Ex. 24 (stip. 37). Therefore, the PDA will not be adjusted based upon any of these factors.

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<sup>45</sup> Mr. Fraga suggested at the hearing that in January of 1998, he and Barden did check to determine if the EMU-9 unit was meeting the alternative standard by checking TCE "throughput." However, he could not testify with any certainty regarding those calculations and no such documentation was submitted in regard thereto in this record. Tr. 398-99.

Penalty Summary

Accordingly, the penalties assessed against Respondent are as follows:

Count I	-	\$15,400
Count II	-	\$15,400
Counts III, IV & VI	-	\$33,000
Count VII	-	\$30,250
Count VIII	-	\$38,500
Count IX	-	\$93,500
Size of violator	-	<u>\$55,000</u>
Total		\$281,050

The total penalty assessed against Respondent for violations of Section 112 of the CAA and Federal and State regulations promulgated pursuant thereto found herein is \$281,050.

**ORDER**

1. A civil penalty of \$281,050 is assessed against Respondent The Barden Corporation.
2. Payment of the full amount of this civil penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c) , as provided below. Payment shall be made by submitting a certified or cashier's check in the amount of \$281,050, payable to the Treasurer, United States of America, and mailed to:

EPA - Region 1 New England  
Regional Hearing Clerk  
P.O. Box 360197M  
Pittsburgh, PA 15251

3. A transmittal letter identifying the subject case and the EPA docket number, as well as Respondent's name and address must accompany the check.
4. If Respondent fails to pay the penalties within the prescribed statutory period after entry of this Order, interest on the penalty may be assessed. *See*, 31 U.S.C. § 3717; 40 C.F.R. § 13.11.
5. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless: (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).

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Susan L. Biro  
Chief Administrative Law Judge

Date: August 9, 2002  
Washington, D.C.

In the Matter of The Barden Corporation, Respondent  
Docket No. CAA-1-2000-0070

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Initial Decision**, dated August 9, 2002 was sent this day in the following manner to the addressees listed below.

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Maria Whiting-Beale  
Legal Staff Assistant

Dated: August 9, 2002

Original and One Copy by Pouch Mail to:

Tricia Leahy  
Regional Hearing Clerk  
U.S. EPA  
One Congress Street, Suite 1100  
Boston, MA 02114-2023

Copy by Pouch Mail to:

Peter DeCambre, Esquire  
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Catherine Garypie, Esquire  
Enforcement Counsel (SES)  
U.S. EPA  
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Copy by Certified Mail Return Receipt to:

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