UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
U.S. ARMY, FORT WAINWRIGHT	)	**Docket No. CAA-10-99-0121**
CENTRAL HEATING & POWER PLANT,	)	
	)	
Respondent.	)	

ORDER GRANTING RESPONDENT'S MOTION FOR INTERLOCUTORY APPEAL

An Accelerated Decision as to Application of Economic Benefit of Noncompliance and Size of Business Penalty Factors (Decision) was issued in this matter on April 30, 2002, ruling that those penalty factors apply to Respondent and may be taken into account in adjusting penalties for Respondent's violations of the Clean Air Act. On May 14, 2002, Respondent submitted a Motion for Interlocutory Appeal (Motion), requesting the undersigned to certify the Decision to the Environmental Appeals Board (EAB) for interlocutory review. On May 23, 2002, Complainant submitted a Response to Respondent's Motion, stating that EPA does not oppose the Motion, although it does not agree with the arguments presented therein.

The Consolidated Rules of Practice governing this proceeding require a party seeking interlocutory appeal to file a motion requesting the Presiding Judge to forward the ruling to the EAB for review. 40 C.F.R. § 22.29(a). The Presiding Judge may recommend an order or ruling for review by the EAB when:

> (1) The order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion; and
>
> (2) Either an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.

40 C.F.R. § 22.29(b).

Respondent argues that the conclusion in the Decision -- that penalty assessments against Federal facilities under Section 113 of the Clean Air Act may be adjusted for the factors of "economic benefit of noncompliance" and "size of the business," involves important questions of law and policy affecting the Department of Defense nationwide, as well as other Federal agencies. Respondent asserts that the extensive briefing as well as the vigorously contested oral argument

between the two agencies, demonstrate that "substantial grounds for difference of opinion" exist with respect to the core legal issues.

Respondent argues further that immediate appeal will materially advance the ultimate termination of the proceeding. Respondent asserts -- but Complainant disagrees -- that the Decision "established new ground rules" for the calculation of economic benefit and size of business penalties for Federal facilities. Respondent argues that the Decision raised factual issues that Respondent did not anticipate would arise at trial, so it may have to substantially revise its witness list, perhaps adding additional experts, and engage in additional pre-hearing exchange.[1] Respondent asserts that the hearing is likely to be lengthy, expensive and inconvenient for the parties, and that it would not be necessary if the EAB reaches a conclusion contrary to the Decision. If, on the other hand, the EAB affirms the Decision, then the resultant certitude as to the legal issues will promote more efficient development of the factual issues at trial, and may enhance the chances of settlement prior to trial, Respondent asserts.

The Decision does involve important questions of policy, if not also questions of law, concerning which there may be substantial grounds for difference of opinion. As to the second prong, a waste of resources would result if the EAB, only after appeal of the initial decision, reversed the Decision after Respondent, and perhaps also Complainant, had several expert witnesses travel to and testify at a hearing as to the "economic benefit" and "size of the business" penalty factors. While it is impossible to determine at this point whether, in fact, under the conclusions reached in the Decision, the parties would present more or less evidence and testimony than would have been presented if the accelerated decision had been denied, it is clear that even less evidence and testimony would be required if the EAB reverses the Decision and concludes that the two penalty factors are inapplicable in the instant case. Therefore, the EAB's conclusions on the "economic benefit of noncompliance" and "size of the business," whether in favor of Complainant or Respondent, should support a more efficient ultimate disposition of this matter.[2]

Accordingly, the Respondent's Motion for Interlocutory Appeal is **GRANTED.**

Susan L. Biro
Chief Administrative Law Judge

Dated: May 28, 2002
Washington, D.C.

[1] Complainant, however, believes that the Decision clarifies the scope and *reduces* the amount of evidence the parties would need to present at a hearing.

[2] This matter was commenced on December 30, 1999. Thereafter the parties engaged in a lengthy Alternative Dispute Resolution process and subsequently filed extensive prehearing exchanges and briefed complex issues of law, upon which two accelerated decisions have been issued. As a result, unfortunately, this matter has been pending for an extended period, which, along with the potential effect of the Decision on other administrative complaints against Federal facilities, suggests that this matter may be appropriate for *expedited* interlocutory review.