

The court should also depart from these policies because they lack provisions for consideration of any other mitigating circumstances, *i.e.* the policies do not really consider other factors as justice requires, *e.g.* actions by rogue employees, disciplinary actions taken, whether the penalty will really have a deterrent effect, impact of penalty on mission (distinguish from economic impact), and the whether facility had dedicated sufficient resources.

Consider first the EPA policies Complainant asserts are applicable.

1. EPA Clean Air Act Civil Penalty Policies.

According to EPA's enforcement policy expert, Mr. Michael J. Walker, the goal for EPA's enforcement efforts is to promote compliance by deterring entities, individuals, and businesses from violating the law. Tr. 163-164. The seminal penalty policy documents are General Management No. 21 (Complainant's Exhibit 14) and General Management Policy No. 22 (Complainant's Exhibit 22). Tr. 164. Deterrence, recovery of economic benefit, considering factors, and incorporating statutory considerations are the hallmark of this penalty scheme. Tr. 164. According to Mr. Walker, these documents are guidance, not a regulation. Tr. 166. However, review of the asserted applicable policies and the testimony of Mr. Russell indicate very little flexibility in the policies and the application thereof by Mr. Russell. Mr. Walker acknowledged that discretion is limited to 30%. Tr. 198. Within EPA, these documents remain in full force and effect today. Tr. 166.

a. EPA General Enforcement Policy #GM -21, Policy on Civil Enforcement, Feb.

16, 1984 (GM-21) (Complainant's Exhibit 14).

In this seminal document, the goals for penalty assessment are: (1) deterrence; (2) fair and equitable treatment of the regulated community; and (3) swift resolution of environmental problems. Complainant's Exhibit 14, p. 1. According to GM-21, penalties and settlements should, where possible, be consistent with the guidance contained in the other seminal document, EPA General Enforcement Policy #GM -22, A Framework for Statute-Specific Approaches to Penalty Assessments, Feb. 16, 1984 (GM-22) (Complainant's Exhibit 15). Deviations are authorized as long as the reasons for the deviation are documented. Complainant's Exhibit 14, p. 1. Certainly the documentation requirement has a chilling effect on discretion.

The first goal of penalty assessment is to deter people from violating the law, to persuade the violator to take precautions against falling into noncompliance. Complainant's Exhibit 14, p. 3. The intent is to place the violator in a worse position than those who have complied in a timely fashion, and at a minimum remove any significant economic benefits resulting from failure to comply. Presumably, this "worse" position means a worse economic position. According to this policy, deterrence and fairness require an additional amount to ensure the violator is economically worst off than if it had obeyed. It is questionable whether any penalty amount puts a federal facility worse off, since there is no profit or accumulation of assets.

The second goal is fair and equitable treatment. Complainant's Exhibit 14, p. 4. Penalties must display both consistency and flexibility. They should be consistent so not to be seen as arbitrary or to promote litigation. Flexibility is required to reflect legitimate

differences between similar violations. However, in calculating the proposed penalty in this case a number of mitigating facts, which distinguish it from similar violations, were not considered. Methods for quantifying penalties are explained in GM-22. The policy provides for increasing or mitigating the penalty amount for the following factors: (1) degree of willfulness and/or negligence; (2) history of noncompliance; (3) ability to pay, (4) degree of cooperation/non-cooperation; and (5) other unique factors specific to the violator or the case.

The third goal is the swift resolution of environmental problems. Complainant's Exhibit 14, p.5. This is essentially accomplished by providing incentives to settle and institute prompt remedial action, primarily considering reducing the gravity component for settlements in which the violator already has instituted expeditious remedies to the identified violations prior to commencement of litigation (degree of cooperation/non-cooperation adjustment factor). Complainant's Exhibit 14, p. 6.

b. EPA General Enforcement Policy #GM -22, A Framework for Statute-Specific Approaches to Penalty Assessments, Feb. 16, 1984 (GM-22)(Complainant's Exhibit 15)

The purpose of GM-22 is to promote the goals of GM-21 by providing a framework for medium-specific penalty policies. Complainant's Exhibit 15, p. 1. While GM-22 contains detailed guidance, it is not cast in absolute terms. Complainant's Exhibit 15, p. 1.

GM-22 provides instruction on the development of a penalty figure, which involves a two-step process: (1) calculating a preliminary deterrence figure, and (2)

adjusting the figure. Complainant's Exhibit 15, p. 2. In administrative cases the initial penalty target figure generally is the penalty assessed in the complaint. Complainant's Exhibit 15, p. 2. The calculation of a Preliminary Deterrence Amount includes an Economic Benefit Component and a Gravity Component.¹⁷ Complainant's Exhibit 15, pp. 2-3.

Medium-specific policies should then assign appropriate dollar amounts or ranges to the different ranked violations. Complainant's Exhibit 15, p. 3. The Preliminary Deterrence Amount should then be adjusted to ensure that penalties further Agency goals besides deterrence, specifically equity and swift correction of environmental problems. Complainant's Exhibit 15, p. 3. GM-22 provides that adjustments can be made for the following factors: (1) degree of willfulness and/or negligence; (2) cooperation/noncooperation (through pre-settlement action); (3) history of noncompliance; (4) ability to pay; and (5) other unique factors (including strength of case, competing public policy considerations). Complainant's Exhibit 15, pp. 3-4.

GM-22 acknowledges that assigning a dollar figure is an essentially subjective process. Complainant's Exhibit 15, p. 13. It should be based primarily on 1) risk of harm inherent in the violation and 2) the actual harm that resulted Complainant's Exhibit 15, p. 14.

In regard to the "size of the violator," GM-22 provides that in some cases, the gravity component should be increased where the resultant penalty will otherwise have little impact on the violator, and is only relevant to the extent it is not taken into account by other factors. Complainant's Exhibit 15, p. 15.

¹⁷ In this case, the Complainant has not asserted any economic benefit and accordingly not included an economic benefit component in the proposed penalty.

In regard to the second goal, equitable treatment of the regulated community, GM-22 provides that the system for penalty assessment must have enough flexibility to account for the unique facts of each case. Complainant's Exhibit 15, p. 16. However, EPA's Clean Air Act penalty policies (Complainant's Exhibits 8 and 9) contain very limited flexibility to account for such unique facts.

GM-22 acknowledges that although most of the statutes which EPA administers are strict liability statutes, this does not render the violators willfulness and/or negligence irrelevant. Complainant's Exhibit 15, pp. 17-18. Presumably, there should also be recognition of other differences. However, EPA policies do not recognize these differences in mitigation; it only considers willfulness/negligence in aggravation. GM-22 instructs that each medium-specific policy should "allow for adjustment for unanticipated factors which might affect the penalty in each case." Ex. C-15, p. 24

In regard to ability to pay, EPA agency will not request penalties beyond the means of the violator, but will seek a penalty that could put a business out of business where refuses to correct or long history of noncompliance. This normally requires a significant amount of financial information, and the burden rests upon the defendant. There various options to consider: (1) delayed payment schedule (dependent upon increase in sales); (2) non-monetary alternatives (service activities); (3) penalty reductions (last recourse); and (4) joinder of violator's individual owners. Complainant's Exhibit 15, pp. 23, 24. This analysis clearly demonstrates the commercial economic bases of EPA's penalty policies.

c. Clean Air Act Stationary Source Civil Penalty Policy, October 25, 1991.

(Complainant's Exhibit 8).

It is EPA policy that penalty amounts sought in an Administrative Complaint should be calculated "using the most aggressive assumptions possible." Complainant's Exhibit 8, p. 1. Respondent submits that the most aggressive assumptions were made in proposing the penalty in this case.¹⁸ For example, Mr. Ripp apparently erroneously assumed the Command planned and authorized the subject renovation activity. Tr. 126-127, 135. The policy provides that the penalty may be mitigated for cooperation up to 10%, and for good faith efforts to comply up to but may never exceed 30%.

Complainant's Exhibit 8, pp. 1-2. EPA asserts this policy reflects the factors enumerated in CAA section 113(e): (1) the size of the business; (2) the economic impact of the penalty on the business; (3) the violator's full compliance history; (4) good faith efforts to comply; (5) the duration of the violation; (6) the economic benefit of noncompliance; (7) seriousness of the violation; and (8) such other factors as justice may require.

Complainant's Exhibit 8, p. 2. However, the methodology presented leaves little room for such other factors as justice may require and limits mitigation to 30%.

This general policy applies to most CAA violations, however, some types of violations have characteristics that make use of the general policy inappropriate. These include Appendix III for the economic benefit and gravity components for asbestos NESHAP demolition and renovation violations. Complainant's Exhibit 8, p3.

Deterrence is an important, if primary goal, of penalty assessment. The Policy establishes a Preliminary Deterrence Amount consisting of (1) an economic benefit

¹⁸ Mr. Russell conceded that he used the most aggressive assumptions. Tr. 2:39.

component, and (2) a gravity component. Complainant's Exhibit 8, p. 4. The Policy provides that any penalty should, at a minimum, remove any significant economic benefit resulting from non-compliance. Complainant's Exhibit 8, p. 4. In this case, the EPA is not asserting or seeking any penalty amount for economic benefit. It is only seeking a penalty based on the seriousness of the violations, referred to as the "gravity component."

According to the Policy, The Gravity Component takes into consideration only the following factors enumerated in CAA factors in 113(e): the size of the business, the duration of the violation, and the seriousness of the violation. Complainant's Exhibit 8, p. 8. The Policy establishes an approach to quantifying the gravity component. Complainant's Exhibit 8, p.8. A separate appendix, Appendix III (Complainant's Exhibit 9), provides separate guidance for determining the gravity component for demolition and renovation cases. Complainant's Exhibit 9, p. 1.

d. Appendix III, Asbestos Demolition and Renovation Civil Penalty Policy, Rev. May 5, 1992 (Complainant's Exhibit 9)

Appendix III provides that the gravity component should account for the following alleged statutory criteria¹⁹: environmental harm resulting from the violation, the importance of the requirement to the regulatory scheme, the duration of the violation, and size of violator. Complainant's Exhibit 9, p. 2. Appendix III essentially provides a mechanistic formula for calculating a gravity component amount, permitting limited

¹⁹ Unlike the criteria listed in the 1991 Clean Air Act Stationary Source Civil Penalty Policy (Complainant's Exhibit 8, p. 8), the alleged statutory criteria listed in Appendix III are not exactly statutory criteria. It appears that "environmental harm resulting from the violation," and "the importance of the requirement to the regulatory scheme," is a restatement and expansion of the "seriousness of the violation" statutory criterion. "Size of violator" is apparently an expansion of the "size of the business" criterion.

discretion. It provides for two types of violations: (1) notice violations, and (2) work-practice, emission and other violations. The amount of the assessment for a notice violation depends on (1) whether it is an initial or subsequent violation, and (2) whether or not there was nevertheless substantial compliance with the work-practice requirements.²⁰ Complainant's Exhibit 9, pp 14. Other potential extenuating or mitigating circumstances are not considered.²¹ The amount of the assessment for a work-practice violation depends on (1) whether it is an initial or subsequent violation, (2) the duration of the violation, and (3) the amount of the asbestos involved in the operation (measured in "units").²² Complainant's Exhibit 9, p. 17. Again, other potential extenuating or mitigating circumstances are not considered.

The mechanistic formula in Appendix III does not include the "size of violator" factor.²³ That factor is considered pursuant to the guidance in the 1991 Clean Air Act Stationary Source Civil Penalty Policy (Complainant's Exhibit 8). This Policy provides as follows:

²⁰ Chart on p. 14 sets forth penalty amounts to be assessed for notification violations:

- No Notice: \$15,000 (1st); \$20,000(2nd); \$25,000(3rd)
- No Notice/substantive compliance: \$5,000 (1st); \$15,000(2nd); \$25,000(3rd)

²¹ The Policy does take into mitigation, subsequent in the mechanical calculation process a factor identified as "Degree of Cooperation."

²² Chart on p. 17 sets forth a matrix for work practice, emission and other NESHAP violations (a "unit" is 260 linear feet/160 sq. ft/35 cu. Ft as applicable):

< 10 units	\$ 5,000(1st)	\$ 500(add. day)	\$15,000(2nd) etc.
>10<50 units	\$10,000(1st)	\$1,000(add. day)	\$20,000(2nd) etc.
>50 units	\$15,000(1st)	\$1,500(add. day)	\$25,000(2nd) etc.

This is more accurately a measure of the asbestos containing material rather than the actual amount of asbestos.

²³ Appendix III provides that "[a]n increase in the gravity component based upon the size of the violator's business should be calculated in accordance with the General Penalty Policy." Ex C-9, p. 6.

Size of violator: A corporation's size is indicated by its stockholders' equity or "net worth." This value, which is calculated by adding the value of capital stock, capital surplus, and accumulated retained earnings, corresponds to the entry for "worth" in the Dun and Bradstreet reports of publicly traded corporations. The simpler bookkeeping methods employed by sole proprietorships and partnerships allow determination of their size on the basis of net current assets. Net current assets are calculated by subtracting current liabilities from current assets.

Complainant's Exhibit 8, p. 10. The Policy, § II.B.3, then attaches a penalty dollar figure to bands of "net worth (corporations); or net current assets (partnerships and sole proprietorships)." Complainant's Exhibit 8, p. 14. The Policy further provides:

In the case of a company with more than one facility, the size of the violator is determined based on the company's entire operation, not just the violating facility. With regard to parent and subsidiary corporations, only the size of the entity sued should be considered. Where the size of the violator figure represents over 50% of the total preliminary deterrence amount, the litigation team may reduce the size of the violator figure to 50% of the preliminary deterrence amount.

Complainant's Exhibit 8, p. 15. Again, the policy and analysis focus on commercial economic considerations.

The Policy provides for the following adjustments to the gravity component: (1) degree of willfulness or negligence; (2) degree of cooperation; (3) history of noncompliance; and (4) environmental damage. Complainant's Exhibit 8, pp. 15-19. Only "degree of cooperation" can be considered in mitigation of the penalty amount. This factor is limited to 30% and provides for mitigation in three situations: (1) prompt reporting of noncompliance; (2) prompt correction of environmental problems; and (3) cooperation during pre-filing investigation. Complainant's Exhibit 8, p. 17. There is no provision for consideration of any other mitigating circumstances or factual differences among violators.

The testimony of EPA's expert, Mr. Walker, confirms this commercial economic focus and demonstrates a misunderstanding of Fort Jackson, and presumably other federal facilities. He advises that EPA looks at two factors when it looks at the "size of a business." Tr. 167. First, what is the size of the operation; what resources are available with respect to the ability to identify non-compliance, to hire and retain personnel, and to manage compliance and supervise activities. Tr. p. 167. Unfortunately, as will be explained, Fort Jackson, no matter what its physical size, has only limited flexibility to reallocate the resources provided by Congress. Second, in order for a penalty to mean something in terms of deterrence, it must be of sufficient size to mean something. Tr. 167-8. A penalty assessed against Fort Jackson only means that the installation's budget will be decremented. It will not affect profitability or net worth. In regard to federal facilities, EPA looks to the volume of resources available, such as operating budgets and physical assets, since, EPA alleges, some federal facilities own properties, facilities, and things like battleships.²⁴ Tr. 169. Unfortunately, these assets are not available to raise funds by sale or do they generate revenues. Only Congress generates revenues for Fort Jackson by raising taxes. EPA looks to operating budgets because this is where funds may be available to put into environmental compliance as opposed to routine maintenance. Tr. 170. The EPA uses the terms "size of violator" and "size of business" interchangeably. Tr. 178. The purpose of the sliding scale in the CAA Civil Penalty Policy (Complainant's Exhibit 8) is to endeavor to the greatest extent practicable to tailor a penalty that will have a sufficient impact on the relevant size of the violator. Tr. 180.

²⁴ However, Mr. Walker conceded battleships are not available for sale to raise money for the Navy. Tr. 200. Of course, if surplus ships were sold, the money would be deposited into the Treasury in accordance with 31 U.S.C. § 3302(b) and not be available to augment the Navy's budget. Mr. Walker also conceded the proceeds are deposited into the Treasury and a federal agency could not retain the funds. Tr. 202, 231.

Larger operations in order to feel the deterrent effect of a penalty should be penalized more. Tr. 180. According to Mr. Walker, the sliding scale in the CAA Civil Penalty Policy (Complainant's Exhibit 8) is a reasonable way to begin. Tr. 181. The policy is guidance, not a regulation. Mr. Walker assumes the reason Fort Jackson's assets were not used to calculate the penalty in this case was due to the inability of the Complainant to come up with an adequate assessment of what Fort Jackson is worth: "the many buildings, the many roads, the water distribution system." Tr. 183. Interestingly, Fort Jackson holds legal title to no property and therefore has no assets. Mr. Walker also erroneously assumes there is significant discretion in terms of how the budget is spent. Tr. 183.

A review of the purportedly applicable EPA penalty policies regarding the "size of violator" demonstrates that they are predicated on a number of economic considerations, not only in how a penalty should be calculated, but also in the impact the penalty will have on the violator. The underlying assumptions simply do not apply to Fort Jackson and other federal facilities and doubling the amount of the penalty will not have the intended effect.

2. Complainant's Application of Its Size of Violator Penalty Policy to Respondent Violates the Clean Air Act

a. Core Principles for EPA's approach to collecting size-of-violator penalty enhancement from the regulated community.

EPA has adopted penalty policies that allow regulators to increase penalties based on the "size of the business," one of the criterion listed in CAA §113(e). 42 U.S.C. § 7413(e)(1). In implementing this statutory criterion, EPA through its policy has impermissibly changed the statutory criterion to "size of violator." Complainant's Exhibit 8, 9-10. EPA must faithfully implement the CAA as written by Congress. In this instance, Congress specifically authorized EPA to adjust a civil penalty based on "size" only in cases where a "business" is the violator. By renaming this "size of violator" and applying this penalty factor to Federal agencies, EPA has impermissibly expanded CAA § 113(e)(1) beyond the intent of Congress. The limited development of this factor is clearly based on commercial business assumptions, which are not applicable to Fort Jackson or other federal agencies.

The lack of guidance on applying this "business" penalty criterion is illustrated in EPA's CAA Civil Penalty Policy, which devotes only about half a page to explain this factor.²⁵ Nevertheless, its commercial business nature is clear: its stated purpose is to effect an increase in the overall fine "in proportion to the size of the violator's business." Complainant's Exhibit 8, p. 9. Application of this factor depends upon on an analysis of a corporation's "stockholder's equity or 'net worth'" as "calculated by adding the value of capital stock, capital surplus, and accumulated retained earnings."²⁶ Complainant's Exhibit 8, 10. The policy provides a table for arriving at a "size of violator" penalty,

²⁵ Complainant's Exhibit 8, at p. 10: The size of business/violator is a "fact" to be considered in evaluating actual or possible harm. As stated in EPA's 1984 basic penalty policy: "Size of violator: In some cases, the gravity component should be increased where it is clear that the resultant policy will other wise have little impact on the violator in light of the risk of harm posed by the violation. This factor is only relevant to the extent it is not taken into account by the other factors."

²⁶ The policy states: "Size of violator: A corporation's size is indicated by its stockholder's equity of 'net worth.' This value, which is calculated by adding the value of capital stock, capital surplus, and accumulated retained earnings, corresponds to the entry for "worth" in the Dunn and Bradstreet reports for publicly traded corporations. The simpler bookkeeping methods employed by sole proprietorships and partnerships allow determination of their size on the basis of net current assets."

which is based on the "net worth (corporations); or net current assets (partnerships and sole proprietorships)."

Simply stated, the size-of-violator factor assumes that corporations with larger financial assets are in a better position to draw upon those assets to pay penalties. Consequently, larger penalties are necessary to make them feel the regulatory bite with sufficient financial pain to effect deterrence. As indicated in the 1984 policy quoted above, this penalty factor is only appropriate when a penalty based on the seriousness of the violation (i.e. gravity component) is small in proportion to a company's ability to pay. Although EPA does not provide much guidance beyond that outlined above, it is implicit within EPA's policy that the thrust of the concept is to mete out extra punishment based on a presumption that business entities with greater assets could have complied earlier or more effectively. Even as applied to the private sector, however, the EPA has been taken to task by administrative law judges for acting arbitrarily and contrary to statutory authority when "automatic consideration of the size of the violator's business" becomes "a major factor in determining the violator's extent level and gravity based penalty. ..."

In the Matter of Troy Chemical Corp., Docket No. II-EPCRA-98-0101, U.S. EPA, 1999 EPA ALJ LEXIS 7 (Jan. 28, 1999).

An apparent assumption is that the violator did not allocate sufficient assets and resources to achieve compliance or prevent violations. In this present case, additional environmental funding or staffing would not have prevented the violations, actions taken in disregard of Fort Jackson policies and guidance. Again, the economic assumptions inherent in this factor do not apply.

Entities? b. What Distinguishes Fort Jackson from a Business and Private-Sector

i. The commercial economic considerations upon which the EPA penalty polices are based do not apply to Fort Jackson.

EPA's recently adopted an enforcement strategy that is designed to treat Federal facilities "just like" private industry in terms of larger penalties. Complanant's Exhibit 13, p. 7. In adopting this strategy, however, it has been necessary for EPA to ignore critical differences between the Federal and private sector that make Federal facilities unique.

The fundamental legal and practical differences between Federal facilities and the private sector render EPA's attempt to recover "business penalties" from Federal agencies legally and factually unsupportable. In order for there to be a tailored application of "business" penalty assessment criteria to Federal facilities, EPA would have to account for the "special institutional characteristics of Federal agencies—their political accountability and the unique role of Congress in setting, with the Executive, their missions and budget," that make them factually incomparable to the private sector.

Fort Jackson and its commanders and managers are only able to look to appropriations from Congress to fund all their mission-essential operations, including environmental compliance. Tr. 2: 99-112. Numerous fiscal law requirements regulate how and when a Federal facility can obligate its funds. In addition, funds can only be obligated and spent for the Congressional purposes that accompany funds. 31 U.S.C. § 1301(a). Normal operating expenses are funded through Operations & Maintenance

("O&M") appropriations that are allocated based on demonstrated requirements. .²⁷ Tr. 2: 100-104. In regard to Fort Jackson's budget, the Command only has discretion over \$2.9 million. Tr. 2: 100-

A salient tenet of the EPA policy regarding the "size of violator" factor is that violators can be influenced to dedicate adequate funding and staffing for environmental compliance. Mr. Walker acknowledged that in regard to size of violator, the rationale for the goal is to determine what resources are available to identify and assure compliance. To make sure they hired enough people for environmental compliance, to ensure that there is proper management and proper monitoring of the environmental activities or environmental compliance. Tr. p. 198-9. However, Fort Jackson does not control the size of its environmental staff or the amount of environmental funding. Tr. 2: 111-112.

Perhaps most importantly, the imposition of a penalty will not have an economic impact on Fort Jackson, but will only adversely impact the same group of persons potentially harmed by the violations, the soldiers in training. Unlike a business, or a nonfederal governmental agency,²⁸ it will not affect the shareholders or taxpayers, the board of directors or Congress, the executive officers, or even the mission of Fort Jackson. The soldiers will still be trained, albeit in less comfortable and safe conditions.

²⁷ There is a complex body of fiscal law and Administration directives that regulate how and when a federal facility can obligate its funds. See discussion *infra* at III.B.4. The expenditure of funds must be consistent with authorization as well as appropriation acts, and both Congress and the Office of Management and Budget are involved in approving budgets and apportioning funds to agencies during the fiscal year to avoid overspending before the funding year expires. Within DoD, the Secretary of Defense further "allocates" funds to the military Services throughout the year, who further issue "allotments" to command and staff organizations. Department of Defense Directive 7200.1, "Administrative Control of Appropriations" (1984).

²⁸ Fort Jackson and other federal agencies are also distinguishable from nonfederal governmental agencies and public utilities in that EPA penalties imposed on such entities will affect their taxpayers and customers. The penalty will not be returned to the respective treasury and as a result of higher utility bills or taxes, the citizens are likely to influence such entities to comply.

Unlike a business, there will not be the economic impact likely to affect environmental policy.

Consideration of these differences exposes EPA's lack of rationale for applying the factor to federal facilities. While federal installations probably typically contain improvements and equipment with a value that exceeds the threshold for a "large" business, EPA's policy contains no acknowledgment that these assets, unlike private industry, are not available to the installation to sell or mortgage to raise money for compliance or to pay fines.

Even though the size-of-violator logic may work in some instances for the business community, applying this factor to Army facilities achieves absurd results. This is because it assumes that installations can raise additional revenues by selling tanks and helicopters, by laying off employees, by mortgaging real estate, or by passing the costs of doing business on to customers. There is simply no evidence available that would support Complainant's assumption that the U.S. Army installations can cash in their "net worth" to augment congressional appropriations. In fact, such augmentation is specifically prohibited.²⁹

In summary, Fort Jackson lacks the attributes that would support application of the core principles underlying EPA's "size of business" methodology/rationale. The unique Federal agency characteristics have no counterpart in the business world, and are inherently different.

ii. Consider the administrative process for Federal agencies as compared to the process afforded to all other Respondents.

²⁹ See e.g. 28 Comp. Gen. 38 (1948).

The Environmental Protection Agency published its Consolidated Rules of Practice at 40 C.F.R. Part 22. These are the promulgated rules that govern the instant proceeding, and interestingly, the rules that apply to a private citizen or a private business entity are noticeably different from those that apply to the Respondent in one very critical way—the right to judicial review by an appeal authority outside of the Environmental Protection Agency. By virtue of the fact that the Respondent is a Federal agency, Subpart G, addressing Final Orders, at § 22.31(e) provides the following:

(e) Final orders to Federal agencies on appeal.

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

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

Note that all other Respondents (those that are not Federal facilities, for example, business entities) have the option of filing an appeal to a Federal court under the Administrative Procedure Act (“APA”), since there is a right of judicial review of “Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court . . .” 5 U.S.C. §704. Therefore, through its own administrative procedures, the Complainant has specified an undeniable distinction between Federal facilities such as the Respondent, and other members of the regulated community, such as true business entities.

iii. Consider implications flowing from the Waiver of Sovereign Immunity under the Clean Air Act, 42 U.S.C. § 118a., Control of pollution from Federal facilities, General compliance.

The inclusion of a Federal facility waiver of sovereign immunity within the Clean Air Act is the best evidence that Congress intended for Federal facilities to be subject to the Clean Air Act. No doubt the Complainant would add that the applicability of the Clean Air Act to the Respondent and other Federal facilities is meant to be the same as for all other nongovernmental entities. In fact, language in the statute appears to say exactly that: “. . . to the same extent as any nongovernmental entity.” However, there is a split of authority within the Federal courts as to exactly how broad the waiver of sovereign immunity under the Clean Air Act actually is, or is not, as concerns punitive fines imposed by State regulatory agencies. See United States v. Georgia Department of Natural Resources, 897 F. Supp. 1464 (N.D.Ga. 1995), following the reasoning of Department of Energy v. Ohio, 503 U.S. 607 (1992), holding that the waiver is not clear and ambiguous enough to authorize the imposition of punitive fines by States; or the contrary position enabling States to fine Federal agencies as set forth in United States v. Tennessee Air Pollution Control Board, 185 F.3d 529 (6th Cir. 1999), or most recently, City of Jacksonville v. United States, 187 F. Supp. 2d 1352 (M.D. Fla. 2002), presently pending appeal before the U.S. Circuit Court of Appeals for the Eleventh Circuit.

As indicated by the fact that the Jacksonville case, which involves a Navy base, is presently pending appeal on this issue, the Department of Justice, which represents the Navy and all other Federal facilities in litigation, continues to press the argument, consistent with U.S. Supreme Court precedent in DoE v. Ohio, that the waiver of

sovereign immunity provision of the Clean Air Act is analogous to that of the Clean Water Act, 33 U.S.C. §1323 (the subject of litigation in DoE v. Ohio)³⁰; therefore, the Department of Justice still maintains that States are not authorized to impose punitive penalties against Federal facilities, except for facilities located within the jurisdiction of the U.S. Court of Appeals for the Sixth Circuit.

Moreover, as noted during the testimony of Mr. Walker, the Complainant did not issue a policy governing its administration of civil administrative penalties against Federal facilities until after the Department of Justice issued an opinion in July 1997, see Complainant's Exhibit 12, and Tr. 213—215, further discussed in Mr. Walker's responses to questions from the Court at Tr. 221—223, with the actual EPA policy memorandum, *Guidance on Implementation of EPA's Penalty/Compliance Order Authority Against Federal Agencies Under the Clean Air Act*, October 9, 1998, Complainant's Exhibit 13, being issued well after the release of the Department of Justice opinion, also further discussed in the exchange between Mr. Walker and the Court, Tr. 223—229, albeit in a different context. As such, Complainant's Exhibit 13, is yet another instance in which the Complainant found it necessary to publish policy guidance for Federal agencies that is separate and distinct from guidance applicable to the rest of the regulated community—Complainant says it wants to treat Federal facilities the same as everyone else, yet continues to issue different policy guidance, no doubt because Federal facilities are in fact different.

³⁰ The best available representation of the current position of the Department of Justice with regard to this issue is found in the brief recently prepared in support of the *Jacksonville* case that is pending appeal in the Eleventh Circuit; therefore, appended to this brief as Appendix A, is an excerpt from the brief filed in that appeal (pp. 21—37), addressing the issue of whether the Clean Air Act waives the United States' sovereign immunity from civil penalties imposed by state and local governments for violations of the state and local air pollution control laws (see Appendix B).

Even more interesting in the context of the pending case, is that it was Respondent's adherence to the Department of Justice position with respect to the waiver of sovereign immunity which ultimately led to referral of this case from the State of South Carolina Department of Health and Environmental Control (SCDHEC) for consideration by Complainant, see testimony of Mr. Russell, Tr. p. 2:58. The Respondent, being an installation subject to orders from superior authority, must adhere to policies established by the Department of the Army; therefore, Respondent refused to pay fines to States, including South Carolina, consistent with guidance from the General Counsel of the Army, as disseminated by the Chief of the Environmental Law Division, Office of The Judge Advocate General, see Respondent's Exhibit 6. Despite Respondent's cooperation with every other aspect of regulatory enforcement by the State of South Carolina, the only reason SCDHEC referred this case to Complainant was Respondent's refusal to pay a penalty based upon the waiver of sovereign immunity issue. If you further consider the documents proffered by Respondent during the hearing, that were objected to by Complainant and denied admission by the ALJ, marked for identification but not admitted by the ALJ, as Respondent's Exhibits 8 for ID, 9 for ID, 11 for ID, 12 for ID, 13 for ID, 14 for ID, and 15 for ID (written communications, letters or e-mail messages, exchanged between Respondent and SCDHEC, indicating extensive cooperative efforts to settle the penalty issue, including an exchange of e-mail messages suggesting SCDHEC's willingness, after the case had been referred to Complainant, to accept payment of an administrative fee in lieu of a penalty, but Complainant's refusal to return jurisdiction to SCDHEC), all objected to by Counsel for Complainant, urging that the entire set of documents is contrary to Federal Rule of Evidence 408, addressing the

inadmissibility of settlement offers (see Tr. 2:167--172). Respondent again asserts that a prohibition based upon Rule 408 was erroneously applied since the settlement discussions at issue pertained to a different forum, and urges that the excluded documents should have been considered as evidence of Respondent's sincere desire to cooperate with SCDHEC.³¹ If the actual amount of the penalty proposed by SCDHEC were known to the ALJ, it would be obvious that any astute business person would have readily agreed to pay a relatively modest punitive penalty to the State of South Carolina; however, because the Respondent is a Federal facility that must adhere to legal positions issued by the Department of Justice, Respondent refused to pay, jeopardizing its otherwise good relationship with State regulators, and ultimately resulting in the referral of this Complaint in which a much greater monetary penalty is sought by Complainant, apparently without any regard for how the rest of the regulated community is treated for similar violations in the State of South Carolina.

Therefore, once again, the Respondent is very different from a business entity in that at the time of the violations, and still to this day, the Respondent is constrained from an ability to pay punitive penalties to States in the same manner as the rest of the regulated community.

³¹ A primary purpose of Rule 408 is to encourage parties to negotiate settlements outside of court; therefore, if any of the proffered documents had pertained to settlement negotiations between Respondent and Complainant, Rule 408 might be properly applied to exclude such evidence, although there are exceptions, for example, to show bias. Moreover, the intent of Rule 408 is to prohibit the admission of evidence of settlement or of settlement negotiations in a disputed claim, and such evidence is expressly inadmissible to prove liability or the amount of a claim. That is not the purpose for which the specified documents were offered for admission in this case, rather, they were proffered as evidence of the extent to which the Respondent sought to cooperate with SCDHEC in an effort to resolve the matter pending with the State of South Carolina, a separate and distinct sovereign. As demonstrated by the testimony of record by Mr. Russell, the only reason this case was referred from SCDHEC to Complainant is that Respondent refused to pay a fine based upon an assertion of sovereign immunity. In all other respects, Respondent was very cooperative; therefore, it is relevant for the Court to be aware of the fact that even with regard to the waiver of sovereign immunity issue, the Respondent went as far as it could, within the constraints imposed by the Department of Justice and the Department of the Army.

iv. Consider implications flowing from , 42 U.S.C. § 118b, Exemption.

Finally, unique to ". . . department, agency, or instrumentality of the executive branch," obviously including the Army, is a provision of the Clean Air Act that enables the President to grant an exemption from compliance requirements if he (or she) determines such a temporary exemption is in the paramount interest of the United States. This exemption provision goes even further in making a specific reference to the Armed Forces, as follows:

In addition to any such exemption of a particular emission source, the President may, if he determines it to be in the paramount interest of the United States to do so, issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vehicles, or other classes or categories of property which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State and which are uniquely military in nature.

There is nothing about the instant case that warrants an exemption from requirements of the Clean Air Act related to asbestos floor tiles. This statutory provision is cited solely for the purpose of demonstrating that Federal facilities, and the Armed Force in particular, were recognized as being different and having the potential to require special consideration. There is no counterpart provision for the rest of the regulated community, rather this provision of law demonstrates Congress' recognition of the fact that Federal agencies in general, and the Armed Forces in particular, are different.

c. EPA's policy violates the CAA by not treating federal facilities "just like" other entities.

CAA § 118(a) subjects Federal facilities to the requirements of the CAA “in the same manner, and to the same extent as any nongovernmental entity.” 42 U.S.C. §7418(a). The provision both subjects Federal facilities to CAA “processes and sanctions” and mandates that EPA will not subject Federal facilities to different standards than private sector entities. This statutory prohibition against discriminatory treatment of Federal facilities is key to EPA’s Federal facility enforcement policy because it forms the basic source of EPA’s authority.

In Wainwright, Judge Biro summarily dismisses the CAA §118(a) equal treatment requirement, holding that CAA §118(a) “direct equality between private and government entities in being subject to process and sanction rather than equality in the effect of process and sanctions on the entities.” Wainwright at 31. In so holding, she deprives the CAA §118(a) phrase “in the same manner, and to the same extent” of all substantive meaning and provides EPA carte blanche to apply the size of violator factor against Federal facilities in a discriminatory fashion. For the reasons set forth below, Respondent respectfully requests the ALJ not follow Wainwright.

In attempts to treat Federal facility violators “just like” private sector polluters, EPA modified the manner in which it applies its size of violator policies. This creates a situation where Federal agencies are, in fact, treated differently because EPA has arbitrarily contorted the definitions and assumptions that drive the size of violator factor.

Since Federal facilities such as Fort Jackson cannot, and do not, invest funds, manage portfolios, have actual asset ownership, or divert funds that they should have spent on environmental compliance into profit making ventures, EPA is forced to redefine “net worth” and “net current assets” as the annual budget.

Second, unlike in the private sector, an EPA Federal facility enforcement action seeks to collect enhanced size of violator penalties from an entity other than the one, which really manages the portfolio and allocates economic resources.³² Fort Jackson has neither the legal means (authority under law), practical means (bank accounts or investment avenues), nor access to additional money.³³

The EPA policy's "ability to pay" provisions for mitigating economic or gravity based penalties appear to unavailable to Federal facilities. Complainant's Exhibit 8, p. 20. Obviously, the Federal government cannot assert that it cannot pay when the payment is returned to the Treasury. In effect, EPA's policy to apply the "size of violator" factor can only achieve the degradation of the Federal mission. This practice has no analog with respect to the private sector.

If a federal agency were treated just like a nonfederal entity, the EPA would recognize that the agency own no property and really has no "net worth." It is really analogous to an entity that rents all the land, buildings and personal property that it uses. If Congress were to decide to not fund a particular facility, it would merely shut down

³² Allocation of funding for environmental compliance is highly regulated at levels higher than the Respondent. See Title 10, U.S. Code, Chapter 160. In addition, Executive Order 12088, October 13, 1978, provides in part:

1 - 5. Funding.

1 - 501. The head of each Executive agency shall ensure that sufficient funds for compliance with applicable pollution control standards are requested in the agency budget.

1 - 502. The head of each Executive agency shall ensure that funds appropriated and apportioned for the prevention, control and abatement of environmental pollution are not used for any other purpose unless permitted by law and specifically approved by the Office of Management and Budget.

³³ Congress is in charge of raising and borrowing the money and appropriates funding, but the installation sustains the penalty, which is returned to Congress.

and responsibility for the property of the United States would be assumed by another federal organization. It is like the corporation that leases all the property it uses: when there are no longer sales or other income revenue, the lessor proceeds to repossess the property. If the EPA were to genuinely treat Fort Jackson like an analogous business entity it would determine that it has a net worth of zero. If one accepts Complainant's assertion that the annual operating budget is the equivalent of assets or worth, one should also consider the \$100 million backlog of maintenance requirements (unfunded requirements)³⁴ as liabilities. This results in a negative "net worth." Under CAA §118(a) Complainant must apply the same principles of the size of violator in the same manner as it applies them to the private sector, taking into consideration the factual differences that exist between the private and Federal sectors. Complainant has failed to do so.

EPA's guidance to its Regions on the application of this penalty factor to Federal facilities is limited to the following: "Regions should consider the size of violator when determining the appropriate penalty against a Federal agency. In many instances, Federal agencies would be considered large violators; in these cases, the Regions should apply the 50% formula" Complainant's Exhibit 13, p. 7. The guidance instructs Regions that federal agencies are liable for penalties "just like any other person." Complainant's Exhibit 13, p. 7. The use of "any" in this guidance invites EPA Regions to evaluate Federal facilities as something they are not (i.e., large for-profit entities that possess extensive alienable assets in the form of bank accounts, stock, physical inventories, and real estate), rather than to evaluate Federal facilities as what they are (i.e., individual bureaucratic sub-units of Federal agencies), and contravenes the CAA §118(a) equal treatment requirement. If words have meaning, then the use of "any" in this guidance is

³⁴ Tr. 2: 100.

all inclusive and invites Regions to analogize federal facilities to the largest profit-making corporate empires, with all their assets in bank accounts, stock portfolios, physical inventories, and real estate holdings. This policy of equating the economics of federal agencies with the finances of private industry throws out the statutory and constitutional differences that are so basic to the issue of appropriate punishment criteria for federal facilities.

A particularly disturbing aspect of EPA's guidance is that it tells Regions not to bother with the normal business criteria that apply to everyone else, but to simply assume that it is appropriate to double the fines for Federal facilities. This is made more egregious in light of the guidance in the CAA Penalty Policy that states: "With regard to parent and subsidiary corporations, only the size of the entity sued should be considered." Complainant's Exhibit 8, p. 15.

EPA's dearth of guidance and rationale as to how and why Regions might go about assessing a Federal facility's or agency's assets to determine financial net worth belies any logical underpinnings for the endeavor. In addition, EPA's silence on the "inability to pay" factor constitutes an unfounded presumption that this is *not* a consideration when dealing with a Federal agency.

Complainant's application of size-of-violator factor to Federal facilities, continues EPA's campaign to treat Federal facilities "just like" private business by force fitting business-based penalty criteria. [As argued with reference to economic benefit,] EPA and Complainant's approach has been to do this by: (i) applying different rules and different tools; and (ii) by labeling these new rules and tools with names similar or identical to longstanding penalty criteria. This practice was never intended by Congress

and makes no sense. CAA §118 is not an open invitation for EPA to equate Federal facilities with private industry across the board. Rather §118 is a requirement to give equal treatment after making appropriate adjustments for significant differences between Federal facilities and the private sector. This discriminatory treatment practiced by Complainant goes beyond its authority in the CAA and is without factual basis to establish a prima facie case for application of the size-of-violator factor.

In the private sector, it would be unthinkable for EPA to seek to recover from a subsidiary of Exxon a civil penalty and return that amount to Exxon, yet Complainant appears unabashed in perpetrating this notion in the federal agency arena. Again, this amounts to unlawful discrimination in opposition to the plain language and intent of Congress under the CAA.

Moreover, the unavailability of considerations that apply to the private sector is underscored by EPA's policy of routinely doubling economic benefit and gravity fines based on the "size-of-the-violator" factor that is presumed to apply in all cases, and which Complainant summarily applied in this case. Complainant's Exhibit's 13, p. 7. Again, it is discriminatory for EPA to presume the applicability of a twofold multiplier in all cases. This practice has no analog with respect to the private sector.

It is clear that Complainant's attempt to presumptively double the overall size of the fine in this case by resorting to the "size of violator" factor contravenes the mandate in §118(a) of the CAA against discriminatory treatment.³⁵ Complainant must apply the same principles of "size of violator" in the same manner as it applies them to the private

³⁵ In contrast, Respondent does not make a similar claim with respect to Complainant's calculation of the other gravity penalty factors in this case. While Respondent disputes gravity penalties on factual and equitable grounds, it appears that Complainant has applied the very principles of its CAA penalty policy in a manner that is consistent with the way those principles would be applied to the private sector.

sector, taking into consideration the factual differences that exist between the private and federal sectors. Complainant has failed to do so. .

3. EPA's application of the "size of violator" factor violates the Constitution by interfering with the balance of power between the executive and legislative branches.

A size-of-violator penalties as applied to Respondent in this case is simply a surcharge. By encouraging the practice of imposing penalties for the economic-based "size of violator" factor on Federal facilities, EPA promotes a practice of greatly multiplying penalties far beyond deterrence. This approach can inflict needless damage to Federal agency missions. Complainant has presented no rationale to justify this level of EPA interference with congressionally authorized missions.

Complainant's actions in this case interfere with the constitutional balance of power between Legislative and Executive branches. EPA's application of the "size of violator" factor to federal facilities runs roughshod over statutory and constitutional attributes of federal facilities as it attempts to treat federal agencies "just like" big business by changing the core principles that would lend legal legitimacy to its approach. The essential differences between the private and federal sectors require EPA to strike a delicate balance when bringing an enforcement action against a federal facility. On one side of the scale, Congress has given EPA enforcement tools, including penalty authority, to get the attention of the alleged violator and achieve compliance. In the context of federal facilities, this means that Congress has authorized the use of punitive penalties as an "attention getter" where it is necessary. On the other end of the scale, however, overloading a federal facility with a large penalty inherently interferes with some aspect

of a Congressional mission that the President has attempted to manage within the funds allocated by Congress. Achieving this balance requires EPA to approach the federal facility enforcement with tools that are carefully tailored for that purpose. In contrast, to adopt a philosophy that treats federal facilities "just like" private industry as well as the procedures that ignore fundamental differences between the two sectors, allows unauthorized intrusion into the funds Congress entrusts to agencies for their missions. There is ample reason to conclude that Complainant cannot justify its enforcement "ends" by using the "means" it has applied in this case.

4. EPA's interpretation and application of CAA §113(e) and CAA §118(a) conflict with federal fiscal law.

The mandatory fiscal law processes are rooted in Art. I, §8 and Art. I, §9 of the U.S. Constitution.³⁶ Federal laws, such as the Antideficiency Act ("ADA") impose severe criminal and administrative sanctions for expenditure of unappropriated funds and for the unlawful use or diversion of appropriated funds. *See* 31 U.S.C. §§1341, 1342, 1350, 1351, and 1511-1519. The ADA prohibits government officer or employee from making or authorizing an expenditure or obligation in excess of the amount available in an appropriation. *Id.* at §1341(a)(1)(A). The ADA also prohibits a federal agency from incurring an obligation in advance of an appropriation unless authorized by law. *Id.* at §1341(a)(1)(B).

³⁶ U.S. Constitution, Art. I, §8 grants Congress the power to "lay and collect Taxes, Duties, Imports, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States...." U.S. Constitution, Art. I, §9 provides that "no Money shall be drawn from the Treasury but in Consequence of an Appropriation made by Law."

The U.S.C. Title 10 and Title 31 restrictions are further defined in lengthy federal agency regulations. *See, e.g.*, DoD Financial Management Regulation 7000.14-R (15 volumes). In addition, the federal "Purpose Statute", 31 U.S.C. §1301(a), provides that "appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." This statute prohibits the use of one appropriation to pay costs associated with the purposes of another appropriation. *Reimbursement of Registration Fees for Fed. Executive Board Training Seminar*, B-245330, 71 Comp. Gen. 120 (1991); *Nonreimbursable Transfer of Admin. Law Judges*, B-221585, 65 Comp. Gen. 635 (1986); *Department of Health and Human Servs.—Detail of Office of Community Servs. Employees*, B-211373, 64 Comp. Gen. 370 (1984).

The Federally mandated processes do not end with Congressional appropriation and authorization. Within the Executive Branch, the funds must be committed, certified as available, and obligated as provided by law. *See e.g.* DoD Financial Management Regulation 7000.14-R, vol 3, ch 15, paras 150202A1, 150202A4, 150203A1.

5. The EPA policies as implemented by Appendix III (Complainant's Exhibit 9) simply do not allow for the proper consideration of "other factors as justice may require."

a. Factual Considerations

Although the Clean Air Act imposes strict liability upon owners and operators who violate the Act,³⁷ it does not impose strict, mechanical determination of penalties. Even GM-22 provides that "although most of the statutes which EPA administers are strict liability statutes, this does not render the violators willfulness and/or negligence irrelevant." Complainant's Exhibit 15, pp. 17-18. However, EPA policy does not

³⁷ *United States v. Dell'Aquila*, 150 F. 3d 329, 47 Env't. Rep. Cas. 1080 (3rd Cir. 1998).

recognize these difference in mitigation; it only considers willfulness/negligence in aggravation.³⁸ The statute is very clear that "other factors as justice may require" should be considered.

Mr. Russell, the person who calculated the proposed penalty in this case, acknowledges that other factors should be considered. Tr. p. 247. However, the proposed penalty fails to acknowledge significant factors. Mr. Russell's understanding of the factor "as justice may require" is "it's integral with those other factors, for example relating to economic benefit." Tr. p. 2:53. Apparently, if the mitigating circumstance is not provided for in the mechanical methodology, Mr. Russell will not consider it. The court should also depart from the EPA penalty policies and the proposed penalty because they lack consideration of mitigating circumstances, *i.e.* they do not really consider other factors as justice may require.

Perhaps the most significant other factor to consider is the real impact of any penalty. The violations are serious, did in fact create a risk to human health and the environment, and punishment is justified. However, who will really be punished, who will suffer by the imposition of a penalty? In reality, the same group of persons victimized by the violations, the soldiers in training, will suffer the consequences of the penalty. The burden of the penalty will not be borne by managers, shareholders or even taxpayers. Instead, the amount of discretionary funding available to Fort Jackson for maintenance and improvements will be reduced. There will be no further consequence, economic or otherwise to Lieutenant Colonel Wall, the executive officer of the unit

³⁸ The penalty policy is guidance. Tr. p. 230. He states the goal is that a penalty policy will endeavor to provide umbrella coverage, but it's conceivable that some things are not covered. Tr. p. 230.

occupying building 5422 or the immediate supervisors of the soldier detail, which removed the tile.³⁹ There will be no consequence to the 1997 leadership at Fort Jackson. The determination of any penalty should be seriously balanced against the reality of who will suffer the consequences. Furthermore, because appropriated funds expire after five years, any monetary penalty adjudged in this case cannot possibly be paid with fiscal year 1997 funds, rather, it will have to be paid with current funds; therefore, as with any set of finite resources, if funds must be spent to satisfy a penalty, then once obligated and deposited into Miscellaneous Receipts of the U.S. Treasury, those funds will no longer be available for any purpose at Fort Jackson, South Carolina, and some other scheduled project or projects will need to be "unfunded."

Justice and fairness require that distinctions must be made among violators. Certainly those violating entities that take responsible actions should receive reduced penalties in mitigation. Mr. Walker acknowledges that EPA would take into consideration rogue actions by subordinate managers. Tr. p. 208. The person considered most culpable or responsible for these violations is Lieutenant Colonel Wall. Serious disciplinary action was taken against him. One might question whether the locally filed letter of admonition was sufficient disciplinary action. However, in light of the fact that he also lost the confidence of the Garrison Commander and was subsequently made the deputy Director of Logistics and Engineering, instead of the Director, the letter of admonition and associated actions clearly ended his military career. Mr. Russell did not take into consideration that a person was severely disciplined. Tr. p. 2:55. The fact that Lieutenant Colonel Wall was disciplined and his military career ended is a significant mitigating factor that should be taken into consideration. This action has a significantly

³⁹ See Tr. 2:127.

greater deterrent effect, one the primary goals of EPA penalty policies, than a budget decrement.

Mr. Russell acknowledges that in considering the notice violation, they would take into consideration the fact that the decision-makers, the Command, was not aware that the project was going to occur, if they had distinct information and knowledge of the circumstance. Tr. 2:43. The record in this case supports the conclusion the Command was not aware of the intention of the unit to remove the floor tile in contravention of Command policy and guidance. This factor should be considered in mitigation of the penalty.

On March 20 and 24, SCDHEC personnel were at the scene of the violations and obviously observed that the material was being wet. Although they gave other advice and suggestions, they never mentioned the requirement to keep the material wet.⁴⁰ Based on Fort Jackson's other responses to SCDHEC's suggestions, Fort Jackson certainly would have acted to keep the material wet. Although this failure by SCDHEC does not relieve Fort Jackson from strict liability, this circumstance should be considered in mitigation in assessing a penalty, at least insofar as additional days of the wetting violation are concerned.

According to EPA's Asbestos Demolition and Renovation Civil Penalty Policy, the best way to prevent future violations of notice and work practice requirements is to ensure that management procedures and training programs are in place. Complainant's Exhibit 9, p. 8. Mr. Russell acknowledges that EPA policy indicates that the way to prevent future violations of notice or work-practice violations is to ensure that management procedures and raining program are in place. Tr. p. 2:51. Correct policies

⁴⁰ Neither did the expert contractor hired on March 21 advise Fort Jackson to keep the material wet.

and guidance were in place. Tr. 2: 118-119, 153-157. Additional resources would not have prevented this violation. Mr. Walker acknowledges that in regard to size of business, the rationale for the goal is (1) to determine what resources are available to identify and assure compliance. To make sure they hired enough people for environmental compliance, to ensure that there is proper management and proper monitoring of the environmental activities or environmental compliance. Tr. p. 198-9. Mr. Walker indicates that whether an entity had dedicated sufficient resources, in an effective and efficient fashion would be a consideration in evaluating either a size of business or other factor. Tr. 199. Mr. Russell was not aware of any such procedures or training and did not give it any consideration. Tr. 2:51-52. A violator who had preventive procedures in place should be given favorable consideration as compared to a violator, which had no such procedures in place.

Mr. Russell states he adjusted the penalty amount based on the degree of cooperation. Tr. 2:22. A 25% reduction was given based on prompt correction and cooperation during the filing period. Tr. pp. 2:23-24. However, the full possible 30% was not given because Fort Jackson did not self-report the violations. Tr. p. 2:24, 52. The Environmental Management Office intended to report the violations to SCDHEC once it had received the expedited results of the samples taken.⁴¹ Tr. 2: 146. However, an anonymous caller contacted SCDHEC first and the opportunity to self-report was thus overcome by events. Although the anonymous caller won the race to make the report, Fort Jackson's actions in preparation to self-report should be considered in mitigation.

⁴¹ Discovery of a possible violation by the EMO always creates a dilemma. If you report a suspected violation before verification the regulator is nevertheless likely to issue a Notice of Violation and require you to disprove your report. If you wait until you have verified, you risk losing the race.

For the three work-practices violations, Mr. Russell followed the chart on the last page of Appendix III (Complainant's Exhibit 9, p. 17). Tr. 2:12. For purposes of applying the chart, he used 5,600 square feet as the size of the project, resulting in 35 units. Tr. pp. 2:12-13. Mr. Russell did not take into consideration that all of the tiles was not asbestos-containing material. Tr. pp. 2:46. He stated that once the material is mixed in, Mr. Russell states there is no practical way to effectively say a certain portion is asbestos-containing and another portion is not. Tr. p. 2:14. This assertion is in apparent conflict with Appendix III, which indicates ways to make such a determination. Complainant's Exhibit 9, p. 3. Mr. Russell essentially acknowledges that the commingling of asbestos-containing material and non-asbestos-containing material does not result in an increase in the number of potential asbestos fibers.⁴² Tr. p. 2:49. Despite the fact the evidence that the tile was asbestos-containing is the representation by Fort Jackson that 25-50% of the material was asbestos-containing, and that the Complainant has the burden of proof, it does appear that this fact was properly considered by Mr. Russell. (Tr. p. 2:49-51). Therefore, the determination of the quantity of asbestos-containing material should be limited to 25% of the total, *i.e.* 1,400 square feet.

b. Procedural Considerations

The Respondent's good faith assertion of inability to pay a punitive fine to SCDHEC, grounded upon reliance in the DoJ position of the waiver of sovereign immunity under the CAA also constitutes an "other factor," within the meaning of the CAA §113(e)(1), 42 U.S.C. §7413(e)(1), that should be considered in determining an

⁴² Of course, the commingled material had to all be handled as if RACM, but there was no increase in risk of harm. As for the mastic, there is no evidence it was friable.

appropriate disposition of the subject case. "But for" the Respondent's refusal to pay a fine to SCDHEC back in 1997, this case would never have been referred by SCDHEC to the Complainant. In terms of the other major issue in controversy in this litigation, the appropriateness of applying the "size of business" penalty factor, it is worth noting that a smart business entity would have paid the relatively minor fine levied by SCDHEC and moved on, but because the Respondent is not a business, that option was simply not available. Respondent was not being recalcitrant, rather, the Command at Fort Jackson was stuck with both legal and policy requirements over which they had no control.

The clear meaning of language in CAA §113(d)(1), 42 U.S.C. §1743(e)(1), evidences Congressional intent that Respondent is statutorily precluded from seeking judicial review of the EPA Administrator and Attorney General's joint determination of appropriateness to proceed with an Administrative Complaint, although there is no prohibition against challenging whether all the necessary procedural steps were taken, as discussed in Respondent's motion to dismiss for failure to establish a *prima facie* case. — Further, there is no prohibition against highlighting the unusual referral process in this case. Specifically, attention is directed to an EPA guidance document admitted as Complainant's Exhibit 13, *Guidance on Implementation of EPA's Penalty/Compliance Order Authority Against Federal Agencies Under the Clean Air Act (CAA)*, dated October 9, 1998. Note that at Section VI, Penalties, includes the following guidance:

Federal agencies are liable for EPA-assessed CAA civil administrative penalties just like any other person. n10 If violations occurred prior to July 16, 1997 and are ongoing, EPA could assess penalties from July 16, 1997 until correction of the violation. Moreover, EPA can require correction of and, in some cases, may seek penalties for violations that occurred prior to July 16, 1997. If a Region believes that seeking penalties for violations occurring prior to July 16, 1997 is warranted, the Region should submit a justification to the Director of Federal Facilities Enforcement Office.

n10 This policy does not intend to require any conduct contrary to the Anti-Deficiency Act. Reference to July 16, 1997 is directly related to a legal opinion issued by DoJ's Office of Legal Counsel, opining that EPA is authorized to assess civil penalties against Federal agencies under the CAA §§113(d), 205(c), and 211(d). This DoJ opinion was admitted as Complainant's Exhibit 12, *Administrative Assessment of Civil Penalties Against Federal Facilities Under the Clean Air Act*. The DoJ opinion concludes that the EPA may seek to impose administrative civil penalties against federal facilities; however, the opinion does not address State enforcement authority, and as demonstrated through the cases previously discussed and cited in Appendix B, it remains the official position of the United States, as represented by DoJ, that the waiver of sovereign immunity under the CAA does not authorize States to impose punitive penalties against federal facilities, or stated conversely, does not authorize federal facilities to pay punitive fines to States.

Note also that both Complainant's exhibits 12 and 13 were issued after the violations occurred in this case (March 1997). At a minimum, the excerpted discussion in EPA's October 1998 guidance suggests a need for heightened scrutiny before proceeding with a case that predates the DoJ opinion, implying that only in an extraordinary circumstance should a Region even consider the exercise of jurisdiction for a case arising before July 16, 1997. Without belaboring the point, it also seems apparent that there are some due process concerns implicated by applying the DoJ opinion and EPA policy guidance to this case in an *ex post facto* manner, especially given that the record fails to establish any prior enforcement interest by the Complainant with regard to this relatively mundane case.

Therefore, although statutorily prohibited from seeking judicial review of the precise reasons for the referral in this case, Respondent respectfully submits that the unorthodox referral process, without any established regulatory procedures, is yet another "other factor," within the meaning of the CAA §113(e)(1), 42 U.S.C. §7413(e)(1), that should be considered in determining a just final disposition. Consider that the same Department of Justice which rendered opinions and pleadings precluding the Respondent from paying even a minimal fine to the State of South Carolina also authorized the Complainant to proceed in bringing this Complaint (with its grossly inflated penalty proposal). Furthermore, consider footnote 10 of Complainant's Exhibit 13, suggesting yet another reason the Respondent could not pay a punitive fine to SCDHEC, i.e., rendering payment in contravention of a well established legal position of DoJ could have been construed as a violation of the Anti-Deficiency Act, 31 U.S.C. §1341.

In fairness to Complainant, Respondent respectfully avers that the issues of sovereign immunity and laches may have been noted in the briefing materials that went forward to EPA's Federal Facilities Enforcement Office (FFEO) and the Acting Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice.

[Respondent is not privy to the "enforcement sensitive memorandum" referenced in Complainant's Exhibit 6, *Request for Waiver to Take Administrative Enforcement Pursuant to 42 U.S.C. §7413(d)(1) (Fort Jackson Army Training Center)*.] Nevertheless, given the overall context of what has transpired over the past six years, it simply is not fair for EPA to bring an extraordinary action such as this, given the detrimental reliance of the Respondent on DoJ's legal position *vis a vis* the CAA waiver of sovereign immunity.

Respondent is not without fault in this matter, violations did occur, but they were addressed in a timely manner, now more than six years ago. Respondent respectfully requests consideration of whether the fine proposed by Complainant is consistent with EPA's stated objective to treat federal facilities the same as private parties. In light of the "other factors" highlighted in this submission, Respondent urges that if a penalty is deemed appropriate at all, the amount should be more in line with the penalty originally proposed by SCDHEC before the case was referred to Complainant.

IV.

Proposed Penalty Calculations

A. Respondent's Proposed Penalty Calculation Using Statutory Criteria and Departure From EPA Penalty Policies

The Respondent proposes a nominal penalty of \$5,000. Since the penalty will only penalize the same group that was harmed by the violations, it should be nominal. The imposition of the penalty will not affect or penalize any of the individuals responsible for the violation. The deterrent effect will be the same whether the penalty is \$5,000 or \$85,500; in either case, the violations have been brought to the highest attention of the United States Army.

B. Respondent's Proposed Penalty Calculation Using Appendix III Methodology

A. Gravity Component

$$\begin{aligned} &1,400 \text{ square feet of RACM (5,6000 x 25\%)} \\ &\quad / 160 \text{ square feet RACM} \\ &= 8.75 \text{ units} \end{aligned}$$

1. Initial Gravity Component

Violation of § 61.145(a) – Failure to thoroughly inspect prior to commencement of renovation activity.

8.75 units	\$ 5,000
Inflation (10%)	<u>500</u>
Total	\$ 5,500

Violation of § 61.145(b)(3)(i) – Failure to provide written notice of intent to demolish or renovate.

8.75 units	\$ 5,000
Inflation (10%)	<u>500</u>
Total	\$ 5,500

Violation of § 61.145(c)(8) – Failure to use properly trained on-site personnel.

8.75 units	\$ 5,000
On additional day of violation	500
Inflation (10%)	<u>550</u>
Total	\$ 6,050

Violation of § 61.145(c)(6)(i) – Maintain adequately wet until disposed of.

8.75 units	\$ 5,000
One additional day of violation	500
Inflation (10%)	<u>550</u>
Total	\$ 6,050

Sum of penalties \$23,100

2. Size of Violator 0

3. Total Gravity Component \$23,100

B. Avoided Cost Component	0
C. Preliminary Deterrence Amount	\$23,100
D. Adjustment to Gravity Component	
Degree of Cooperation 30%	<u>- 6,930</u>
Final adjusted Penalty Amount	<u>\$16,170</u>

V.

PRAYER FOR RELIEF

1. Respondent respectfully requests favorable action upon its Motion to Dismiss for failure to establish a *prima facie* case.

2. Alternatively, in the event that Respondent's Motion to Dismiss is denied, Respondent requests favorable consideration of its argument to deviate completely from the penalty criteria urged by the Complainant, enabling the Court to fashion a penalty that is consistent with the requirements of justice, taking the following mitigating factors into account:

a. The Respondent cooperated with regulatory officials of the South Carolina Department of Health and Environmental Control (SCDHEC), and corrected all violations in a matter of days.

b. The Respondent cooperated with Complainant, respecting demands upon the EPA's enforcement system, by entering into a Stipulation of Fact that eliminated the need to conduct an extensive hearing with regard to liability issues, and instead allowed the Presiding Officer to focus attention on the issue of how to fashion an appropriate penalty, i.e., the civil administrative equivalent of a guilty plea.

c. Given that six years have passed since the occurrence of the violations at issue, and those soldiers who committed the substantive violations, as well as those leaders responsible for command oversight have all long since departed Fort Jackson for other military assignments, or in some instances have retired, the equitable

doctrine of laches should be applied to temper the harshness of any penalty adjudged, thereby minimizing the negative impact upon the innocent soldiers, leaders, family members, and others within the Fort Jackson military community who will be left to suffer the consequences, i.e., cancellation of some other worthwhile quality of life project(s), depending on the size of any monetary penalty adjudged.

d. More specifically, if a monetary penalty is to be adjudged as part of the resolution of this case, Respondent respectfully requests that however the gravity portion is computed, it should not be further inflated by applying an arbitrary size-of-business or size-of-violator penalty factor.

e. Factor into the equation some sort of discount, based upon the peculiarities of this case, i.e., "other factors as justice may require," recognizing that "but for" its adherence to the legal interpretation of the Department of Justice that the waiver of sovereign immunity under the Clean Air Act does not authorize the payment of fines by Federal facilities to States; otherwise, Respondent would have gladly paid a relatively modest fine to the State of South Carolina and this case would never have been referred to Complainant by SCDHEC—i.e., fashion a modest penalty that will treat Respondent the same as other violators in the regulated community in South Carolina.

f. Factor into the equation some sort of discount, based upon the peculiarities of this case, i.e., "other factors as justice may require," recognizing that the manner in which this case was referred is unusual and constitutes an *ex post facto* application of the EPA's enforcement policy as specified in Complainant's Exhibit 13, the

Herman memorandum, dated October 9, 1998, and thus a finding of liability with assessment of no penalty, or perhaps only a modest penalty, being appropriate in light of all the facts and circumstances.

g. Factor into the equation the fact that the Commanding General at Fort Jackson took the initiative to institute an adverse administrative personnel action against Lieutenant Colonel Kevin Wall, determined to be the responsible command official, in the form of a Letter of Admonition, an action that ultimately led to a somewhat premature ending to Lieutenant Colonel Wall's career, since he opted to retire after being assigned to positions of less responsibility.

h. Finally, consider, and factor into any penalty calculation, the equitable consideration that it simply is fundamentally unfair to punish the Respondent six years after the occurrence of the violations, given that the substantive violations were all corrected within a matter of days.

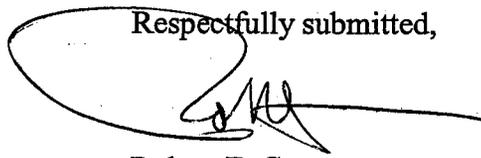
3. Respondent respectfully requests that the Presiding Officer reject the penalty criteria, as well as the grossly inflated penalty calculation, proposed by Complainant, and instead use "Respondent's Proposed Penalty Calculation Using Statutory Criteria and Departure From EPA Penalty Policies," or the modified Appendix III penalty calculation, included herein, "Respondent's Proposed Penalty Calculation Using Appendix III Methodology," as the starting point for any monetary penalty to be adjudged, and then apply further equitable credits to decrease the amount of the penalty consistent with the requirements of justice and the mitigating factors discussed above.

4. In advocating a specific penalty calculation methodology, Respondent is not conceding that imposition of a monetary penalty is necessarily appropriate in this case, rather, if the Presiding Officer concludes that a monetary penalty should be adjudged, then Respondent urges a more judicial approach to fashioning an appropriate penalty; however, understand that Respondent contends that the needs of justice could be met through a finding of liability coupled with a finding that under the facts and circumstances of this case, no monetary penalty is necessary or appropriate—i.e., Respondent was adequately punished six years ago when it expended the necessary funds to correct the violations in a timely manner, paying for emergency contract support and laboratory analysis estimated to have cost the command approximately \$30,000.00.

5. Respondent appreciates the time and effort expended by the Presiding Officer in conducting the hearing and considering the issues in dispute, and is confident that the Presiding Officer will do his best to balance the needs of justice in reaching an appropriate resolution of this case.

April 23, 2003

Respectfully submitted,



Robert F. Gay
Attorney-Advisor
U.S. Army Training Center and Fort Jackson



Michael C. Bobrick
Major, U.S. Army, Judge Advocate
Co-counsel for Respondent

No. 03-10570-II

In the United States Court of Appeals for the Eleventh Circuit

CITY OF JACKSONVILLE,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF THE NAVY,

Defendant-Appellant.

On Certification from the United States District Court
for the Middle District of Florida

BRIEF OF APPELLANT

OF COUNSEL:

ROBERT SMITH
U.S. Department of the Navy
Office of the General Counsel
Washington Navy Yard, D.C.

THOMAS L. SANSONETTI
Assistant Attorney General
JEFFREY BOSSERT CLARK
Deputy Assistant Attorney General
ELLEN DURKEE
PAMELA TONGLAO
KATHRYN E. KOVACS
U.S. Department of Justice
Environment & Natural Resources
Division, Appellate Section
P.O. Box 23795 L'Enfant Plaza Sta.
Washington, D.C. 20026
(202) 514-4010

later-enacted statute controls, here the 1996 amendment to the federal removal statute. See Tug Allie-B, Inc. v. U.S., 273 F.3d 936, 941 (11th Cir. 2001) (“more recent or specific statutes should prevail over older or more general ones”).

Therefore, the United States properly removed this case to federal court under the federal removal statute. Section 304(e) of the CAA does not preempt the unambiguous language of that provision. In the interests of federal supremacy, federal-state comity, and uniformity of decisions, this case, and in particular the sovereign immunity defense, should be heard in a federal court.

II. The CAA does not waive the United States’ sovereign immunity from the payment of civil penalties for violations of state and local air pollution control laws.

The United States is immune from suit, except insofar as it consents to be sued. Lehman v. Nakshian, 453 U.S. 156, 160 (1981); Means v. United States, 176 F.3d 1376, 1378 (11th Cir. 1999). Absent a waiver of sovereign immunity, the courts lack subject matter jurisdiction to entertain a suit against the United States. Bennett v. United States, 102 F.3d 486, 488 n.1 (11th Cir. 1996). The plaintiff bears the burden of proving that the government has waived its immunity. Holloman v. Watt, 708 F.2d 1399, 1401 (9th Cir. 1983), cert. denied, 466 U.S. 958 (1984); Cole v. United States, 657 F.2d 107, 109 (7th Cir.), cert. denied, 454 U.S. 1083 (1981).