

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

2003 MAY - 7 PM 2: 57

RECEIVED
EPA REGION IV

HEARING CLERK

IN THE MATTER OF:)
)
)
U.S. ARMY TRAINING CENTER)
AND FORT JACKSON)
)
Respondent)
_____)

Docket No. CAA-04-2001-1502

Administrative Penalty
Under Clean Air Act,
Section 113(d)

COMPLAINANT'S REPLY BRIEF

6

TABLE OF CONTENTS

I. THE ADMINISTRATOR'S SECTION 113(D) AUTHORITY WAS PROPERLY DELEGATED 1

II. THE STATUTORY FACTOR "ECONOMIC IMPACT OF THE PENALTY ON THE BUSINESS" MUST BE CONSIDERED IN ASSESSING THE PENALTY 8

III. RESPONDENT'S UNSUCCESSFUL NEGOTIATIONS WITH THE STATE SHOULD NOT BE CONSIDERED IN ASSESSING THE PENALTY 9

IV. RESPONDENT WAS NOT TREATED IN A DISCRIMINATORY MANNER IN ASSESSING THE PROPOSED PENALTY 14

V. COMPLAINANT PROPERLY CONSIDERED "OTHER FACTORS AS JUSTICE MAY REQUIRE" IN DETERMINING THE PROPOSED PENALTY 18

VI. RESPONDENT'S ATTEMPTS TO DEFLECT RESPONSIBILITY FOR THE VIOLATIONS DEMONSTRATE THAT A SIGNIFICANT PENALTY IS REQUIRED TO DETER FUTURE VIOLATIONS 20

Attachment A EPA Filings in *Julie's Limousine Case*

Attachment B Delegation Transmittal Memoranda

Attachment C Respondent's Improper References to State Penalty Negotiations

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

HEARING CLERK

2003 MAY -7 PM 2:57

RECEIVED
EPA REGION IV

IN THE MATTER OF:) Docket No. CAA-04-2001-1502
)
)
)
U.S. ARMY TRAINING CENTER) Administrative Penalty
AND FORT JACKSON) Under Clean Air Act,
) Section 113(d)
)
)
Respondent)
_____)

COMPLAINANT'S REPLY BRIEF

In accordance with the schedule set forth at the end of the hearing in this matter, Complaint hereby submits Complainant's Reply Brief.

I. The Administrator's Section 113(d) Authority was Properly Delegated

Section 113(d)(1) of the Clean Air Act (CAA or the Act), 42 U.S.C. § 7413(d)(1), requires that the EPA Administrator and the Attorney General determine the appropriateness of on any Section 113(d) penalty action involving violations greater than one year old. It was stipulated at hearing that the Attorney General had properly concurred on the appropriateness in this matter. See Stipulation 45¹. In its brief, Respondent continues to challenge whether the EPA Administrator properly delegated its Section 113(d)(1) authority to make that determination.

At hearing and in the February 27, 2003, Supplemental Filing, Complainant presented appropriate evidence that the Administrator properly delegated its Section 113(d)(1) authority to determine appropriateness and that the authority was properly exercised in this matter. No

¹ Stipulations were entered into the record at the commencement of the hearing in this case on February 20, 2003. In its Initial Brief, Complainant incorrectly referred to Stipulation 45 as reflecting the Attorney General concurrence. The proper reference is to Stipulation 46. In addition, Complainant incorrectly stated in its Initial Brief that Complainant's Exhibit 5, which references the Attorney General concurrence, was admitted into evidence.

further evidence is necessary to document that delegation or exercise of authority. However, attached to this brief, Complainant also presents additional information which confirms that the Section 113(d)(1) authority was properly delegated.

A. Evidence in the Record Establishes that the Section 113(d)(1) Authority was
Properly Delegated and Exercised

Complainant has already presented evidence documenting that the Administrator's Section 113(d)(1) authority to determine penalty appropriateness was properly delegated. In the Supplemental Filing, Complainant presented a copy of Delegation 7-6-A, dated August 4, 1994. This delegation, from EPA's Delegation Manual, documents the delegation of the Administrator's Section 113(d)(1) concurrence authority. See Delegation 7-6-A, paragraph 1.b. This delegation delegates that authority from the Administrator to the Regional Administrators and to the Assistant Administrator for Enforcement and Compliance Assurance (OECA AA). See Delegation 7-6-A, paragraph 2. In addition, the Supplemental Filing presented a copy of the June 6, 1994, redelegation from the Assistant Administrator for OECA. In that redelegation, for federal facilities cases, the OECA AA redelegated its authorities under Delegation 7-6-A to the Director of the Federal Facilities Enforcement Office (FFEO). In the Supplemental Filing, these delegations were presented in a declaration by Elliott Gilberg, Associate Director of FFEO. In that declaration, Mr. Gilberg explained that these were the applicable delegation of the Section 113(d)(1) concurrence authority from the Administrator and redelegation of that authority from the OECA AA.

B. Respondent Misreads any "Limitation" in Delegation 7-6-A

In its Brief, Respondent asserts that paragraph 3.e of Delegation 7-6-A requires OECA AA concurrence on Section 113(d)(1) determinations and that "...nowhere in the documents presently before the Court has there been any showing of concurrence of the Assistant Administrator for Enforcement and Compliance Assurance (Mr. Herman)". (Respondent's Post-Hearing Brief at 18). Respondent's reading is a nonsensical one that simply ignores the unambiguous language of Delegation 7-6-A as well as the redelegation of authorities to FFEO. Respondent's interpretation should therefore be rejected.

Paragraph 1.b of Delegation 7-6-A delegates the Section 113(d)(1) appropriateness determination authority to the OECA AA and to the Regional Administrators. The paragraph 3.e limitation provides that the OECA AA must concur on the authority delegated under Paragraph 1.b. However, Paragraph 4 of Delegation 7-6-A provides that the OECA AA may redelegate its authorities under Delegation 7-6-A, including paragraph 1.b, to the Division Director level. As indicated in the Supplemental Filing, the OECA AA has in fact redelegated its authorities to FFEO, which is an office located within OECA and for purposes of this delegation is treated as a division. Therefore, when OECA AA concurrence is necessary, that concurrence authority can be expressed by FFEO. As discussed above, FFEO expressed that concurrence in this matter. Complainant's Exhibit 6.

Respondent asserts that the paragraph 3.e. limitation renders the Section 113(d)(1) authority nondelegable below the OECA AA level. (Respondent's Post-hearing Brief at 19). By suggesting that result, Respondent completely ignores the express and unambiguous language in Paragraph 4 of Delegation 7-6-A, which provides that the Section 113(d)(1) authority is

delegable. If Respondent suggests that OECA AA concurrence is still necessary even when the FFEO Division Director exercises the redelegated Section 113(d)(1) authority, then Respondent is suggesting an absurd result: the language allowing redelegation will have been rendered meaningless. Respondent's position does not represent a reasonable reading of Delegation 7-6-A.

C. The Record Reflects a Section 113(d)(1) Determination by Complainant

Respondent apparently asserts that Complainant failed to make any determination under Section 113(d)(1) that penalties are appropriate in this matter. (Respondent's Post-Hearing Brief at 18). The record is clear, however, that Region 4 in fact made and evidenced such determination. In coming to its conclusion, Respondent simply ignores the record in this matter.

Complainant's Exhibit 6 is a letter from FFEO to DOJ concurring on a Region 4 determination that a Section 113(d) penalty is appropriate. That the necessary determination was made by Region 4 was confirmed by Mr. Walker's testimony. (T. 190). Based on this document and that testimony, it is clear that Complainant made the appropriateness determination required by Section 113(d). Respondent has presented no evidence to rebut this showing.

With respect to any penalty appropriateness determination, Section 113(d)(1) provides that "such determination by the Administrator and the Attorney General shall not be subject to judicial review." 42 U.S.C. § 7413(d)(1). The Environmental Appeals Board (EAB) recognizes that this provision only allows a tribunal to conduct a very narrow review of Section 113(d)(1) determinations to determine if jurisdictional requirements have been met. Assuming that a waiver is legally available, a reviewing tribunal is not allowed to substitute its judgment for that

of Complainant and determine whether or not a waiver should be granted in a particular case. IN RE: *Lyon County Landfill*, 8 E.A.D. 559, 567-568 (EAB 1999).

Consistent with this narrow scope of review under Section 113(d)(1), Complainant's Exhibit 6, along with Mr. Walker's testimony, provides adequate evidence that the jurisdictional appropriateness determination had been made. Inclusion of the underlying appropriateness request by the Region to Headquarters and DOJ would not provide further information as to whether the jurisdictional requirements (i.e., concurrence by HQ and DOJ) were met. Rather, the substantive discussion of the case included in the underlying request would only be relevant to the merits of the case and whether a Section 113(d)(1) waiver, otherwise legally available, should be granted. Under *Lyon County Landfill*, such substantive review is prohibited.

II. The Statutory Factor "Economic Impact of the Penalty on the Business" Must be Considered in Assessing the Penalty

For the first time in this matter, Respondent now argues that the CAA Section 113(e)(1) statutory penalty factor related to "the economic impact of the penalty on the business" can not be considered in assessing the penalty. (Respondent's Post-Hearing Brief at 27). For the same reasons discussed in Complainant's Initial Brief with respect to the "size of business" factor, Respondent's argument should be rejected. The factor is legally applicable - how it is applied in a particular case depends on the facts and circumstances of the case.

At hearing, Respondent's witness Nahrwold testified that payment of a penalty could impact sustainment, restoration and modernization activities at Fort Jackson. (T2. 130). In light of Respondent's Post-Hearing Brief, it appears that Respondent is abandoning any argument that penalty payment would have an economic impact on Fort Jackson. See Respondent's Post-

Hearing Brief at 27. However, Respondent apparently still wants the impact of a penalty to be considered under "other factors as justice may require." ("... some other scheduled project or projects will need to be 'unfunded.'"); (Respondent's Post-Hearing Brief at 66); ("The soldiers will still be trained, albeit in less comfortable and safe conditions."); (Respondent's Post-Hearing Brief at 49); "Instead, the amount of discretionary funding available to Fort Jackson for maintenance and improvements will be reduced." (Respondent's Post-Hearing Brief at 65). In its Initial Brief, at pages 47-50, Complainant addressed the issue of economic impact and demonstrated why Respondent had failed to establish any such impact. For the reasons set forth in Complainant's Initial Brief, any argument that penalty payment will have a negative impact on the base, regardless of which statutory factor is considered, should be rejected.

III. Respondent's Unsuccessful Negotiations with the State should not be Considered in Assessing the Penalty

In its Post-Hearing Brief, Respondent argues that consideration should be given to its unsuccessful attempts to settle with the State. (Respondent's Post-Hearing Brief at 69).

As a legal matter, Those negotiations are irrelevant to this proceeding and merit no consideration. The exclusion at hearing of settlement documents was therefore proper. Consistent with that ruling, all references in Respondent's Post-Hearing Brief to the amount of settlement being discussed with the State should be stricken.

A. The State Negotiations are Legally Irrelevant to Penalty Assessment

As addressed in Complainant's Initial Brief, the EAB has ruled that it is improper to consider other enforcement actions when assessing a penalty. Recently, the EAB summarized three reasons for this view. First, different environmental statutes have different penalty factors

examined, as well as subjective criteria such as the decisionmaking process and deliberations of State enforcement personnel.

Finally, there is simply no obligation to limit federally-imposed penalties to those which a State might settle upon. If there is no right to expect equal penalties between violations of a single statute, there certainly is no right to expect equality of penalties when different statutes and agencies are involved.

Consideration of the unsuccessful state negotiation stands the dual state-federal enforcement role on its head. EPA's ability to seek a penalty would be dependent on whether a State attempted enforcement and what a State might seek as relief in enforcement. As in this case, problems particular to negotiation with a State would become imputed to EPA. In this case, Respondent asserts it was unable to settle with the State due to sovereign immunity issues. Those issues are not relevant to EPA because the same sovereign immunity issue does not exist with respect to actions by EPA. Nevertheless, Respondent would have those issues considered.

B. Complainant's Proposed Exhibits Addressing State Settlement Negotiations were Properly Excluded from Evidence

At hearing, Presiding Officer excluded from evidence several of Respondent's proposed documents relating to the unsuccessful negotiations between the Respondent and the State. (T2. 168, 172). Those documents included, among other things, proposed settlement amounts, proposed consent agreements, and correspondence arguing the respective positions of the parties. For the reasons described above, each of those documents was properly excluded under the 40 C.F.R. § 22.22(a).

C. References in Respondent's Brief to the Details of the State Negotiation and the Amount of the Penalty Sought by the State Should be Stricken from the Brief

Despite the proper exclusion by the Presiding Officer of Respondent's negotiation-related documents, Respondent has attempted to circumvent that ruling by repeatedly referring in its Post-Hearing Brief to the details of its negotiation with the State, including the documents excluded from evidence, and the relative size of the penalty sought by the State. Because those documents and the amount involved in the unsuccessful State negotiations was inadmissible, none of those documents or statements in Respondent's Post-Hearing Brief are supported by testimony in the record. Every reference to the details of the negotiation and the amount of the State penalty should be stricken from Respondent's Post-Hearing Brief. In order to address this issue while at the same time prevent undue contamination of the record, Attachment C to this brief lists in of the improper references identified by Complainant.

IV. Respondent was not Treated in a Discriminatory Manner in Assessing the Proposed Penalty

A. The General Penalty Policy is not a Rule

In its Post-Hearing Brief, Respondent asserts that EPA's policies violate Section 118(a) of the Act by failing to treat federal agency respondents exactly the same under the General Penalty Policy as private respondents. (Respondent's Post-Hearing Brief at 56-57). Respondent then argues that the asset/net-worth base approach to the "size of business" penalty factor must be strictly applied to a federal agency respondent, which must be valued at \$0. (Respondent's Post-Hearing Brief at 58-59, 61-62). In making these arguments, Respondent is insisting that the General Penalty Policy be treated as a rule.

The General Penalty Policy is not a rule. In this case, Complainant did not use the concept of assets or net worth in applying the size of violator factor because that concept is difficult to directly apply to this federal agency respondent. Rather, Complainant relied on Respondent's budget. (T. 182; T2. 20). Complainant believes that budget serves as a reasonable measure of the resources, sophistication and experience available to Respondent.

Despite claiming that the General Penalty Policy must be strictly applied, Respondent also makes the diametrically opposed assertion: "CAA §118 is not an open invitation 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." (Respondent's Post-Hearing Brief at 61) (emphasis added). By relying on budget rather than assets/net worth, Complainant has tried to apply the framework of its General Penalty Policy to the greatest extent possible while at the same time recognizing the differences between federal facilities and private respondents. Complainant submits that in doing so, it has implemented Section 118(a), Section 113(e), and the General Penalty Policy in a reasonable manner based on the facts of this case.

B. EPA's Policies do not Assume a Doubling of Penalties

In an apparent attempt to show that EPA improperly treats federal agencies differently from private respondents, Respondent suggests that EPA policy requires all fines for federal agencies to be doubled. (Respondent's Post-Hearing Brief at 60). Respondent apparently is referring to Complainant's Exhibit 13 and to the "50% rule" under the General Penalty Policy (Cx. 8 at 15). Respondent completely misreads the guidance and fails to understand the effect of the 50% rule.

Complainant's Exhibit 13 does not require the "doubling" of fines. Exhibit 13 provides: "In many instances, Federal agencies would be considered large violators; in these cases, the Regions should apply the 50% formula, under which the size of the violator component, if very large, may be reduced to 50% of the total penalty at the discretion of the Agency." (Cx 13 at 7). Nothing in this guidance assumes or requires the doubling of fines or anything else to be done to federal agencies. Rather, this guidance simply reflects a common situation: federal agencies will often be considered large violators. In this case, Complainant considered Respondent's budget and determined, based on that budget, that Respondent was large enough in size that the 50% rule could be, and in fact was, applied. (T2. 20).

The 50% rule under the General Penalty Policy limits the size of the "size of violator" component and as a result limits the size of the overall penalty. Under a strict application of the sliding scale in the General Penalty Policy, the size of violator component could increase far beyond the other components of the penalty. By applying the discretionary 50% rule, the penalty is actually decreased from what it otherwise could have been, not increased. This limitation is potentially available for federal agency respondents as well as private respondents. Therefore, use of the 50% rule does not indicate any disparate treatment for federal agency respondents.

C. The Anti-Deficiency Act is Available to Respondent

In attempting to show that it is treated differently from private respondents, Respondent argues that it has no access to "ability to pay" arguments generally available to private respondents. (Respondent's Post-Hearing Brief at 58). Respondent conveniently ignores the very statutory provisions which it later addresses in its brief. The Anti-Deficiency Act, 31 U.S.C. § 1341 (ADA), prohibits unfunded expenditures. The ADA can be viewed as the federal agency

V. Complainant Appropriately Considered "Other Factors as Justice may Require" in Determining the Proposed Penalty

At hearing, Mr. Russell testified that he considered the statutory factor "other factors as justice may require" in determining the proposed penalty. He testified that he was unaware of anything meriting a penalty reduction under that factor. In its Post-Hearing Brief, Respondent suggests that several considerations merit a penalty reduction under this statutory factor. As set forth below, Respondent's arguments should be rejected.

A. A Penalty Poses no Adverse Impact to the Base

At hearing, Respondent presented testimony on the impact on the base of paying a penalty. In its Initial Brief, Complainant discussed these facts under the "economic impact" statutory factor. (Complainant's Initial Brief at 47-49). In its Post-Hearing Brief, Respondent seems to suggest that the "impact" should instead be considered under the "other factors as justice may require" statutory factor. (Respondent's Post-Hearing Brief at 65-66).

Regardless of which statutory factor those facts are analyzed under, the result is the same: For the reasons set forth in Complainant's Initial Brief, the speculative and undefined "impact" posed by penalty payment does not merit any type of consideration with respect to penalty, regardless of whether those facts are considered under "economic impact" or "other factors as justice may require" statutory factor.

B. There is Nothing "Extraordinary" about this Case to Merit Penalty Reductions

Finally, although it is not relevant to any issue in this case, this case is simply not as "extraordinary" as Respondent would like to think. (Respondent's Post-Hearing Brief at 20-22).

C. Internal Procedures

Respondent asserts that it had sufficient internal procedures in place to ensure compliance. (Respondent's Post-Hearing Brief 67-68). Obviously, such policies were not sufficient because they did not prevent the violations in this matter.

VI. Respondent's Attempts to Deflect Responsibility for the Violations Demonstrate that a Significant Penalty is Required to Deter Future Violations

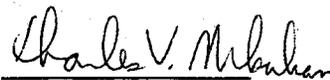
Mr. Walker testified that the primary purpose of the EPA's enforcement program is to deter violations. (T. 163). However, Respondent's Post-Hearing Brief demonstrates that Respondent continues to focus responsibility for the violations on individual service members rather than on Fort Jackson.⁴ With respect to the wetting violation, Respondent even blames its own contractor and the State for length of time over which the wetting violation occurred. (Respondent's Post Hearing Brief at 67). Of course, the Respondent in this matter is Fort Jackson, not individual officers or soldiers, not its contractors, and certainly not the State. See Stipulation 6).

⁴ "There will be no further consequence, economic or otherwise, to Lieutenant Colonel Wall, the executive officer of the unit occupying building 5422 or the immediate supervisors of the soldier detail, which removed the tile. There will be no consequence to the 1997 leadership at Fort Jackson" (Respondent's Post-Hearing Brief at 65-66); "The person most culpable or responsible for these violations is Lieutenant Colonel Wall." (Respondent's Post-Hearing Brief at 66); "The imposition of the penalty will not affect or penalize any of the individuals responsible for the violations." (Respondent's Post-Hearing Brief at 73); "...those soldiers who committed the substantive violations, as well as those leaders responsible for command oversight have all long since departed Fort Jackson..." (Respondent's Post-Hearing Brief at 75).

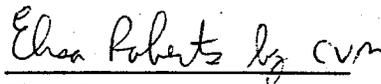
Even worse, Respondent shows disdain for the enforcement process.⁵ Under Respondent's interpretation, no penalty would ever be appropriate against a federal agency respondent.

Congress has decided under the Act that enforcement, including penalties, is appropriate for federal agency respondents. A significant penalty in this matter will help correct this cavalier attitude towards its environmental obligations and will encourage Respondent's future compliance.

Respectfully submitted,



Charles V. Mikalian
Counsel for Complainant



Elisa Roberts
Counsel for Complainant

⁵ "Would an increase in the amount of penalty against a General Electric subsidiary really mean something if the penalty was merely returned to General Electric's corporate coffers? Such a return to the corporate treasury is the result when the EPA imposes a penalty upon a federal agency." (Respondent's Post-Hearing Brief at 31); "It is questionable whether any penalty amount puts a federal facility worse off, since there is no profit or accumulation of assets." (Respondent's Post-Hearing Brief at 36); "...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." (Respondent's Post-Hearing Brief at 44);

CERTIFICATE OF SERVICE

I also certify that on the date below I hand-delivered the original and one copy of the **COMPLAINANT'S REPLY BRIEF** to the Regional Hearing Clerk at the following address:

Regional Hearing Clerk
U.S. EPA Region 4
Atlanta Federal Center
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

I also certify that, on the date below, I sent a copy of the **COMPLAINANT'S REPLY BRIEF** by certified mail, return receipt requested, to the following addresses:

Robert F. Gay
Attorney Advisor
USATC and Fort Jackson
9475 Kershaw Road
Fort Jackson, South Carolina 29207-5600

I also certify that, on the date below, I sent a copy of the **COMPLAINANT'S REPLY BRIEF** by certified mail, return receipt requested, to the Presiding Officer at the following address:

William B. Moran
Administrative Law Judge
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Mail Code 1900L
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460-2001

May 7, 2003
Date

Stacy D Williams

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

IN THE MATTER OF:)
)
U.S. ARMY TRAINING)
CENTER AND FORT JACKSON)
)
Respondent)
)
)
)
)
)

Docket No. CAA-04-2001-1502

RESPONDENT'S POST-HEARING REPLY BRIEF

I. INTRODUCTION

For ease of reference, the numbering of the sections in this Reply Brief corresponds to the numbers of the sections in Complainant's Proposed Finding of Fact and Conclusions of Law and Brief in Support Thereof

II. NOT ALL OF THE COMPLAINANT'S PROPOSED FINDINGS OF FACT ARE SUPPORTED BY THE EVIDENCE .

The evidence does not support some of Complainant's proposed findings of fact. A number of these proposed findings are discussed in this section. However, the failure of the Respondent to address any particular proposed finding does not mean that the Respondent concurs or agrees with the proposed finding.

Proposed Finding 3. The dining facility is merely part of the complex identified as building 5422. In Mr. (Colonel, retired; hereinafter "Colonel") Nahrwold's testimony

presumably in failing to providing clear and accurate guidance, rested with Lieutenant Colonel Wall. Tr. 2: 121.

Proposed Finding 109. The proposed finding is inaccurate as drafted. Although the substance is consistent with paragraph 45 of the Stipulation of Fact, recall that this paragraph was objected to at the hearing. Tr. 14-20. A more accurate finding would be as follows: On December 29, 2000, the Director of the Federal Facilities Enforcement Office, Headquarters, U.S. Environmental Protection Agency, concurred with a determination made by EPA Region IV, that a waiver of the twelve month limitation on EPA's authority to initiate a penalty action is appropriate, and forwarded to the Department of Justice a Request for Waiver to take Administrative Enforcement pursuant to 42 U.S.C. §7413(d)(1) with respect to this matter.³

III. NOT ALL OF COMPLAINANT'S PROPOSED CONCLUSIONS OF LAW ARE SUPPORTED BY PROPER FINDINGS

The supportable findings do not support some of the proposed conclusions of law. Respondent objects to Proposed Conclusion of Law 14 that the penalty proposed by Complainant is reasonable or appropriate. The failure of the Respondent to address any other proposed conclusion does not mean that the Respondent concurs or agrees with the proposed conclusion.

³ Complainant's Exhibit 6 makes reference to an "appropriateness determination" by EPA Region IV; however, there was no evidence presented to document such a determination as having been made by the Regional Administrator. Similarly, as noted in Respondent's Motion to Dismiss, there is no evidence in the Record documenting that an "appropriateness determination" was made by the Assistant Administrator for Enforcement and Compliance Assurance. Note that when Complainant's Exhibit 6 was staffed with the Department of Justice, to obtain DoJ's concurrence in a waiver, there apparently was an Enclosure, "enforcement sensitive memorandum from Region IV, EPA;" however, that document has never been provided to Respondent (nor did Respondent seek it through discovery since by its title it appears to be privileged), and it was never offered as evidence in this proceeding.

IV. CONSIDERATION OF THE SECTION 113(e) "SIZE OF BUSINESS"

CRITERION IS NOT REQUIRED IN ASSESSING THE PENALTY IN THIS CASE

To determine the proper construction of a statutory provision, Complainant correctly points out that the language of the statute itself must be examined and given effect as the intent of Congress; however, Complainant erroneously asserts (Complainant's Brief, p. 13) that the text of Clean Air Act (CAA) § 113(e)(1) expresses an unambiguous intent to apply the size of business factor against a Federal agency. In support of this position, EPA relies on the dictionary definition of "business" and argues that because the definition includes a broad range of activities, federal facilities are not excluded and thus by default included within the definition.

Complainant's argument is fatally flawed for three reasons: First, it fails to give effect to the plain and ordinary meaning of the term "business." Second, it neglects to consider the legislative intent of Congress in choosing the term "business" in coining the phrase "size of business." Third, Complainant, itself, did not contemplate this broad definition in adopting its penalty policy.

Complainant fails to give effect to the plain and ordinary meaning. Absent a definition of a term in a statute, the courts rely on the plain meaning of the words the Congress selected to give expression to its intent. *United States ET AL. v. American Trucking Associations Inc. ET AL.* 310 U.S. 534, 543 (1940). The dictionary definition Complainant relies upon, does not give effect to the plain meaning. The plain meaning contemplated by the Supreme Court of a term is the literal, ordinarily understood meaning of the term. *Id.* at 542. The plain meaning of the term "business" is best

V. THE GENERAL PENALTY POLICY AND ASBESTOS PENALTY POLICY
SHOULD NOT BE USED IN CALCULATING THE PENALTY IN THIS MATTER

The Presiding Officer should depart from the General Penalty Policy (Complainant's Exhibit 8) and Appendix III (Complainant's Exhibit 9). Contrary to the view of Complainant, there are sufficient compelling reasons to depart from the penalty policies. Application of the penalty policies in this case simply will not achieve the goals of the penalty policies. The penalty policies are predicated on assumptions that do not apply to Respondent. Complainant is actually required to depart from its policies to support the proposed penalty. The penalty policies lack sufficient provisions for consideration of mitigating circumstances, allowing for only limited mechanical discretion.

A. EPA Penalty Policies Should Not Be Used in Assessing the Penalty in this Matter

Although insisting in testimony and in its Brief that the penalty policies are not regulations, but mere guidance, Complainant nevertheless stresses that the Environmental Appeals Board will closely scrutinize the Presiding Officer's reasons for not applying the policy to determine if such reasons are compelling. Reliance is placed on EPA rule 22.27(b) to establish this quasi-regulatory effect of the policies.

There are sufficient reasons to depart from the penalty policies. First, rigidly applying the penalty policies in this case will not achieve the goals of the penalty policies.⁶ The imposition of a penalty will not deter subordinates, tenants, contractors, or

⁶ The goals of the penalty policies include (1) deterrence; (2) fair and equitable treatment of the regulated community; and (3) swift resolution of environmental problems. (Complainant's Exhibit 14).

others who may in the future knowingly or unknowingly violate Fort Jackson or higher headquarters policies and guidance. As discussed under the heading "Sovereign Immunity Claim," *infra*, pp. 33-47, the penalty proposed by Complainant is disproportionate to what penalty a nonfederal agency would have paid in this situation. This is clearly contrary to the goal of fair and equitable treatment. A penalty will have no impact on swift resolution.⁷ In this case Respondent acted as quickly as possible; subject to SCDHEC review and approval.

Second, as discussed in Respondent's Brief, pp. 64-73, the penalty policies lack provisions for consideration of any other mitigating circumstances.⁸

Third, in calculating the proposed penalty, Complainant has had to depart from its own policies in applying its size of violator factor. Unable to determine "net worth" for the Respondent, Complainant has inappropriately substituted "budget" as a basis to achieve a 50% surcharge.

B. The Penalty Policies are Predicated on Assumptions That Do Not Apply to Respondent.

The policies provide for determining the size of the violator by measuring its assets or worth. The problem arises in this case because a Federal facility really has no assets in the sense that a non-federal entity owns alienable assets from which it can retain proceeds.⁹ Fort Jackson's only source of funds is the allotments received from higher

⁷ Swift resolution is probably more appropriate in situations where purchase of pollution control equipment or other corrective action is required.

⁸ 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.

⁹ Unless specifically authorized by Congress, receipts from sales, just like any penalty assessed in this case, are deposited into the Treasury as miscellaneous receipts. See 41 C.F.R. Part 101-45 and Chapter 102 for

headquarters that originate from Congressional appropriations. Complainant attempts to deal with this problem by itself departing from the policies and measuring a Federal facility's size by use of its budget. If the budget of the named respondent is not sufficient to justify the 50% surcharge, it attempts to identify and seek to add the budgets of higher headquarters. Tr. 2: 133. This budget ascension itself departs from the penalty policy that only the "net worth" of the entity sued will be used.¹⁰ Furthermore, Complainant would have to stop somewhere before reaching the budget of the owner, the United States, because then the absurdity of imposing a penalty on the United States, the recipient of the penalty, would be obvious.

Notwithstanding Complainant's assertion that EPA considers "other factors as justice may require" (Complainant's Brief at 20), review of the policies and the testimony of Mr. Russell can only raise serious doubt.

As discussed *supra*, p. 3, regarding Proposed finding 79, the assumption that larger facilities are in a better position to identify and manage environmental problems is fallacious. At best this is merely an assumption that should be factually examined in each case.

C. The Asbestos Penalty Policy Addresses the Asbestos NESHAPS Violations in a Mechanical Manner

Both Complainant and Respondent have outlined and summarized the EPA penalty policies with which the Presiding officer is no doubt very familiar. As with any large federal agency, the policies are designed to establish consistency in application

detailed regulations governing the sale and disposal of Government property, including property used by the Department of Defense and the Army.

¹⁰ See Complainant's Exhibit 8, p. 15.

throughout the United States, to establish a bureaucratic pegboard into which each bureaucrat can insert the appropriate pegs and reach an answer. Recognizing that the Clean Air Act Penalty Policy was not suitable for asbestos NESHAP violations, Appendix III was added to address this shortcoming. It provides a very detailed and mechanical pegboard.

D. The Penalty Policies Provide EPA with Only Limited Discretion in Assessing Penalties.

The applicable penalty policies allow for only limited mechanical discretion. Only if the circumstance surrounding the violation fits into one of the permitted variables in Appendix III or the CAA Penalty Policy, is discretion permitted.

Mr. Russell's testimony makes it clear he did not and would not consider circumstances not specifically provided for in the policies. When asked about the other types of considerations, he indicated they were listed in the policy. Tr. 2: 34. 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. The simple reality is the penalty policies severely limit the Complainant's discretion and essentially eliminate "other factors as justice requires."

Mr. Walker acknowledged that discretion is limited to 30%, for cooperativeness. Tr. 198. In addition, deviations are authorized as long as the reasons for the deviation are documented. Complainant's Exhibit 14, p. 1. GM-22 provides that an adjustment in the 0-20% range is within the discretion of the case development team, but that any adjustment of more than 20% "will be subject to scrutiny in any performance audit."

Complainant's Exhibit 15, p. 17. One can only conclude that Mr. Russell or any other EPA employee preparing a proposed penalty amount would very reluctant to exercise any significant discretion.

GM-22 instructs that each medium-specific policy should "allow for adjustment for unanticipated factors which might affect the penalty in each case." Complainant's Exhibit 15, p. 24. However, the Clean Air Act Penalty Policy and Appendix III fall short of this goal.

E. Conclusion

GM-22 acknowledges that assigning a dollar figure is an essentially subjective process. Complainant's Exhibit 15, p. 13. There are sufficient compelling reasons to depart from the penalty policies: (1) application of the penalty policies in this case does not achieve the goals of the penalty policies; (2) the penalty policies are predicated on assumptions that do not apply to Respondent; (3) Complainant itself must depart from its policies to support the proposed penalty; and (4) the penalty policies lack sufficient provisions for consideration of mitigating circumstances, allowing for only limited mechanical discretion.

VI. THE PROPOSED PENALTY IS NOT APPROPRIATE CONSIDERING THE STATUTORY PENALTY CRITERIA, EPA PENALTY POLICIES, AND FACTS AND CIRCUMSTANCES OF THIS CASE

Contrary to the assertions of Complainant, it did not properly consider each of the statutory criteria in determining the proposed penalty in this case. As discussed in Respondent's Brief at pp.65-67, the penalty will not have a deterrent effect upon the type

of conduct (disregard by subordinates for established installation procedures) that resulted in the violations. The calculation of the proposed penalty does not consider all appropriate facts and circumstances of this case.

A. Penalties from Asbestos Penalty Policy

1. Amount of Asbestos Involved in Renovation

According to Appendix III, the amount of asbestos involved in the renovation relates to the potential for environmental harm. Complainant has the burdens of proof of presentation and persuasion. Rule 22.24(a). Complainant relies on the results of tests results provided by Respondent and stipulations of the parties, which are based on those test results. However, Complainant's own expert called into question the results of the underlying tests. Tr. pp. 2: 175-182. There is no evidence in the record to conclusively prove the mastic was friable and thus posed any risk of harm.¹¹

Complainant asserts that the entire square footage of tile removed must be considered as asbestos containing material and implies the Respondent has the burden of proofing the tiles were not asbestos containing. However, this is an element of the offense, and not an affirmative defense; therefore, the burden properly rests with Complainant. Complainant asserts that because asbestos containing and non-asbestos containing tiles were commingled there was an increase in the amount of asbestos. If this proposition were correct, Appendix III would not need to address the issue:

Where the facility has been reduced to rubble prior to the inspection, information on the amount of asbestos can be sought from the notice, the contract for removal or demolition, unsuccessful bidders, depositions of the owners or maintenance or personnel, or from blueprints if available.

¹¹ If walking on non-friable floor tile and/or mastic created a significant risk of harm, it seems that immediate remediation of all such material would be required.

Complainant's Exhibit 9, p. 3. Appendix III clearly recognizes that the amount of asbestos involved does not increase when there is commingling. Assuming there is some validity to the tests,¹² and given the appropriate application of the burden of persuasion, the appropriate finding is that 25% of the tile was asbestos containing material and the correct number of "units" is 8.75.

2. Complainant's Calculation from Asbestos Penalty Policy

Mr. Russell calculated the proposed penalty by mechanically applying the penalty policy based on the facts as presented in the state case file, using the most aggressive assumptions possible. Tr. 2: 39. As discussed above, Respondent submits the use of 5,600 square feet to determine the amount of asbestos is inappropriate. Mr. Russell did not consider the fact the Command neither knew nor authorized the illegal renovation. Certainly if the illegal renovation was accomplished by vandals or trespassers, the Command would not be accountable for prior notification and inspection. Similarly, the fact the improper renovation activity authorized by the battalion executive officer (XO) and his drill sergeants was unauthorized in violation of Fort Jackson requirements and guidance should be taken into consideration in determining the amount of the penalty. Correct policies and guidance were in place and some consideration should be given to Respondent in comparison to a violator making no attempt to comply. Mr. Russell also did not take into consideration that Lieutenant Colonel Wall was administratively disciplined and his military career ended somewhat prematurely as a result of the fallout of this incident. With respect to the continuing "wetting" violation, SCDHEC personnel

¹² Respondent does not mean to suggest that it would be inappropriate to find there are no valid test results and thus no evidence to support a finding that there was any asbestos containing material.

were at the scene and failed to mention the requirement to keep the material wet. Given Respondent's track record in complying with other substantive requests at the time, it is reasonable to assume that wetting would also have been accomplished, if the SCDHEC officials had noted the wetting deficiency.

3. General Considerations – Potential for Harm

Respondent does not contest the seriousness of these violations. In fact, Respondent had policies and procedures in place to ensure compliance and prevent such harm. In large measure, the reason the Commanding General took administrative action against Lieutenant Colonel Wall was due to his outrage at the danger posed to the soldiers assigned to the work detail. Respondent's only objection in this regard is the use of 5,600 square feet as the measure of asbestos. The best evidence of the fact that Respondent took the seriousness of these violations to heart is the cooperative response in doing whatever was necessary to bring the dining facility back into compliance as quickly as possible—cost was never an issue in arranging for an emergency contract to fix the mess created when this unscheduled, self-help project was identified as a serious health and safety issue.

4. General Considerations – Importance to the Regulatory Scheme

Respondent fully understood then, and understands now, the importance of the notification requirements to the regulatory scheme. In fact, Respondent's procedures and guidance were intended to achieve compliance with the notice and work practices requirements. Had the Command known about and authorized the renovation, there would have been compliance with the notice requirements. Interestingly, management

and enforcement of the asbestos NESHAP program has been delegated to the SCDHEC, which in turn establishes its regulations. Certainly SCDEHC anticipates that some operators in South Carolina are going to ignore the rules. Similarly, Fort Jackson will experience subordinates, tenants and trespassers who may chose to ignore or violate Fort Jackson's rules and regulations (unfortunately some with blatant disregard, others because they are ignorant of the requirements). Unlike SCDHEC, Fort Jackson is subject to strict liability. However, in assessing penalties, a distinction should be made between an operator who establishes rules and regulations, trying to be compliant, and one who does not.

5. Consideration of Multi-day Penalties

Fort Jackson has no quarrel with the concept of increasing the amount of a penalty based on the number of days the violation continues. However, with respect to the "wetting" violation, due consideration should be given to the fact SCDHEC enforcement personnel observe the site on more than one occasion, and although offering other advice, never mentioned that the material should be wetted. Granted, this failure is no defense to strict liability, but it seems appropriate for consideration in determining the amount of any adjudged penalty.¹³

¹³ Respondent does not mean to suggest or imply that the SCDHEC personnel intentionally failed to advise Fort Jackson so that the penalty would accumulate, but rather that SCDHEC probably took notes, then went back to the office and went through the regulation to see what violations they could find.

B. Size of Violator Component of the Preliminary Deterrence Amount Should Not Result in a Greater Penalty Amount

1. "Size of Violator" under the Clean Air Act Penalty Policy Does Not Implement the Statutory "Size of Business" Criterion.

To begin with, "size of violator," as developed in the 1984 seminal documents, pre-dates the 1990 Amendments to the Clean Air Act adding the "size of business" criterion. According to Complainant, the goal is to deter violations and a large facility requires a larger penalty to have a deterrent effect.

The policy assumes a larger facility is in a better position to identify and manage environmental compliance. Although it is more likely to have the economic resources to identify the requirements and perhaps be in a better position to procure pollution control equipment (not applicable to asbestos NESHAP compliance), it trades these advantages for other problems, primarily control over large numbers of potentially dispersed and apathetic employees. As discussed in conjunction with Proposed Finding 79, *supra*, p. 3, this assumption is fallacious.

The policy also assumes a larger penalty amount is required to have a deterrent effect, to cause sufficient pain. When the violator is motivated by economic considerations such as profits this makes sense. But Federal agencies are not so motivated and the amount of penalty is merely returned to the U.S. Treasury as a miscellaneous receipt. Does it really make a difference to Federal agency managers if their budget is decremented by twice as much? Will the managers' employments be terminated? Probably only if they knowingly violated the law, in which case the

violating act would be outside the scope of their employment and the appropriate enforcement action, criminal or civil, would be against the violating individual. The imposition of a penalty only hurts the mission of the agency and reduces the services provided by the agency's mission. In order to really inflict substantial pain, the size of the penalty must be sufficient to adversely affect the mission. The likely consequence of that size of penalty is Congressional intervention. For example, in *Wainwright*, Complainant seeks a penalty of \$16 million. A budget decrement of this size definitely would affect the mission at Fort Wainwright. Congress acted to prevent such an impact to Fort Wainwright's mission by placing a cap on the amount of any penalty in the case of \$2 million.¹⁴ Unlike a business entity, a penalty amount that causes pain to the Board of Directors did not result in action against the violating subsidiary, but against the enforcer. The assumption that a larger penalty is required against a larger violator in order to achieve deterrence is simply not applicable to Federal agencies, because they are not businesses and do not operate in a business-like fashion. Doubling the size of the proposed penalty will not increase the deterrent effect of the penalty in this case; it will only adversely affect soldiers in training and other innocent members of the Fort Jackson military community at large.

2. Budget is Not an Appropriate Measure of Size for a Federal Agency

Respondent

Federal agencies have no independent value or net worth. As a consequence, the Complainant has to depart from its own policies and use a Federal facility's budget as a substitute for net worth. An annual budget is not equivalent to net worth. At best it is

¹⁴ See Section 342, DOD Authorization Act for 2001..

analogous to a business entity's annual sales or revenues. But unlike a business entity, there is no profit or loss affecting net worth. There is no effect on salaries, profit sharing, dividends, equity, etc. If management decides to go out of business, it ceases operations and sells its assets. If a business fails, it files for bankruptcy protection. None of these events occur when a Federal agency or installation ceases operations. Stewardship of any government property is assumed by another Federal agency or organization. There is no lasting value to a facility's budget. The annual budget simply is not a proper substitute for "net worth," and Complainant departs from its own policies.

3. Size Should Not be Based on A Broad View of Respondent's Resources

Complainant's view that size should be based on a broad view of Respondent's resources is again a departure from Complainant's own policies. The Clean Air Act Penalty Policy 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.

Complainant's Exhibit 8, p. 15. Of course, Federal agencies are neither businesses nor corporations. So, in departing from the policy, where does one draw the analogous line? Complainant implies that the Presiding Officer should look to the broad resources available from higher command levels, perhaps even to the Commander-in-Chief, which then would include the entire Federal budget. Complaint conveniently forgets the Respondent named in the Complaint is not TRADOC, the Army, the Department of Defense or the United States. To look beyond the Respondent is yet another departure from Complainant's own policy. Somewhere along the line it must become clear that a

Federal agency is not like a business or any other non-federal governmental agency. There is no impact on net worth or national debt because any penalty is returned to the U.S. Treasury.

Complainant suggests that a large penalty is required to serve as an adequate deterrent because the respondent had the resources (in-house staff, legal support, contractors, funds to remediate), and specific knowledge of the asbestos NESHAP Program. Complainant is correct that resources and institutional knowledge were there, and its assertion might have validity if the Respondent did not have procedures in place with the intent to be compliant. As long as there are people who will choose to ignore rules, regulations and guidance, or simply fail to read the guidance provided, there will continue to be some violations, irrespective of the size of monetary or personnel resources employed. A larger penalty will not serve as an adequate deterrent; rather personal consequences, such as the adverse administrative action taken against Lieutenant Colonel Wall, will deter such violations.

4. Size of Violator Does Not Reflect the Seriousness of the Violations

Complainant, in testimony and policy asserts that the size of violator measures the seriousness of the violation. However, neither the policy nor the testimony provides any rationale for this assumption. This assumption may be supportable in certain circumstances, but not in this one. This case is about the harm caused by the potential release of asbestos fibers into the environment and the resulting potential harm to the soldiers and others in and around the dining facility at the time the violations occurred. This risk is not affected by the size of the violator. Query, who is the violator? Is it

really the drill sergeants, the executive officer, Lieutenant Colonel Wall, or perhaps Colonel Nahrwold? Does the answer to this question affect the seriousness of the violation? Should the battalion have been the named violator? Respondent is the named violator because it is liable for the in scope actions of its officers and employees. Is a crime resulting in personal harm to an individual more serious when committed by a wealthy person than by a poor person? Consider the same set of violations committed by a contractor. Would the potential harm to the environment have been greater if the contractor was a Fortune 500 corporation rather than a small business? There may be circumstances when greater harm or more serious consequences result when the violator is large, but this case is not one of them.

C. Summary of Gravity Calculation

As indicated throughout Respondent's Post-Hearing Brief and this Reply Brief, Respondent asserts that Complainant failed to consider other factors as justice may require in mechanically applying Appendix III.

D. Application of Adjustment Factors

1. History of Noncompliance

Complainant's assumption that the 1992 NOV apparently had no deterrent effect and thus a significant penalty is appropriate is incorrect. This is not exactly a repeat violation. In the instant case unauthorized subordinates violated command policy intended to prevent such violations. Both Colonel Nahrwold and Mr. McDowell testified about the procedures in effect to ensure compliance. As repeatedly stressed, the

violations resulted from failures to comply with Respondent's requirements. In addition, a significant increase in the penalty amount will not have a corresponding increased deterrent effect..

2. Willfulness or Negligence

Respondent certainly does not object to Complainant's decision to not increase the proposed penalty on the basis of this factor.

3. Degree of Cooperation

Respondent reiterates its arguments on page 68 of its Post-Hearing Brief concerning credit for preparations for reporting. In addition, since the penalty policies are only guidance and not regulations, the Presiding Officer should not be limited to these arbitrary percentage limitations.

4. Environmental Damage

Respondent certainly does not object to Mr. Russell's decision to not increase his proposed penalty amount based on this factor.

5. Payment of Other Penalties

No other penalties have been paid for these violations.

6. Ability to Pay

This factor is obviously irrelevant. There can be no rational argument that the United States cannot pay the United States. The impact of any penalty imposed is a budget decrement. Since there is no profit or loss or impact on the "corporate treasury," there can be no adverse economic impact. If there are no discretionary current year funds available at the time any penalty is due and payable, payment will merely be deferred until there is an available appropriation.

7. Other Factors as Justice may Require

Respondent strenuously objects to Complainant's effort to impose a grossly inflated penalty. At the risk of being accused of "whining," Respondent notes that what has happened thus far in this case simply "ain't fair." More than six years after violations were committed and corrected at considerable cost to Respondent (recall this was not a project planned by the Command), the Complainant is actively engaged in what can only be described as a miscarriage of justice. With no change in the underlying facts, and no further investigation, Complainant took a case file in which the State of South Carolina sought a modest penalty, and now proposes a penalty that is several magnitudes higher than that which was sought by the State. Complainant acknowledges that the only reason the case was referred for Federal enforcement action was due to Respondent's refusal to pay a penalty to the State based upon the waiver of sovereign immunity, then argues that sovereign immunity is irrelevant. Meanwhile, Complainant steadfastly claims to be treating the Respondent the same as the rest of the regulated community.

Respondent respectfully appeals to the Presiding Officer's sense of justice and fairness,

a. Rogue Officer Argument

Lieutenant Colonel Wall is central to these violations. Had he made it clear to the battalion executive officer that the mechanical removal of the floor tile would indeed be a violation of Federal and State law, these violations would not have occurred. The Respondent does deny liability. However, Respondent asserts that in determining an appropriate penalty, the fact the violations occurred in contravention of Command policy and an administrative disciplinary action was taken should be considered. Complainant minimizes the disciplinary action; however, Complainant may not fully appreciate the Army culture. The receipt of a letter of admonition, even filed locally, is a significant blemish for a Lieutenant Colonel. More significant is the action of making him the Deputy Director, instead of the Director, of the new Director of Logistics and Engineering (DLE). Such an assignment, at that stage in Lieutenant Colonel Wall's career, significantly limited his potential for promotion to the grade of Colonel.²⁰ His subsequent removal from that position and reassignment to be the Deputy Garrison Commander clearly sent a message to him and he responded with the submission of his retirement paperwork.

b. Sovereign Immunity Claim

There is an elephant in the room than cannot be ignored, and that elephant is DoJ's interpretation of the waiver or sovereign immunity under the Clean Air Act, *i.e.*,

²⁰ Although it would be beyond the scope of this inquiry to delve into the minutia associated with the monetary difference associated with retirement as a Lieutenant Colonel as compared to a Colonel, suffice it to say that as long as Lieutenant Colonel Wall continues to draw retirement benefits that are directly related to the rank at which he retired, he continues to be punished for his failure to make sure the guidance he provided was compliant with all applicable laws and regulations governing floor tile replacement.

relationship with SCDHEC, but Respondent had no choice but to fall in line with the position of the Department of Justice.

Respondent urges the Presiding Officer to consider the significance of the waiver of sovereign immunity in the context in which it is presented, i.e., as an "other factor as justice may require," as previously argued. Any penalty adjudged should factor-in Respondent's willingness to pay an administrative fee in lieu of penalty to SCDHEC. Finally, and most importantly, unlike the Air Force in *Davis-Monthan*, realize that Respondent does not seek to avoid liability through some clever assertion of sovereign immunity (you could not fine me there so you cannot fine me here either), rather this Respondent, even in going through this administrative process, is actively searching for a means to reach a just result, preferably one that is consistent with the manner in which other similarly situated regulated entities are treated in South Carolina.

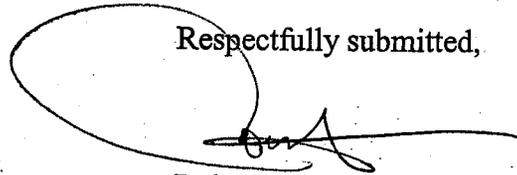
VII. CONCLUSION

Respondent stands by its Prayer for Relief as presented in Respondent's Brief, pages 75-78. Respondent is confident that the Presiding Officer will consider all the facts in evidence, apply the law, and reach a resolution that is fair and equitable. Specifically, the Court is urged to grant Respondent's Motion to Dismiss. Alternatively, the Court is urged to depart from the unfair penalty calculation used by the Complainant and instead apply the law to the facts in a manner that allows for appropriate consideration of "other factors as justice may require." In this way, Respondent is confident that the Presiding Officer will reach a result that is more fair than that which has been proposed by the Complainant, and hopefully closer to that which was proposed by the State of South

Carolina when SCDHEC referred this case to Complainant more than three years ago, thereby achieving a result that is consistent with outcomes faced by others similarly situated within the regulated community.

May 13, 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