2008

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Repository Citation

Rosenberg, Ronald H., "Doing More or Doing Less for the Environment: Shedding Light on EPA's "Stealth" Method of Environmental Enforcement" (2008). *Faculty Publications*. 94.
<https://scholarship.law.wm.edu/facpubs/94>

DOING MORE OR DOING LESS FOR THE ENVIRONMENT: SHEDDING LIGHT ON EPA'S *STEALTH* METHOD OF ENVIRONMENTAL ENFORCEMENT

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Abstract: Since the 1970s, environmental protection goals have gone from general statements of political desire to highly articulated systems of environmental regulation implemented by federal, state, and local governments. Environmental statutes have been enacted giving administrative agencies such as the U.S. Environmental Protection Agency (EPA) the responsibility for translating broad policy goals into specific regulatory requirements. Through its enforcement program, EPA seeks to assure that these general goals are achieved by individual actors. This Article examines a recent trend in EPA's practices, increased reliance on internal agency methods of enforcement. The study analyzes EPA's administrative enforcement system with particular emphasis on the imposition of civil penalties. Its central conclusion is that EPA's administrative enforcement dominates the Agency's enforcement practices, dwarfing judicially supervised enforcement. In addition, this mechanism yields outcomes emphasizing settlement, at process at variance with EPA rules that renders outcomes in a context largely invisible from public scrutiny.

INTRODUCTION

Government regulation of environmental quality is relatively new, with the main environmental protection statutes having been first enacted by Congress only during the 1970s. This decade witnessed the passage of at least eighteen major environmental protection statutes, including the Clean Air Act (CAA), the Clean Water Act (CWA), the Resource Conservation and Recovery Act (RCRA), and the Toxic Substances Con-

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trol Act (TSCA).¹ This unprecedented period of legislation represented the starting point in the development of national environmental policy.²

In 1970, the U.S. Environmental Protection Agency (EPA or Agency) was established to act as the principal environmental policy-maker and regulation-implementing authority under the legislation that would soon be enacted.³ Acting under these congressionally legislated powers, EPA embarked upon the complex task of designing and executing a comprehensive set of regulations establishing environmental quality norms to protect the nation's air, water, and land, as well as human and ecosystem health and wellbeing.⁴ As a regulatory agency, EPA has translated these diverse statutory directives into a sweeping and complex set of environmental rules affecting a variety of activities undertaken by both private firms and by individuals.⁵ These standards set a wide array

¹ See, e.g., Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601–2629, 2641–2656, 2661–2671, 2681–2692 (2000 & Supp. 2004); Clean Water Act of 1977, 33 U.S.C. §§ 1251–1387 (2000 & Supp. 2004); Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended in scattered sections of 42 U.S.C.); Resource Conservation and Recovery Act of 1976, §§ 6901–6992k (2000 & Supp. 2004). Other examples include the National Environmental Policy Act of 1970, Federal Water Pollution Control Act of 1972, Federal Insecticide, Fungicide, and Rodenticide Act (1972), Noise Control Act of 1972, Coastal Zone Management Act of 1972, Endangered Species Act of 1973, Safe Drinking Water Act of 1974 (SWDA), Forest and Rangeland Renewable Resources Planning Act of 1974, Federal Coal Leasing Amendments Act of 1976, National Forest Management Act of 1976, Federal Land Policy and Management Act of 1976, Surface Mining Control and Reclamation Act of 1977, and the Outer Continental Shelf Lands Act (1978).

² RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 67–97 (2004) (describing the 1970s as a period of “Building a Road” towards national environmental policy).

³ Environmental Protection Agency, 35 Fed. Reg. 15,623 (Oct. 6, 1970). The establishment of EPA was achieved during the presidency of Richard M. Nixon in 1970. *Id.* Following the signing of the National Environmental Policy Act (NEPA) on New Years Day, 1970, President Nixon proclaimed the decade to be one of environmental transformation in his State of the Union address. An Agency for the Environment, EPA History, US EPA, <http://www.epa.gov/history/publications/origins6.htm> (last visited Apr. 14, 2008) [hereinafter *An Agency for the Environment*]. During the spring of 1970, the President decided to establish a separate regulatory agency to manage the enforcement of environmental policy in the federal government. *Id.* On July 9, 1970, he transmitted Reorganization Plan Number 3 to the Senate and the House of Representatives to inform Congress of his wish to consolidate functions of many departments, bureaus, and other diverse federal offices to form a new EPA. *Id.*; see Environmental Protection Agency, 35 Fed. Reg. at 15,623–26. Hearings were held over the summer of 1970 and by December 2, 1970, the EPA was in operation. See *An Agency for the Environment*, *supra*.

⁴ Building an Agency, EPA History, US EPA, <http://www.epa.gov/history/publications/formative3.htm> (last visited Apr. 14, 2008).

⁵ See *id.*

of performance, monitoring, and recordkeeping responsibilities, and, as federal regulations, they carry the force of law.⁶

However, those regulated by EPA rules do not immediately come into compliance with the them. Environmental regulations are not self-enforcing and frequently, when they ask regulated entities to assume new economic costs or to change their methods of operation, they are resisted.⁷ As part of federal environmental policy, EPA has also developed both coercive and cooperative tactics to achieve compliance with its many rules.⁸ Using the threat of punishment to encourage voluntary compliance, EPA has adopted an enforcement program that threatens noncompliant behavior with a variety of judicial and administrative sanctions, believed necessary to achieve the environmental goals of federal law.⁹ Environmental law authorizes a range of enforcement techniques that can impose both civil remedies—injunctive and financial—and criminal penalties.¹⁰ However, both of these enforcement methods require a federal enforcement lawsuit.¹¹ Federal environmental statutes provide an alternative enforcement route to resource-intensive and time-consuming judicial intervention: EPA's issuance of administrative injunctive and penalty orders.¹² Increasingly, EPA has selected this in-house approach by taking civil enforcement actions within the agency's own administrative law structure to punish environmental violators.¹³

⁶ An Agency for the Environment, *supra* note 3. Professor Koch has described this phenomena in the following terms: "Legislative rules are rules made pursuant to delegated authority to make rules. Because they are an extension of a legislative act, they have the force of law and are subject to very limited judicial review The drafters of the [Administrative Procedure Act] characterized these rules as 'true administrative legislation.'" CHARLES H. KOCH, ADMINISTRATIVE LAW AND PRACTICE § 4.11[2] (2d ed. 1997).

⁷ See, e.g., Clean Air Act, 42 U.S.C. § 7410(a)(2)(F) (2000) (discussing state implementation plans for primary and secondary National Ambient Air Quality Standards). Regulations adopted pursuant to environmental statutes become enforceable on their own terms or by virtue of being incorporated into permits or licenses issued to an individual, firm, or institution. See *id.* Upon breach of the conditions imposed by the regulations, the government or citizen groups may seek enforcement and penalties against the violator in court or in an administrative proceeding. See, e.g., *id.*

⁸ See JOEL A. MINTZ ET AL., ENVIRONMENTAL ENFORCEMENT: CASES AND MATERIALS 5 (2007) [hereinafter ENVIRONMENTAL ENFORCEMENT].

⁹ See *id.* at 3–5.

¹⁰ See, e.g., Clean Water Act of 1977, 33 U.S.C. § 1319(b)–(c) (2000) (describing civil actions and criminal penalties).

¹¹ See, e.g., *id.*

¹² ENVIRONMENTAL ENFORCEMENT, *supra* note 8, at 82–83.

¹³ See *id.* at 81.

During the last decade, these administrative enforcement cases have become so numerous that they far outnumber court-ordered actions and result in the payment of millions of dollars in civil penalties and in the imposition of injunctive compliance orders.¹⁴ This practice is so pervasive that one recent assessment has estimated that approximately ninety percent of EPA's enforcement actions are administrative, not judicial, in nature.¹⁵ For example, in fiscal year 2006, EPA data reported that the agency initiated 4647 administrative complaints while issuing 1438 compliance orders and imposing 4624 final administrative penalty orders for approximately \$42 million in fines.¹⁶ To put these

¹⁴ See EPA, COMPLIANCE AND ENFORCEMENT ANNUAL RESULTS: NUMBERS AT A GLANCE, FISCAL YEAR 2006 (2006), available at www.epa.gov/compliance/resources/reports/end-of-year/eoy2006/fy2006numbers.pdf [hereinafter 2006 NUMBERS AT A GLANCE]. Contrary to popular belief, civil penalties paid by defendants do not become the property of EPA, but rather they are paid into the U.S. Treasury. *Steel Co., AKA Chicago Steel & Pickling Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106 (1998). In *Steel Co.*, the U.S. Supreme Court addressed this issue within the context of an Emergency Planning and Citizen Right-to-Know Act (EPCRA) citizen suit enforcement action. *Id.* There, Justice Scalia wrote that "civil penalties authorized by the statute . . . might be viewed as a sort of compensation or redress to respondent if they were payable to respondent. But they are not. These penalties—the only damages authorized by EPCRA—are payable to the United States Treasury." *Id.* In general, all civil penalties are payable to the U.S. Treasury and not to EPA. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 173 (2000) (penalties under the CWA are payable to the U.S. Treasury).

Most federal environmental statutes include civil penalties imposing a range of maximum penalties. See, e.g., Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.1–.4 (2007). In 2004, EPA adopted its Adjustment of Civil Monetary Penalties for Inflation rule to adjust EPA's civil monetary penalties for inflation. See *id.* (increasing the per-day penalties for violation of the CWA to \$32,500 and \$6500 for minor stationary source field citation violations, the CAA to \$32,500 with a maximum of \$270,000, the SDWA to \$32,500, and EPCRA to \$97,500 for subsequent violations).

¹⁵ Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens*, 28 HARV. ENVTL. L. REV. 401, 415 (2004) (estimating that ninety percent of EPA enforcement and ninety-five percent of state enforcement is administrative).

¹⁶ 2006 NUMBERS AT A GLANCE, *supra* note 14. EPA's enforcement data reports, however, have been seriously disputed by outside organizations that claim EPA's data has been exaggerated to hide a significant reduction in enforcement results. See ENVTL. INTEGRITY PROJECT, PAYING LESS TO POLLUTE: ENVIRONMENTAL ENFORCEMENT UNDER THE BUSH ADMINISTRATION 2 (2007), available at <http://www.environmentalintegrity.org/pubs/Paying%20Less%20to%20Pollute.pdf> (noting that Justice Department cases were down seventy percent, civil penalties declined by twenty-four percent, and criminal fines were down thirty-eight percent comparing 1996 to 2000 with 2002 to 2006). More specifically, the Environmental Integrity Project (EIP) claims that for 2006 the number of administrative penalty settlements was actually 2056 and that the much larger EPA-reported figure was due to large numbers of "amnesty agreements" with large animal feeding operations that included nominal \$500 civil penalties. See *id.* at 6, 10 app.I; CLAUDIA COPELAND, CRS REPORT FOR CONGRESS, AIR QUALITY ISSUES AND ANIMAL AGRICULTURE: EPA'S AIR COMPLI-

numbers into a comparative perspective, during this same year, EPA reported that the total number of judicial enforcement cases concluded in federal court totaled only 173 and that \$82 million were collected in civil penalties.¹⁷ A private estimate places the number of civil enforcement law suits filed by the Department of Justice (DOJ) in fiscal year 2006 to be only fifteen cases.¹⁸ The overall trends in EPA enforcement demonstrate consistent reductions in the number of judicial civil case referrals and case conclusions, as well as criminal sentences and fines.¹⁹ While at the same time, the available data shows that EPA ad-

ANCE AGREEMENT 2 (2006), available at http://www.ncifap.org/_images/CRS_Air_Quality_and_Animal_Ag_Oct_2006.pdf.

¹⁷ 2006 NUMBERS AT A GLANCE, *supra* note 14. Perhaps reflecting the seriousness of judicially resolved enforcement actions, the fiscal year 2006 total of judicially imposed civil penalties stood at \$82 million, or nearly double the amount generated by the administrative system. *Id.* This number is also disputed by the EIP as being inflated due to the inclusion of a \$40 million—and possibly uncollectible—default judgment gained against one large polluter who did not defend an enforcement case. ENVTL. INTEGRITY PROJECT, *supra* note 16, at 1–3. The EIP's analysis of fiscal year 2006 penalty data agreed with EPA's total of \$42 million for administrative penalties. *Id.* at 10 app.I. They disagreed, however, with the EPA's claim that it had collected a total of \$124 million for both judicial and administrative cases. *Id.*; 2006 NUMBERS AT A GLANCE, *supra* note 14. The EIP found only \$49 million in judicial civil penalties for a total of just \$91 million. ENVTL. INTEGRITY PROJECT, *supra* note 16, at 10 app.I.

¹⁸ ENVTL. INTEGRITY PROJECT, *supra* note 16, at 10 app.I. As low as this number may seem, it actually is higher than the 2002 to 2006 average of fourteen. *See id.* The EIP, a Washington, D.C. EPA watchdog group headed by the former EPA enforcement chief, derived this information from a Freedom of Information Act request and examination of EPA's Enforcement and Compliance History online database. *Id.* at 7.

¹⁹ *See* ENVIRONMENTAL ENFORCEMENT, *supra* note 8, at 112. Taking an annual average from fiscal year 2002 to fiscal year 2006 from EPA-reported enforcement statistics, the following patterns of EPA enforcement performance emerge, with fiscal year 2006 being close to or under the five year averages:

- 1) Civil judicial referrals average 266 per year as compared to 286 in fiscal year 2006.
- 2) Civil judicial case conclusions average 183 per year as compared to 173 in fiscal year 2006.
- 3) Criminal sentences imposed average 155 years as compared to 154 years in fiscal year 2006.
- 4) Criminal fines imposed average \$64.6 million per year as compared to \$43 million in fiscal year 2006.

Comparisons to the prior five year period, fiscal year 1997 to fiscal year 2001, tell a different story:

- 1) Civil judicial referrals average 346 per year.
- 2) Civil judicial case conclusions have no data available.
- 3) Criminal sentences imposed 187 years.
- 4) Criminal fines imposed average \$255.4 million.

This reduction in judicially imposed enforcement penalties has led several commentators to opine that the EPA enforcement system has become ineffective. *See* ENVIRONMENTAL ENFORCEMENT, *supra* note 8, at 112; William L. Andreen, *Motivating Enforcement: Institutional Culture and the Clean Water Act*, 24 PACE ENVTL. L. REV. 67, 76 (2007). Some have

ministrative penalties have become the only increasing form of enforcement undertaken over the last decade.²⁰ This striking rise in in-house environmental enforcement has occurred just when more visible judicial enforcement has diminished.

Administrative enforcement has not only become the more frequently selected alternative to judicial enforcement, but it has also given rise to the development of an administrative analogue to the federal judicial system—an administrative judicial system.²¹ This system conducts adjudicatory proceedings governed by its own Agency rules of practice, largely within the confines of EPA, in an insulated administrative format with significantly less public involvement or awareness.²² Despite the increasing importance of EPA's internal enforcement regime, the workings of this administrative enforcement process have operated as a *stealth* system, largely escaping the view of the public. Over the years, it has also avoided scholarly examination both in terms of its methods and its results.²³ Significantly, there has been no concerted

been charitable in their comments, stating that "the volume of civil enforcement has fluctuated over time, in part due to resource constraints, and in part due to the philosophical leanings of various administrations." See ENVIRONMENTAL ENFORCEMENT, *supra* note 8, at 112. Worse, this drop has led some critics to suggest that:

Breakdowns in federal enforcement seriously undercut law enforcement efforts, produce confusion in the regulated community, encourage non-compliance, and subject the EPA to ridicule. Such lapses also breach an implied social contract with those regulated entities who, relying upon responsible enforcement, have invested substantial amounts of time and money to comply with the law.

Andreen, *supra*, at 76 (footnote omitted); see also John Solomon & Juliet Eilperin, *Bush's EPA Is Pursuing Fewer Polluters*, WASH. POST, Sept. 30, 2007, at A1 (noting a seventy percent drop in civil lawsuits to enforce environmental law pursued between 2002 and 2006, relative to the late 1990s).

²⁰ ENVTL. INTEGRITY PROJECT, *supra* note 16, at 10 app.I. This EIP data indicates more than a doubling in EPA administrative penalty settlements from 1004 in 1996 to 2056 in 2006. *Id.* There is no data in this report indicating the proportion of administrative penalties imposed as the result of a contested case in the EPA administrative system. These figures also demonstrate a fairly stable total of administrative civil penalties collected, at approximately \$30 million per year, with 2006 reaching a higher total of \$42 million. *Id.*

²¹ See ENVIRONMENTAL ENFORCEMENT, *supra* note 8, at 94.

²² See *id.*

²³ A cursory description of this administrative enforcement system is usually within most environmental texts and treatises. See Joseph J. Lisa, *EPA Administrative Enforcement Actions: An Introduction to the Consolidated Rules of Practice*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 1, 3-4 (2005) (providing a description of EPA's existing Part 22 Rules of Practice); Richard R. Wagner, *The U.S. EPA Administrator's Assessment of Civil Penalties: A Review of the Sources of Authority and the Administrator's Regulations*, 22 WM. & MARY ENVT. L. & POL'Y REV. 149, 156-57 (1997) (providing a brief description of pre-1999 Part 22 procedure and author-

attempt to analyze reported case decisions that have been generated by these administrative enforcement methods. The augmented use of EPA's administrative civil penalty technique of enforcing environmental rules is the focus of this Article.

Part I will provide an overview of EPA's environmental enforcement activities with a description of the changing mix of enforcement tools over the last decade.²⁴ Part II will describe EPA's practice of administrative enforcement, concentrating on the methods that are employed that may result in the imposition of administrative penalties.²⁵ Part III will examine the empirical data of reported administrative enforcement actions taken under five environmental statutes over a five-year period to analyze EPA Administrative Law Judge (ALJ) decisions on the design of civil penalties assessed under the Agency's civil penalty policies and governing environmental statutes.²⁶ Lastly, Part IV will provide conclusions about the wisdom and efficacy of such an administrative system imposition of civil penalties.²⁷

I. EPA'S ENFORCEMENT AUTHORITIES AND PRACTICES

A. *How Environmental Statutes Achieve Their Purposes*

Federal environmental law has no single, uniform statutory base. Over the last four decades, Congress has enacted numerous pieces of legislation focusing upon a range of particular types of environmental problems. For example, the CAA was concerned with the nation's air quality while the CWA focused upon the eradication of pollution in the nation's waters.²⁸ As a result, federal environmental law has been established in a media-specific or problem-specific fashion and, as a consequence, is a composite of a large number of statutes. These environmental laws usually direct EPA to set substantive and procedural requirements necessary for the achievement of identified environmental policy goals underlying each statute.²⁹ For instance, in order to

ity). The best summary of administrative enforcement practices can be found in 2 LAW OF ENVIRONMENTAL PROTECTION § 9:5-:12 (Novick et al. eds., 2007).

²⁴ See *infra* Part I.

²⁵ See *infra* Part II.

²⁶ See *infra* Part III.

²⁷ See *infra* Part IV.

²⁸ Clean Water Act of 1977, 33 U.S.C. §§ 1251-1387 (2000 & Supp. 2004); Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended in scattered sections of 42 U.S.C.).

²⁹ See, e.g., 33 U.S.C. § 1252(a) (requiring EPA to "prepare or develop comprehensive programs" for reducing water pollution under the CWA).

meet the National Ambient Air Quality Standards (NAAQS) set under the CAA, EPA and the states must establish source-specific emission standards that limit the amount of air pollution that can be emitted.³⁰ Agency requirements, such as these emission rules, often impose economic costs, require operational changes and/or delay activities falling under EPA's statutory jurisdiction.³¹ As a result, these environmental standards may not be enthusiastically embraced by those subject to them. Not surprisingly, those falling under the EPA regulatory umbrella may find many practical reasons not to comply or not to fully comply with these rules.

As with any regulatory scheme, EPA must find ways to have its regulations followed so that the environmentally protective goals of the regulations and statutes will be realized. But how will compliance be achieved? What approach will be taken? This effort to insure regulatory compliance is generally known as enforcement.³² Two main theories of enforcement have been advocated: a deterrence-based approach and a negotiated, cooperative approach.³³ Over time, and with the differing political philosophies of successive governing administrations, the relative emphasis between these two approaches can shift. Despite this observation, EPA's enforcement system has consistently stressed deterrence-based enforcement methods using formal sanctions imposed through adversarial processes as a sign of programmatic success.³⁴ The central idea underlying this view is that polluters will act in an economically rational fashion and will seek to avoid the certain—and

³⁰ See, e.g., 42 U.S.C. § 7410(a)(2)(A) (stating that CAA implementation plans must include "enforceable emission limitations and other control measures, means, or techniques . . . as may be necessary or appropriate to meet the applicable requirements of this chapter").

³¹ See, e.g., *id.* § 7410(a)(2)(F). New performance standards necessary to meet environmental quality goals often require that firms construct new facilities or modify existing ones in order to meet the standards. See *id.* Examples of this principle are legion in the EPA environmental regulations. See, e.g., *id.*

³² OFFICE OF ENFORCEMENT, EPA, PRINCIPLES OF ENVIRONMENTAL ENFORCEMENT 1-2 (1992), available at <http://www.tinyurl.com/ytdj71> (defining enforcement as a "set of actions that governments or others take to achieve compliance within the regulated community").

³³ Raymond J. Burby, *Coercive Versus Cooperative Pollution Control: Comparative Study of State Programs to Reduce Erosion and Sedimentation Pollution in Urban Areas*, 19 ENVTL. MGMT. 359, 359-61 (1995).

³⁴ See JOEL A. MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES 102 (1995) ("With the brief exception . . . of the early 1980s, both the EPA's written enforcement policies and its actual practices have consistently emphasized the initiation of formal enforcement actions against violators of federal environmental standards."). EPA reports its annual enforcement accomplishments on its website and promotes its regulatory achievements whenever it can. 2006 NUMBERS AT A GLANCE, *supra* note 14.

high—penalty costs of their environmentally noncompliant conduct.³⁵ This risk avoidance will influence behavior and encourage compliance.³⁶ In this way of thinking, EPA consistently must act to quickly identify regulatory violations and punish these transgressions in a predictable and economically onerous way. Even if EPA wishes to employ its enforcement powers in a more conciliatory or cooperative way, it must maintain the possibility of using more punitive tactics as an incentive to securing cooperation.³⁷ This conclusion is especially true when public health and environmental quality interests are at stake. In the most environmentally threatening situations, the deterrence theory also requires that EPA have the authority to punish particularly egregious behavior with noneconomic criminal law penalties.³⁸

B. *The Means of Assuring Compliance: The Statutory Design of Environmental Enforcement*

When designing the structure of federal environmental statutes, Congress considered enforcement to be an important component of its statutory policy. It did not establish a single enforcement method to

³⁵ Colin S. Diver, *A Theory of Regulatory Enforcement*, 28 PUB. POL'Y 257, 263 (1980) (noting that costs can include reputational injury, legal expenses, closer future regulatory oversight, and tort liability).

³⁶ *Id.*

³⁷ *See id.*

³⁸ *Id.* Criminal sanctions exist within the enforcement provisions of environmental law. *See* Pollution Prosecution Act of 1990, Pub. L. No. 101-593, § 202(a), 104 Stat. 2954, 2962 (1990). According to EPA's fiscal year 2006 Compliance and Enforcement data, for the five year period ending in fiscal year 2006, approximately 300 defendants were charged with criminal offenses annually. *See* 2006 NUMBERS AT A GLANCE, *supra* note 14. Within EPA is the Criminal Investigative Division that is required to be staffed with a minimum of 200 investigators. *See* Pollution Prosecution Act of 1990 § 202(a): "The EPA now employs 172 investigators in its Criminal Investigation Division, below the minimum of 200 agents required by the 1990 Pollution Prosecution Act, signed by President George H.W. Bush." Solomon & Eilperin, *supra* note 19, at A1.

These investigators often work in tandem with those of other federal agencies, such as the Coast Guard and the Department of Transportation, to ferret out information that would lead to a criminal referral to the Department of Justice (DOJ). *See id.* A 1994 EPA guidance document instructs these investigators to concentrate on environmental violations that cause "significant environmental harm." Memorandum from Earl E. Deveney, Director, Office of Criminal Enforcement, EPA to All EPA Employees Working in or in Support of the Criminal Enforcement Program 3 (Jan. 12, 1994), available at <http://www.epa.gov/compliance/resources/policies/criminal/exercise.pdf>. If this harm occurs in conjunction with "culpable conduct" such as "repeat violations, deliberate misconduct, efforts to conceal," or tampering with pollution monitors, then criminal prosecution is recommended. Steven P. Solow, *Preventing an Environmental Violation from Becoming a Criminal Case*, NAT. RESOURCES & ENV'T., Spring 2004, at 19, 20.

enforce the new environmental laws. With each statute enacted, Congress created a diverse array of overlapping enforcement tools. Each individual environmental statute allowed for the imposition of a range of both civil and criminal sanctions against noncompliant behavior.³⁹ But that was not all. Concerned that rules might not be rigorously implemented by the government, Congress embraced a policy of diffusing environmental enforcement authority by granting it to both governmental and nongovernmental actors.⁴⁰ In most instances, federal environmental law vests enforcement authority in state and federal governments as well as providing enforcement power to individuals and citizen groups.⁴¹ By expanding the range of enforcement authority, Congress intended to maximize the chances of achieving the important environmental objectives it had established.⁴²

The structure of this system of environmental enforcement has been described as a four-tier hierarchical structure.⁴³ Tier one is comprised of enforcement actions taken by state, local, and tribal governments, as well as citizens organizations in state or federal court or administrative agencies. State environmental agencies and attorney general offices initiate the largest number of actions overall, and their work implements both federal and state environmental law.⁴⁴ Tier two

³⁹ See, e.g., Clean Water Act of 1977, 33 U.S.C. § 1319(g)(2) (2000) (listing sanctions under the CWA).

⁴⁰ See William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 108 (2005). Congressional intent in designing such a redundant enforcement scheme was intended to provide for checks and balances in environmental enforcement so as to minimize the chances of "regulatory underkill." *Id.*

⁴¹ See, e.g., 33 U.S.C. § 1319(g)(6)(B). A number of the major federal pollution control statutes actually use a cooperative federalism approach to the achievement of their statutory purposes. See, e.g., *id.* Cooperative federalism in the environmental context has been described in the following terms: "This arrangement—in which Congress gives EPA ultimate responsibility for program delivery but requires or authorizes EPA to vest primary responsibility with states for program implementation—is often referred to as a 'cooperative federalism' approach to environmental regulation." CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, *REINVENTING ENVIRONMENTAL ENFORCEMENT & THE STATE/FEDERAL RELATIONSHIP* 15–16 (2003); see ROBERT V. PERCIVAL, *ENVIRONMENTAL REGULATION* 120–21 (3d ed. 2000).

⁴² See John C. Cruden & Bruce S. Gelber, *Federal Civil Environmental Enforcement: Process, Actors, and Trends*, 18 NAT. RESOURCES & ENV'T. 10, 10 (2004).

⁴³ *Id.*

⁴⁴ *Id.* at 11; see 2 DANIEL P. SELMI & KENNETH A. MANASTER, *STATE ENVIRONMENTAL LAW* § 16:9–18 (2006) (describing state administrative enforcement). Rather than supplementing federal environmental enforcement with vigorous actions, state enforcement has declined in terms of the numbers of actions. See James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 31 (2003) (documenting a more than forty percent decline in state administrative enforcement between 1998 and 2002). Administrative enforcement power is not uniformly distributed, and some states, including Michigan and Wisconsin, lack the authority completely. See SUE ELLEN KEINER ET

is composed of "federal administrative agency actions."⁴⁵ This highly visible form of judicial enforcement is brought by the DOJ upon referral from EPA or another federal agency and is usually reserved for more serious or complex enforcement matters.⁴⁶ Tier three is comprised of federal criminal enforcement of environmental law, also brought upon referral to the DOJ and prosecuted by the United States in U.S. district court.⁴⁷ This form of enforcement penalty is reserved for some of the most egregious conduct threatening environmental quality and human health.⁴⁸ Tier four contains federal administrative agency actions taken to enforce environmental law.⁴⁹ Administrative enforcement occurs in a number of formal and informal forms, including the issuance of notices of violation, compliance orders, abatement orders, and penalty assessment orders.⁵⁰ It is the last of these administrative enforcement actions—penalty assessment orders—that constitutes the focus of this Article.⁵¹ These financial penalties frequently are brought

AL., BEYOND ENFORCEMENT? ENVIRONMENT, COMPLIANCE ASSISTANCE AND CORPORATE LEADERSHIP IN FIVE MIDWESTERN STATES 4-7-50 (2003); see also David L. Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1, 43 (2000) (outlining shortcomings in state environmental enforcement).

⁴⁵ Cruden & Gelber, *supra* note 42, at 10.

⁴⁶ See *id.* at 12.

⁴⁷ See *id.*; see, e.g., Clean Water Act of 1977, 33 U.S.C. § 1319(c) (2000); Safe Drinking Water Act, 42 U.S.C. § 6928(d) (2000); Clean Air Act; 42 U.S.C. § 7413(c) (2000); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675, § 9603(b) (2000).

⁴⁸ Cruden & Gelber, *supra* note 42, at 10. Two CWA cases provide examples of the adverse health effects of water polluting discharges that led to criminal indictments. See *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 650 (2d Cir. 1993) (throwing hepatitis B tainted blood samples into a river found not within the CWA); *United States v. Weitzenhoff*, 35 F.3d 1275, 1284 (9th Cir. 1993) (dumping of waste-activated sludge into the Pacific Ocean was a knowing violation of the CWA).

⁴⁹ Cruden & Gelber, *supra* note 42, at 10.

⁵⁰ *Id.* While EPA is accorded principal enforcement authority under most environmental laws, other federal agencies, such as the U.S. Army Corps of Engineers, the Coast Guard, the Department of Interior, and the Department of Housing and Urban Development, possess important environmental enforcement functions as well. *Id.* This Article will examine the administrative penalty practice only of the EPA.

⁵¹ ENVIRONMENTAL ENFORCEMENT, *supra* note 8, at 83. EPA's authority to administratively impose civil penalties did not exist when the federal environmental statutes were first enacted. *Id.* As Professor Joel Mintz has noted:

At the federal level, the first set of modern environmental legislation in the early 1970s granted EPA only the authority to issue administrative orders that directed recipients to comply with particular conditions and requirements. At that time, EPA lacked the authority to issue orders directly assessing penalties. In the late 1970s and 1980s, however, in an attempt to provide EPA with addi-

under the authority of a wide range of federal environment statutes, and they are the result of settlement agreements and administrative case decisions.⁵²

This four-tier array of enforcement methods represents a mix of techniques sharing the common goal of ensuring compliance with the myriad environmental rules and regulations, as well as the larger programmatic objectives underlying each environmental statute.⁵³ While citizen suits continue to be filed, the vast majority of environmental enforcement activity is initiated by the government, rather than by citizens or environmental organizations.⁵⁴ Frequently, media attention is fixed upon enforcement results from significant court judgments or settle-

tional enforcement tools, Congress amended several important environmental laws to empower EPA to assess penalties through administrative action.

Id.

⁵² See *id.* In fact, in fiscal year 2006, financial civil penalties were imposed administratively in over 2650 instances. 2006 NUMBERS AT A GLANCE, *supra* note 14. While the agency incentives for using the administrative—non-judicial—methods of enforcement are strong, some commentators have warned of their excessive use. See, e.g., LAW OF ENVIRONMENTAL PROTECTION, *supra* note 23, at § 9:9. It has been noted that:

Over-reliance on administrative orders to the exclusion of more drastic remedies, however, softens the fiber of the regulatory program and results in the erosion of its credibility. This ultimately leads to the all too familiar pattern of a succession of orders endlessly amending and extending earlier orders. Indeed, the effectiveness of administrative orders depends upon the perception by the regulated community that the government will not hesitate to use more drastic remedies if the order is violated. Administrative orders are not self-enforcing and EPA has no contempt powers. Administrative orders can only be enforced by a court.

Id.

⁵³ See Cruden & Gelber, *supra* note 42, at 10.

⁵⁴ See May, *supra* note 44, at 25. One study noted that 38.5% fewer citizen suits were initiated under the CWA and the CAA in 2002 than in 1996. *Id.*; see Andreen, *supra* note 19, at 76. Even with this reduction, citizen suits under these two statutes contributed approximately twenty-seven percent of the number of EPA civil referrals to the DOJ over a ten year period. *Id.* Enforcement of environmental standards by individuals and organizations is allowed under the citizen suit provisions contained in most federal environmental laws. These provisions allow federal courts to issue injunctive remedies and to impose civil penalties. See, e.g., Clean Water Act of 1977, 33 U.S.C. § 1365(d) (2000); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972(e) (2000); Clean Air Act, 42 U.S.C. § 7604(d) (2000); Emergency Planning & Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11,001–11,005, 11,021–11,023, 11,041–11,050, 11,046(f) (2000). Evidence suggests that at least sixty-eight environmental law citizen suits were filed per year in the period from 1970 to 2003. See May, *supra* note 44, at 2–4 (finding that more than 2000 citizen suits were filed between 1970 and 2003). Considering the fact that in fiscal year 2006, EPA referred 286 civil enforcement cases to DOJ, and that there were 173 civil case conclusions, citizen suits represent a small fraction of the total of litigated environmental enforcement cases. See 2006 NUMBERS AT A GLANCE, *supra* note 14. But see May, *supra* note 44, at 3–4.

ments imposing substantial monetary penalties and far-reaching injunctive relief.⁵⁵ With this *big case* emphasis in the popular media and in the minds of many commentators, it is easy to lose sight of the fact that a significant amount of environmental enforcement occurs within EPA itself by way of administrative or agency penalty practice.⁵⁶ It is not difficult to comprehend the reasons for this shift towards administrative enforcement: (1) reduced agency resources than are required by judicial methods; (2) EPA independence in enforcement without required coordination with the DOJ; and (3) decisionmaking by EPA's ALJs, who are familiar with the law, regulations, and technical aspects of environmental conflicts.⁵⁷ Relying upon these administrative authorities, EPA annually obtains both monetary penalties and injunctive relief in many individual cases that are decided within its own administrative *judicial system* staffed by EPA ALJs and by EPA's Environmental Appeals Board (EAB or Board).⁵⁸ As the statistical data below will indicate, this kind of

⁵⁵ Press Release, EPA, EPA Reaches \$100 Million Agreement in Olympic-Shell Pipeline Case (Dec. 11, 2002), available at <http://yosemite.epa.gov/opa/admpress.nsf/4a3d7e51caf96c7a85257359003f533e/ea057914f8e03450852570cb0075e23a!OpenDocument>. Examples of large penalties can be found in public announcements by EPA. See *id.* For instance, the Agency gave notice that it had reached a settlement against Olympia Pipeline and Shell Pipeline companies for a total of \$100 million in improvements and penalties. *Id.* Of this amount, \$36 million was composed of civil and criminal penalties. See *id.*; see also Lee Hancock & Matt Stiles, *Foundry Admits Air Violations: Tyler Pipe to Pay \$4.5 Million Fine, Gets 5 Years' Probation*, DALLAS MORNING NEWS, Mar. 23, 2005, at 5A, available at 2005 WLNR 24705219 (discussing criminal penalties under the CAA). Some studies, however, have indicated a significant decline in EPA financial penalties, including civil penalties—a twenty-five percent reduction—and criminal fines—a thirty-eight percent drop—in fiscal years 2002 through 2006 as compared to fiscal years 1996 through 2000. See Press Release, Env'tl. Integrity Project, Pollution Enforcement Efforts Under the Bush Administration's EPA Drop on Four of Five Key Fronts (May 23, 2007), available at <http://www.environmentalintegrity.org/pubs/052307%20EIP%20EPA%20enforcement%20data%20news%20release%20FINAL3.pdf>.

⁵⁶ See Andreen, *supra* note 19, at 74. In fact, during the period from 1997 through 2005, a substantial decline—thirty-seven percent to forty-one percent—in EPA's civil referrals to the DOJ for judicial enforcement was offset by a steady and significant increase in EPA's administrative enforcement orders. *Id.* There have been studies documenting substantial declines in EPA's enforcement efforts for several years. See Seth Borenstein, *Fewer Polluters Punished Under Bush, Data Show*, HOUSTON CRONICLE, Dec. 9, 2003, at A2, available at 2003 WLNR 16429053 (examining seventeen categories of civil enforcement and finding reduced annual averages below both the first Bush and the Clinton administrations).

⁵⁷ ENVIRONMENTAL ENFORCEMENT, *supra* note 8, at 79.

⁵⁸ The structure of EPA's administrative enforcement can be discerned from EPA's rules of practice. See 40 C.F.R. §§ 22.1–.52; LAW OF ENVIRONMENTAL PROTECTION, *supra* note 23, at § 9:5–:12; Lisa, *supra* note 23, at 3–4. This system of agency adjudication contains both a trial level (ALJs) and an appellate level (EAB). See Lisa, *supra* note 23, at 8–9. Both function within an established and regulated system replete with practice manuals. See Helene Ambrosino, *Handbook on Administrative Enforcement at EPA* (3d ed. 2002). The

administrative enforcement is becoming increasingly common as more cases are disposed of in this low visibility, administrative fashion. The wisdom of this enhanced reliance on civil enforcement via administrative means remains an open question.

II. THE EPA ADMINISTRATIVE ENFORCEMENT PROCESS

A. *Determining Environmental Compliance*

As the annual enforcement statistics indicate, the administrative enforcement of environmental statutes has “play[ed] an ever-increasing role in the EPA’s enforcement activities.”⁵⁹ However, in order to fully comprehend the data reported in this Article, it is necessary to briefly describe the administrative process emphasizing its structure, decisionmaking methods, and enforcement results.⁶⁰ Enforcement of environmental law also depends upon EPA’s awareness of compliant or noncompliant behavior, followed by steps taken to assure that rules will be followed.⁶¹ The mere existence of EPA environmental rules without the assurance that they are being observed would represent an empty effort. Obvious questions arise. Does the regulated firm have a necessary permit and is it meeting its performance obligations required un-

EAB decisions constitute final agency action, and, as the “consummation of the agency’s decision-making process,” they are determinative within this EPA structure. *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)). As final agency action, they may be appealed to a federal court. *See id.* at 177. They cannot be further appealed to the EPA Administrator. *See id.* Once the EAB’s decisions reach federal court, they will be reviewed to determine whether they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” under § 706(2)(A) of the Administrative Procedure Act. 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5362, 7521, 706(2)(A) (2000). Functioning as an internal appellate body within EPA’s administrative judicial system, the EAB has issued its own Practice Manual to assist parties in the adjudicatory process. *See Lisa, supra* note 23, at 9.

⁵⁹ *Lisa, supra* note 23, at 2.

⁶⁰ *See generally* Ambrosino, *supra* note 58 (describing in detail EPA structure and procedure). Much of the information concerning EPA administrative enforcement procedure is derived from conversations with Ms. Joyce Howell, Esq., Senior General Counsel, Region III, EPA in March and April 2006, Mr. Michael Walker, Esq. Enforcement Office in Washington, D.C. in April 2006, and other enforcement counsel. Telephone Interviews with Joyce Howell, Senior Gen. Counsel, Region III, EPA (Mar. & Apr. 2006) (on file with author); Telephone Interview with Michael Walker, Senior Enforcement Counsel, Office of Enforcement & Compliance Assurance, EPA (Jan. 2008) (on file with author).

⁶¹ *See* Joel A. Mintz, *Some Thoughts on the Interdisciplinary Aspects of Environmental Enforcement*, 36 *Envtl. L. Rep.* (Envtl. Law Inst.) 10,495 (July 2006) (describing the four sources of critical environmental enforcement information). At the heart of EPA’s enforcement efforts rests the availability of accurate compliance information which enables the agency to assess its success in achieving regulatory goals. *Id.*

der the regulatory program? Having clear and reliable answers to these questions is fundamental to the enforcement process and, ultimately, to the achievement of the underlying environmental program objectives.⁶²

In order to determine compliance status, the Agency must acquire information concerning compliance—is the firm or individual meeting the environmental rules or violating them? Violations are identified through reports generated by EPA's program-specific inspectors who visit and inspect regulated sites on a periodic basis. These inspectors perform their duties pursuant to EPA's inspection guidelines. Often, they have deep experience and expertise with a number of environmental statutes, allowing them to identify violations on-site. The gathering of this compliance information stands at the center of the enforcement process and is crucial to the success of environmental regulation.

B. *Deciding Whether to Enforce*

When an inspection identifies a compliance issue of concern to the Agency, the inspector distributes his report to the pertinent program manager for review. The program manager and staff then determine whether the submitted inspection report has described an instance of significant noncompliance requiring an enforcement response. This program manager will also conduct "tier meetings" with both the state in which the facility is located and EPA staff. The state tier meeting will determine whether EPA or the state will initiate the enforcement action. Perhaps due to resource constraints, states frequently defer to EPA and elect to have it proceed with enforcing the violation.⁶³ EPA may also prefer to take charge of the matter to ensure that a state-led enforcement action will not result in a settlement that

⁶² EPA obtains enforcement information from a variety of sources, including facility self-reporting, governmental inspections, and investigations. EPA conducted approximately 23,000 inspections in 2006. OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, EPA, FY 2006 OECA ACCOMPLISHMENTS REPORT 27 (2006), *available at* <http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy06accomplishment.pdf>. This figure represents a significant increase from fiscal years 2001 and 2002, where the number of EPA inspections was approximately 17,500 per year. *Id.*

⁶³ It is notable, however, that the states collectively initiate far more environmental enforcement actions than does EPA. EPA's enforcement statistics reveal the disparity between state and federal enforcement activities. EPA records indicate that the percentage of state-led actions is often over ninety percent. Sector Notebooks Data Refresh, Compliance Assistance, US EPA, http://www.epa.gov/compliance/resources/publications/assistance/sectors/notebooks/data_refresh.html (follow "Five-Year Summary" hyperlink under "Enforcement and Compliance Summary for Selected Industries") (last visited Apr. 14, 2008).

imposes lenient financial penalties and operating permit features.⁶⁴ As a procedural matter, EPA cannot proceed within its own administrative enforcement system with the state as a co-plaintiff. If the state insisted in joining in the enforcement proceeding, EPA would have to proceed with a judicial enforcement action.

C. *Initiating the Administrative Enforcement Process: EPA's Complaint*

If EPA and the state conclude that EPA alone will proceed with enforcement, an internal EPA tier meeting of EPA's General Counsel and relevant Agency program heads will result in the appointment of a staff attorney to review the inspection report and to make a recommendation on whether to proceed and how. If violations have been identified, a notice of violation will be issued to the actor, informing it of the regulatory infraction and requesting compliance with the environmental rules.⁶⁵ Ultimately, the General Counsel and program heads then make the final decision on whether to proceed with the matter and what form of relief should be sought. If the decision is to proceed, the previously appointed staff attorney will review the case file and draft an administrative complaint.⁶⁶ The complaint is then reviewed using the same concurrence process involving the General Counsel and the program heads before it is filed.

In most instances, the complaint will make a claim for a specific dollar amount to be assessed as a civil penalty. Approximately ten per-

⁶⁴ An example of this phenomena can be found in the well-known CWA citizen suit case. *See generally* Chesapeake Bay Found., Inc v. Gwaltney of Smithfield, Ltd., 611 F. Supp. 1542 (E.D. Va. 1985) (finding the citizen group had standing and authorizing the group to seek a civil penalty against the polluter). The federal district court found for the environmental plaintiffs and imposed a civil penalty of \$1.28 million upon the defendant. *Id.* at 1565. Judge Merhige reduced the maximum penalty of \$6.6 million after considering adjustment factors. *Id.* at 1556. However, the Commonwealth of Virginia had recovered penalties of merely \$40,000 for the same violations in a case brought in state court for violations of state law. *See* Ann Powers, *Gwaltney of Smithfield Revisited*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 557, 562-63 & n.32 (1999).

⁶⁵ Even prior to the filing of EPA's administrative complaint, EPA may engage in negotiation by sending a "show cause" letter to the alleged violator setting out the agency's allegation and specifying a civil penalty. Telephone Interview with Michael Walker, Senior Enforcement Counsel, Office of Enforcement & Compliance Assurance, EPA (Jan. 2008) (on file with author).

⁶⁶ The complaint must contain statutory authorization supporting a factual basis for relief sought, including penalty assessed, or, when no penalty is yet assessed, a description of the severity of the violations alleged; request for Permit Action, compliance or corrective action; notice of right to a hearing; address; instructions for paying penalties; and a copy of the Consolidated Rules of Practice. 40 C.F.R. § 22.14(a)(1)-(8) (2007). The complaint can also be amended or withdrawn. *Id.* § 22.14(c)-(d).

cent of the time, however, complaints will state no specific penalty amount but will make a general penalty demand by setting forth the number of alleged violations and their severity.⁶⁷ In the remaining ninety percent of cases, a penalty request is structured from penalty policies and penalty matrices based on statutory factors and EPA civil penalty guidance.⁶⁸ It is important to note that the penalty calculation usually begins with the program personnel and not the enforcement attorney. In theory, if the consideration of the statutory and administrative penalty policies occurs at this early stage in the enforcement process, it will effectively establish the EPA's civil penalty request at a high point that will frequently be compromised in a settlement agreement or an ALJ case decision.

Although at this point there has not yet been any contact with the opposing party, once the complaint is filed, the opposing party is invited to participate in settlement discussions prior to filing its answer.⁶⁹ Only rarely does the opposing party simply choose to pay the penalty sought in the complaint and thereby end the enforcement action. The settlement negotiations are conducted at the regional-office level by regional personnel. In most cases, parties charged in administrative complaints elect to negotiate with EPA, hoping to reach a prehearing settlement. Settlement options available to the opposing party will vary according to the allegations that have been made in the complaint, but usually the respondent and EPA discuss: (1) modifications to payment obligations; (2) whether or not to file an answer; (3) questions about underlying liability; (4) agreements on extension motions; (5) setting future settlement meetings; and, most importantly, (6) timetables for compliance if the alleged violation has not yet been corrected.

⁶⁷ *Id.* § 22.14(a)(4)(ii).

⁶⁸ Lisa, *supra* note 23, at 13–14. (“When the complainant elects to make a specific penalty demand, it has been the practice of the Agency to calculate such civil penalties based upon the previously mentioned statutory factors and in accordance with civil penalty policies created by EPA.”); *see* Policies & Guidance, Civil Enforcement, US EPA, <http://www.epa.gov/compliance/resources/policies/civil/index.html> (last visited Apr. 14, 2008) (providing links to various examples of EPA penalty policies); *see, e.g.*, OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, EPA, CIVIL PENALTY POLICY FOR SECTION 311(B)(3) AND SECTION 311(J) OF THE CLEAN WATER ACT 1 (1998), *available at* <http://www.epa.gov/compliance/resources/policies/civil/cwa/311pen.pdf>.

⁶⁹ *See* 40 C.F.R. § 22.18(b)–(c); *see also* Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties Issuance of Compliance or Corrective Action Order and the Revocation, Termination, or Suspension of Permits, 64 Fed. Reg. 40,138, 40,157 (July 23, 1999) (to be codified at 40 C.F.R. pt. 22) (discussing proposed rules to the settlement process).

Frequently, negotiated settlements include features that are not exclusively civil fines, but rather, agreements to take other environmentally beneficial actions in order to mitigate the cash penalties initially assessed. These settlement tools are called Supplemental Environmental Projects (SEPs) and, if undertaken by the respondent, could result in a reduction of the initial penalty assessment.⁷⁰ The range of potential SEPs is quite broad. For example, for an Emergency Planning and Citizen Right-to-Know Act violation, the opposing party could offer to utilize substitute chemicals in its processes that are not statutorily within the jurisdiction of EPA.⁷¹ SEPs could also include easements for open space and accompanying land trust conveyances for RCRA violations,⁷² or purchasing hybrid busses for significant CAA violations.⁷³ SEPs are commonly used as components of EPA settlements and are subject to Agency policy.⁷⁴ While EPA cannot specifically propose that a company implement a SEP, nor propose what SEP might be acceptable, EPA can direct the party to a "SEP Idea Bank" for ideas.⁷⁵

⁷⁰ ENVIRONMENTAL ENFORCEMENT, *supra* note 8, at 150. EPA is now increasingly using the SEP device as a part of its settlements. Professor Mintz has noted that in fiscal year 2006, EPA settled 220 cases requiring defendants to implement SEPs. *See id.* In its policy on SEPs, EPA sets out categories of supplemental projects that may be undertaken. Memorandum from Steven A. Herman, Assistant Adm'r, EPA, to Reg'l Adm'rs 7-11 (Apr. 10, 1998).

⁷¹ *See id.* at 9.

⁷² *See id.* at 10-11.

⁷³ *See id.* at 9.

⁷⁴ *See id.* at 3-4. In fiscal year 2006, EPA reached settlements in 220 cases where it required defendant to undertake SEPs with a total value of approximately \$78 million. 2006 NUMBERS AT A GLANCE, *supra* note 14. States have also adopted SEP policies and included SEPs in state-brokered settlements. *See* PUB. L. RESEARCH INST., UNIV. OF CAL. HASTINGS COLL. OF L., SUPPLEMENTAL ENVIRONMENTAL PROJECTS: A FIFTY STATE SURVEY WITH MODEL PRACTICES 1 (2006), available at http://www.uchastings.edu/site_files/plri/SEPsummary.pdf. The academic literature has shown mixed receptiveness to EPA's use of SEPs. Compare David A. Dana, *The Uncertain Merits of Environmental Enforcement Reform: The Case of Supplemental Environmental Projects*, 1998 WIS. L. REV. 1181, 1184 (criticizing SEPs for their "underdeterrence" potential), with Joel S. Hirschhorn, *Pollution Prevention Comes of Age*, 29 GA. L. REV. 325, 331-32 (1995) (approving of SEP practices).

⁷⁵ EPA's website provides information on the Agency's SEP policy, SEP characteristics, and categories of acceptable SEPs. *See* SEPs, Civil Enforcement, Compliance and Enforcement, US EPA, <http://www.epa.gov/compliance/civil/seps/index.html> (last visited Apr. 14, 2008). The six jurisdictions in the mid-Atlantic Region III have established a SEP Idea Bank and Index. *See* SEP Idea Bank, Mid-Atlantic Enforcement, US EPA, <http://www.epa.gov/Region3/enforcement/sepbank.htm> (last visited Apr. 14, 2008). SEPs can warrant a 100% credit to the gravity component of a penalty, although generally the credits fall in the range of sixty to eighty percent of the penalty proposed. *See* Memorandum from Steven A. Herman, *supra* note 70, at 22. No SEP credit is available for any penalty based upon economic benefit. *Id.* at 12.

If the parties reach an agreement, EPA will draft a Consent Agreement/Final Order (CAFO).⁷⁶ The CAFO will generally contain both an outline of the settlement and a separate "conditions" document attachment.⁷⁷ It becomes final when approved by the Regional Judicial Officer (RJO) or Regional Administrator in the EPA region, since the RJOs serve as "Presiding Officers" in a Part 22 proceeding until an answer is filed by a respondent and the case is forwarded to the Agency's Office of Administrative Law Judges.⁷⁸ With this agreement and receipt of payment of the penalty, the regional official issues a Final Order ending the enforcement case.⁷⁹ Up to this point, the administrative enforcement proceeding has been conducted by EPA's regional officials as a process of negotiation and prehearing settlement. If settlement is not possible, the filing of the respondent's answer to EPA's complaint starts the adjudicatory hearing process.⁸⁰

*D. After the Complaint: Respondent's Answer and Prehearing
Alternative Dispute Resolution*

Although the parties may continue to negotiate, the administrative hearing process formally begins when the respondent files an answer to EPA's administrative complaint.⁸¹ In practice, the answer generally mirrors EPA's complaint paragraph-by-paragraph. EPA considers a response of "lacks sufficient information," however, as the functional equivalent of a denial.⁸² Once the answer is filed, EPA's Office of Administrative Law Judges obtains jurisdiction over the action.⁸³ At the

⁷⁶ Settlement: Consent Agreement, 40 C.F.R. § 22.18(b)(2) (2007).

⁷⁷ See *id.* A consent agreement specifies the terms and conditions of the settlement. *Id.*

⁷⁸ See *id.* § 22.4(b).

⁷⁹ See *id.* § 22.18(b)(2), (c). This process is not exclusively a regionally managed one. EPA's Washington, D.C. headquarters enforcement office files some cases on its own accord. Telephone Interview with Michael Walker, Senior Enforcement Counsel, Office of Enforcement & Compliance Assurance, EPA (Jan. 2008).

⁸⁰ 40 C.F.R. § 22.15.

⁸¹ See *id.*; Answer to the Complaint, 64 Fed. Reg. 40,138, 40,153 (July 23, 1999) (to be codified at 40 C.F.R. pt. 22). Contents must admit, deny, or explain each allegation and include circumstances or arguments alleged to constitute grounds for defense or any proposed relief. 40 C.F.R. § 22.15(b).

⁸² 40 C.F.R. § 22.15(b).

⁸³ *Id.* § 22.21. ALJs are employed by many federal agencies to perform the quasi-judicial function of conducting adjudicatory hearings authorized by the Administrative Procedure Act. See 5 U.S.C. § 554 (2000). EPA has less than ten ALJs working at any time to do this work. There is no universal panel of federal ALJs and each agency has its own cadre. Other agencies, such as the Social Security Administration, employ several hundred ALJs for the conduct of various Social Security benefit programs. See Robin J. Arzt, *Recommendations for a New Independent Adjudication Agency to Make the Final Administrative Adjudica-*

outset, the parties will have an opportunity to participate in Alternative Dispute Resolution (ADR) or ADR arbitration methods to resolve the dispute. There are two main forms of ADR available: (1) party-initiated ADR and (2) EPA ALJ mediation.⁸⁴ The chief ALJ will offer the parties an opportunity to participate in ADR or ADR arbitration methods,⁸⁵ which are usually conducted by a retired ALJ or an ALJ who will not thereafter preside at the hearing should the ADR process fail to resolve the matter. ADR is offered automatically and respondents almost always accept the offer since doing so delays the forward momentum of the administrative case and removes the case from the active docket. The arbitration session usually is conducted by telephone and the ALJ arbitrator frequently will comment individually to the strength or weakness of the respective parties' positions. If this arbitration is successful, the arbitrator will report this result to the head ALJ who subsequently will issue a letter to the parties instructing them that they have thirty days to file the CAFO that formally terminates the administrative charge. If they do so, the matter ends without further hearing and decision.⁸⁶

If the ADR arbitration is not successful in resolving the controversy, the matter proceeds on a fast track towards an administrative hearing. Within approximately six months of filing the complaint, EPA is required to undertake its prehearing information exchange.⁸⁷ At the same time, an EPA ALJ is assigned to preside over the case.⁸⁸ The information exchange, with certain exceptions, establishes the exclusive list of documents, exhibits, and witnesses that may be considered or

tions of Social Security Act Benefits Claims, 23 J. NAT'L ASS'N ADMIN. L. JUDGES 267, 275-92 (2003) (providing a general bibliography on federal ALJ practice).

⁸⁴ Lisa, *supra* note 23, at 37-38.

⁸⁵ See Alternative Dispute Resolution, 64 Fed. Reg. 40,138, 40,158 (July 23, 1999) (to be codified at 40 C.F.R. pt. 22). In 2000, EPA issued a final Policy on Alternative Dispute Resolution that encouraged ADR use in adjudications, rulemaking, policy development, and administrative and civil judicial enforcement actions. See Policy on Alternative Dispute Resolution, 65 Fed. Reg. 81,858, 81,858-81,860 (Dec. 27, 2000).

⁸⁶ Lisa, *supra* note 23, at 39-40.

⁸⁷ Prehearing Information Exchange, 40 C.F.R. § 22.19(a) (2007).

⁸⁸ The powers and duties of an ALJ are subject to the published EPA rules, and they preside subject to rules set forth at 40 C.F.R. § 22.4(c). These powers are quite extensive. *Id.* The ALJ is responsible for conducting the formal proceeding, interpreting the law, and applying agency regulations and policies in the course of an administrative adjudication. *Id.* They are EPA employees, but in order to assure their independence, ALJs are not subject to agency personnel evaluation or sanctions and their compensation is set by the federal Office of Personnel Management, an independent agency. See 5 C.F.R. § 930.205(a). EPA can take disciplinary action against an ALJ only for good cause and before the federal Merit Systems Protection Board. *Id.* § 930.211(a).

heard in the administrative hearing.⁸⁹ This process structures the hearing around a predetermined evidentiary base.⁹⁰ If any further discovery beyond the prehearing exchange is considered to be necessary, EPA must file a motion to compel discovery.⁹¹ At this point in the proceeding the respondent must exchange its relevant information too, and EPA has an opportunity to object to documents contained therein. This phase is important in the hearing process: since the parties are bound by the pre-hearing process, no additional information may be offered at the hearing that was not already produced.⁹² The Part 22 regulations specifically set forth the nature of the information required for the prehearing exchange, and they take special note of penalty information by requiring EPA to explain and justify its penalty request.⁹³ If EPA's complaint sets forth a specific penalty amount, the Part 22 rules require that the complainant, EPA, "shall explain . . . how the proposed penalty was calculated in accordance with any criteria set forth in the Act."⁹⁴ If EPA has elected to plead generally without specifying a penalty amount, Part 22 requires that the complainant's prehearing information exchange must set forth all the facts that it believes are relevant to the calculation of a penalty for respondent's alleged violations.⁹⁵ In this case, EPA must file a specific penalty amount within fifteen days of the respondent's prehearing exchange filing, along with an explanation of the penalty calculation.⁹⁶ Similarly, the respondent must then supplement its prehearing exchange with any arguments it plans to present to justify reduction or elimination of the proposed penalty.⁹⁷

These procedural requirements suggest that the issue of the size of the administrative penalty sought by EPA is one that requires early disclosure and that EPA must justify its request in its administrative pleadings. These rules also reflect a desire to tie specific remedial requests to statutory penalty factors or existing EPA penalty policies rather than random, exorbitant figures. Certainly, the Agency's stated policy in its

⁸⁹ 40 C.F.R. § 22.19(a).

⁹⁰ *See id.*

⁹¹ *Id.* § 22.19(e). Other discovery is permitted. Other Discovery, 64 Fed. Reg. 40,138, 40,160-62 (July 23, 1999) (to be codified at 40 C.F.R. pt. 22).

⁹² 40 C.F.R. § 22.19(a)(1). Information required in the prehearing exchange that is not submitted shall not be admitted into evidence at hearing, except as provided in 40 C.F.R. § 22.22(a). *Id.*

⁹³ *Id.* § 22.19(a)(3).

⁹⁴ *Id.*

⁹⁵ *Id.* § 22.19(a)(4).

⁹⁶ *Id.*

⁹⁷ *Id.* § 22.19(a)(3).

own rules has been to impose a disciplined method of decisionmaking for its enforcement personnel to use in explaining how they arrived at their civil penalties.

E. *Securing Settlements Prior to Hearing*

The administrative penalty process is extremely successful in securing settlements prior to the hearing. Prehearing ADR and other settlement negotiation will usually dispose of ninety percent of the filed cases through the CAFO settlement technique. As a result, only about ten percent of the filed cases, or several hundred per year, actually move forward to the administrative hearing. These contested cases usually are characterized by large dollar penalty amounts, high capital expenditures required to come into compliance, or, more rarely, a point of law needing interpretation. This ten percent slice of filed cases is overwhelmingly heard not on questions of basic liability, but rather in order to contest the penalty calculation contained in EPA's complaint. Most of the liability questions are resolved by a prehearing Motion for Accelerated Decision, a form of administrative summary judgment.⁹⁸ To the extent that the underlying liability is still contested at the hearing, however, EPA must present its *prima facie* case, and the respondent is then accorded an opportunity to present its defenses.⁹⁹ EPA may prevail only if it proves every contested issue by a preponderance of the evidence.¹⁰⁰

Once liability is found, the proceeding moves to its second stage, the penalty determination. This bifurcated process sets the penalty in the form of a written opinion rendered after the hearing. During the penalty phase of the hearing, EPA presents evidence on how its penalty policy should apply to the case at hand. The principal EPA witness on this issue is the program person who originally calculated the proposed penalty. To buttress its penalty arguments, EPA will also present evidence on administrative penalties previously ordered for respondents having been found to have committed comparable violations. This evidence will attempt to establish a penalty norm for the ALJ to follow. After EPA presents its penalty case, the respondents will then present their response, raising such issues as the inability to pay or to continue in business. Both respondents and EPA remain bound to the penalty-related information

⁹⁸ See 40 C.F.R. § 22.20(a). The Motion for Accelerated Decision may be granted at any time by the Presiding Officer to either party if there is no issue of material fact and a party is entitled to judgment as a matter of law. *Id.* In addition, it can be granted to the respondent if EPA has failed to establish a *prima facie* case. *Id.*

⁹⁹ *Id.* § 22.24(a).

¹⁰⁰ *Id.* § 22.24(b).

produced during the prehearing information exchange. When the amount of penalty is high enough respondents will present testimony from outside economic experts to reinforce their case.

F. *Reaching Decision in the Administrative Hearing*

ALJs do not rule from the bench, but rather provide the parties with a period of time to prepare and submit briefs after the hearing.¹⁰¹ After receiving the briefs, a written ruling is issued by the ALJ.¹⁰² Despite its nonjudicial, administrative nature, this entire process is not an expeditious one for either EPA or the party charged with the violation. For those few cases that are not settled, case resolution usually takes between eighteen and twenty-four months to move from facility inspection to the ALJ's written opinion. Furthermore, the process need not end here since appeal may be taken to EPA's EAB and this could further extend the decisionmaking time period.¹⁰³ In practice, these appeals almost always are initiated by respondent. Under EPA's Part 22 rules, the EAB serves as the final Agency decisionmaker for administrative penalty actions.¹⁰⁴ As such, the EAB is "responsible for assuring consistency in Agency adjudications by all of the ALJs and RJOs."¹⁰⁵ The scope of the EAB review is limited to those issues raised during the administrative proceeding and the Initial Decision, matters as to subject matter jurisdiction, and anything additional the EAB decides should be included.¹⁰⁶ As the data below reveals, very few cases make it to the EAB for administrative appellate review, and the EAB does not appear to exert much supervisory influence to assure consistency or conformity with EPA rules. Theoretically, an EAB decision could be appealed to the federal courts for further review.¹⁰⁷

¹⁰¹ *Id.* § 22.26.

¹⁰² *See id.* § 22.27(a).

¹⁰³ *Id.*

¹⁰⁴ *See* 40 C.F.R. § 22.4(a); Nancy B. Firestone, *The Environmental Protection Agency's Environmental Appeals Board*, 1 ENVTL. L. 1, 1 (1994); William A. Tilleman, *Environmental Appeal Boards: A Comparative Look at the United States, Canada, and England*, 21 COLUM. J. ENVTL. L. 1, 3 (1996). After Post-Hearing Briefs have been submitted summarizing the evidence presented at hearing and the legal positions of the parties, the Presiding Officer will issue a written ruling, called an Initial Decision, in which the Presiding Officer makes findings of fact, draws conclusions of law, and, when appropriate, imposes some form of relief to address a respondent's violations. 40 C.F.R. § 22.27(a).

¹⁰⁵ 64 Fed. Reg. 40,138, 40,165 (July 23, 1999) (to be codified at 40 C.F.R. pt. 22).

¹⁰⁶ 40 C.F.R. § 22.30(c).

¹⁰⁷ *See id.* § 23.12. In the few judicial review cases that examine administratively assessed civil penalties, EPA penalties have been accorded great deference upon later court review and are usually tested under an abuse of discretion standard. *See Pepperell Assocs. v.*

III. EMPIRICAL EXAMINATION OF EPA'S ADMINISTRATIVE CIVIL PENALTY PRACTICES

A. *Collecting Data Concerning EPA Administrative Penalties*

This Article analyzes administrative enforcement data derived from EPA reports over the five year period spanning from 1999 to 2004. There has been very little scholarly attention given to administrative enforcement sanctions and extremely little consideration of the impact of the ALJ system of decisionmaking on civil penalties suggested by EPA enforcement officials. In fact, EPA provides no public information on the subject of administrative enforcement besides annual totals and the value of the penalties imposed.¹⁰⁸ The principal purposes of the research in this Article were to examine EPA's assessment of civil or financial penalties through this administrative enforcement mechanism and to determine the extent to which statutory and agency penalty policies affected the actual imposition of financial penalties. More generally, this research is intended to examine how EPA handles the discretion that it has in the imposition of civil penalties. The main objectives of this work are to address three tasks:

(1) To evaluate the civil penalty assessment process in the first instance by identifying the initially proposed penalty amounts as reported in the administrative decisionmakers' opinions and compare them to the final penalties actually assessed (the Start/Finish comparison);

(2) To ascertain the frequency with which administrative decisionmakers alter EPA's proposed penalties and determine which of the statutory adjustment factors identified in the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), TSCA, CAA, CWA, RCRA, and EPA penalty policies, if any, are utilized in making those adjustments; and

EPA, 246 F.3d 15, 29 (1st Cir. 2001) (reviewing CWA penalties for abuse of discretion); *Kelly v. EPA*, 203 F.3d 519, 523 (7th Cir. 2000) (deciding that an abuse of discretion by an agency involves a decision made without a rational explanation, that departs from established policies, or that rests on an impermissible basis); *see also* *Newell Recycling Co. v. EPA*, 231 F.3d 204, 208 (5th Cir. 2000); *All Regions Chem. Labs, Inc. v. EPA*, 932 F.2d 73, 75 (1st Cir. 1991) (applying the Administrative Procedure Act § 706(2)(A) standard of "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). *But see* *3M Co. (Minn. Mining & Mfg.) v. Browner*, 17 F.3d 1453, 1456 (D.C. Cir. 1994) (rejecting EPA's interpretation of § 2462 of TSCA's statute of limitations in administrative penalty cases).

¹⁰⁸ *See* ENVTL. INTEGRITY PROJECT, *supra* note 16, at 10 app.I. Often, those statistics are criticized as being unduly inflated by EPA by the inclusion of amnesty agreements and default judgments that are unlikely to be collected. *See id.* at 6.

(3) To determine which of the statutory and EPA adjustment factors is most commonly cited in case decisions that make civil penalty adjustments upwards or downwards.

B. *EPA's Administrative Enforcement System: Points of Termination*

The administrative enforcement system is an enforcement process that is comprised of a number of steps.¹⁰⁹ After a matter is set for enforcement by EPA regional officials, it can be terminated in a number of different fashions.¹¹⁰ The discussion below outlines the four principal ways in which an administrative enforcement action can end. These steps are important to properly understand in order to put the following empirical results into perspective. In addition, the data collected for this research uses the labels set forth in the subsections that follow.

1. The CAFO

The CAFO is developed when the parties to an enforcement case settle a matter.¹¹¹ It is a two-part document consisting of a Consent Agreement and Final Order.¹¹² The Consent Agreement sets forth the specific terms and conditions of the settlement and includes: the amount and terms of payment of any penalty; a statement by respondent admitting the jurisdictional allegations of the complaint; a waiver by respondent of its right to appeal the CAFO; terms of compliance or corrective action tasks to be performed by the respondent; terms and conditions of any SEPs; releases of liability; and reservations of rights or authorities for the complainant.¹¹³ As its name suggests, the Consent Agreement comprises the terms of the settlement between the government and the charged party.¹¹⁴ It contains the amount of any civil penalty imposed under the Agreement and the parties' consent to the assessment of any stated civil penalty.¹¹⁵ The Consent Agreement does not terminate the proceeding by itself.¹¹⁶ The conclusion comes when the EPA regional official or the EAB headquarters issues a Final Order

¹⁰⁹ See 40 C.F.R. pt. 22.

¹¹⁰ See *id.* §§ 22.17–.20, 22.31–.32.

¹¹¹ *Id.* § 22.18(b)(2).

¹¹² *Id.*

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ 40 C.F.R. § 22.18(b)(3).

¹¹⁶ See *id.*

in the case.¹¹⁷ The Final Order serves as the final Agency action in the proceeding and it ratifies the settlement terms set forth in the Consent Agreement.¹¹⁸ Actually, the party's liability for civil penalties for the charged offenses is finally resolved only when EPA receives "full payment" for any violations of law.¹¹⁹ The release is final when the check clears.

2. Default Orders

Default Orders address "failure [of a respondent] to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing."¹²⁰ The central idea is that a charged party may be considered to be in default under each of the stated scenarios and that a Default Order may terminate the proceeding.¹²¹ Most civil litigation systems contain similar provisions in their rule structures.¹²² Under the EPA rules, "[w]hen the Presiding Officer finds that default has occurred, he shall issue a [D]efault [O]rder against the defaulting party as to any or all parts of the proceeding," unless the record indicates a "good cause" rationale why a Default Order should not be issued.¹²³ In the usual case, the matter is ended with the Default Order and the recommended penalties become part of the order.¹²⁴

3. The Initial Decision

The Initial Decision is the judgment issued by the ALJ following the full administrative hearing and after the period reserved for filing briefs.¹²⁵ Not surprisingly, it includes findings of fact, conclusions of law or discretion, recommended civil penalty assessments, if appropriate, and a corrective action order or compliance order.¹²⁶ The EPA Part 22

¹¹⁷ *See id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* § 22.18(c).

¹²⁰ *Id.* § 22.17(a).

¹²¹ 40 C.F.R. § 22.17(a).

¹²² *See generally* 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2681 (3d ed. 1998) (discussing the history and policy of default judgments in civil litigation systems).

¹²³ 40 C.F.R. § 22.17(c).

¹²⁴ *Id.* § 22.17(d).

¹²⁵ *Id.*

¹²⁶ *Id.*

rules require that the penalty decision be explained in the ALJ's Initial Decision and state that the amount of the civil penalty be determined based on "evidence in the record" and in accordance with "any penalty criteria set forth in the Act."¹²⁷ The rules explicitly direct the decision-maker to "explain in detail . . . how the penalty to be assessed corresponds to any [statutory] penalty criteria."¹²⁸ Significantly, if the Initial Decision sets the civil penalty at an amount different from that proposed by EPA, this discrepancy must be explained with specific reasons given for an increase or decrease.¹²⁹ The drafters of the rule intended that the Initial Decision explain in writing the penalty calculation before making it final.¹³⁰ The Initial Decision automatically becomes a Final Order within forty-five days unless the respondent: (1) moves to reopen the hearing; (2) files an appeal to the EAB; (3) files a motion to set aside a default order; or (4) the EAB elects to review the matter on its own accord.¹³¹ If none of these steps are taken, the Initial Decision becomes final and, the respondent waives its right to have a court review the decision.¹³²

4. Final Orders

The Initial Decision will become a Final Order if none of the motions or appeals mentioned above are granted.¹³³ However, the EAB maintains an independent right to review these ALJ Initial Decisions on "its own initiative."¹³⁴ From the statistics discussed in Part III of this Article,¹³⁵ this prerogative is infrequently exercised.¹³⁶ When the EAB elects to review the determination, however, it will review the entire record de novo and will issue a final decision that either "shall adopt, modify, or set aside the findings of fact and conclusions of law or discre-

¹²⁷ *Id.* § 22.27(b).

¹²⁸ *Id.*

¹²⁹ 40 C.F.R. § 22.27(b); see Lisa, *supra* note 23, at 43 ("[A] Presiding Officer is required to consider any Agency penalty policies that are applicable to the case, but is not required to follow these policies in calculating a penalty as long as an adequate explanation as to the deviation from the policies is provided.").

¹³⁰ 40 C.F.R. § 22.27 (a)-(b).

¹³¹ *Id.* § 22.27(c) (1)-(4); see also *id.* §§ 22.28(a) (motion to reopen a hearing), 22.30(b) (review initiated by the EAB).

¹³² *Id.* § 22.27(d). Appealing the decision through the EAB preserves that right, although the data fail to identify many instances of the parties choosing to do so. *Id.*

¹³³ *Id.* § 22.31.

¹³⁴ *Id.* § 22.27(c) (4).

¹³⁵ See discussion *infra* Part III.

¹³⁶ See discussion *infra* Part III.D.

tion contained in the decision.”¹³⁷ Although the EAB makes a de novo review of penalty determinations, “[T]he Board generally will not substitute its judgment for that of the presiding officer absent a showing that the presiding officer has committed an abuse of discretion or a clear error in assessing the penalty.”¹³⁸ The Part 22 rules indicate that a penalty will be scrutinized in cases where the ALJ has chosen not to apply EPA’s penalty policies or the penalty assessed falls outside the range of penalties provided for by such policies.¹³⁹ In these cases, the EAB “will closely scrutinize the ALJ’s reasons for choosing not to apply the policy to determine [whether the reasons] are compelling.”¹⁴⁰ From the language used in these EPA rules, it would seem that the EAB intended to supervise ALJ civil penalties and to enforce the EPA’s guidance and statutory directives on penalty design.¹⁴¹ While some EAB precedent suggests that the EPA penalty policies are merely suggestive and not binding on the ALJ,¹⁴² a number of cases have reversed ALJ penalty decisions when they departed from the result that would have been obtained from application of the policy.¹⁴³ The small number of penalty cases actually reaching the EAB indicates that the exercise of this supervisory function is occasional at best.¹⁴⁴

¹³⁷ 40 C.F.R. § 22.30(f).

¹³⁸ *Predex Corp.*, 7 E.A.D. 591, 597 (1998); see *Phoenix Constr. Servs.*, 11 E.A.D. 379, 390 (2004) (stating that the Board will “ordinarily defer to a presiding officer’s factual findings where credibility of witnesses is at issue”); *Carroll Oil Co.*, 10 E.A.D. 635, 656 (2002) (“[T]he Board will generally not substitute its judgment for that of an ALJ absent a showing that the ALJ committed clear error or abused his or her discretion in assessing a penalty.”); *M.A. Bruder & Sons*, 10 E.A.D. 598, 610 (2002) (citing 40 C.F.R. § 22.30(f)); *Advanced Elec., Inc.*, 10 E.A.D. 385, 399 (2002) (stating that “the Board generally gives deference to a presiding officer’s penalty determination”); *Britton Constr. Co.*, 8 E.A.D. 261, 293 (1999) (citing *Predex Corp.*, 7 E.A.D. at 597) (stating that the Board ordinarily will not substitute judgment of presiding officer).

¹³⁹ See 40 C.F.R. § 22.27(b).

¹⁴⁰ *Chem. Lab Prod., Inc.*, 10 E.A.D. 711, 725 (2002) (quoting *M.A. Bruder & Sons*, 10 E.A.D. at 613). Compare *Chem. Lab Prod., Inc.*, 10 E.A.D. at 734 (holding that reasons for not applying agency penalty policies were not compelling), and *M.A. Bruder & Sons*, 10 E.A.D. at 612–13 (finding that ALJ’s reasons for departing from the penalty policy was not compelling), with *Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (1994) (finding the Presiding Officer’s rationale for deviating from penalty guidelines compelling).

¹⁴¹ 40 C.F.R. § 22.30(f).

¹⁴² See, e.g., *Employers Ins. of Wausau*, 6 E.A.D. 735, 758 (1997).

¹⁴³ See, e.g., *Carroll Oil Co.*, 10 E.A.D. at 661; *M.A. Bruder & Sons*, 10 E.A.D. at 616; *Advanced Elec., Inc.*, 10 E.A.D. at 415.

¹⁴⁴ See discussion *infra* Part III.D.

C. Sampling Strategy and Methodology

The central purpose of this research was to examine administrative enforcement civil penalty results in actual cases. To find reports of these administrative decisions, the research employed the Lexis EPA Administrative Materials Combined database.¹⁴⁵ The analysis was limited by searching only those decisions issued between August 1, 1999 and November 11, 2004, in order to coincide with the newly revised and promulgated Part 22 regulations issued in July of 1999.¹⁴⁶ As stated above, these rules required that ALJs and other decisionmakers carefully explain their civil penalties and conform to EPA guidance and statutory directions.¹⁴⁷ The five-year period that the research covered

¹⁴⁵ This database contains EPA ALJ Decisions, EPA EAB decisions, EPA General Counsel Memoranda, EPA RJO Decisions, and EPA Title V Air Permit Orders. Because the analysis primarily focused on administrative adjudications, this database was considered to be most appropriate for the research.

¹⁴⁶ Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. pt. 22.

¹⁴⁷ See, e.g., Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 135–136, 136l (a)(4) (2000); Toxic Substances Control Act of 1976, 15 U.S.C. § 2615(a)(2)(B) (2000); Clean Water Act of 1977, 33 U.S.C. § 1319(d) (2000); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6928(a)(3) (2000); Clean Air Act, 42 U.S.C. § 7413(e) (2000). Each environmental statute contains an enforcement section which specifies both the nature of enforcement powers and the range of punishments that are available. See, e.g., 33 U.S.C. § 1319(d). With regard to civil, noncriminal enforcement, these statutes set statutory maximum penalties per day of violation. See, e.g., *id.* Most of these statutes then offer a menu of factors that federal judges and EPA enforcement officials shall consider when setting the actual penalty amounts. See, e.g., *id.* Section 309(d) of the CWA provides a common example of such a list:

In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

Id.; see, e.g., 7 U.S.C. § 1361(a)(4); 15 U.S.C. § 2615(a)(2)(B); 42 U.S.C. § 6928(a)(3); 42 U.S.C. § 7413(e). These statutory *adjustment* factors do not explain emphasis or weighting of elements. In order to help itself, and to inform the regulated community as well as the federal courts, in 1984 EPA issued a general policy on civil penalties. EPA, POLICY ON CIVIL PENALTIES: EPA GENERAL ENFORCEMENT POLICY GM-21 (1984). This policy document set a single set of EPA goals for penalty assessment and outlined a general process for the assessment of penalties. On the same day, it issued a companion document intended to guide agency programs in the development of their own penalty assessment programs. EPA, A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENTS: IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES: EPA GENERAL ENFORCEMENT POLICY GM-22 (1984). This framework directs EPA officials to set preliminary penalty amounts derived from two basic components: a gravity element and an economic benefit element. *Id.* Since 1984, EPA has issued statute-specific penalty policies that implement program-specific goals. See, e.g., RCRA ENFORCEMENT DIV., EPA, RCRA CIVIL PENALTY POLICY 1-4 (2003),

also spanned two presidential administrations of different political parties in an attempt to identify long-term trends unaffected by short-term political goals. The analysis focused on five environmental regulatory statutes that were considered to be fairly representative of administrative enforcement actions across the range of environmental law. With this outlook, the data collection proceeded.

The initial search efforts attempted to find ways to eliminate extraneous orders and motions from the large sample of administrative case decisions, numbering approximately 1100 for the five statutes combined. The main focus was to concentrate on those decisions discussing the issue of civil penalties and, more specifically, those explaining how the proposed penalties were adjusted upwards or downwards by the ALJs. The decisions in the sample were classified as motion orders, Default Orders, CAFOs, Initial Decisions, or Final Orders. These cases were then evaluated on the basis of whether they contained any discussion of penalty calculation. Those decisions likely to contain considerations of adjustment factors were identified as "relevant" and separate lists of relevant decisions for each statute were generated and analyzed.¹⁴⁸

The large list of approximately 1000 decisions quickly shrunk. Of the total decisions under the CAA, TSCA, FIFRA, CWA, and RCRA for the time period under study, 597 were CAFOs, 246 constituted "other" orders and motion orders, and the remaining 190 were considered to be relevant decisions because they contained civil penalties. Relevant decisions were defined as those where a final disposition of the penalty issue was addressed in an adjudicated setting; in other words, anything not a Consent Agreement or Final Order.¹⁴⁹ The chart below reflects these total numbers.

available at <http://www.epa.gov/compliance/resources/policies/civil/rcra/rcpp2003-fnl.pdf>; Memorandum from Mary T. Smith, Dir. Field Operations & Support Div., EPA, to Field Operations & Support Div. Pers. (Jan. 14, 1993), available at <http://www.epa.gov/compliance/resources/policies/civil/caa/mobile/adminpenpol.pdf>.

¹⁴⁸ The methodology used for the majority of the analysis was generated using tools available in Microsoft Access and Microsoft Excel, specifically the report generation and pivot table functions. This analysis was conducted for the entire 389 case sample and for the 191 non-CAFO case sample as well.

¹⁴⁹ Each of the five statutes' penalty assessment sections were analyzed to ascertain what statutory factors the Presiding Officer was required to consider in assessing a final penalty for each violation. Importantly, a single researcher checked each of the cases to ensure consistency in data collection and overall accuracy of reporting. A report was generated for each case containing the entire information collected for the record.

Table 1: Total number of TSCA, FIFRA, CWA, and CAA cases identified for time period 1999–2004

Statute					
Decision Type	TSCA	FIFRA	CWA	CAA	RCRA
CAFOs	188	100	220	82	7
Other orders/ motions	51	32	83	77	3
"Relevant" decisions	35	33	53	42	27
Total	274	165	356	201	37

RCRA cases identified do not represent the total number for the time period, only those identified in the refined search specific to RCRA.

From these decisions, the cases were broken down into two categories: (1) CAFOs with civil penalties imposed and (2) relevant ALJ decisions with civil penalties imposed. The final case sample contained a total of 389 decisions, including 198 CAFOs and 191 cases considered relevant for the purposes of this research. The Consent Agreement cases contained some discussion of penalty issues. The relevant ALJ cases were the main focus of the research analysis, in the hopes they would reveal the ALJs' methods for constructing civil penalties in actual administrative case decisions.

As the numbers indicate, over half of the case resolutions were by way of CAFO settlement agreements.¹⁵⁰ This large proportion should have been expected since many cases were settled for relatively small amounts of money, perhaps less than the cost of contesting the EPA charge.¹⁵¹ While these CAFO terminations were numerous, they often would not specify a penalty calculation method, and they represent compromise at the regional office level and not the full decision of an ALJ. Once these CAFOs were eliminated from the total of 389 cases, the research concentrated on the remaining 191 ALJ penalty decisions.

Table 2: Total number of cases by statute represented in the sample analyzed

Statute							
Type of Decision	TSCA	FIFRA	CWA	CAA	RCRA	Multi-Media	Grand Total
CAFO	69	20	37	65	1	6	198
Final Decision	6	9	13	10	7		45
Initial Decision	6	13	25	20	11		75
Initial Decision/ Default Order	14	12	5	11	7		49
Other	3	4	3	9	1	2	22
Grand Total	98	58	83	115	27	8	389

¹⁵⁰ See *infra* tbl.2.

¹⁵¹ See ENVTL. INTEGRITY PROJECT, *supra* note 16, at 10 app.I (presenting amnesty agreements with nominal \$500 civil penalties).

D. Observations Derived from the Data

1. Comparison Between Proposed Initial Penalties and Final Assessed Penalties (the Start/Finish Comparison)

One interesting question addressed by the research was how successful EPA was in actually imposing the civil penalty that had been initially recommended by the regional enforcement officials in their administrative complaint. This inquiry was termed the "start/finish comparison" and it reflects the degree of *discount* that ALJs and other decisionmakers made from the initial EPA penalty demand. Considering all 389 cases in the large sample mentioned above, EPA's administrative complaints had proposed approximately \$24 million in civil penalties, while the final penalties assessed amounted to approximately \$13.4 million. This amounted to a rather sizable 44% reduction in the start/finish comparison. Curiously, within this sample of cases, those that terminated with an early CAFO resulted in a 29% reduction over the administrative complaint request, while those that were imposed following an Initial Decision resulted in a 52% reduction. This result suggests that, in the aggregate, it was more beneficial to contest the administrative complaint through EPA's ALJ system if the costs of doing so were less than the saved penalty. Successfully contesting the EPA-proposed penalty would result in an additional 23% discount off of the proposed amount. However, as the data indicates, the penalty amounts are relatively small and the cost savings derived from successfully contesting EPA's penalty might not be worth the effort.¹⁵²

2. Examining the Start/Finish Comparison in Relevant or Contested Administrative Penalty Cases

When the contested—or nonsettled—penalty-imposing cases became the focus of the analysis, several interesting questions emerged. First, of these 191 relevant cases, what was the impact of the administrative proceeding on the penalty amount that had been initially proposed in EPA's complaint? Was it increased, decreased, or left at the requested amount? When considering the case decisions in this sample, 5% resulted in an increase in the penalty initially proposed, 53% resulted in no change, and 42% resulted in a decrease in the penalty from the one initially proposed. This important data reveals that, for the most part,

¹⁵² The author compiled this data from several databases.

contesting the proposed civil penalty held little danger of having the ALJ or the EAB increase the initially proposed penalty. On the other hand, removing the small number of penalty increases from consideration, the statistics reveal that by contesting the case, the charged party has a 56% chance of having the penalty proposed in EPA's complaint affirmed unchanged, while having a 44% chance of having the civil penalty reduced. Perhaps the small dollar amount of the proposed civil penalties kept the contested case count down and the number of CAFO settlements up.

Second, of the small number of penalty increases in the sample, a defendant was four times as likely to have the penalty increased by the EAB than by an ALJ. In most of these upward-adjustment cases, the EAB was persuaded by EPA counsel that the ALJ had unreasonably lowered the initial penalty amount set forth in the administrative complaint. This result suggests that there was some risk—though not great—of appealing an ALJ-issued penalty award to the EAB. Other evidence collected supports the idea that the ALJs regularly ruled in favor of defendants in civil penalty cases. In two out of three contested cases in the sample, ALJs decreased the initially proposed penalty, while in one in three cases, they did not change the recommended penalty. This would suggest that the ALJs were persuaded by the defendants' arguments that the proposed penalty was excessive or unjustified.

In the cases that were appealed to the EAB, there was a 50% chance of decreasing the penalty imposed in the proceeding below, and this percentage was somewhat lower than the comparable figure for ALJ decisions. This statistic suggests that the EAB considers it to be its role to correct erroneous ALJ decisions and adjust the civil penalties downward as well as upward in cases reaching them.

Third, in terms of the amount of money involved in the relevant cases, the average penalty increase was \$8904, while the average penalty decrease was \$96,000.¹⁵³ This ten-fold imbalance in amount should be considered in light of the fact that there were nearly ten times as many downward adjustments made as upward adjustments. With this much

¹⁵³ Even excluding the smallest downward penalty change, \$365, and the largest downward adjustment, \$1.7 million, the average decrease was approximately \$72,000. This amount exceeds the amount reported for the larger sample of 191 contested cases. The probable explanation for this fact is that the 122 contested cases in this *relevant* case category might represent matters with higher initially proposed penalties, since they resulted in full ALJ case decisions, complete with a penalty calculus. Perhaps the other sixty-nine cases involved considerably less money, which would clarify why the ALJ did not explain the final penalty assessed.

money at stake, and with the odds of winning a downward penalty adjustment, it is surprising that more cases are not contested. Perhaps the CAFOs obtain similar penalty reductions without the expense and inconvenience of contesting the charge. Also, there is a greater chance that challenging the initial penalty that EPA has proposed will be unsuccessful and that, in the end, the ALJ will impose a penalty unchanged from the amount requested by EPA.

Fourth, an examination of the civil penalty adjustments made by ALJs reveals unevenness in the distribution of the adjustments across the five statutes studied. Since the upward adjustments were so few, there was no clear difference in the small numbers involved. When comparing the no change results with the decrease or downward adjustments, however, interesting patterns emerged. The following illustrates the percentage of no change cases with the percentage of decrease cases in terms of the penalties imposed by ALJs, arranged by statute:

CAA (47.5%/47.5%);
FIFRA (71%/29%);
RCRA (41%/50%);
TSCA (81%/19%);
CWA (27%/66%).

While there was an even chance of penalty decrease or no change in the CAA, with RCRA (50%), and the CWA (66%), there was an even or better chance of penalty reduction. In the FIFRA (71%) and TSCA (81%) cases, the odds were in favor of no change in the proposed penalty amount, suggesting that challenging the initial penalty figure was a long shot at best. There is no obvious explanation for this discrepancy between statutes. The lesson that this data provides is that the chances of a downward civil penalty adjustment are much greater with the CAA, RCRA, and the CWA than with FIFRA and TSCA. It is unclear why there would consistently be erroneous, high civil penalty demands by EPA, but that the FIFRA and TSCA penalty requests would be more accurate and legally defensible.

3. How Frequently Is the Civil Penalty Calculation Explained?

a. *Providing a Civil Penalty Explanation: Overall Statistics*

Analyzing the 191 case decisions that imposed administrative civil penalties, the opinions reflect an uneven degree of attention to the need for explanation of how the penalty was determined. All in all, the research determined that only 122 of the 191 penalty-imposing deci-

sions in the sample actually contained any explanation of penalty setting as clearly required by the EPA Part 22 rules. This represented an overall 64% compliance rate with this clear procedural mandate. In the other 36% of the penalty-imposing case decisions, EPA's administrative enforcement system provided no explanation for its final penalty.¹⁵⁴ The surprising conclusion derived from this data was that EPA's administrative enforcement system regularly ignored provisions of the Agency's own rules in the implementation of its penalty process. With little public oversight of this internal Agency process and little objection to the actual civil penalties imposed by it, there appears to be little or no incentive for EPA to enforce its own rules against itself.

When broken down by level in the administrative enforcement system, the frequency of penalty explanations also varied to a significant extent. Interestingly, 72% of the ALJ-written opinions contained discussions of penalty design and calculation. This figure reflects the fact that a relatively high level of compliance with the Part 22 direction had been achieved in ALJ practice.¹⁵⁵ That being said, 28% of the ALJ case decisions omitted this required element. When the analysis shifted to the decisions of the EPA EAB, the percentage of opinions containing a penalty discussion actually fell to 52% of the decisions in the sample. Finally, 57% of decisions made at the regional level by a RJO explained the penalty results. The overall statistics reveal a striking lack of compliance with the explicit mandate of the Part 22 rules.¹⁵⁶ Apparently, the case decisionmakers often impose a financial penalty, but they do not justify it with any consideration of the statutory or administrative penalty adjustment factors.

b. Following the EPA Penalty Policy or Guidance

Examination of the subset of the 122 case decisions where some explanation of the civil penalty's calculation was given presented a number of interesting patterns. First, in these cases the frequency of explicitly applying the statutory or EPA penalty policy varied greatly

¹⁵⁴ If the 198 penalty-imposing CAFO settlements are considered separately, these decisions provided a calculation method only forty-two percent of the time. This is significantly less than the rate of explanation in the contested decisions, which had an overall explanation rate of sixty-four percent.

¹⁵⁵ See 40 C.F.R. § 22.27(b) (2007) ("The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the [I]nitial [D]ecision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act.").

¹⁵⁶ See *id.*

across the five environmental statutes being studied: CAA (31%), FIFRA (58%), RCRA (71%), TSCA (59%), and CWA (13%). In all of these cases some explanation was provided, just not one that referenced the relevant penalty policy. It is not exactly clear why such a discrepancy exists among the five statutes.

4. What Adjustment Factors Affect Penalty Design?

Environmental statutes authorize enforcement actions and set maximum penalties allowed per violation under each statute.¹⁵⁷ This consistent statutory approach ensures that EPA will have a high potential ceiling on the amount of civil penalties that it could seek to impose on those violating environmental standards in both administrative and judicial enforcement contexts. Since these statutes frame penalty liability in terms of numbers of violations multiplied by the number of days of violation, the potential maximum for fines that might be charged under the law is extremely high.¹⁵⁸ In order to provide some guidance to EPA and the federal courts on how to exercise discretion in the choice of civil penalties under the maximum amounts, Congress provided a short list of statutory factors that should be considered in the design of a civil penalty. Two main themes reflected in this legislative approach are deterrence and the denial of economic advantage to those who violate environmental law.¹⁵⁹ Using the CWA § 1319(d) as an example, the following six factors were identified in the law for calibrating penalties:

In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the ap-

¹⁵⁷ See DANIEL RIESEL, *ENVIRONMENTAL ENFORCEMENT: CIVIL AND CRIMINAL* § 4.07 (Law Journal Press 2002) (1977) (discussing penalty policies for various environmental statutes).

¹⁵⁸ Identifying the violations and determining the duration of the violations are crucial steps in establishing the maximum possible penalty under the law. After March 15, 2004, the maximum penalty per day of violation was increased to \$32,500, creating the possibility of a \$11,862,500 penalty for a violation lasting one year. Should there be multiple violations, the maximum penalty could rise by tens of millions of dollars.

¹⁵⁹ See *Tull v. United States*, 481 U.S. 412, 422–23 (1987) (finding the nature of civil penalties to include punitive elements, such as deterrence and retribution, as well as elements of recovery of unfair economic advantage gained by noncompliance).

plicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.¹⁶⁰

Other statutes contain similar factors within the terms of enforcement authority.¹⁶¹ These statutory adjustment factor provisions were intended to influence both the prosecutorial discretion of enforcement officials in fashioning their penalty requests and the civil penalties actually imposed by federal courts and administrative decisionmakers. Like the sentencing guidelines in federal criminal law, the adjustment factors attempt, in a limited fashion, to restrain arbitrary punishments and to achieve larger statutory purposes.¹⁶² However, these statutes provide absolutely no guidance on how these factors should be weighed and compared in their use to calculate penalties.¹⁶³ By themselves, these statutory penalty factors mandate little discipline on the part of federal judges assigning penalty amounts.

Within EPA's administrative enforcement regime, ALJs and other decisionmakers operate under a system with a great deal more guidance. The Agency's Civil Penalty Policy serves as the general guidance for constructing penalties,¹⁶⁴ but it has been supplemented by a number of statute-specific and general EPA penalty guidelines.¹⁶⁵ The general policy creates a basic method for setting a proposed administrative penalty. EPA must calculate a "preliminary deterrence amount," which is

¹⁶⁰ Clean Water Act of 1977, 33 U.S.C. § 1319(d) (2000). The CAA and CWA penalty design factors have been particularly influential to federal courts that have applied them to cases arising under other federal environmental laws without such provisions. *See, e.g.,* *United States v. Ekco Housewares, Inc.*, 62 F.3d 806, 814–16 (6th Cir. 1995) (applying CAA and CWA factors in a RCRA enforcement case).

¹⁶¹ RIESEL, *supra* note 157, § 4.07.

¹⁶² U.S. SENTENCING COMM'N, U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2004).

¹⁶³ In civil penalty cases, the federal courts have employed two analytical approaches in their penalty design that have been termed a top-down approach and a bottom-up approach. Under the top-down approach, the court starts by calculating the maximum penalty allowed by the statute. It then adjusts the penalty downward by using the mitigating factors set out in the statute. Using the bottom-up approach, the court determines the economic benefit derived from the environmental violation and then considers the statutory factors to adjust upward the penalty amount. *See* RIESEL, *supra* note 157, § 4.01[1]; *see, e.g.,* *Atl. States Legal Found., Inc. v. Tyson Foods*, 897 F.2d 1128, 1142 (11th Cir. 1990) (employing the top-down method); *United States v. Allegheny Ludlum Corp.*, 187 F. Supp. 2d 426, 444 (W.D. Pa. 2002) (using the bottom-up approach); *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 353–54 (E.D. Va. 1997) (demonstrating the bottom-up method). Some courts vary their approach and permit either method to be used. *See, e.g.,* *United States v. Anthony Dell'Aquila, Enters.* 150 F.3d 329, 338–39 (3d Cir. 1998).

¹⁶⁴ *See* RIESEL, *supra* note 157, § 4.04.

¹⁶⁵ *See id.* § 4.07 (EPA has issued over twenty-five different penalty policies to implement the statutory crude guidelines).

composed of the sum of two elements: the economic benefit component and the gravity component.¹⁶⁶ This preliminary figure is then modified through the application of adjustment factors.¹⁶⁷ A number of additional factors are then added to the mix by a supplement to the 1984 Civil Penalty Policy.¹⁶⁸ These other factors include: the benefit derived from delayed and avoided costs and the benefit of competitive advantage, "degree of willingness/negligence, degree of cooperation/non-cooperation, history of noncompliance, ability to pay, and other unique factors."¹⁶⁹ Potentially, the penalty proposed and the penalty finally assessed could be influenced by considerations of these wide-ranging and varied policies included within EPA's civil penalty guidance.

The research analyzed the 191 case decisions that had imposed administrative civil penalties within the period under study. As above, sixty-nine decisions were removed from the sample because they failed to specify any calculus for the final penalty they imposed. This left 122 case decisions where a penalty rationale was set out and these cases were examined to identify what factors were mentioned in ALJ opinions. The intent was to determine what elements were most frequently mentioned and, therefore, were the most influential in the final decisionmaking. The results revealed the following pattern in descending degree of frequency:

- (1) Gravity of harm: 55/122 or 45.1%;
- (2) Ability to pay/ability to continue in business: 31/122 or 25.4%;
- (3) Economic benefit from noncompliance: 31/122 or 25.4%;
- (4) Degree of cooperation/cooperative attitude: 30/122 or 24.6%;
- (5) Other factors "as justice may require": 27/122 or 22.1%;
- (6) Degree of willfulness: 17/122 or 13.9%;
- (7) History of noncompliance/history of prior violations: 17/122 or 13.9%;
- (8) Environmental damage: 11/122 or 9.0%.

If this sample is representative of most ALJ judgments, the gravity of harm component appears to be the most influential factor affecting the setting of administrative civil penalties, as it was mentioned nearly twice as frequently as the next four items. That being said, the two economic

¹⁶⁶ *Id.* § 4.04.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties, [1 Admin. Mat.] 17 *Env'tl. L. Rep.* (Env'tl. Law Inst.) 35,078 (Feb. 16, 1984).

factors, the cooperative-spirit element and the miscellaneous component, all seem to have approximately equal weight in these cases. Surprisingly, past noncompliant behavior on the part of the defendant does not seem to be a major driver of penalty determinations.

IV. CONCLUSIONS ABOUT ADMINISTRATIVE ENFORCEMENT CIVIL PENALTIES

After reviewing the EPA administrative enforcement data for the five-and-a-half-year study period, a number of conclusions can be made. First, administrative enforcement within EPA is definitely increasing, even if recent EPA data is discounted for being somewhat over-inclusive. This appears to be the result of twin trends: a reduction in EPA and DOJ judicial civil enforcement and an increase in the use of administrative measures. If this de-emphasis of more formal judicial enforcement continues, EPA will employ these administrative tactics to seek both injunctive relief and civil penalties from violators of environmental regulations in the future. Serious questions remain whether this increased reliance on administrative enforcement measures sufficiently advances the environmental policy goals of the underlying statutes. A more complete analysis of this greater emphasis on the administrative process is warranted to determine if environmental policy goals are being adequately served.

Second, the data collected indicates that administrative enforcement can result in cost savings for the Agency by encouraging Consent Agreements as the principal method of resolving a large number of environmental complaints. While the EPA regional offices expend time and effort to secure these settlements, it would seem that more of both would be needed to expand judicial and administrative enforcement proceedings from their present levels. As the research shows, a relatively small portion of the administrative complaints actually result in contested cases. Put into perspective, for the five-plus years of the study period, there were less than 200 reported ALJ case decisions under the five major environmental statutes. This suggests that EPA conducted adjudicatory hearings in approximately thirty-five contested cases each year, with hundreds more resolved by CAFO settlement agreements.¹⁷⁰ If this trend continues, negotiated settlements conducted at the regional level will become the rule in environmental violation cases, with

¹⁷⁰ As small as this number might seem, it is much larger than the fifteen reported civil lawsuits filed by EPA in fiscal year 2006. ENVTL. INTEGRITY PROJECT, *supra* note 16, at 10 app.I.

administrative penalty proceedings being an occasional event and judicial enforcement serving as the rare exception.

Third, the review of the reported CAFOs and administrative case decisions reveals a surprising lack of adherence to EPA's own rules of practice in administrative penalty hearings. This defiant behavior is not reflected by the parties charged with environmental offenses or EPA enforcement officials, but rather by the RJOs and ALJs who draft the CAFOs and write the case decisions. These are the decisionmakers who have been charged with the responsibility of implementing EPA's administrative enforcement system. In particular, the absence of specific civil penalty calculations in the final penalty decisions undercuts the objectivity of the system as a whole. The Part 22 rules specifically require this explanation in all decisions to enhance the transparency and accountability of these decisionmakers. In an agency adjudicatory system where individual decisions rarely reach the public or the environmental community, it would seem especially important to comply with EPA's own disclosure regulations as a means of reinforcing the legitimacy of this important and increasingly utilized penalty process. Unfortunately, this does not seem to be the case and one is left to wonder just how the particular civil penalties were calculated. The absence of coherent explanations certainly does not build confidence in the administrative enforcement system that is so isolated from public view.¹⁷¹

Fourth, the administrative enforcement process not only results in low visibility and negotiated settlements but has also produced an adjudication format that results in a high number of penalty reductions. The number of downward penalty adjustments greatly exceeds the number of upward adjustments. This fact suggests that ALJs frequently perceive EPA's initial proposed penalty to be too high, rather than too low. It is not altogether clear why EPA enforcement officials would repeatedly err on the high side. One possible answer is that they expect the ALJs to reduce the penalty, so they set their bargaining and litigation starting point high. Perhaps the ALJs systematically discount the EPA claims as being excessive from past experience in prior cases.

¹⁷¹ There is no requirement in EPA's Part 22 rules for public participation or even publicity about administrative enforcement. The design of these rules is organized around a bilateral litigation-type relationship between EPA and the violator. The one exception is the possibility for "any person" to intervene in a Part 22 adjudicatory proceeding. *See* 40 C.F.R. § 22.11(a) (2007). This intervention is authorized along with the filing of nonparty briefs, but it is unclear just how anyone might know about the pendency of the enforcement proceeding so as to participate. *Id.* §§ 22.11(b), 22.21(b) (indicating that notice of hearing is only given to parties). The same limits on outsider participation apply to appeals taken to the EAB.

Whatever the strategic reason might be for setting the initial penalty amounts, as the system has evolved, it rewards initial penalty challenges with a forty-two percent chance of downward adjustment. This adjustment would compensate penalty challenges with a relatively high probability of financial reductions.

Fifth, with a limited number of cases reviewed by the EAB, ALJ decisions, in reality, represent the final step in the EPA enforcement process. This conclusion means that a larger number of environmental enforcement disputes are being resolved by EPA's ALJs without external review by courts.¹⁷² The only review of these decisions is potentially undertaken by the EAB. However, the small number of EAB appeals granted suggests that few cases are seriously reconsidered. All in all, this adjudicatory process vests considerable discretion and authority upon EPA's ALJs and in regional officials to determine how environmental noncompliant behavior will be sanctioned.

While there may be certain efficiencies and other benefits from such an administrative enforcement system, there is no assurance that the *right* cases are being kept inside the Agency, rather than being enforced in a more public way outside of EPA in court. Perhaps this kind of case selection represents a proper exercise of prosecutorial discretion. However, this increased emphasis on administrative enforcement potentially diverts more serious cases away from the judicial forum. Perhaps these *right* cases will be resolved in the *wrong* venue. The expansion of this form of internal Agency enforcement, while simultaneously contracting the amount of external enforcement, holds the potential for inadequately sanctioning more serious environmental wrongs. While deciding which matters are worthy of referral to the DOJ for civil enforcement would be essentially a matter of discretionary judgment, the rapidly shrinking number of judicially enforced environmental cases calls this selection process into serious question.

Sixth, the sustained increase in EPA administrative enforcement emphasizing negotiated settlements and relatively low civil penalties may provide the regulated community with the idea that environmental enforcement does not present a serious threat of court enforcement, and so may not deter noncompliant conduct. If those subject to envi-

¹⁷² When environmental civil enforcement is undertaken in the federal courts, case decisions are matters of public record and often receive publicity in the media. Even settlements proposed as consent agreements must be filed by EPA in the Federal Register for at least thirty days before the agreement is approved by the court in order to provide notice for non-parties and an opportunity to file their written comments with the Agency. *See, e.g.,* Clean Air Act, 42 U.S.C. § 7413(g) (2000).

ronmental rules believe that regulatory compliance is something that can be negotiated away for a low-level sanction in a nonthreatening context, what will become of the deterrent effect of enforcement? Conventional wisdom suggests that serious and costly EPA enforcement is unlikely and that environmental charges can be dealt with through publicly invisible negotiation.

In conclusion, the increased use of the administrative penalty mechanism is not a clear-cut improvement in the attainment of environmental-quality objectives. In fact, this shift could actually represent a movement towards under enforcement and result in damage to the deterrent effect of all environmental enforcement. An unjustified and unwise over reliance on informal and less-costly methods of enforcing environmental law could have a deleterious effect on the willingness of regulated parties to meet their environmental obligations. If this actually does occur, the stealth system of administrative enforcement will have harmed environmental policy more than it has helped—certainly an unfortunate result.