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# THE U.S. EPA ADMINISTRATOR'S ASSESSMENT OF CIVIL PENALTIES: A REVIEW OF THE SOURCES OF AUTHORITY AND THE ADMINISTRATOR'S REGULATIONS

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Across the United States of America, in ten specifically identified regions,<sup>1</sup> and in Washington, D.C., certain designated officials of the United States Environmental Protection Agency ("U.S. EPA") issue documents identified as "complaints" or "proposed penalty orders" against those charged with violating environmental statutes, giving notice to the person so charged that a civil penalty will be assessed for the person's wrong-doing.<sup>2</sup> These cases may be resolved quickly, but more often go through a pre-trial litigation process during which an Administrative Law Judge ("ALJ") presides,<sup>3</sup> if the case is not settled during that process, it is tried before the Presiding Officer.<sup>4</sup> If the person is found to have committed violations of an environmental statute, the case is concluded, administratively, by a final order of the U.S. EPA Administrator, directing that the person pay the penalty she is assessing in the final order.

This article has two objectives. First, Part I identifies the constitutional and statutory sources that authorize the U.S. EPA Administrator to exercise the authority discussed above. Second, Part II identifies the applicable law and the steps taken by the Administrator in her exercise of this authority, intended to affect and control the actions of her officers and employees, which will culminate in a final order of the Administrator—an order that, if appealed, the Administrator must be prepared to defend on administrative review before the appropriate Federal Court. Part III contains some observations concerning the Administrator's exercise of her penalty assessment authority within the context of the language of the law and regulations reviewed.

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<sup>1</sup> See 40 C.F.R. § 1.5 (1996).

<sup>2</sup> See *id.* § 22.14.

<sup>3</sup> See Administrative Procedure Act § 556, 5 U.S.C. § 556(b) (1994); 5 U.S.C. § 3105 (1994).

<sup>4</sup> See 40 C.F.R. § 22.04(c). The Presiding Officer is an ALJ appointed by the Chief ALJ to conduct certain aspects of the litigation. See *infra* notes 20-25 and accompanying text.

## I. THE AUTHORITY

The government of the United States of America, of which the U.S. EPA is a part, is not a loose entity existing for the purpose of interfering with the freedom of certain individuals within its geographical boundaries. Rather, it is a constitutionally established authority created by "We the People," that has been provided the power and invested with the duty to, among other things, "promote the general welfare" of the people.<sup>5</sup>

To "promote the general welfare" of the people, Congress, as a body of representatives of the people, has exercised its authority under Article I of the U.S. Constitution and has passed laws to protect the environment in which the people live as well as the health and well-being of the people from hazardous and toxic substances.<sup>6</sup> Under the authority of Article II of the U.S. Constitution, the President signed these laws; and, as Chief Executive Officer, he is invested with a duty and provided with the authority to execute these laws. Toward that end, the President appoints a person to be the U.S. EPA Administrator.<sup>7</sup>

A review of the environmental statutes discussed in this article<sup>8</sup> reveals that the Administrator is provided specific authority to enforce compliance with each statute thereby ensuring that the public health and the environment are protected. The enforcement powers provided in particular environmental statutes<sup>9</sup> includes the authority of the Administrator to assess a civil penalty.<sup>10</sup> Under each of these statutes, when the Administrator finds

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<sup>5</sup> U.S. CONST. preamble.

<sup>6</sup> See, e.g., Clean Air Act, 42 U.S.C. § 7401(b) (1994); Federal Water Pollution Control Act, 33 U.S.C. § 1251(a) (1994); Solid Waste Disposal Act, 42 U.S.C. § 6901(b) (1994).

<sup>7</sup> 5 U.S.C.S. § 903 (Reorganization Plan No. 3 of 1970 §1(b)) (1994).

<sup>8</sup> See 40 C.F.R. § 22.01 for a list of statutes covered by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties.

<sup>9</sup> See, e.g., Clean Water Act of 1977, 33 U.S.C. § 1319(a)-(c), (g) (1994); Toxic Substances Control Act of 1986, 15 U.S.C. § 2615 (1994); Federal Insecticide, Fungicide, and Rodenticide Act of 1947, 7 U.S.C. § 1361 (1994); Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. § 11045 (1994); Clean Air Act of 1970, 42 U.S.C. § 7413 (1994); Safe Drinking Water Act of 1974, 42 U.S.C. § 300g-3 (1994); Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. § 1415 (1994); Solid Waste Disposal Act of 1976, 42 U.S.C. § 6928 (1994).

<sup>10</sup> See 33 U.S.C. § 1319(d), (g); 15 U.S.C. § 2615(a); 7 U.S.C. § 1361; 42 U.S.C. § 11045; 42 U.S.C. § 7413(b); 42 U.S.C. § 300g-3(g); 33 U.S.C. § 1415(a); 42 U.S.C. §§ 6928(a), 6991e, 6992d (1994); see also 40 C.F.R. §§ 22.31, 22.33-43.

the statute has been violated, it is the Administrator that shall assess penalties; it is the Administrator that shall provide notice of opportunity for hearing to the person to be assessed the penalty; and, in determining the amount of civil penalty, it is the Administrator that shall take into account the statutory penalty criteria.<sup>11</sup> Although these statutes allow for a fact-finding and remedy selection process<sup>12</sup> that may result in the deprivation of a violator's "property," the statutes are constitutional.<sup>13</sup>

## II. THE ASSESSMENT PROCESS

Pursuant to each of the environmental statutes cited in note nine, the Administrator is required to provide notice of the proposed administrative order to the alleged environmental law violator and to provide notice of the opportunity to request a hearing prior to assessing a penalty. Because each of these statutes provides that the alleged environmental law violator be given an "opportunity for an agency hearing," the provisions of the Administrative Procedure Act ("APA") become applicable.<sup>14</sup>

The APA provides, in part, that:

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<sup>11</sup> While each specific statute may vary to some degree in its language, each is clear in identifying who it is that has the authority to assess a civil penalty for violations: the Administrator. The Administrator is responsible for giving notice of the opportunity to request a hearing, and the Administrator must consider the statutory penalty criteria in determining the amount of penalty to assess. *See, e.g.*, 33 U.S.C. § 1319(a), (d), (g); 15 U.S.C. § 2615(a); 7 U.S.C. § 1361; 42 U.S.C. § 11045; 42 U.S.C. § 7413(d), (e); 42 U.S.C. § 300g-3; 33 U.S.C. § 1415(a); 42 U.S.C. §§ 6928, 6991e, 6992d. Section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9609 (1994), actually grants these authorities to the President, who delegates them to the U.S. EPA Administrator by Executive Order.

<sup>12</sup> This does not occur before an Article III court of law, before which there would be available a full complement of litigant rights, such as a jury trial.

<sup>13</sup> *See Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977) (Blackmun, J., not participating), in which the United States Supreme Court unanimously upheld the assessment of administrative penalties by the Secretary of Labor under the Occupational Safety and Health Act of 1970. The earlier decision of the Fifth Circuit Court of Appeals affirming the Secretary of Labor's administrative penalty order identified the various statutes which, at that time, provided for the assessment of administrative penalties. *See Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 518 F.2d 990, 1003-09 (5th Cir. 1975). As revealed by the very existence of each of these decisions, court review is available on an administrative penalty order just as it is on any other final agency action.

<sup>14</sup> Administrative Procedure Act § 554, 5 U.S.C. § 554(a) (1994).

(b) Persons entitled to notice of an agency hearing shall be timely informed of —

- (1) the time, place, and nature of the hearing;
  - (2) the legal authority and jurisdiction under which the hearing is to be held; and
  - (3) the matters of fact and law asserted.
- ....

(c) The agency shall give all interested parties opportunity for—

- (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding and the public interest permit; and
- (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.<sup>15</sup>

In addition, “a party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”<sup>16</sup>

To “govern all adjudicatory proceedings”<sup>17</sup> under the environmental statutes that may result in the Administrator’s assessment of a civil penalty against a violator, the Administrator has lawfully promulgated the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (“the Administrator’s Rules”).<sup>18</sup> When the Administrator, or someone to whom the Administrator has duly delegated her authority, initiates the exercise of her power to assess a civil penalty against a violator by issuing a complaint or proposed administrative order and provides notice to the alleged law violator of an opportunity for an agency hearing, the Administrator’s Rules govern the

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<sup>15</sup> *Id.* § 554.

<sup>16</sup> *Id.* § 556(d).

<sup>17</sup> 40 C.F.R. § 22.01(a) (1996).

<sup>18</sup> *See* 40 C.F.R. pt. 22.

process that follows.<sup>19</sup>

In accordance with the Administrator's practice, the Chief Administrative Law Judge designates an ALJ to serve as "Presiding Officer" when a request for a hearing is filed.<sup>20</sup> The Administrator's Rules provide that "the Presiding Officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay."<sup>21</sup>

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<sup>19</sup> Consistent with the fundamental requirements of fairness and notice, "agencies are free to fashion their own rules of procedure." *Katzson Bros., Inc. v. EPA*, 839 F.2d 1396, 1399 (10th Cir. 1988). "[T]he [Federal] Rules of Civil Procedure do not bind administrative agencies." *Id.* In *Katzson Bros.*, an alleged law violator argued that it was entitled to notice under the Federal Rules of Civil Procedure in an administrative penalty action brought by the U.S. EPA Administrator. The Tenth Circuit Court of Appeals held that "[t]hese rules [the Consolidated Rules of Practice] and the requirements of due process alone determine whether EPA's service is proper." *Id.* That Administrative agencies should be "free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties" is well recognized. *Silverman v. Commodity Futures Trading Comm'n*, 549 F.2d 28, 33 (7th Cir. 1977) (quoting *Federal Communications Comm'n v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940)).

In *Pottsville Broadcasting*, Justice Frankfurter, writing the decision, noted the historical distinctions in the evolution of court procedure and modern administrative tribunals. He noted that administrative tribunals "have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process." See *Pottsville Broad.*, 309 U.S. at 142. He further noted that administrative agencies had been granted powers "far exceeding and different from the conventional judicial modes for adjusting conflicting claims . . ." *Id.* They have the "power themselves to initiate inquiry . . ." *Id.* He concluded that "differences in origin and function preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts" to administrative agencies, and that administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Id.* at 143.

The "wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies 'preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts,'" was reiterated by the U.S. Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (quoting *Pottsville Broad.*, 309 U.S. at 143). His admonishment that agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties," *Pottsville Broad.*, 309 U.S. at 143, has been found by the U.S. Supreme Court to be a "very basic tenet of administrative law" and one which the Court has "continually repeated . . . through the years. . ." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544 (1978).

<sup>20</sup> See 40 C.F.R. § 22.03 (1996).

<sup>21</sup> *Id.* § 22.04(c).

The rules also provide specific authority to the Presiding Officer to preside over different aspects of the litigation.<sup>22</sup>

The APA sets forth the role and authority of the Presiding Officer as follows:

- (c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—
- (1) administer oaths and affirmations;
  - (2) issue subpoenas [sic] authorized by law;
  - (3) rule on offers of proof and receive relevant evidence;
  - (4) take depositions or have depositions taken when the ends of justice would be served;
  - (5) regulate the course of the hearing;
  - (6) hold conferences for the settlement or simplification of the issues by consent of the parties;
  - (7) dispose of procedural requests or similar matters;
  - (8) make or recommend decisions in accordance with section 557 of this title; and
  - (9) take other action authorized by agency rule consistent with this subchapter [5 U.S.C.S. §§ 551 et seq.].<sup>23</sup>

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<sup>22</sup> See *id.*

<sup>23</sup> Administrative Procedure Act § 556(c), 5 U.S.C. § 556(c) (1994). The APA permits each agency to “appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title” [the APA]. *Id.* § 3105. In reviewing a forerunner of this section, section 11 of the APA, 60 Stat. 244, 5 U.S.C. § 1010, the Supreme Court recognized that the position of hearing examiner, or administrative law judge, is “a creature of congressional enactment,” and “is not a constitutionally protected position.” *Ramspeck v. Federal Trial Exam’rs Conference*, 345 U.S. 128, 133 (1953). Consequently, while an ALJ must “scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts’ . . . [and] [t]he conduct of the hearing rests generally in the ALJ’s discretion[,] . . . [o]n matters of law and policy . . . ALJs are entirely subject to the agency.” *Association of Admin. Law Judges v. Heckler*, 594 F. Supp. 1132, 1141 (D.C. Cir. 1984) (citations omitted). Though not specifically cited by the Court, statutory authority for this proposition is found in the APA, wherein the enumerated powers of an ALJ are “[s]ubject to published rules of the agency and within its powers . . .” 5 U.S.C. § 556(c). The Administrator’s Rules also recognize that the authority of Presiding Officers, or ALJs, to conduct administrative hearings is “under these rules of Practice.” 40 C.F.R. § 22.04(c)(1) (1996). In rejecting a challenge by seven ALJs to an instruction of the Chief ALJ of the Social Security Administration to all of the Administration’s ALJs, adopting a new policy on a particular matter, the Seventh Circuit Court of Appeals, while noting that the instruction did “truncate the administrative law judges discretion[,]” and their “refusal

After evidence is taken and arguments are made during a hearing conducted pursuant to the Administrator's rules, the Presiding Officer issues and files an "initial decision" that contains: "his findings of fact, conclusions regarding all material issues of law or discretion, as well as reasons therefor, a recommended civil penalty assessment, if appropriate, and a proposed final order."<sup>24</sup>

The initial decision of the Presiding Officer shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceedings unless (1) an appeal to the Environmental Appeals Board is taken from it by a party to the proceedings, or (2) the Environmental Appeals Board elects, sua sponte, to review the initial decision.<sup>25</sup>

By rule, the Administrator has delegated her authority to make final agency decisions on administrative civil penalty cases to the Environmental

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to obey instructions may subject them to disciplinary action[.]" held that "[t]hier proper course is to obey the instruction and let any claimant injured by it ask the courts to set it aside." *D'Amico v. Schweiker*, 698 F.2d 903, 905-06 (7th Cir. 1983). The Third Circuit Court of Appeals has recognized that:

[t]here are, however, definite limits on the extent to which ALJ's may exercise their decisional independence. Indeed, were it otherwise it might be difficult for the agency to implement its policies or, in the case of the SSA, to administer benefits in a fair and consistent manner. Administrative law judges therefore remain entirely subject to the agency on matters of law and policy.

*Mullen v. Bowen*, 800 F.2d 535, 540-41 n.5 (6th Cir. 1986) (citing *Heckler*, 594 F. Supp. at 1141).

That the ALJs are subject to the agency on matters of law and policy is further demonstrated by the APA's provisions allowing for appeal from or review of an initial decision, on which "the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 U.S.C. § 557(b). This includes "the authority of agencies to increase sanctions proposed by the ALJ." *Blackfoot Livestock Comm'n v. Department of Agric.*, 810 F.2d 916, 922 (9th Cir. 1987).

<sup>24</sup> 40 C.F.R. § 22.27(a) (1996).

<sup>25</sup> *Id.* § 22.27(c). This rule, which addresses the effect of the initial decision of the Presiding Officer, is consistent with the applicable provisions of the APA, which state that "[w]hen the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule." 5 U.S.C. § 557(b).



Appeals Board ("the Board").<sup>26</sup> In publishing this rule, the Administrator announced that

motions for reconsideration under this provision shall be directed to, and decided by, the Environmental Appeals Board. Motions for reconsideration directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered, except in cases that the Environmental Appeals Board has referred to the Administrator pursuant to § 22.04(a) and in which the Administrator has issued the final order.<sup>27</sup>

Consequently, a final decision of the Board becomes a final decision of the Administrator, subject to judicial review under section 702 of the APA<sup>28</sup> or under the environmental statute that is the subject of the particular final agency decision. The Administrator must defend her final decision when it is reviewed by the Court of Appeals; and, with regard to the penalty assessed, the Administrator must convince the Court that her final decision assessing the penalty is not "unwarranted in law or . . . without justification in fact . . . ."<sup>29</sup>

### III. SOME OBSERVATIONS ON THE ADMINISTRATOR'S EXERCISE OF HER AUTHORITY

Once there is a final decision of the Board, either by issuance, or by operation of 40 C.F.R. § 22.27(c), the Administrator has assessed a civil penalty against a person whom she has found to have violated an environmental statute. Her decision is subject to judicial review. Based on the presumption that no person wants to give up his or her money to the United States of America, the assessed penalties will have a deterrent effect on the person paying them and will hopefully cause other potential violators

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<sup>26</sup> See 57 Fed. Reg. 5320 (Feb. 13, 1992) (codified at 40 C.F.R. § 22.04(a)).

<sup>27</sup> 40 C.F.R. § 22.32. 40 C.F.R. § 22.04(a) provides that the "delegation of authority to the Environmental Appeals Board does not preclude the Environmental Appeals Board from referring any case or motion . . . to the Administrator when the Environmental Appeals Board . . . deems it appropriate to do so." 40 C.F.R. § 22.04(a).

<sup>28</sup> See 5 U.S.C. § 702.

<sup>29</sup> *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-86 (1973) (quoting *American Power Co. v. SEC*, 329 U.S. 90, 112-13 (1946)).

to bring their activities into compliance with the environmental statutes.<sup>30</sup>

A review of the administrative record of any final decision of the Administrator will reveal that the Administrator, or her delegated authority, gave notice to the alleged violator of its opportunity to request a hearing prior to her assessment of the penalty.<sup>31</sup> The record also will reveal that the Administrator provided the alleged violator an opportunity for a hearing if the alleged violator so requested.<sup>32</sup>

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<sup>30</sup> See, e.g., Daniel Horne, *Casnote: Federal Facility Environmental Compliance After United States Department of Energy v. Ohio*, 65 U. COLO. L. REV. 631, 632 (1994) (in which the court assesses a penalty against a federal violator). "Few dispute that punitive fines help deter violations of environmental laws . . ." *Id.* The environmental statutes are legislated by Congress and approved by the President to promote the general welfare of the People and to protect the People from pollution and environmental harm. See *supra* note 9.

<sup>31</sup> See 40 C.F.R. §§ 22.13 and 22.14.

<sup>32</sup> An actual evidentiary hearing is not necessary in every case. See *In Re Green Thumb Nursery, Inc.*, 27 Env'tl. L. Rep. (Env'tl. L. Inst.) 40,608 (Mar. 6, 1997) wherein a final order of the Administrator, authored by the Board, held that a person "is not entitled to an evidentiary hearing unless that person puts a material fact at issue," notwithstanding the environmental statute FIFRA section 14(a)(3) clearly providing an alleged violator an "opportunity for a hearing," *Id.* at 40,611.

An accelerated decision, permitted in accordance with 40 C.F.R. § 22.20, is a dispositive pre-trial tool similar in all respects to the "summary judgment" of Rule 56 of the Federal Rules of Civil Procedure. See *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 604-07 (1st Cir. 1994). This tool is especially appropriate in many civil penalty enforcement actions brought under the Administrator's Rules in that a substantial amount of the evidence supporting the factual allegations of the Administrator's complaints consists of "admissions" of the respondent. See 11 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE*, § 56.31[2] (3d ed. 1997). Such admissions include: statements in applications and notices; monitoring and operating reports of permit holders; facility records, or the lack thereof, submitted by respondent in answer to an information demand of the Administrator; admissions implicit in the late filing of required forms, with the information in the form submitted constituting admissions to facts establishing the applicability of the requirement to the respondent. See *id.* (citing several decisions that identify factual situations in which summary judgment is most appropriate). The Court of Appeals for the District of Columbia Circuit held that:

There was conflict concerning interpretation of the facts and the ultimate conclusion to be drawn from them . . . . But there was none as to the facts themselves. In other words, the evidentiary facts were not substantially in dispute . . . . Conflict concerning the ultimate and decisive conclusion to be drawn from undisputed facts does not prevent rendition of a summary judgment, when that conclusion is one to be drawn by the court. The court had before it all the facts which formal trial would have produced. Going through the motions of trial would have been futile.

*Cody v. Aktiebolaget Flymo*, 452 F.2d 1274, 1281 (D.C. Cir. 1971) (quoting *Fox v. Johnson*

Presumably, the administrative record of the Administrator's final decision will reveal that everyone involved in the process complied with the Administrator's Rules. Once again, because the Administrator alone possesses the authority to assess a civil penalty against violators of an environmental statute, and because the Administrator must defend her final order assessing a civil penalty on judicial review, the Administrator maintains a public duty to ensure, to the greatest extent possible, that all those against whom she has proposed civil penalties are provided the same procedural rights and subject to the same procedural obligations.<sup>33</sup>

With regard to the amount of the civil penalty assessed in an initial decision, which later becomes a final decision of the Administrator by operation of rule 40 C.F.R. § 22.27(c), or in a final decision of the Administrator issued by the Board, the administrative record presumably will reflect that the process complied with the penalty assessment provisions of the Administrator's Rules.<sup>34</sup> 40 C.F.R. § 22.27(b) provides:

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& Wimsatt, Inc., 127 F.2d 729, 736-37 (D.C. Cir. 1942)). If the evidentiary facts are undisputed, then the parties can argue, in their briefs, the factual inferences and legal conclusions they each hope the Presiding Officer will make in the initial decision. Once a respondent is found to have committed violations, the appropriate penalty amount can be argued through briefing, unless there are additional contested facts material to some statutory penalty criteria. A penalty determination results from an analysis of the evidentiary facts and inferences to be drawn from them in consideration of the statutory penalty criteria. No "witness" need advise a Presiding Officer on how the case should be decided; that is, no "witness" need advise the Presiding Officer, through "testimony," on how the evidence should be analyzed and what conclusions should be drawn based upon the statutory penalty criteria. See, e.g., *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 510 (2d Cir. 1977). In *Marx*, the testimony of a securities law expert was found improper and stricken because he "repeatedly gave his conclusions as to the legal significance of various facts adduced at trial," and such testimony "amounts to no more than an expression of the [witness'] general belief as to how the case should be decided." *Id.* (quoting MCCORMICK ON EVIDENCE, § 12 at 26-27).

<sup>33</sup> The Third Circuit Court of Appeals, citing *J. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM 19* (1978), recognized that:

Perhaps no characteristic of a procedural system is so uniformly denounced as a tendency to produce inconsistent results. When disposition depends more on which judge is assigned to the case than on the facts or the legal rules, the tendency is to describe the system as lawless, arbitrary, or the like, even though the case assignment is random.

*Santise v. Schweiker*, 676 F.2d 925, 930 (3d Cir. 1982).

<sup>34</sup> See 40 C.F.R. § 22.27(b) (1996) for the penalty assessment provisions.

(b) *Amount of civil penalty.* If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. The Presiding Officer shall not raise a penalty from that recommended to be assessed in the complaint if the respondent has defaulted.

In numerous cases reviewed on appeal, the Administrator, through the Board, has upheld civil penalties recommended by ALJs when the ALJs have complied with the assessment provisions of the Administrator's Rules, and has set aside ALJ's recommended civil penalties when they have not complied.<sup>35</sup> The final decisions of the Administrator, issued by the Board,

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<sup>35</sup> See, e.g., *In re Employers Ins. of Wausau and Group Eight Tech., Inc.*, 27 Env'tl. L. Rep. (Env'tl. L. Inst.) 40,596 (Feb. 11, 1997); *In re Everwood Treatment Co.*, 26 Env'tl. L. Rep. (Env'tl. L. Inst.) 40,552 (Sept. 27, 1996); *In re DIC Americas, Inc.*, 25 Env'tl. L. Rep. (Env'tl. L. Inst.) 40,428 (Sept. 27, 1995); *In re Pacific Ref. Co.*, 25 Env'tl. L. Rep. (Env'tl. L. Inst.) 40,296 (Dec. 6, 1994).

While *United States Tel. Ass'n v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994) (finding penalty guidelines issued by the Federal Communications Commission ("FCC") invalid) served as a catalyst for a member of the Board to dissent in *Pacific Refining*, the Board's subsequent final decisions on behalf of the Administrator, upholding the use of penalty policies as provided for in 40 C.F.R. § 22.27(b), have been unanimous. Furthermore, there are substantial distinctions between the FCC assessed penalties which were the subject of review, and the EPA's procedure for assessing penalties.

The court noted that "[t]he FCC decided in 1991 to abandon its traditional case-by-case approach to implementing section 503(b) [the imposition of monetary fines for violations of the Communications Act] and issued an order to 'adopt more specific standards for assessing forfeitures.'" *Id.* at 1233 (quoting Standards for Assessing Forfeitures, 6 F.C.C.R. 4695 (1991), *recon. denied*, 7 F.C.C.R. 5339 (1992), *modified*, 8 F.C.C.R. 6215 (1993)).

The FCC matrix setting out "base forfeiture amounts" consisted of a left hand column that identified specific title 37 violations. Across the top of the matrix were three columns, the first was labeled "BC/Cable" (broadcasters and cable operators); the second was labeled "CC" (common carriers); and the third was labeled "other" (other violators). For the very same violation, different fine amounts were identified on the matrix for each of the three

have consistently identified the value of both complainants and ALJs using her applicable agency penalty policies, as directed by rule, in determining the amount of civil penalty in any particular case. The value is that violations grounded on similar facts will result in similar penalties being assessed. That is, through the use of such policies as directed, the Administrator can attempt to assure that civil penalties assessed in her name “are not only appropriate for the violations committed but are assessed fairly and consistently.”<sup>36</sup>

If there is a reason for assessing a different penalty, notwithstanding similar facts, then a different penalty can be recommended in the initial decision. The “Presiding Officer may depart from the policy as long as he or she considers it and adequately explains the reasons for departing from it.”<sup>37</sup> The Administrator recognized that:

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categories of violators, the amounts of the different fines being determined as a percentage of the maximum fines allowed by statute for each of the three categories of violators. The maximum statutory fine for broadcaster/cable operators was \$25,000; for common carriers it was \$100,000; and for other service providers it was \$10,000. *See id.*

The court specifically noted an historical record which revealed that the FCC deviated from imposing the matrix based forfeiture amount against a violator in only one out of over 300 cases, notwithstanding the FCC’s claim that the forfeiture standards were not a rule and that their application was discretionary. *See id.* at 1235. The court then noted that “[t]he Commission appears to wish to avoid grappling with the issue which we noted at the outset is quite vexing—whether the disparate treatment of different classes of licensees in the forfeiture schedule is reasonable and authorized under the statute.” *Id.* The court then identified the specific problem: “[n]either in a direct challenge to the policy nor in an individual enforcement proceeding, according to the Commission, would common carriers be entitled to claim that their treatment vis-a-vis broadcasters or other licensees is arbitrary.” *Id.* at 1235-36. The court then concluded: “The FCC cannot determine that common carriers as a class will pay heavier fines than other licensees and not explain their reasons for that position or subject that explanation to judicial review.” *Id.* at 1236.

In contrast to the FCC, any alleged unfairness in a proposed penalty notice issued by the U.S. EPA Administrator can be challenged in a case-specific proceeding, at the conclusion of which an ALJ can recommend, in an initial decision, a penalty other than as calculated under an applicable policy, so long as he or she states the reason for doing so. *See* 40 C.F.R. § 22.27 (1996). Also, in contrast to the FCC, the numerical value in the matrix of U.S. EPA penalty policies is based upon the actual evidence of the violation, with subsequent adjustments being made based upon evidence regarding the particular violator; no assessed penalty may be based solely upon the category of violator and title of the violation.

<sup>36</sup> *In re DIC Americas*, 25 *Envtl. L. Rep.* at 40,429.

<sup>37</sup> *In re Everwood Treatment*, 26 *Envtl. L. Rep.* at 40,555.

[U]se of a written policy to assist in developing penalty proposals should not be presumed to eliminate the exercise of sound professional judgment from that process; nor should it be presumed to result in penalty proposals that do not fairly reflect the circumstances of a particular violation or a particular violator. To the contrary, fairness in enforcement might well be better served if penalty proposals are developed in a regular and consistent manner, such as by consulting a written policy document, than if those proposals are generated *ad hoc*. [Footnote omitted]<sup>38</sup>

Thus, with these rules, the Administrator attempts to avoid the *ad hoc* and inconsistent results that concerned the Third Circuit Court of Appeals in *Santise*,<sup>39</sup> while at the same time allowing for an application of reasoned discretion to the specific facts of a case. Such an approach differs considerably from that used by the FCC in assessing its penalties against violators, which was voided by the D.C. Circuit Court of Appeals.<sup>40</sup>

#### IV. CONCLUSION

A review of the language of the environmental statutes reveals that the authority to assess administrative civil penalties against violators rests solely with the Administrator. Consequently, the concomitant duty to exercise this authority in a fair and consistent manner is with the Administrator and none other. In recognition of her authority and duty, the Administrator has promulgated rules of procedure applicable to all who participate in civil administrative penalty assessment proceedings before her, and has issued, through the Environmental Appeals Board, final decisions addressing and interpreting those rules. The rules are intended to provide for one and the same fair procedure to all; to allow for integrity in her fact-finding process; and, by requiring reference to the policies and guidance, with their rejection only when reasons are articulated for doing so, to assure that civil penalties assessed in her name are fair and consistent, as well as appropriate.

By exercising her lawful authority to assess civil penalties against those who violate the nation's environmental statutes, the Administrator is

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<sup>38</sup> *In re Employers Insurance*, 27 Env'tl. L. Rep. at 40,604.

<sup>39</sup> 676 F.2d 925 (3rd Cir. 1982).

<sup>40</sup> *See United States Tel. Ass'n v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994).

able to discharge her duty to protect the public health and environment. By controlling her exercise of that authority through procedural rules and policies requiring those who act in her name to articulate reasons for decisions being made in her name, she fulfills her "due process" obligations to be fundamentally fair to all who appear before her and satisfies her responsibility to assess civil penalties that are not "unwarranted in law or without justification in fact."<sup>41</sup>

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<sup>41</sup> *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-86 (1973) (quoting *American Power Co. v. SEC*, 329 U.S. 90, 112-13 (1946)).