

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

IN THE MATTER OF:)
)
John A. Biewer Company of Ohio, Inc.)
300 Oak Street)
St. Clair, Michigan 48079-0497)
(Washington Courthouse Facility))
)
U.S. EPA ID #: OHD 081 281 412; and)
)
John A. Biewer Company, Inc.)
812 South Riverside Street)
St. Clair, Michigan 48079; and)
)
Biewer Lumber LLC)
812 Riverside Street)
St. Clair, Michigan 48079)
)
Respondents)

DOCKET NO. RCRA-05-2008-0007

Order on EPA’s Motion for Accelerated Decision on Liability and Penalty¹

In this proceeding John A. Biewer Company of Ohio, Inc. (“Biewer Ohio”) has been charged with a single violation of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(a), (“RCRA”), by failing to take the steps necessary to decontaminate all waste residues and containment system components at its drip pad, upon closing its facility located in Washington Courthouse, Ohio. EPA has filed a one-page Motion for Accelerated Decision on Liability and Penalty, (“Motion”) together with two Memoranda in Support of the Motion. One Memorandum is entitled “Memorandum in Support of Complainant’s Motion for Accelerated Decision on Liability and Penalty,” (“Memorandum re Liability and Penalty”), while the other is its “Memorandum in Support of the Penalty Amount Proposed” (“Memorandum re Proposed Penalty”). The Motion contends that there is no genuine issue of material fact regarding liability for the alleged violation and that the “penalty amount of \$287,441 is an appropriate amount of civil penalty for the Administrator to assess” Motion. The Respondent filed an Opposition to the Motion and EPA filed a Reply.

¹ This Order should be read in tandem with another Order concerning EPA’s related motion to strike, in part, Respondent’s prehearing exchange. That Order, the Court’s “Order on EPA’s Motion to Strike, in part, Respondent’s Prehearing Exchange,” is also being issued today. It is included as an appendix to this Order.

As the Respondent's Opposition concedes the alleged violation, EPA's Motion is GRANTED as to liability. However, the motion is DENIED with regard to EPA's claim of entitlement to an accelerated decision as to the civil penalty.

EPA speaks to the issue of accelerated decision as to the civil penalty twice. In its Memorandum re Liability and Penalty, it advises that it is separately submitting a Memorandum in Support of the Penalty Amount Proposed. Despite the separate submission, EPA still addresses the issue first in its Memorandum re Liability and Penalty. There, while it acknowledges that the Presiding Officer (i.e. "the Court") may assess "a penalty amount assessed in an accelerated decision different from that proposed," it adds that the specific reasons for the increase or decrease must be set forth in the initial decision. Memorandum re Liability and Penalty at 22. EPA cites to *Newell Recycling Company*, 8 E.A.D. at 625, for the proposition that there must be a genuine issue of material fact in order for one to be entitled to an evidentiary hearing on the issue of liability. There is no dispute about that. An accelerated decision is essentially undistinguishable from a motion for summary judgment but EPA takes this a step further by suggesting that where only the proposed penalty is remaining in dispute, there is no right to a hearing at all and that the matter is purely one of submitting competing briefs on the issue. Accordingly, from EPA's perspective, once liability is established, the penalty determination process is simply a matter of legal arguments regarding the proper penalty and such process does not afford a respondent with the right to cross-examine EPA's analysis for its proposed penalty. *Id.* at 23-24.

The EPA Memorandum re Proposed Penalty

EPA correctly notes that RCRA provides that in assessing a civil penalty the Administrator is to take into account the seriousness of the violation and any good faith efforts to comply with the requirements. However, EPA contends that the determination of an appropriate penalty does not involve fact finding and that it is instead "an exercise of discretion by the agency."² Memorandum re Proposed Penalty at 2. Thus, it contends that if there is liability, the

² As explained *infra*, while the *assessment* of an appropriate penalty is not, as EPA expresses, "fact finding," but rather an exercise of discretion by the agency," the underlying facts in support of the assessment is most certainly fact finding. EPA draws a distinction between the facts upon which a penalty amount determination is made and the "actual calculation of the penalty amount." However, this distinction is imprecisely expressed because the facts and the actual calculation are intertwined. Thus, if EPA's "facts" are wrong, the "actual calculation" will be incorrect as well. Further, the cases cited by EPA are distinguishable. EPA cites to *Panhandle Co-op*, 771 F.2d 1149, at 1152, (8th Cir. 1985), but *Panhandle* is distinguishable as that case was submitted to the administrative law judge on stipulations. That has not happened in this case. The judge reviewed those *stipulated* facts and then applied them to the penalty criteria. *Robinson v. U.S.*, 718 F. 2d 336, at 339 (10th Cir. 1983), also cited by EPA, involved an action by the Secretary of Agriculture for a violation of the Animal Welfare Act. But there, a hearing *was* held. Although there is language in the decision that "once the agency determines

penalty is simply a “matter of agency policy and discretion” and there can be no factual dispute over the calculation of the penalty amount, as it is simply a legal or policy issue. *Id.*

At that juncture, according to EPA’s Senior Attorney and Counsel for the Administrator’s Delegated Complainant Region 5 in this matter, the Administrator’s role is “to inform the determination of penalty amounts that [] will [be] assess[ed] for [the] violations of RCRA.” *Id.* at 3. Although EPA is quick to add that this power “is not open-ended, without limits,” it advises that the decision as to the penalty amount is informed “through the rules [the Administrator] has promulgated, and the policies [the Administrator] has adopted, interpreting statutory penalty criteria and establishing calculation methodologies based upon those interpretations.” *Id.* at 4. To this end, EPA notes, the Administrator has issued its “Penalty Policy” for RCRA and this policy takes into account the twin statutory penalty criteria of the seriousness of the violation and good faith efforts to comply. ³ *Id.* at 6. Following the prescribed

that a violation has been committed, the sanctions to be imposed are a matter of agency policy and discretion,” that decision does not suggest that once liability is established, an agency has unfettered authority to assess whatever penalty it deems appropriate. To the contrary, in *Robinson* the administrative law judge considered the penalty criteria and then arrived at the penalty imposed. *In Re Chautauqua Hardware Corporation*, 3 E.A.D. 616, EPCRA Appeal No. 91-1 (June 24, 1991) is another case cited by EPA. Involved there was an order on interlocutory review. At issue were alleged EPCRA violations concerning failure to file certain forms. However that case is also inapplicable to the present matter because *Chautauqua* was seeking the underlying documents pertaining to the penalty policy’s *formulation*. Clearly information of that sort runs afoul of the agency’s deliberative process privilege but that is decidedly not what is being sought here by the Respondent, Biewer Ohio. Although not its sole basis for the exercise of its right to a hearing, Respondent is seeking the right to cross-examine EPA’s *application* of the policy in this case. Thus Respondent is contending that the Penalty Policy was incorrectly applied in this case. That is not the situation that obtained in *Chautauqua*, where the respondent was seeking internal memoranda, notes, and legal opinions, among other items, to delve into the purpose and legal basis for EPA’s EPCRA policy. Given the type of information being sought, the Board concluded that *Chautauqua* was not attempting to prove a fact, such as that the application of the policy to their case incorrectly categorized the degree or severity of one or more criteria. Instead its challenge was really a “legal or policy argument.” As the Board pointed out, the ability of a company to continue in business is a factual issue, as is the quantity of a particular substance used in given year and both of those facts can impact the final figure for the proposed penalty. If an agency’s calculation in a particular case is based on an erroneous fact, a respondent has the right to contest that and to otherwise show that the penalty policy was incorrectly applied. So too, *Chautauqua* would have the opportunity to show that other factors were incorrectly assessed. For example, *Chautauqua* would have the opportunity to show that its good faith efforts to comply were incorrectly evaluated by EPA.

³ In this regard EPA Counsel cites to *In re Everwood Treatment Company, Inc.*, 6 E.A.D. 589, 1996 WL 557269 (E.P.A.) (September 27, 1996). However there *was* a hearing in that case and EPA provided testimony concerning its penalty computation. That testimony was provided by the RCRA compliance section Chief for Region IV and, unlike in this case, the individual in

manner to have the penalty amount determined, EPA states that the Administrator's "Delegated Complainant in this matter has analyzed the evidence in the record in consideration of the RCRA statutory penalty criteria , as interpreted . . . in the RCRA Penalty Policy, and its calculation methodologies, to arrive at an appropriate penalty" *Id.* at 7.⁴ The analysis having been made, EPA Counsel asserts there is no need, *or right*, to examine that process.

EPA's Senior Attorney and Counsel next proceeds to recite the structure of the penalty policy formula, by noting that the penalty policy calls for determining a gravity based penalty for the violation, adding in a 'multi-day' component, if applicable, adjusting that figure, up or down, 'for case-specific circumstances' and then adjusting that total by adding the economic benefit the respondent gained through non-compliance.⁵ *Id.* at 7. After addressing multi-day violation issues and economic benefit, EPA counsel notes that there are 'adjustment factors' to be considered. These are good faith efforts to comply, or the lack thereof; the degree of willfulness and/or negligence; the history of noncompliance; the ability to pay; environmental projects; and other 'unique factors.'

the *Everwood* litigation was *not* also acting as EPA's Counsel. It would seem that where EPA Counsel also is a witness in a case, problems exist. Perhaps recognizing this, the Senior Counsel in this case has announced that EPA "will call no witnesses." EPA Pre-hearing Exchange at 1. Still, as discussed *infra*, it would seem that Respondent's Counsel should have the right to call EPA's penalty calculation witness in order to test whether the policy was properly applied in this instance.

⁴ As alluded to in the preceding footnote, a troublesome aspect of the proposed penalty calculation is that apparently it was done, not by an enforcement person, but by EPA's Senior Attorney and Counsel for the Administrator's Delegated Complainant Region 5, Mr. Wagner. As the author of the penalty calculation, it would seem that the Senior Attorney and Counsel has put himself in the position of being a witness in this case. Mr. Wagner is the only individual listed on the Memorandum re Proposed Penalty and the only other penalty computation document in the record, the "Penalty Rationale," dated August 15, 2008, also lists only Mr. Wagner as the author. The RCRA penalty policy, though not definitive on this issue, seems to suggest that an enforcement person, not trial counsel, is the one to be performing the penalty calculation. The June 2003 RCRA Civil Penalty Policy ("Policy") speaks in terms of this effort being made by "enforcement personnel," just as was done in the *Everwood Treatment Company* case, and not by trial counsel. *See, for example* the Policy at 1, 2, 7, 10, and 19. The same Policy provides that a "penalty computation worksheet" be completed, but no such document appears in this record other than EPA's Counsel's submissions.

⁵ Adding detail to this, EPA sets forth the policy's method for determining the "gravity-based penalty amount," explaining that one looks to the vertical axis and then the horizontal axis to locate the 'potential for harm' and the 'extent of deviation' from the regulatory or statutory provision violated. These two axes have sub-factors to consider. For the 'potential for harm,' the risk of exposure of humans or the environment to the hazardous waste and the adverse effect of noncompliance are evaluated, with each of these having a 'major,' 'moderate,' or 'minor' designation available to select. So too, the 'extent of deviation' affords EPA the opportunity to select a 'major,' 'moderate,' or 'minor' designation.

EPA then applies the penalty policy to this case, beginning with the gravity based penalty amount. Offering its take on the proper application of the policy to this case, it first discusses the two aspects of the ‘potential for harm,’ the risk of exposure and the harm to the regulatory program. Concerning the former, it notes that EPA has determined that wastes from wood preservation typically have high concentrations of arsenic, chromium and lead and that these dangerous wastes have led to contamination of soil and water. There can be no doubt that these wastes are serious business and this Court does not discount this at all. However, for now, the issues are the appropriate penalty to be assessed and the extent of Respondent’s rights to contest that proposed assessment, both with its own evidence and through cross-examination of EPA’s witnesses, in order to reveal the correctness of the penalty proposal presented by EPA and whether the penalty policy has been properly applied.

As to the probability of exposure, the policy asserts that this determination should be based on whether the integrity and/or stability of the waste unit is likely to have been compromised. EPA agrees that the Respondent’s facility shut down in 2001,⁶ but adds that, since that time, it has not completed closure of the drip pad.⁷ EPA contends that there is a high probability of an increased likelihood of human or ‘other environmental receptors’ exposure from the Respondent’s drip pad waste. It reaches this conclusion on the basis of the Nation’s historical experience with the wood preservation industry and the ‘historical experience’ of the Respondent’s owners, that is, the Biewers.⁸ It also finds support based on the drip pad not being lined, that it had cracks, that it was not completely surrounded by a berm, and that the Respondent does not know how much waste was released onto the drip pad during its use.⁹

⁶ EPA adds that the Respondent’s operation of its drip pad was not permitted under RCRA and that it did not have “interim” status either. The inclusion of this assertion, as part of its penalty analysis, is unclear. The Complaint does not allude to this claim. This would seem to present an area for cross-examination.

⁷ While EPA characterizes the Respondent as admitting that it has not completed that closure, it unfairly characterizes the Respondent’s justification for that failure as Respondent’s claim that it “lack[ed] [] information sufficient to form [sic] a belief” that any such removal was necessary. This description is misleading, as it relies upon the Respondent’s Answer, but ignores all the information EPA has learned since that early stage of this litigation, through discovery, concerning the Respondent’s financial status. An answer such as Respondent provided is typical, and perfectly permissible, at the initial stage of litigation, as EPA must know.

⁸ EPA Counsel’s leap to “the Biewers” is reminiscent of its attempt to include “the Biewer family” in its failed effort to expand derivative liability to other Biewer entities and even to non-entities who were not named as respondents. *See* this Court’s Order on Derivative Liability, issued October 5, 2009.

⁹ EPA also believes that the ‘probability of exposure’ was greater because the Administrator has *proposed* a regulation requiring waste generators to have equipment, such as forklifts, dedicated for use at each drip pad and which would never leave that drip pad. By confining such equipment to the drip pad, waste would not be tracked off of the pad site. Similarly, EPA *proposed* that the clothing of those working at the drip pad be decontaminated,

EPA concludes that the probability of exposure was ‘substantial’ in this instance because the Respondent did nothing to detect the extent of hazardous waste at the drip pad, nor did it take steps to contain and remove it. *Id.* at 16.

Looking at the “potential seriousness of contamination,” EPA states that the penalty policy “provides that the ‘quantity and toxicity of wastes (potentially) released’ is to be considered.” *Id.* Also, “the ‘likelihood or fact of transport by way of environmental media (e.g. air and groundwater)’ and the ‘existence, size, and proximity of receptor populations (e.g. local resident, fish, and wildlife . . . and sensitive environmental media (e.g. surface wastes and aquifers)’ are to be considered. *Id.* at 16-17. To this, while admitting it does not know if wastes have been released into the environment, EPA states that the Policy’s emphasis is on “the potential for harm posed by a violation rather than on whether harm actually occurred.” *Id.* at 17. EPA concludes that this consideration, the potential seriousness of contamination, should be deemed ‘minor’ because of the *limited amount of the waste*, and the fact that the drip pad was in an industrial area.

Speaking to the harm to the RCRA Regulatory Program, EPA notes the statute’s “cradle to grave” approach to dealing with hazardous waste, and that, as the Respondent did not comply with the drip pad closure requirements, any hazardous waste that may have been generated during the time of its operation has not been addressed. Therefore, it concludes that the harm to the RCRA Regulatory Program is considered to be “substantial.” *Id.* at 18-19.

For the “extent of deviation” element, EPA notes that the Respondent’s violation is that it did nothing to implement the decontamination process as provided in its drip pad closure plan. EPA concedes that the Respondent implemented some of the closure requirements but that it “significantly deviated” from other closure requirements.¹⁰ Because Respondent failed to

with the same idea of keeping the hazardous waste from being tracked off from the drip pad. It then states that, as the Respondent never had a permit or interim status, it is ‘uncertain’ “whether Respondent ever met *this standard*.” *Id.* at 15 (emphasis added). If the *proposed* regulation ever became a standard, by virtue of becoming a final rule, EPA does not so advise, but it must know that only *final rules* have the force of law. In the face of this unclear state of affairs, EPA still contends that it is a “fair inference” that there was a ‘greater likelihood’ that hazardous waste was tracked off the site. This would seem to be another area for cross-examination.

¹⁰ It is unclear whether EPA adhered to the penalty policy in considering the “extent of deviation” factor. This is because EPA acknowledges that the Policy differentiates between situations where one has no closure plan at all from those where there is a plan but that it has ‘minor’ or ‘major’ deficiencies. Instead, EPA apparently measured the extent of deviation by Respondent’s failure to take all actions necessary to decontaminate any waste remaining at the drip pad site. This would seem to be another area for cross-examination. In making this observation, the Court is not instructing that the Respondent must inquire into this, nor does it suggest that the Respondent is limited to the areas of possible examination noted by the Court.

complete the decontamination process according to the drip pad closure plan, EPA asserts that Respondent's extent of deviation was moderate. *Id.* at 19.

With regard to evaluation of the "total gravity based penalty," although EPA acknowledges that there are a host of factors to consider, it seemingly sidesteps those considerations on the basis that "none of the factors legitimately affect the 'seriousness of the violation.'" *Id.* at 20. Instead it focuses again on the fact that the Respondent failed to take the steps to decontaminate all waste residues at its drip pad. Yet, the Policy at page 19, as cited by EPA, seems to require more, as it provides that "Enforcement personnel should analyze and rely on case-specific factors in selecting a dollar figure from this range. Such factors include, the seriousness of the violation (relative to other violations falling within the same matrix cell), the environmental sensitivity of the areas potentially threatened by the violation, efforts at remediation or the degree of cooperation evidenced by the facility . . . the size and sophistication of the violator, the number of days of violation, and other relevant matters." Penalty Policy at 19. While noting that multi-day penalties are discretionary in this case, EPA states that it is appropriate to impose them in this case, reasoning that the multiple days all occurred after the Respondent had been notified that it was in violation.¹¹ This too would appear to be a potential area for cross-examination.

EPA's Senior Attorney and Counsel then sums up his analysis for the various elements reaching the dollar amount, upon applying the matrices, of \$253,461.00¹² and then proceeds to the adjustment factors, starting with "good faith efforts to comply." For this EPA simply states that no downward adjustment is due as the Respondent has gone "seven years without completing decontamination and closure of its . . . drip pad." *Id.* at 22. "Willfulness and/or negligence," the next consideration, only works in one direction under the policy, as it can only make the penalty increase.¹³ Again, EPA states that the Respondent knew about the failure to close its drip pad. EPA contends, contrary to the facts, "there is no apparent reason that [Respondent] could not comply with the law." *Id.* at 23. This is disingenuous, as it ignores that the Respondent went out of business and lacked the funds to carry out the drip pad closure.

¹¹ Of course this ignores that it is a central contention of the Respondent that it had no funds to carry out the closure. Therefore, Respondent asserts that, while notified, it lacked the financial wherewithal to do anything about it. EPA has not shown that Biewer Ohio's financial situation demonstrates a different assessment of its ability to pay for the closure. This is evident by EPA's effort to add other Biewer entities to these proceedings and hold them accountable, an effort which failed per this Court's October 5, 2009 Order on Derivative Liability.

¹² EPA's analysis of the other factors ultimately raised its proposed penalty to \$282,649.

¹³ The factor of 'history of non-compliance' works this way as well; penalties only increase and cannot decrease based upon consideration of one's history.

In addressing the factor of “ability to pay” EPA takes an interesting approach.¹⁴ Although the Penalty Policy states that this factor should be considered, EPA Counsel instead asserts that Congress did not designate that factor as one of the penalty criteria. *Id.* at 24. EPA then notes that the Respondent waived this claim earlier in the proceeding. That waiver did occur, it is true, but it is still somewhat misleading because implicitly the Respondent elected to forego that fight as its business had closed and, having no funds, fighting over the ability to pay would serve no purpose.

In its Opposition to EPA’s Motion for Accelerated Decision on Liability and Penalty, Biewer Ohio concedes that it has been unable to “complete the remedial activities called for in the drip pad closure plan.” Opposition at 2. Consequently, it acknowledges that it is not in compliance with RCRA. However, while conceding liability to the violation alleged in the Complaint, Biewer Ohio makes two critical points. First, it emphasizes that the failure to carry out the drip pad closure plan stems from its financial inability to continue its business, as opposed to any “unwillingness” to comply with the closure plan. Second, it “vigorously contests” the civil penalty EPA seeks for this failure. *Id.*

Biewer Ohio notes that the EPA Administrator’s authority to assess a civil penalty is not unlimited. Rather, under Section 3008 of RCRA, EPA must take into account both the seriousness of the violation and any good faith efforts to comply with the applicable requirements. *Id.* Respondent notes that under the RCRA Civil Penalty Policy, as revised in 2003, proposed penalties are to be adjusted to take into account the case specific factors. These include “the willingness, or unwillingness, of the Respondent to comply with RCRA obligations.” The evaluation of the degree of willfulness is to consider how much control the violator had over the events constituting the violation and the foreseeability of the events constituting the violation. Respondent notes that the policy provides that if “correction of the environmental problem was delayed by factors which the violator can clearly show were not reasonably foreseeable and were out of his or her control and the control of his or her agents, the penalty may be reduced.” *Id.* at 3, citing penalty policy at 37.

Given that such factors are to be considered, Respondent states that it “intends to present evidence at the hearing showing that there are a number of factors militating against Complainant’s proposed penalty, including its financial inability, not unwillingness, to perform the drip pad closure plan.” Respondent adds that its “lack of funds stemmed from circumstances that were beyond JAB Ohio’s control.” Respondent also intends to provide evidence that it borrowed funds it would be likely be unable to repay in order to retain the Mannik & Smith Group and its view that such act of borrowing evidences good faith on Respondent’s part. Respondent notes this speaks to Respondent’s position that its lack of funds explains why the violation occurred in the first place, a point distinct from the inability to pay issue. *Id.* at 4. With

¹⁴ Up to this point, EPA Counsel had lauded the Administrator’s authority and wise implementation of the penalty policy. For this penalty factor, however, EPA Counsel pivoted abruptly, invoking the statutory criteria as the appropriate penalty evaluation source. This too would seem to be a potential area for cross-examination.

these defenses to the proposed penalty in mind, Respondent notes that the court has the authority to deviate from that policy's application, upon finding that those factors have not been properly applied in a given case.

Last, Respondent notes that EPA has not established, nor for that matter contended, that there are no disputed facts pertaining to its proposed penalty. While EPA has defended the correctness of its proposed penalty, it has not shown that the penalty amount is uncontested, nor has EPA shown that all the facts relevant to that penalty's determination are undisputed. As such, Respondent contends that it is entitled to a hearing to present evidence relevant to the appropriate penalty, as well as to cross-examine the author of EPA's penalty rationale. *Id.* at 4-5.

In its Reply EPA contends that the Respondent makes no attempt to challenge any of the *analysis* in Complainant's Memorandum re Proposed Penalty. Instead, from EPA's perspective, Respondent only raises a "lack of willfulness" on its part regarding the violation. However, it contends that the Respondent has "cited no evidence" to support its claim "that it was a 'lack of funds' that caused it to be unable to follow through on the drip pad closure plan." Reply at 4. EPA characterizes this as "nothing more than an 'unsupported allegation,' a 'conclusion' and as such cannot defeat a motion for accelerated decision." *Id.* at 5. Continuing with this theme, EPA proclaims that one may not "avoid accelerated decision 'by merely alleging that a factual dispute may exist or that future proceedings may turn something up.'" *Id.* EPA concludes that, given these assertions, its proposed penalty of \$282,649 is appropriate.

Discussion:

The wealth of EPA's contention regarding its motion makes the point that there must be material facts in dispute for one to be entitled to an adjudicatory hearing.¹⁵ The problem with this extensive effort is that the Respondent has raised material facts which are in dispute. The Court finds that there are material facts in dispute as to the appropriate penalty and in addition to that finding, the Court, in the exercise of its discretion, finds that a hearing on the penalty issue is otherwise warranted.

¹⁵ Accordingly, EPA's citation to cases such as *In re Green Thumb Nursery, Inc.*, 6 E.A.D.782 (EAB 1997), while interesting, are not pertinent here. Similarly, the contention that it is *per se* impermissible to assess a penalty without first conducting an evidentiary hearing is not made here by the Respondent. Thus, EPA's citation to *Newell Recycling Company*, 8 E.A.D. at 598 (EAB 1999) is not useful here for the same reason. Both *Green Thumb* and *Newell* are discussed *infra*. Having devoted 21 pages of its 25 page Memorandum re Liability and Penalty to the issue of Respondent Biewer Ohio's liability for the alleged violation and given Respondent's concession to liability, only the appropriate penalty remains in issue. For this issue, at least in its Memorandum re Liability and Penalty, EPA devotes one page to the subject, where it repeats its earlier stated points and prior reference to *Newell Recycling Company*. See EPA Memorandum at 23. The recounting and discussion of EPA's Memorandum re Proposed Penalty appears in the body of this Order.

The Consolidated Rules of Practice (“Procedural Rules”) governing the administrative assessment of civil penalties, found at 40 C.F.R. Part 22, provides that where a “respondent Contests any material fact upon which the complaint is based; contends that the proposed penalty . . . is inappropriate . . . it shall file . . . a written answer” Procedural Rules at 40 C.F.R. § 22.15(a). It is noted that the literal words of this section draw a distinction between the alleged violation and the proposed penalty. For the former, the Rule speaks in terms of contesting “material facts,” but those words do not appear where the challenge pertains to the proposed penalty. For that issue, the Rule only requires the contention that the proposed penalty is “inappropriate.” The same section provides that a “hearing upon the issues raised by the complaint and answer may be held if requested by respondent in its answer.” 40 C.F.R. § 22.15(c). While the Court *may* issue an accelerated decision as to any or all parts of the proceeding, this is contingent upon there being no genuine issue of material fact existing and a party being entitled to judgment as a matter of law. 40 C.F.R. § 22.20. In the case of *Chem Lab Products, Inc.* FIFRA Appeal No. 02-01, October 31, 2002, 2002 WL 31474170 (E.P.A.), a FIFRA case, the judge did hold a hearing on the penalty issue. The Board stated that the Enforcement Response Policy “contains guidance only; its provisions are not binding on enforcement personnel, ALJs, or the Board.” It also took note that “penalty assessments are sufficiently fact-and circumstance-dependent that the resolution of one case cannot determine the fate of another.” This speaks to the Court’s exercise of its discretion. It also noted that the “generic penalty factors naturally become unique to [a given case] on the basis of the evidence and testimony introduced into the administrative record.” The “uniqueness of the penalty inquiry” means that the “unique record information” is central to a fair penalty determination. Just as in the *Everwood* case¹⁶, an enforcement officer testified in *Chem Lab* as to the computation of the proposed penalty, not EPA counsel.¹⁷ Further, the Complainant “has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint *and that the relief sought is appropriate.*” 40 C.F.R. § 22.24 (emphasis added). The Respondent put EPA on notice from the outset, through its answer, that while it “neither admits nor denies the legal allegations contained in the “Proposed Civil Penalty” portion of the complaint, [it] further responds that the asserted penalty of \$282,649 is excessive.” Answer at 7. It should be borne in mind that the case did not remain static following the answer. Both the prehearing exchange and significant discovery ensued and through those processes EPA has become keenly aware that the Respondent has significant financial issues. The Respondent’s financial status is a factual matter which is in dispute and by virtue of EPA’s own filing in this matter, it knows that this can have a bearing on the Respondent’s good faith efforts to comply as well as the degree of its ‘willfulness/negligence,’ ability to pay, and other unique factors.

¹⁶ See n.3.

¹⁷ The enforcement officer was also the ‘team leader in the Pesticide Program for Region 9. The officer had been an EPA enforcement officer for six years and that during that time she had calculated penalties in approximately 50 cases, of which approximately 40 were penalties under FIFRA. In determining the proposed penalty herein, she used the Enforcement Response Policy for FIFRA and her determinations were reflected on the Civil Penalty Calculation Worksheet.

A brief discussion of representative cases cited by the parties is warranted. *In re: Employers Insurance of Wausau and Group Eight Technology, Inc.* 6 E.A.D.735, TSCA Appeal No. 95-6, 1997 WL 94743 (“*Wausau*”) was cited by both parties. While this was a TSCA case involving violations of the “PCB Rule,” specifically, storage, marking and improper disposal violations related to PCBs, it is the Environmental Appeals Board’s discussion regarding proposed civil penalties that is relevant here. The Board noted there that the Presiding Officer “is in no way constrained by the Region’s penalty proposal, even if that proposal is shown to have ‘take[n] into account’ each of the prescribed statutory factors,” but rather need only explain the basis for not assessing EPA’s recommended penalty. It should not be overlooked that there was a hearing held in that case and accordingly the matter was not resolved, through an accelerated decision, either as to the liability or the penalty aspect. The Board did discuss the penalty in terms of “the Region’s analysis of the statutory penalty factors and their application to the particular violations at issue.” The Board has noted that while the judge must consider any civil penalty guidelines, he is not required to, nor specifically precluded from, considering any other relevant materials. The Board also recognized that the Court has the discretion to demand additional argument or evidence to support the penalty policy’s interpretation and analysis. On the other hand, the Board noted that EPA need not prove each of the penalty policy’s factual underpinnings. Thus, EPA need not offer evidentiary support for each and every factual proposition that is either recited in the policy or implicit in it. Instead EPA need only demonstrate that it took into account the statutory criteria and that its proposed penalty is appropriate “in light of those criteria and the facts of the particular violations at issue.” Fairly, the Board stated that the bottom line for the assessment of a penalty is that it “reflect [] a reasonable application of the statutory penalty criteria *to the facts* of the particular violations.” *Wausau* at 758. In numerous iterations, while noting the obligation of the court to ‘consider’ any penalty guidelines, the Board has expressed that departure from the penalty policy must be adequately explained. For example, a reduction from a proposal is appropriate where the penalty policy formulation overstates the actual gravity. *In re James C. Lin and Lin Cubing, Inc.* 5 E.A.D. 595, at 598-599 and 603 (EAB 1994), *In re Sav-Mart, Inc.*, 5 E.A.D. 732 (EAB 1995), and *In re Green Thumb Nursery, Inc.*, 6 E.A.D.782 (EAB 1997).

Of especial relevance to this case, the Board has also recognized that it is appropriate for penalty assessments to be influenced by the financial circumstances of a respondent. *In re Kay Dee Feed Division, Kay Dee Feed Company*, 2 E.A.D. 646 (CJO 1988) and *In re Custom Chem. & Agric. Consulting, Inc.*, 2 E.A.D. 748 (CJO 1989). Certainly the Respondent’s financial circumstances are very much in issue here.

Puerto Rico Aqueduct and Sewer Authority v. E.P.A., 35 F.3d 600 (1st Cir. 1994) (“*Puerto Rico Aqueduct*”) was cited by EPA for its position that a respondent has no right to a hearing, absent the presence of a material fact in dispute. It is the case that EPA refused to hold an evidentiary hearing regarding its determination that the Respondent had not presented any legally cognizable basis for modifying the secondary treatment requirements for its publicly owned treatment works. However the case did not involve a proceeding for the imposition of a civil penalty, but rather whether the sewer authority was entitled to modifications from certain secondary treatment requirements. The First Circuit upheld the Board’s decision that the sewer

authority was not entitled to a hearing unless a genuine issue of material fact is present. As it observed, “Due process simply does not require an agency to convene an evidentiary hearing when it appears conclusively *from the papers* that, on the available evidence, the case only can be decided one way.” *Id.* at 606. As explained *supra*, this Court does not subscribe to the idea that the penalty here can only be decided one way.

In re Green Thumb Nursery, Inc., 6 E.A.D.782 (EAB 1997), the Board addressed the respondent’s claim that the judge erred in not providing an oral evidentiary hearing. But, as with *Puerto Rico Aqueduct*, it was held that a hearing request must raise real disputes of material fact. However the facts were starkly different from those in the case at hand. The Respondent had not even made a demand for a hearing, and its only substantive dispute on the issue of liability was its challenge to EPA’s claim that the product was not registered. The Board first noted that the Respondent was afforded an “opportunity” for a hearing, “including an evidentiary hearing where it would be allowed to present witnesses in support of its case and to *cross-examine* witnesses against it.” (emphasis added). Although the Board determined that the respondent *waived* that right by its failure to make a timely request for a hearing and that this waiver applied to both the liability and penalty aspects of the proceeding, it then held that the Presiding Officer still retains the “informed discretion” to hold a hearing, even where a respondent fails to timely request one. That discretion also allows the judge to decide that no hearing is warranted, as well. Therefore, while there is an opportunity for a hearing before a civil penalty may be imposed, one basis for invoking that opportunity is that the respondent put a material fact at issue. Where there is no material fact at issue that requires an oral evidentiary hearing, and it is determined that a documentary record is sufficient, there is no “right” to proceed with a hearing anyway. Thus, the Board made it clear that the test for summary judgment is similar to judicial summary judgment under Rule 6 of the Federal Rules of Civil Procedure. Respondent *Green Thumb* did not present a single genuine issue of material fact on the issue of liability nor *as to the amount of such a penalty*. The Court exercised its discretion and chose to decide the penalty phase on documentary submissions. It is also noted that the Respondent’s only objection on the issue of the penalty was to EPA’s affidavit of the calculation of the penalty. The affidavit identified EPA’s penalty policy document and showed how the penalty was derived from it. The Board expressed that the affidavit properly was received into evidence because the affiant did not testify to any factual matter that had been put at issue by the Respondent. Significantly, the Respondent never challenged the penalty calculation itself. Rather, its entire argument in this regard was that no penalty should be assessed and only a warning issued.

In *Newell Recycling Company*, 8 E.A.D. 598 at 625, 1999 WL 778581 (E.P.A.) (September 13, 1999), the Board held that “Newell failed to raise a genuine issue of material fact with respect to the calculation of an appropriate penalty, and that the Presiding Officer was, therefore, under no obligation¹⁸ to hold an evidentiary hearing on that subject.” At least in *Newell* it was found that there were no genuine issues of material fact, entitling it to an

¹⁸ Expressing that a court is under “no obligation” to hold an evidentiary hearing is distinct from holding that the matter is not within the discretion of the trial judge to decide that a hearing should be conducted.

evidentiary hearing.¹⁹ Upon appeal to the 5th Circuit, that court noted that the Presiding Officer granted EPA's motion for accelerated decision, finding improper PCB disposal. However, that court's review was in the posture of the limited power present where the Agency has issued its final determination regarding the penalty. *Newell Recycling Company*, 231 F.3d 204 (5th Cir. Nov. 8, 2000). As the court noted, its review of the penalty was made with "significant deference" to the agency's penalty determination. *Id.* at 208. The court also noted that "EPA regulations require that a hearing be held at a respondent's request if the party requesting the hearing has raised a genuine issue of material fact." *Id.* at 210. This Court of course agrees with at least that much, but what distinguishes *Newell* from the case at hand is that this Court finds that there are genuine issues of material fact that necessitate an evidentiary hearing.

In re: Spitzer Great Lakes Ltd., TSCA Appeal No. 99-3, June 30, 2000, 9 E.A.D. 302, 2000 WL 893127 (EPA EAB), is distinguishable, as the parties jointly decided to cancel the hearing on the penalty since they agreed that there were no genuine issues of material fact that would be presented at a hearing to determine an appropriate penalty.

While not cited by EPA, *In the Matter of Federal Cartridge Company*, 2004 WL 2342640 (E.P.A. ALJ, September 3, 2004) is instructive. As in this litigation, a RCRA case was involved and the same EPA Senior Attorney and Counsel in the present litigation was a co-counsel there. As here, the attempt to have a pre-hearing assessment for the violations was sought, and rejected, by the judge presiding in that case. In the separately issued Order denying the attempt to circumvent testing of the Agency's proposed penalty rationale, the judge noted that "EPA has not shown that there exists no questions of material fact relating to the civil penalty issue. Indeed, absent a default situation where a respondent willingly relinquishes its right to its 'day in court,' it is a substantial challenge, to say the least, for the government to show that the facts of its case are so compelling that respondent is not entitled to a hearing on the civil penalty to be assessed against it." Order re Accelerated Decision, 2002 WL 31926408 (E.P.A. ALJ, December 6, 2002). The Court agrees and notes that, while Biewer Ohio has raised material issues of fact which are in dispute and which could impact upon the penalty, another independent aspect of its right to a hearing is to cross-examine the EPA witness(es) who applied the penalty policy. It has been this Court's experience that a respondent will not know, until the process of cross-examination has been afforded, if the Agency has in fact faithfully adhered to the penalty policies' instructions. Therefore the right to conduct such a cross-examination is fundamental. This right is, as a practical matter, often of equal or greater importance than challenges to the fact of a violation because the financial impact can be, as in this case, significant. Here, the government is seeking nearly a third of a million dollars. Additionally, while a respondent is apt to be on equal footing as to knowledge of the facts surrounding an alleged violation, the same is not true where the issue is the agency's application of its penalty policy to such alleged violation.

¹⁹ In *Newell*, unlike the matter at hand, EPA did present a declaration from an EPA enforcement person, an EPA environmental scientist, which person was not EPA Counsel in that matter.

From the foregoing, it is clear that disputes of material fact raised in response to a motion for accelerated decision render the granting of such motion inappropriate, whether the issue for determination is the fact of violation or the proper application of a given penalty policy. That is the case here. There are material facts in dispute, which facts bear upon the correct application of the penalty policy. Beyond that independent basis for denying EPA's Motion as to Accelerated Decision for the penalty, the Court also is of the view that, either through discovery or through the exercise of cross-examination, a respondent should be afforded the right to explore EPA's penalty proposal analysis, in order to make its own determination as to whether the policy was in fact properly applied. Such questioning may disclose avenues for contending that the policy was not adhered to and consequently that the penalty should instead be derived from application of the statutory penalty criteria.

William B. Moran
United States Administrative Law Judge

December 23, 2009
Washington, D.C.

Appendix

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

IN THE MATTER OF:)	
)	
John A. Biewer Company of Ohio, Inc.)	
300 Oak Street)	
St. Clair, Michigan 48079-0497)	
(Washington Courthouse Facility))	
)	
U.S. EPA ID #: OHD 081 281 412; and)	DOCKET NO. RCRA-05-2008-0007
)	
John A. Biewer Company, Inc.)	
812 South Riverside Street)	
St. Clair, Michigan 48079; and)	
)	
Biewer Lumber LLC)	
812 Riverside Street)	
St. Clair, Michigan 48079)	
)	
Respondents)	

**Order on EPA’s Motion to Strike, in part,
Respondent’s Prehearing Exchange**

Under consideration is “COMPLAINANT’S [sic] MOTION TO STRIKE, IN PART, RESPONDENT’S PRE-HEARING EXCHANGE.” EPA, through its Senior Counsel, seeks to strike the Respondent’s reservation of its “right to cross-examine the author of the ‘Penalty Rational’ provided by Complainant dated August 15, 2008.”²⁰ In a Memorandum in Support of its Motion, EPA contends that “Respondent has no such right.” EPA Memorandum at 1. A truncated, but accurate, synopsis of EPA’s argument proceeds as follows: Congress gave the EPA Administrator exclusive authority to assess a civil penalty under RCRA; such penalty assessment is to consider the seriousness and good faith associated with the violation; the Administrator employed that authority through the establishment of a penalty policy for the assessment of such penalties; a respondent is not entitled to cross-examination of the penalty

²⁰ This Order should be read in tandem with a related Order addressing EPA’s Motion for Accelerated Decision on Liability and Penalty, which Order is also being issued today. That Order is included as an Appendix to this Order. Footnotes for the appendix version of this Order continue sequentially in this document.

assessment at hearing; and a respondent may only challenge such an assessment through paper submissions of its analysis of the penalty policy to the violation in issue.

Although EPA seems to acknowledge that the Administrative Procedure Act (“APA”) affords those faced with agency action, such as in this case, the right to a hearing and a decision on the matter, all in accordance with the APA provisions at 5 U.S.C. §§ 554, 556 and 557, its motion argues against that right, contending that administrative law judges are subject to the Administrator’s rules governing the assessment of a civil penalty, and that “on matters of law and policy, an ALJ is subordinate to the agency in which he serves.” EPA Memorandum at 2-3. ALJ’s, according to EPA’s Counsel, as “creature(s) of Congressional enactment” are “semi-independent subordinate hearing officers.” *Id.* at 4 (citations omitted). Accordingly, while EPA Counsel admits that the parties have a right to cross-examine witnesses, acknowledging that 40 C.F.R. § 22.22 (b) and (c) provide for such examination of witnesses, Counsel contradictorily takes the position that “[t]he Administrator has promulgated no rule requiring a complainant, or any party, in an action in his civil penalty process to make available any witness for cross-examination other than as is stated in [sections 22.22 (b) and (c)] and [the Administrator] certainly has invested ‘no right’ in a respondent to cross-examination as a witness anyone who calculates a penalty amount proposed in [sic] complaint.” *Id.* at 4-5. EPA Senior Counsel’s thinking is that it is only if EPA calls the author of the ‘Penalty Rationale’ as a witness or submits the penalty rationale document into evidence, that a Respondent has the right to cross-examine the document’s author. *Id.* at 5. EPA Counsel believes that, because one can file a motion for summary judgment²¹ where there is no genuine issue of material fact, it means that the Administrator has allowed for the assessment of penalties “without providing any oral evidentiary hearing for the cross-examination of witnesses” and that this “support[s] [] the proposition that the Respondent has no right to cross-examine the author of the ‘Penalty Rationale’ provided in the Complainant’s Pre-Hearing Exchange.” *Id.* at 6.²²

The upshot of EPA’s argument is its view that, even if there is a genuine issue of material fact, one does not have the right to cross-examine the author of the penalty rationale provided with EPA’s pre-hearing exchange unless EPA calls the author as a witness. *Id.* at 8-9, citing *In Re Newell Recycling Company, Inc.*, 8 E.A.D. 598, 625 (1999) for the proposition that the respondent did not raise “any material issue of fact relating to the amount of penalty appropriate for the violations.” *Id.* at 9. EPA also looks to the appeal of that decision, issued by the Fifth Circuit, for the rejection of Newell’s due process claim that an evidentiary hearing was required before a penalty could be assessed. *Id.*, citing *Newell Recycling Company, Inc. v. U.S. EPA.*²³

²¹ Summary judgment is known in EPA’s parlance as a motion for accelerated decision.

²² EPA cites “*Puerto Rico Aqueduct & Sewer Authority v. U.S. EPA*, 35 F.3d 600 (1st Cir. 1994), for the proposition that an agency need not conduct an evidentiary hearing “when it appears conclusively from the papers that, on the available evidence, the case only can be decided one way.” EPA Memorandum at 7, citation omitted.

²³ EPA cites, but incorrectly, to the Federal Circuit Court’s affirmation of the *Newell Recycling Company* decision as 232 F. 2d 204 (5th Cir. 2000), when the correct citation is 231 F.3d 204. EPA Memorandum at 9.

Citing other decisions, EPA contends that it is not necessary to have a witness testify as to how the particular penalty was calculated. Instead, EPA asserts that the “analysis” produced by the author of the “Penalty Rationale” does not create evidence, but rather is a “thought process involving a consideration of evidence, and the language of a statute and the Administrator’s policy.” EPA’s Senior Counsel goes further, suggesting that the assessment of a penalty is not fact finding but rather is the exercise of a discretionary grant of power. This leads EPA’s Counsel to the view that once it determines there has been a violation, the sanction to be imposed is a matter of agency policy and discretion. Although EPA does not assert it foursquare, it is clearly suggesting with this argument that the penalty aspect is essentially unreviewable as the “penalty amount determination is not an issue of fact, it is not a determination to be established by witness testimony.” *Id.* at 11-12.

In its Brief in Opposition to EPA’s Motion, Respondents note, accurately, that the Court stated, during a conference call on January 9, 2009, that cross-examination of the author of the penalty computation would be allowed and consequently no accelerated decision was available on that issue. Respondents fairly characterize EPA’s stance on this issue as a claim that all the agency need do is inform the Court and the Respondent of its calculated penalty amount and perhaps add the penalty calculation worksheet, but that it is under no obligation to provide written or oral testimony on the issue. Respondents submit that without admitted evidence on the issue or a stipulation to use the penalty calculation without sworn testimony, the Court would not have a factual basis to make a decision regarding the penalty. Opposition at 2. The short answer to this quandary is that the Court takes EPA’s Motion as a claim that it need not present any evidence on the matter of the penalty as such information is beyond a respondent’s inquiry and outside the Court’s purview.

Yet, as Respondents point out, EPA’s position that it need not present anything on the penalty amount runs up against 40 C.F.R. § 22.24(a), which provides that the “Complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint *and that the relief sought is appropriate.*” Opposition at 2. Given that requirement and the agency’s burden of the establishing by a preponderance of the evidence that the relief sought is appropriate, Respondents believe that oral or written testimony of the individual who calculated the penalty amount and the right to subject that person to cross-examination concerning the reasons and rationale for that calculation are fundamental. Respondents maintain that they should be afforded the right to cross-examine the individual who calculated the proposed penalty on issues such as the agency’s evaluation of Respondents’ good faith as well as other aspects of the penalty calculation. The Court agrees with the Respondent’s contentions.

In EPA’s “Response,” that is, in what EPA Counsel meant to describe as its Reply,²⁴ Complainant points to 40 C.F.R. § 22.20, “by which the Administrator specifically provides for the assessment of a civil penalty without any cross-examination of an agency witness, when there is no genuine issue of material fact. EPA “Response” at 2. The problem with that assertion is that the provision does not so “*specifically provide[]*” any such thing. Rather, the Section

²⁴ Section 22.16, “Motions,” provides that a movant may file a “reply.”

provides that it is within the Presiding Officer's discretion to render an accelerated decision as to any or all parts of a proceeding if no genuine issue of material fact exists. EPA reasserts its view that "the determination of an appropriate amount of civil penalty for violations is an issue of law for argument, and not a factual issue requiring the credibility of a witness' testimony." *Id.* Further, EPA maintains that Sections 22.22(c) and 22.24(a) of the procedural rules only require that each matter is to be decided upon a preponderance of the evidence and that EPA has the burden of proving that the violation occurred and that "the burden of persuasion that the penalty amount sought is appropriate." *Id.* at 3. EPA asserts that the proposition that a respondent has a right to an oral evidentiary hearing to cross-examine an agency penalty witness is unsupported by the procedural rules: "As a matter of law, there is simply no such right." *Id.* at 3-4. Further, as EPA expresses it, "Complainant has presented a 27 page argument in which she has analyzed the facts of this case in consideration of the RCRA statutory criteria, as interpreted in the Administrator's civil penalty policy, to support the penalty amount proposed in the Complainant and Compliance Order . . ." *Id.* at 4. Given that, EPA's stance is that a respondent may only "argue against Complainant's proposed penalty amount . . . asserting that Complainant's analysis is defective and that a penalty amount other than that proposed by Complainant is more appropriate." *Id.* Given its view that a Respondent may only argue its position as to the penalty, EPA rejects the Respondent's view that the cross-examination process "[requires] the Complainant to present a witness to read - - or otherwise attempt to recite by memory - - Complainant's penalty argument." EPA contends this "is simply not necessary . . . nor has it ever been . . . to provide Respondents an opportunity to challenge the amount of penalty Complainant proposes for their alleged violation." *Id.* at 5

Discussion:

As previously described, EPA contends that there is no right to cross-examine the individual who prepared the proposed penalty EPA is seeking to impose. According to EPA, at most, cross-examination of such an individual is available for a respondent only when the respondent can show that there is a genuine issue of material fact in dispute. The problem with this stance is twofold. First, the Court has determined that there are material facts in dispute. *See* the Court's Order on EPA's Motion for Accelerated Decision on Liability and Penalty, issued the same day as this Order. Second, a respondent may not know if the individual who prepared the proposal properly applied the penalty policy, in a given instance, unless afforded an opportunity to cross-examine that individual. In over a decade of experience in these matters the Court has observed instances when EPA's facially-sound penalty rationale has unraveled during the process of pointed questions posed by respondent's counsel during the process of cross-examination. Such weaknesses would have gone undetected, absent cross-examination because the flaws could not have been gleaned based on the mere exchange of papers supporting the rationale.

Given that EPA has flirted with the idea that when it comes to the proposed penalty cross-examination may be denied entirely, the value and purpose of cross-examination should be recalled. As Wigmore has stated, cross-examination is the "greatest legal engine ever invented for the discovery of truth." This "vital" tool "can expose inconsistencies, incompleteness, and

inaccuracy in [] testimony.” *Perry v. Leeke*, 488 U.S. 272 (1989) at 283. As the court in *Perez-Perez v. Popular Leasing Rental, Inc.* 993 F.2d 281 (1st Cir. 1993), observed, “one purpose of cross-examination is to give counsel the opportunity to root out . . . inconsistencies, omissions, and exaggerations. 993 F.2d at 286. Cases such as *Mathews v. Eldridge*, 424 U.S. 319 (1976) (“Mathews”), involving the issue in the administrative law context, do not suggest that the right may be entirely denied. Instead, the cases have described any limitation upon the right as being impacted by considering the private interest affected by the official action, the risk of erroneous deprivation of that interest under the procedures being employed, the probable value of additional procedures, and the administrative burden created if additional procedures were added. Accordingly, in the administrative litigation context the Supreme Court has affirmed that “[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of . . . ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” *Mathews* at 333. This “fundamental requirement of due process is the opportunity to be heard . . . in a meaningful manner.” *Id.* The Supreme Court noted that, as due process is flexible, the procedural protections required are those “the particular situation demands” and that this requires an “analysis of the governmental and private interests that are affected.” *Id.* at 334.

Certainly it is true that where necessary to ensure that the evidence presented is trustworthy, cross-examination is required. Section 556(d) of the Administrative Procedure Act provides for this: “A party is entitled to . . . such cross-examination as may be required for a full and true disclosure of the facts.” Accordingly, the “provision recognizes that “one of the fundamentals of a fair hearing [includes] a reasonable opportunity to test and controvert adverse evidence whether or not such evidence is a statement of opinion, observation, or consideration of a witness.” McCormick on Evidence (1972 ed. at 857).

The Court recognizes that the APA mandates only “such cross-examination as may be needed for a full and true disclosure of the facts.” 5 U.S.C. § 556(d). Thus, while there is not an absolute right to cross-examination, the key question to be posed is whether the procedure to be employed will be sufficient to develop the truth.²⁵ Therefore it must be asked whether the procedures being contemplated will adequately protect a respondent’s interests. Another aspect to be considered is the reasonableness of the cross-examination.²⁶ Thus the

²⁵ McCormick notes that the legislative history for the APA rejects any claim for an unlimited right of unnecessary cross-examination. McCormick on Evidence 1972 edition at 857. Neither limitation applies here.

²⁶ The APA provision, Section 556(d) provides a party is entitled to such cross-examination as may be required for a full and true disclosure of the facts. The procedures an Agency employs may not prejudice a party from that right. *Richardson v. Perales*, 402 U.S. 389 at 409. The right to confrontation exists “in all types of cases where administrative and regulatory actions [are] under scrutiny.” *Greene v. McElroy*, 360 U.S. 474 (1959) at 497. The Court in *Perales* also cited to Professor Wigmore’s explanation that “confrontation and cross-examination are basic ingredients in a fair trial . . . [and that] cross-examination [is] a vital feature of the law.” Thus the Court noted that “no safeguard for testing the value of human

extent of cross-examination should be determined by the administrative law judge according to the particular circumstance of the case being litigated.²⁷ The uses of cross-examination, as applicable here, include a respondent's opportunity "to bring out matters left untouched by direct examination . . . to question [the witness'] . . . narration; and *to expose the basis of any opinions he has expressed.*" McCormick on Evidence (1972 ed. at 857) (emphasis added).

If the Board's statements that there may be a departure from a penalty policy is to have substance, a respondent must have meaningful opportunity to test the application of such a policy in each case. Merely presenting the Agency's rationale and the attendant mathematical calculation may well leave a respondent without a real opportunity to test the Agency's fealty to the policy's requirements.

Accordingly, it is this Court's view that a respondent has a right to cross-examine the author who applied the penalty policy to a particular alleged violation. In a real sense, if the Court were to adopt EPA's stance, the description of the penalty EPA seeks as its "*proposed* penalty" would be an enormous misnomer, because there would be no *proposed* aspect to it, and it would be akin to a penalty imposed by fiat. Alternatively, if it is subsequently determined upon an appeal that the right to cross-examine only exists where material facts in dispute have been demonstrated, a respondent should be able to look behind the EPA rationale and calculations through discovery. The point is that, through discovery or through cross-examination, a respondent should have the opportunity to inquire about the proposed penalty rationale. Absent this opportunity, a respondent may not learn of potential flaws in the agency's application of the policy in a given instance. Without it, the Court may also remain in the dark about potential errors in the penalty calculation process and consequently lack the Board-required rationale basis to explain any departure from a penalty policy.

Based on the foregoing, the Court concludes that EPA's Motion is properly DENIED.

statements is comparable to that furnished by cross-examination, and the conviction that no statement . . . should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience." *Id.* quoting Wigmore on Evidence (3d ed. 1940).

²⁷ On that basis the administrative law judge in *Central Freight Lines v. United States*, 669 F. 2d 1063 (5th Cir. 1982) upheld the ALJ's procedure to limit the *amount* of cross-examination to 127 of some 1,600 witnesses.

William B. Moran
United States Administrative Law Judge

December 23, 2009
Washington, D.C.