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To The Late David Jones, Senior Attorney, Region 9, A Worthy
Litigator And Valued Colleague:

**Administrative Decisionmaking by Judges in the United
States' Environmental Protection Agency
Administrator's Civil Penalty Assessment Process:
Whatever Happened to the Law?**

By Richard R. Wagner*

INTRODUCTION

In 1940, Justice Felix Frankfurter admonished a federal appellate court on the need to observe distinctions between the administrative process and the judicial process. He observed that "[m]odern administrative tribunals are the outgrowth of conditions far different from those" of traditional Anglo-American court procedures, rules of evidence, and judicial review.¹ Justice Frankfurter noted that "[t]hese 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 the administrative process.² The Court emphasized that "[u]nless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine."³ This admonishment stands equally as a warning for

* Senior Attorney, Region 5. Any opinion expressed herein is that of the writer and not necessarily that of the Administrator, Agency, or the United States.

1. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 142 (1940).

2. *Id.* at 143.

3. *Id.* at 144.

anyone who is involved with any administrative process, and has been recognized through the years.⁴

This article argues that, in issuing his penalty assessment orders, decision makers of the United States Environmental Protection Agency ("EPA") Administrator have "stray[ed] outside their province and read the congressional laws through the distorting lenses of inapplicable legal doctrine."⁵ Without regard for the "laws of Congress" which govern the administrative process, but, rather, using the judicial process as a template, each of several Administrative Law Judges ("ALJs") has acted as an independent trial judge issuing final decisions, and the Environmental Appeals Board ("EAB"), delegated by the Administrator his final decisionmaking authority, has acted as a court of appeals, deferring to the decisionmaking of each of the several ALJs.⁶ As a consequence, instead of final decisions of the Administrator manifesting the consistent application

4. Justice Brennan, writing for the Court thirty-six years later, noted the following: We reiterate 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.' *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (citing *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940)). Two years later, Justice Rehnquist, writing for the Court, stated, this much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances the "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." *FCC v. Schreiber*, 381 U.S., at 290, 85 S. Ct., 1467, quoting from *FCC v. Pottsville Broadcasting Co.* 309 U.S., at 143, 60 S. Ct., at 441. Indeed, our cases could hardly be more explicit in this regard. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543-44 (1978). In subsequent years, the Court has continued to cite *Pottsville Broadcasting Co.* to support its holdings. *Sims v. Commissioner of Social Security*, 513 U.S. 103, 110 (2000) ("it is well settled that there are wide differences between administrative agencies and courts."); *Shepard v. NLRB*, 459 U.S. 344, 351 (1983) ("[t]he Board is not a court; it is not even a labor court; it is an administrative agency charged by Congress with the enforcement and administration of the federal labor laws.").

5. *Pottsville Broad. Co.*, 309 U.S. at 144.

6. The Board was created by the Administrator on February 13, 1992. Prior to his creation of the Board, a Chief Judicial Officer ("CJO") was delegated authority by the Administrator to issue his final decisions. *Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications*, 57 Fed. Reg. 5320 (Feb. 13, 1992) (codified at 40 C.F.R. §§ 1, 3, 17, 22, 27, 57, 60, 66, 85, 86, 114, 123, 124, 164, 209, 222, 223, 233, and 403).

of law, and the policy and discretion of one Administrator, these final decisions have become ad hoc, their contents determined by the personal views and predilections of whichever ALJ has been assigned the case. As we shall later see, inconsistency in the Administrator's penalty assessment has been a concern the Government Accountability Office ("GAO") has brought to the attention of Congress over the course of a number of years.

Part I of this article reviews relevant provisions of the United States Constitution and of the laws of Congress which govern the Administrator's civil penalty assessment process. Part II reviews the rules promulgated by the Administrator, setting out the process by which he exercises his authority to assess civil penalties for violations of the various federal environmental statutes. Part III reviews various decisions made on behalf of the Administrator. Some concluding comments will follow.

I. THE LAW GOVERNING THE ADMINISTRATOR'S ASSESSMENT OF PENALTIES

A. Constitutional Sources of Authority

The Constitution provides, "WE THE PEOPLE of the United States, in Order to form a more perfect Union, . . . promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."⁷ It further provides that [t]he Congress shall have Power To . . . provide for the common Defence [sic] and general Welfare of the United States; . . . And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.⁸

Pursuant to this authority, Congress has passed numerous statutes regulating human activity harmful to the environment of the United States. With these statutes, Congress invested in the Administrator the authority to assess civil penalties for their violation. In upholding

7. U.S. CONST. pmbl.

8. *Id.* art. I, § 8.

the constitutionality of the assessment of civil penalties by executive authority under a statute passed by Congress to regulate safety in the workplace, the Fifth Circuit Court of Appeals recognized the remedial nature of the statute, and recognized that, by the use of administratively imposed civil penalties "[b]usiness is encouraged to comply with the law not only because that is what the law exacts but because failing to do so will bring down on the activity or purse noncriminal consequences."⁹ That decision incorporates a listing of the numerous federal statutes then in existence, including environmental statutes, in which Congress provided for the administrative assessment of civil penalties against violators.¹⁰ In upholding the Fifth Circuit decision, the Supreme Court stated, it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.¹¹

B. Federal Statutory Authority

1. The Federal Environmental Statutes

In various federal environmental statutes, Congress specifically and exclusively authorized the Administrator to assess civil penalties for their violation, and Congress specifically and exclusively authorized the Administrator to determine the amount of civil penalty, by considering or taking into account the particular penalty criteria identified in the statute.¹²

9. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, U.S. Dep't of Labor, 518 F.2d 990, 1009 (5th Cir. 1975).

10. *Id.* at 1003-09.

11. *Atlas Roofing Co. v. Occupational Health & Safety Review Comm'n*, 430 U.S. 442, 451 n.9 (1977) (citing *Oceanic Steam Navigation Co. v. Stranahan*, 215 U.S. 320, 339 (1909)).

12. Clean Water Act of 1977 ("CWA"), as amended, 33 U.S.C. § 1319(g) (2000); Toxic Substances Control Act of 1986 ("TSCA"), 15 U.S.C. § 2615(a) (2000); Federal Insecticide, Fungicide, and Rodenticide Act of 1947 ("FIFRA"), 7 U.S.C. § 136l (2000); Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11045 (2000); Clean Air Act ("CAA"), 42 U.S.C. 7413(d) (2000), invalidated by *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236 (11th Cir.

For instance, "The Administrator may issue an administrative order . . . assessing a civil administrative penalty" and, in determining the amount of civil penalty to assess, "the Administrator . . . shall take into consideration" the statutory penalty criteria identified.¹³ And, "A civil penalty for a violation . . . shall be assessed by the Administrator" and "[i]n determining the amount of a civil penalty, the Administrator shall take into account" the statutory penalty criteria identified.¹⁴ Congress further provides in these statutes that, prior to assessing any civil penalty, "the Administrator" must serve notice on the alleged violator of his proposed penalty order, and the alleged violator's right to an opportunity for a hearing. For instance, "An administrative penalty assessed under paragraph (1) shall be assessed by the Administrator by an order made after opportunity for a hearing on the record in accordance with sections 554 and 556 of title 5. . . . Before issuing such an order, the Administrator shall give written notice to the person to be assessed an administrative penalty of the Administrator's proposal to issue such order and provide such person an opportunity to request such a hearing on the order."¹⁵ And, "A civil penalty for a violation of section section [sic] 2614 or 2689 of this title shall be assessed by the Administrator by an order made on the record after opportunity (provided in accordance with this subparagraph) for a hearing in accordance with section 554 of title 5. Before issuing such an order, the Administrator shall give written notice to the person to be assessed a civil penalty under such order of the Administrator's proposal to issue such order and provide such

2003), on the grounds that an administrative compliance order cannot be the basis for the imposition of civil penalties; Safe Drinking Water Act of 1974 ("SDWA"), 42 U.S.C. § 300g-3(g) (2000); Marine Protection, Research and Sanctuaries Act of 1972 ("MPRSA"), 33 U.S.C. § 1415(a) (2000); and the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. § 6928 (2000). By Executive Order 12580 (January 23, 1987), the President delegated his penalty assessment authority under section 109(b) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9609(b) (2000), to the Administrator.

13. CAA § 113, as amended, 42 U.S.C. § 7413(d)-(e) (2000).

14. TSCA, 15 U.S.C. § 2615(a)(2)(A) (2000).

15. CAA § 113, 42 U.S.C. § 7413(d)(2)(A).

person an opportunity to request, within 15 days of the date the notice is received by such person, such a hearing on the order."¹⁶

2. The Administrative Procedure Act

The Administrative Procedure Act ("APA") is codified in Title 5 of the United States Code.¹⁷ Enacted in 1946, the APA sets a pattern designed to achieve relative uniformity in the administrative machinery of the Federal Government. It effectuates needed reforms in the administrative process and at the same time preserves the effectiveness of the laws which are enforced by the administrative agencies of the Government.¹⁸

With exceptions not applicable to this discussion, Congress directs that section 554 of title 5 "applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."¹⁹ Congress provides that persons who are subject to agency²⁰ action

16. TSCA, 15 U.S.C. § 2615(a)(2)(A).

17. 5 U.S.C. §§ 551-559 (2000).

18. Tom C. Clark, Attorney General, U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 5 (1947) [hereinafter Attorney General's Manual]. This manual is "the Government's own most authoritative interpretation of the APA" and one which the Supreme Court "[has] repeatedly given great weight," as it "was prepared by the same Office of the Assistant Solicitor General that had advised Congress in the latter stages of enacting the APA, and was originally issued 'as a guide to the agencies in adjusting their procedures to the requirements of the Act.'" *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988) (Scalia, J., concurring) (citations omitted). See also *Pacific Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 n.17 (D.C. Cir. 1974) ("The Attorney General's Manual is entitled to considerable weight because of the very active role that the Attorney General played in the formulation and enactment of the APA.").

19. 5 U.S.C. § 554(a) (2000).

20. "Agency" is defined under the APA as "each authority of the Government of the United States." 5 U.S.C. § 551(1) (2000). Legislative history reveals that "[a]uthority" means any officer or board, whether within another agency or not. [sic] which by law ha- [sic] authority to take final and binding action with or without appeal to some superior administrative authority." Attorney General's Manual, *supra* note 18, at 9. As the Administrator is exclusively authorized by Congress to assess civil penalties for violations of the federal environmental statutes, the Administrator is the "authority of the Government of the United

have a right to certain notice,²¹ and that "[t]he agency shall give all interested parties opportunity for" making a response to proposed agency action, and "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."²² Congress provides that an ALJ may be appointed to conduct any hearing that is necessary, and, in conducting any such hearing, the actions of the ALJ are "[s]ubject to the published rules of the agency and within its powers."²³ This provision has been interpreted to mean that, on matters of law and policy, an ALJ is subordinate to the agency in which he or she serves.²⁴ The Supreme Court has recognized that Congress intended to make ALJs "semi-independent

States," and, therefore, the agency as identified in the APA. In other statutes a Board or Commission or Secretary might be the agency. *Id.*

21. 5 U.S.C. § 554(b) (2000).

22. *Id.* § 554(c).

23. *Id.* § 556(c).

24. The Attorney General of the United States has stated that "[t]he phrase 'subject to the published rules of the agency' is intended to make clear the authority of the agency to lay down policies and procedural rules which will govern the exercise of such powers by presiding officers." Attorney General's Manual, *supra* note 18, at 75. In addition, the federal courts consistently have recognized that, on matters of law and policy, ALJs are subordinate to the agency in which they serve. See, e.g., *Croplife Am. v. EPA*, 329 F.3d 876, 882 (D.C. Cir. 2003) ("[T]he reality of agency operations makes it clear that ALJs cannot independently rule on the legality of third-party human studies, because they may not ignore the Administrator's unequivocal statement prohibiting the agency from considering such studies."); *Iran Air v. Kugelman*, 996 F.2d 1253, 1260 (D.C. Cir. 1993) ("It is commonly recognized that ALJs 'are entirely subject to the agency on matters of law.'"); *Mullen v. Bowen*, 800 F.2d 535, 540-541 n.5 (6th Cir. 1986) ("There are, however, definite limits on the extent to which ALJ's [sic] may exercise their decisional independence. Indeed, were it otherwise it might be difficult for the agency to implement its policies," therefore, ALJs "remain entirely subject to the agency on matters of law and policy."); *D'Amico v. Schweiker*, 698 F.2d 903, 905-06 (7th Cir. 1983) (stating that ALJs must comply with an "instruction" issued by the Chief Administrative Law Judge of the agency announcing "new policy," even though the instruction "truncated" ALJ discretion, and ALJs believed the instruction injured social security claimants); *Ass'n of Admin. Law Judges, Inc. v. Heckler*, 594 F. Supp. 1132, 1141 (D.D.C. 1984) (stating that an ALJ "must 'scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts,'" but "[o]n matters of law and policy, however, ALJs are entirely subject to the agency.").

subordinate hearing officers," and that an ALJ "is a creature of Congressional enactment."²⁵

Congress authorized an ALJ only to "initially" decide a case, and "on appeal from or review of the initial decision the agency has all the powers which it would have in making the initial decision," with exceptions not relevant to this discussion.²⁶ In this regard, the Supreme Court noted that where Congress places decision-making authority in a Board, "[t]he responsibility for decision thus placed on the Board is wholly inconsistent with the notion that it has power to reverse an examiner's findings only when they are 'clearly erroneous.' Such a limitation would make so drastic a departure from prior administrative practice that explicitness would be required."²⁷

The Attorney General of the United States explained that an initial decision is advisory in nature, and that "[i]n making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision-as though it had heard the evidence itself."²⁸

25. *Ramspeck v. Fed. Trial Exam'rs Conference*, 345 U.S. 128, 132-33 (1953). The terms "hearing officer" and "trial examiner" and "ALJ" all refer to the same governmental officer. In 1978 amendments to the APA, Congress provided that hearing examiners shall be known as administrative law judges. Act of March 27, 1978, Pub. L. No. 95-251, 92 Stat. 183. Notwithstanding the name change, no amendment was made to the Administrative Procedure Act effecting the authority of this particular governmental officer. See 5 U.S.C. §§ 556-557 (2000); see also Kenneth Culp Davis, *Administrative Law Treatise* § 17.11 (2nd ed. 1980) (describing the historical development of the position).

26. 5 U.S.C. § 557(b) (2000).

27. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 492 (1951). See also *FCC v. Allentown Broad. Corp.*, 349 U.S. 358, 364 (1955) (rejecting an appellate court's holding that findings of an ALJ based on witness demeanor are not to be overruled by an agency's final decision-making authority "without a 'very substantial preponderance in the testimony as recorded,'" as such a holding was tantamount to a "clearly erroneous" standard which does not apply to an agency's review of an ALJ's initial decisions).

28. Attorney General's Manual *supra*, note 18, at 83. Federal courts have interpreted this statutory provision likewise. It has been recognized that *Universal Camera* makes clear that "the ultimate responsibility for findings of fact rests with the National Labor Relations Board by statute, as we believe it rests with the Secretary of Health and Human Services here, and for the same reasons." *Mullen*, 800 F.2d at 542. "Under administrative law principles, an agency or board is free either to adopt or reject an ALJ's findings and conclusions of law." *Starrett v.*

Finally, Congress has established criteria which all final agency action- including final decisions of the Administrator assessing civil penalties-must meet to conform with the law and be upheld on judicial review, providing that "[a] sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence."²⁹ Congress further provides that, on judicial review, final decisionmaking of an agency shall be held "unlawful and set aside" if its findings and conclusions are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."³⁰

Special Counsel, 792 F.2d 1246, 1252 (4th Cir. 1986). "[A]s the Supreme Court made clear in *Universal Camera*, the agency is free to substitute its judgment for that of the ALJ," and "the ALJ's determinations are not entitled to any special deference from the agency except insofar as the ALJ's findings are based on witness credibility determinations." *Mattes v. United States*, 721 F.2d 1125, 1129 (7th Cir. 1983). "[T]he fact that the Board reached different factual conclusions that [sic] the administrative law judge is not as diabolic as respondent suggests," the issue "is whether the Board's decision is based on substantial evidence." *U.S. Soil Conditioning v. NLRB*, 606 F.2d 940, 942 (10th Cir. 1979). "Section 8(a) of the Administrative Procedure Act, 5 U.S.C. § 557(b), clearly authorizes the agency to 'make any findings or conclusions which in its judgment are proper on the record,' notwithstanding a different determination by the Examiner [ALJ]." *Fink v. Securities and Exchange Comm'n*, 417 F.2d 1058, 1059 (2d Cir. 1969). 29. 5 U.S.C. § 556(d) (2000).

30. *Id.* § 706. The Court of Appeals for the District of Columbia has held that: The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (citations omitted). The Court emphasized that it has maintained a "rigorous insistence on the need for conjunction of articulated standards and reflective findings, in furtherance of even-handed application of law, rather than impermissible whim, improper influence, or misplaced zeal." *Id.* at 852. The Court observed that "in the last analysis it is the agency's function, not the Examiner's, to make the findings of fact and select the ultimate decision, and where there is evidence supporting each result it is the agency's choice that governs." *Id.* at 853. In addressing the "even handed application of law" in administrative adjudication, the Third Circuit Court of Appeals, citing *J. Mashaw et al., Social Security Hearings and Appeals: A Study of the Social Security Administration Hearing*

II. THE ADMINISTRATOR'S PROMULGATED RULES

The Supreme Court recognized that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."³¹

The Administrator promulgated the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Orders, and the Revocation, Termination or Suspension of Permits" (the "Administrator's Rules"), which are codified at 40 C.F.R. part 22.³² These rules were first promulgated in 1980,³³ and more recently amended.³⁴ In the public notice proposing the amended rules, the Administrator noted that amendments were necessary to "correct a number of inconsistencies and ambiguities in the procedures which have become apparent through experience" with the original rules, which "were promulgated in 1980 to establish uniform procedural rules for administrative enforcement proceedings required under various environmental statutes to be held on the record after opportunity for a hearing in accordance with section 554 of the Administrative Procedure Act, 5 U.S.C. et seq."³⁵ The rules "govern all

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 (3rd Cir. 1982).

31. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

32. 40 C.F.R. pt. 22 (1999).

33. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 45 Fed. Reg. 24,360 (Apr. 9, 1980) (codified at 40 C.F.R. pts. 22, 80, 168, 226).

34. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 64 Fed. Reg. 40,138 (July 23, 1999) (codified at 40 C.F.R. pt. 22).

35. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 63 Fed. Reg. 9464 (Feb. 25, 1998) (codified at 40 C.F.R. pts. 22, 59).

administrative adjudicatory proceedings for . . . [t]he assessment of any civil administrative penalty" under various federal environmental statutes in which Congress has invested the Administrator with authority to assess civil penalties for violations, those statutes being specifically identified in the rules.³⁶

By rule, the notice of proposed penalty order and of opportunity for hearing, which the Administrator is required by the federal environmental statutes to provide to alleged violators prior to assessing any civil penalty against them, is identified by the Administrator as a "complaint."³⁷ His rules provide that a "complainant"-meaning "any person authorized to issue a complaint,"³⁸ may issue a complaint which meets the requirements of 40 C.F.R. section 22.14.³⁹ Those requirements include that the complaint: identify statutory provisions "authorizing the issuance of the complaint; identify statutory and regulatory provisions which are "alleged to be violated; include a "concise statement of the factual basis for each violation alleged[:]" and, at the discretion of the Administrator's delegated complainant, identify the amount of civil penalty proposed.⁴⁰

The complaint also must advise the alleged violator that he or she has a "right to request a hearing on any material fact alleged in the complaint, or on the appropriateness of any proposed penalty,"⁴¹ and a copy of the Administrator's Rules must be provided to the alleged violator along with a copy of the complaint.⁴²

When the alleged violator intends to contest "any material fact upon which the complaint is based," or if he or she "contends that the proposed penalty . . . is inappropriate," the alleged violator must respond to the complaint with "a written answer to the complaint."⁴³ In the answer, a respondent must "clearly and directly admit, deny or explain each of the factual allegations contained in the complaint,"

36. 40 C.F.R. § 22.1 (2006).

37. *Id.* § 22.13.

38. *Id.* § 22.3(a)(2).

39. *Id.* § 22.14(a).

40. *Id.* § 22.14(a)(1)-(4).

41. *Id.* § 22.14(a)(5).

42. *Id.* § 22.14(b).

43. *Id.* § 22.15(a).

or, if the respondent is without knowledge and unable to answer, to so state.⁴⁴ The respondent also must state in the answer "[t]he circumstances or arguments which are alleged to constitute the grounds of any defense; the facts which respondent disputes; the basis for opposing any proposed relief; and whether a hearing is requested."⁴⁵ The Administrator provides that "failure of the respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation"⁴⁶ and that "[a] hearing upon the issues raised by the complaint and answer may be held if requested."⁴⁷

The Administrator provides for a pre-hearing process, including discovery and summary disposition, the latter identified as "accelerated decision."⁴⁸ The Administrator also provides specific rules applicable to the conduct of the hearing⁴⁹ and requires initial decisions to be issued by the ALJ presiding in the case.⁵⁰

The Administrator provides for review of "initial" decisions by the Board, either on appeal from a party or on the Board's own initiative.⁵¹ In those instances where the initial decision is not appealed to the Board, or otherwise selected by the Board itself for review, by rule, the initial decision of the ALJ becomes the final decision of the Administrator "45 days after its service upon the parties."⁵² If the initial decision is reviewed by the Board, the Administrator has provided, without restriction, that the Board "shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed, and shall set forth in the final order the reasons for its actions."⁵³

In the preamble of his latest promulgation of the rules, the Administrator stated that [t]he EAB is responsible for assuring consistency in Agency adjudications by all of the ALJs and RJOs

44. *Id.* § 22.15(b).

45. *Id.*

46. *Id.* § 22.15(d).

47. *Id.* § 22.15(c).

48. *Id.* §§ 22.16, 22.19, 22.20.

49. *Id.* §§ 22.21-22.26.

50. *Id.* § 22.27.

51. *Id.* §§ 22.29-22.30.

52. *Id.* § 22.27(c).

53. *Id.* § 22.30(f).

[Regional Judicial Officers]. The appeal process of the [Administrator's Rules] gives the Agency an opportunity to correct erroneous decisions before they are appealed to the federal courts. The EAB assures that final decisions represent with [sic] the position of the Agency as a whole, rather than just the position of one Region, one enforcement office, or one Presiding Officer.⁵⁴

III. FINAL DECISIONS OF THE ADMINISTRATOR

This Part examines the final decisionmaking of the Board, conducted on behalf of the Administrator. It will first review decisions of the Board relating to the penalty amount for adjudicated violations. Then it will review the Board's decisions relating to procedural matters such as summary decisionmaking, discovery and the admission of evidence.

A. Determination of an Appropriate Penalty Amount

The Administrator provides that, after hearing or on motion for an accelerated decision, an ALJ must determine an appropriate amount of penalty in an initial decision.⁵⁵ As an ALJ is subordinate to the Administrator,⁵⁶ and an initial decision of an ALJ may become a final decision of the Administrator for which the Administrator is responsible,⁵⁷ the Administrator provides the following guidance to the ALJs, "The Presiding Officer [an ALJ] shall consider any civil penalty guidelines issued under the Act [violated]. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease."⁵⁸

54. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 64 Fed. Reg. 40,138, 40,165 (July 23, 1999) (codified at 40 C.F.R. pt. 22).

55. *Id.* § 22.27(b).

56. 5 U.S.C. § 556(c) (2000).

57. 5 U.S.C. § 557(b) (2000); 40 C.F.R. § 22.27(c).

58. 40 C.F.R. § 22.27(b).

1. The Administrator's Civil Penalty Guidelines

Under the federal environmental statutes, Congress authorizes the Administrator to assess penalty amounts for a violation, or day of violation, anywhere from \$ 1 to as much as \$ 10,000 or \$ 25,000.⁵⁹ In these statutes, Congress provides no guidance as to how the Administrator is to determine specific amounts of penalty for specific violations other than to identify narrative criteria that the Administrator must take into consideration. Given the wide range of authorized penalty amounts, how the statutory penalty criteria are interpreted and applied to the evidence of a particular case can have an enormous influence on whether the penalty amount chosen for a particular violation will be closer to \$ 1 or to \$ 25,000.

In *Butz v. Glover Livestock Commission Co.*, the Supreme Court recognized a "fundamental principle" that "where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'"⁶⁰ Consequently, "[t]he fashioning of an appropriate and reasonable remedy is for the Secretary [of Agriculture], not the court," and, on judicial review, "[t]he court may decide only whether, under the pertinent statute and relevant facts, the Secretary made 'an allowable judgment in his choice of the remedy.'"⁶¹ A corollary to the recognition of agency discretion is this, "[o]ne of the fundamental justifications for the administrative process is that an agency possesses an expertise in a particular subject area that the judiciary, as it is presently structured, cannot acquire at an acceptable cost. That justification does not come into play in a particular case unless the agency has in fact applied its expertise."⁶²

59. See, e.g., CAA § 113(d), 42 U.S.C. § 7413(d) (2000); CWA § 309(g)(2), 33 U.S.C. § 1319(g)(2) (2000); TSCA § 15(a)(1), 15 U.S.C. § 2615(a)(1) (2000); SWDA § 3008(a)(3), 42 U.S.C. § 6928(a)(3) (2000); EPCRA § 325, 42 U.S.C. § 11045 (2000).

60. *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185 (1973).

61. *Id.* at 188-89.

62. *Brock v. Dow Chem. U.S.A.*, 801 F.2d 926, 932 (7th Cir. 1986).

Just as Congress entrusted the Secretary of Agriculture with selecting the means of achieving the statutory policy of the Packers and Stockyards Act⁶³ at issue in *Butz*, Congress entrusted the Administrator with selecting the means of achieving the statutory policy of the federal environmental laws,⁶⁴ utilizing the expertise made available to him in his agency. Consequently, the fashioning of an appropriate remedy, such as determining penalty amounts for violations of a federal environmental statute, is a matter of the Administrator's discretion.⁶⁵

The Administrator, pursuant to his authority as Chief Executive Officer, organized the agency. One of the "[n]ine operational offices, each headed by an Assistant Administrator responsible for carrying out EPA's major environmental and administrative programs,"⁶⁶ is the Office of Enforcement and Compliance Monitoring.⁶⁷ "Under the supervision of" the Assistant Administrator for Enforcement and Compliance Monitoring, this office serves as the principal adviser to the Administrator in matters concerning enforcement and compliance; and provides the principal direction and review of civil enforcement activities for air, water, waste, pesticides, toxics, and radiation. The Assistant Administrator [for Enforcement and Compliance Monitoring] reviews the efforts of each Assistant and Regional Administrator to assure that EPA develops and conducts a strong and consistent enforcement and compliance monitoring program. The Office manages the national criminal enforcement program; ensures coordination of media office administrative compliance programs, and civil and criminal enforcement activities; and provides technical expertise for enforcement activities.⁶⁸

63. *Glover Livestock Comm'n*, 411 U.S. at 188-89.

64. *See supra* Part I.B.1 (describing Congressional authority vested in the Administrator).

65. *See Panhandle Coop. Ass'n v. EPA*, 771 F.2d 1149, 1152 (8th Cir. 1985) ("The assessment of a penalty is particularly delegated to the administrative agency. Its choice of sanction is not to be overturned unless 'it is unwarranted in law' or 'without justification in fact.'"); *see also Robinson v. United States*, 718 F.2d 336, 339 (10th Cir. 1983) ("once the agency determines that a violation has been committed, the sanctions to be imposed are a matter of agency policy and discretion.").

66. 40 C.F.R. § 1.21 (2006).

67. *Id.* § 1.35.

68. *Id.*

This delegation of authority is long-standing.⁶⁹ On February 16, 1984, the Assistant Administrator for Enforcement and Compliance Monitoring ("Assistant Administrator"), on behalf of the Administrator, issued general policy documents regarding the determination of appropriate civil penalty amounts in the Administrator's civil penalty assessment process.⁷⁰ These documents were published in an effort to assure that the process resulted in assessed penalties meeting designated goals of "deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems."⁷¹ The Assistant Administrator directed that each division of the Agency issue program-specific penalty policies, based upon Agency-wide framework principals being announced that day.⁷² Policy GM-21 directs that "[i]n order to achieve the above Agency policy goals, all administratively imposed penalties and settlements of civil penalty actions should, where possible, be consistent with the guidance contained in the Framework document. Deviations from the Framework's methodology, where merited, are authorized as long as the reasons for the deviations are documented."⁷³

69. In announcing an update, the Administrator delegated on June 30, 1978 to his Assistant Administrator for Enforcement the task of "serv[ing] as the principal adviser to the Administrator in matters pertaining to the enforcement of standards for environmental quality, and [being] responsible for the conduct of enforcement activities on an agencywide [sic] basis." 43 Fed. Reg. 28,479, 28482 (June 30, 1978) (codified at 40 C.F.R. § 1.31). This title was later expanded to Assistant Administrator for Enforcement and Compliance Monitoring. See 49 Fed. Reg. 26,727, 26,730 (June 29, 1984). In addition to being the "principal adviser to the Administrator in matters concerning enforcement and compliance," this Assistant Administrator was also to "review[] the efforts of each Assistant and Regional Administrator to assure that EPA develops and conducts a strong and consistent enforcement and compliance monitoring program." *Id.*

70. U.S. Env'tl. Prot. Agency, Policy on Civil Penalties: EPA Gen. Enforcement Policy #GM-21 (1984) [hereinafter Policy GM-21]; U.S. Env'tl. Prot. Agency, A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties, EPA Gen. Enforcement Policy #GM-22 (1984) [hereinafter Policy GM-22].

71. Policy GM-21, *supra* note 70, at 1; Policy GM-22, *supra* note 70, at 1

72. Policy GM-21, *supra* note 70, at 1; Policy GM-22, *supra* note 70, at 1.

73. Policy GM-21, *supra* note 70, at 1.

The "consistent application of a penalty policy" was found important "because otherwise the resulting penalties might be seen as being arbitrarily assessed. Thus violators would be more inclined to litigate over those penalties. This would consume Agency resources and make swift resolution of environmental problems less likely."⁷⁴

The Administrator's general policy and framework document also recognized that "[t]reating similar situations in a similar fashion is central to the credibility of EPA's enforcement effort and to the success of achieving the goal of equitable treatment."⁷⁵

While each of the Administrator's statute-specific policies address the penalty criteria of the particular statute involved, the policies generally provide for a two step process in which evidence is evaluated in consideration of the statutory penalty criteria. The first step is the determination of a preliminary deterrence amount, which involves an "economic benefit" component and a "gravity of harm" component.⁷⁶ The "economic benefit" component consists of determining the dollar amount by which the violator was enriched as a consequence of his violating conduct, based upon the evidence in the case.⁷⁷ A dollar amount representing the gravity of the violation is then added, which incorporates a consideration of such things as the amount and toxicity of the pollutant involved; the actual harm, or potential for harm, presented by the violating conduct; the sensitivity of the ambient environment; the duration of the violation; and the threat to the regulatory scheme presented by the violating conduct.⁷⁸ To assist in the gravity determination, a matrix is often provided, with dollar amounts on the matrix ranging from low to high, representing various degrees of harm as disclosed by the evidence in the case. Once the preliminary deterrence amount is determined, that amount will be raised or lowered, based upon a consideration of the evidence in the case relating to such statutory criteria as the violator's culpability; ability to pay a particular penalty amount; history of prior

74. *Id.* at 4.

75. Policy GM-22, *supra* note 70, at 27.

76. *Id.* at 2.

77. *Id.* at 6-12.

78. *Id.* at 13-15.

violations; and other factors as justice may require specific to the case.⁷⁹

2. An Analysis of the Administrator's Final Penalty Determinations as Issued by the Board, in Consideration of the Language of the Federal Environmental Statutes, the APA, and the Administrator's Rules

Although the Board has acknowledged that the Administrator's regulations "grant the Board *de novo* review of a penalty determination"⁸⁰ in an ALJ's initial decision, without any consideration of the language of Congress in the federal environmental statutes and in sections 556(c), 557(b) and 706 of the APA, "the Board has many times stated that it will generally not substitute its judgment for that of an ALJ absent a showing that the ALJ committed clear error or an abuse of discretion in assessing a penalty."⁸¹

79. *Id.* at 16-24.

80. *In re CDT Landfill Corp.*, 11 E.A.D. 88, 117 (2003).

81. *In re CDT Landfill Corporation*, 11 E.A.D. at 117. A word must be said about terminology. An ALJ is not authorized by Congress in any federal environmental statute to "assess" a civil penalty; only the Administrator is invested with that authority. See *supra* Part I.B.1. The Supreme Court has noted that "[o]ur precedents make clear that the starting point for our analysis is the statutory text. And where, as here, the words of the statute are unambiguous, the 'judicial inquiry is complete.'" *Desert Palace, Inc., v. Costa*, 539 U.S. 90, 98 (2003) (citations omitted). Moreover, "[a] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). As the Administrator is one specifically designated Chief Executive Officer of a federal agency, the words "the Administrator" appearing in the several federal environmental statutes cannot be interpreted, consistent with sound principles of statutory interpretation, to include each of several ALJs who are "creature[s] of congressional enactment" and "semi-independent subordinate hearing officers." *Ramspeck v. Fed. Trial Exam'rs Conference*, 345 U.S. 128, 132-33 (1953). Moreover, in the relevant "Congressional enactment," Section 557(b) of the APA, Congress authorizes an ALJ to do no more than "initially" decide a matter. And, in conformance with that section, the Administrator has invested ALJs with authority only to initially decide a matter. 40 C.F.R. § 22.17 (2006). Consequently, the notion that an ALJ "assesses" or is "assessing" a penalty is inaccurate.

The Board has recognized an ALJ's independence from the Administrator's policies when determining penalty amounts, stating that an ALJ's obligation under 40 C.F.R. § 22.27(b) to consider a particular penalty policy adopted by the Administrator carries with it no obligation to adhere to the penalty policy in a particular instance. Nor does it suggest that a presiding officer errs in the slightest respect if he or she decides not to deviate from the penalty policy. The fact that the presiding officer has a choice of either following or deviating from the [p]enalty [p]olicy operates to preserve not restrict the presiding officer's independence.⁸²

Five years later, the Board stated "as we have made clear in many prior decisions, once a presiding officer considers the relevant penalty policy, he or she may adopt the penalty computed in accordance with that policy or deviate therefrom, so long as the penalty assessed reflects the criteria in the applicable statute."⁸³

The "Board has repeatedly stated that a Presiding Officer, having considered any applicable civil penalty guidelines issued by the Agency, is nonetheless free not to apply them to the case at hand,"⁸⁴ and observed that an ALJ, in determining a penalty amount in an initial decision, could simply have considered the [p]enalty [p]olicy's analytical framework and concluded that, in this particular case, application of the TSCA § 16 criteria in the manner suggested by the [p]enalty [p]olicy did not yield an 'appropriate' penalty. The ALJ could likewise have rejected an 'appropriate' penalty generated in accordance with the Penalty Policy, in favor of another 'appropriate' penalty better suited to the circumstances of this particular case.⁸⁵

Moreover, the Board has stated "it also should be clear that subsumed within the ALJ's authority to assess a penalty different than one calculated under Agency guidance is the notion that Agency guidance does not limit the ALJ's authority to assess a penalty that is otherwise in accordance with the statutory factors."⁸⁶

82. In re DIC Americas, Inc., 6 E.A.D. 184, 190-91 (1995) (citation omitted).

83. In re Rogers Corp., 9 E.A.D. 534, 569 (2000).

84. In re Employers Ins. of Wausau & Group Eight Tech., Inc., 6 E.A.D. 735, 758 (1997).

85. *Id.* at 759.

86. In re U.S. Army, Fort Wainwright Cent. Heating & Power Plant, 11 E.A.D. 126, 172 (2003).

From its decisionmaking, it would appear that the Board has failed to heed the admonishment of Justice Frankfurter and, indeed, has "read the laws of Congress through the distorting lenses of inapplicable legal doctrine."⁸⁷ The Board does not analyze its role, and that of an ALJ, in consideration of the language of the laws of Congress which govern the Administrator's penalty assessment process, those laws being the federal environmental statutes and the APA.⁸⁸ Instead, the Board has adopted appellate review principles of the judicial process, ruling as if the ALJ was an independent trial judge assessing penalty amounts, and, in its review of an ALJ's decision, the Board, like an appellate court, is to give deference to the ALJ's penalty assessment. As we shall see, this is a problem. In deferring decisionmaking to each of several ALJs, rather than acting as the delegated authority responsible for the content of the Administrator's final decisions, the Board has adopted a posture on review which is not in accordance with law. Moreover, as a consequence of deferring decisionmaking to each of several ALJs, the Board has issued final decisions on behalf of the Administrator that are arbitrary and capricious.

a. Review Standards of the Board are not in Accordance with Law

Given the law and the Administrator's Rules and delegation, the Board itself is responsible for assessing civil penalties and determining the amount of those penalties in final decisions of the Administrator, not each of the several ALJs. The Supreme Court has reviewed rules promulgated by the Attorney General under the Immigration Act of 1917, in which the Attorney General delegated his final decision-making authority to a Board of Immigration Appeals. The Court held that "the Board was required, as it still is, to exercise its own judgment when considering appeals," and that, "if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience."⁸⁹

87. FCC v. Pottsville Broad. Co., 309 U.S. 134, 144 (1940).

88. See *supra* Part I.B.

89. U. S. ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 266-67 (1954). The procedure under review here "called for decisions at three separate administrative

As we have seen, the Administrator has created a unified Board, delegating to that Board his authority to issue final decisions assessing civil penalties.⁹⁰ Recognizing his obligations under the federal environmental statutes and the APA,⁹¹ the Administrator publicly announced that the Board "is responsible for assuring consistency in Agency adjudications by all of the ALJs and RJOs," and that it is "to correct erroneous decisions before they are appealed to the federal courts" and assure "that final decisions represent with [sic] the position of the Agency as a whole, rather than just the position of one Region, one enforcement office, or one Presiding Officer."⁹² Toward that end, by rule, the Administrator provides, without restriction, that the Board "shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the [initial] decision or order being reviewed, and shall set forth in the final order the reasons for its actions."⁹³ Like the rules of the Attorney General reviewed in *Accardi*, the clear import of the language of the Administrator in his rules, and their preamble, is that the Board is required "to exercise its own judgment when considering appeals,"⁹⁴ and not to defer to the judgment of whichever one of several ALJs authored the initial decision.⁹⁵

levels below the Attorney General-hearing officer, Commissioner, and the Board of Immigration Appeals." *Id.* at 266. Regarding the Board, the regulations provided that "[i]n considering and determining . . . appeals, the Board of Immigration Appeals shall exercise such discretion and power conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case." *Id.* The decision of the Board was final except in certain delineated circumstances set out in the rules. *Id.*

90. Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5320 (Feb. 13, 1992) (codified at 40 C.F.R. §§ 1, 3, 17, 22, 27, 57, 60, 66, 85, 86, 114, 123, 124, 164, 209, 222, 223, 233, 403).

91. *See supra* Part I.B.

92. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 64 Fed. Reg. 40,138, 40,165 (July 23, 1999) (codified at 40 C.F.R. pt. 22).

93. 40 C.F.R. § 22.30(f) (2006) (emphasis added).

94. *Accardi*, 347 U.S. at 266-67.

95. In a 1987 final decision, the Administrator's CJO recognized that "[t]he Administrator has the responsibility for making final agency decisions," citing, in part, to Professor Kenneth C. Davis's description of the case law on the relationship

Moreover, an ALJ is not "the agency."⁹⁶ Federal courts interpret an ALJ's decisionmaking as subject to the law and policy of the agency, i.e., the Administrator.⁹⁷ As, by law, an ALJ in making an initial decision is subordinate to the Administrator on matters of law and policy, and the law recognizes that a penalty amount determination is an exercise of agency discretion involving matters of law and policy,⁹⁸ it would appear that the law is contrary to the Board's position that each ALJ independently determines penalty amounts, and its inclination to defer to the discretion of each of several ALJs in determining appropriate penalty amounts for the Administrator to assess for violations of the federal environmental statutes.

In this regard, two characteristics of a penalty determination also must be noted. First, "[t]he assessment [of a penalty] is not a factual finding but the exercise of a discretionary grant of power."⁹⁹ The Administrator, through his CJO, has explained that although the quantity of a particular chemical may be a factual issue bearing on the appropriateness of a penalty, as may be the "ability of the company to continue doing business," whether the policy should impose a separate penalty for each chemical not reported, or whether an appropriate penalty dollar amount was selected for each box of the policy matrix "is a legal or policy issue."¹⁰⁰ Consequently, as a

between the ALJ and the agency: The final distillation (of present case law) is that the primary factfinder is the agency, not the ALJ; that the agency retains 'the power of ruling on facts . . . [i]n the first instance'; that the agency still has 'all the powers which it would have in making the initial, [sic] decision', that the ALJ is a subordinate whose findings do not have the weight of the findings of a district judge; that the relation between the ALJ and agency is not the same as or even closely similar to the relation between agency and reviewing court; and that the ALJ's findings are nevertheless to be taken into account by the reviewing court and given special weight when they depend upon demeanor of witnesses. In re Martin Elecs., Inc., 2 E.A.D. 381, 394-95 (1987) (citing 3 Kenneth Culp Davis, Administrative Law Treatise § 17:16 (2d ed. 1980)).

96. See *supra* note 20 (discussing the definition of "Agency").

97. See *supra* note 24 (discussing the interpretation of the Administrative Procedure Act).

98. See *supra* note 65 and Part III(A)(2).

99. Panhandle Coop. Ass'n v. EPA, 771 F.2d. 1149, 1152 (8th Cir. 1985).

100. In re Chautauqua Hardware Corporation, 3 E.A.D. 616, 623 (1991).

penalty amount determination is not an issue of fact, it is not a determination to be established by witness testimony, and deference to an ALJ's penalty amount determination cannot be warranted on grounds that he alone had an opportunity to observe witness demeanor.¹⁰¹

Second, although one of the fundamental justifications for judicial deference to the administrative process is that an agency "possesses an expertise in a particular subject area" that judges do not have, "[t]hat justification does not come into play in a particular case unless the agency has in fact applied its expertise."¹⁰² The Assistant Administrator, to whom the Administrator has directly delegated his policy-making authority, can draw upon the historical experience and technical expertise of the Administrator's entire agency in formulating and issuing the Administrator's policy. In contrast, an ALJ, by law, is restricted in making his initial decision to the administrative record in the case before him.¹⁰³ One ALJ cannot match the agency's collective training, historical experience, and expertise in evaluating environmental risks and environmental harm.¹⁰⁴ Consequently, an ALJ's pronouncements and judgments regarding policy and discretion on such matters are suspect when at odds with the Administrator's own issued policy statements, and to the extent that a penalty determination is informed by an ALJ's personal policy choices and not those of the Administrator, a reviewing court cannot find that "the agency has in fact applied its expertise."¹⁰⁵

It must be emphasized that the Administrator's penalty policies are not separate and apart from the penalty criteria of the subject statute; the policies are interpretations of the statutory penalty

101. See *River Forest Pharmacy, Inc. v. Drug Enforcement Admin.*, 501 F.2d 1202, 1206 (7th Cir. 1974) (witness credibility and demeanor "are irrelevant to an assessment of the seriousness of petitioner's violations and of the sanction most appropriate for the promotion of agency policy regarding them").

102. *Brock v. Dow Chem. U.S.A.*, 801 F.2d. 926, 932 (7th Cir. 1986).

103. 5 U.S.C. § 556(d)-(e).

104. See *Accelerated Decision*, In re U.S. Army, Fort Wainwright Cent. Heating & Power Plant, U.S. Env't'l Prot. Agency No. CAA-10-99-0121, 7, n.5 (Apr. 30, 2002) ("none of EPA's current ALJs worked for the Agency or any state environmental entity prior to their judicial appointment").

105. *Dow Chem. U.S.A.*, 801 F.2d. at 932.

criteria, and they incorporate penalty calculation methodologies based upon those interpretations. The interpretations and methodologies in these policies are those of the Administrator, the Chief Executive Officer of EPA in whom Congress has specifically and exclusively invested authority to assess, and to determine the amount of, civil penalties for violations of the federal environmental statutes.¹⁰⁶ These interpretations and methodologies are formulated and issued by the senior officers to whom the Administrator has specifically delegated his policy-making authority in enforcement matters.¹⁰⁷

Moreover, these penalty policies do not require that a specific penalty amount be determined appropriate for any particular violation of any particular violator. Before any penalty amount can be determined appropriate, there must be an analysis of the evidence in the record relating to a specific violation and a specific violator, applying the statutory criteria as interpreted in the various premises of the policy. The policies explicitly allow for "[d]eviations from the [policy's framework], where merited," so long as "the reasons for the deviations are documented."¹⁰⁸ It is one thing, however, for a penalty amount determination in a final decision to deviate from a premise in the Administrator's penalty policy framework regarding a particular penalty criteria—for instance, where it does not appear that the evidence in a particular case has been contemplated by the policy—while applying the remainder of the policy. It is something far different when the Board adopts an initial decision of an ALJ as a final decision of the Administrator, holding that the ALJ has the discretion to reject "an 'appropriate' penalty generated in accordance with the [p]enalty [p]olicy" if the ALJ personally finds a different amount of penalty than that yielded by the Administrator's policy

106. See *supra* notes 12-16 (discussing the statutory delegation of Congressional authority to the Administrator under various statutes).

107. See *supra* notes 67-72 and accompanying text (discussing Administrator's delegation of authority to the Board); see also *In re Bell & Howell Co.*, 1 E.A.D. 811, 817 n.6 (1983) ("the penalty guidelines constitute an interpretation of the statutory factors set forth in TSCA § 16(a)(2)" and "the Administrator . . . has specifically directed the presiding officer in § 22.27(b) of the procedural rules to give that interpretation consideration.").

108. Policy GM-21, *supra* note 70, at 1.

"better suited to the circumstances of the particular case."¹⁰⁹ It is something far different when, as we shall see, the Board adopts in a final decision of the Administrator an independent penalty determination of an ALJ, finding that the ALJ was within his discretion in rejecting the Administrator's policy as arbitrary and unauthorized by statute. It is also far different when the Board adopts, in a final decision of the Administrator, a penalty determination of an ALJ, even though the ALJ in making the determination simply ignored the Administrator's policy without comment.¹¹⁰

109. In re Employers Ins. of Wausau & Group Eight Tech., Inc., 6 E.A.D. 735, 759 (1997). The ruling of the Board in In re Employers Insurance of Wausau and Group Eight Technology, Inc. warrants closer scrutiny, as it is emblematic of the confusion which has plagued the Administrator's penalty assessment process. If "an 'appropriate' penalty generated in accordance with the [p]enalty [p]olicy" is before the ALJ, as here contemplated by the Board, by what authority does the Board find that the ALJ has the discretion to reject that penalty amount for a penalty amount that the ALJ personally finds "better suited to the circumstances of the particular case[?]" *Id.* Given that the penalty policy from which the rejected penalty amount was generated was the Administrator's policy, is such a holding not at odds with the statute itself, in this case TSCA, in which Congress makes clear that it is the Administrator, and not anyone else, who is to determine the penalty amount? In recognizing that a presiding ALJ can pick a penalty amount which he personally finds "better suited to the circumstances of the particular case" than one generated by use of the Administrator's policy, is the Board's holding not at odds with section 557(b) of the APA, in which Congress invests ALJs with authority only to issue initial decisions, making the agency responsible for the contents of final decisions?

110. The Administrator's penalty policies, and his intended use of the policies, stand in marked contrast to the Federal Communications Commission's ("FCC") penalty guidelines found to be promulgated unlawfully. See U.S. Telephone Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir. 1994). In 1991, the FCC decided to "abandon its traditional case-by-case approach to implementing section 503(b)" of the Federal Communications Act ("FCA"), and issued specific standards for assessing fines. *Id.* at 1233. The Court found that penalty amounts assessed by the FCC in all but eight of over 300 cases were automatically determined under the standards, based upon nothing more than the name of the violation found to have been committed and which category the violator fell within. *Id.* at 1233-34. The Court struck down the standards, finding that, although not promulgated as a rule, the FCC was applying the standards as a rule, disallowing anyone charged with a violation to challenge the penalty amount assessed. *Id.* at 1235-36. Like the FCC guidelines, the Administrator's penalty policies have not been made subject to rulemaking. No penalty policy of the Administrator, however, requires that any particular amount of penalty be assessed against any particular violator for any particular violation; nor, for that matter, does any such policy require that anyone do anything. Under

A careful reading of 40 C.F.R. section 22.27(b) reveals that the Administrator allows an ALJ, in making an initial decision, discretion to determine appropriate "a penalty different in amount from the penalty proposed by complainant," provided the ALJ "shall set forth in the initial decision the specific reasons for the increase or decrease."¹¹¹ In the very same rule, however, the Administrator provides that an ALJ "shall" consider the applicable penalty policy of the Administrator, and shall is a word that generally indicates a requirement.¹¹²

One need not go to a dictionary to comprehend the meaning of the word "consider." In section 113(e)(1) of the CAA, for instance, Congress provides that "[i]n determining the amount of any penalty," the Administrator "shall take into consideration" the statutory criteria that it has identified.¹¹³ One cannot seriously argue that by "take into consideration" Congress intended to leave the Administrator free to

these policies, each penalty determination must incorporate an evaluation of the evidence of record in consideration of each statutory penalty criteria, as interpreted by the Administrator in his policies and penalty calculation methodologies, and each violator can challenge the appropriateness of the particular penalty amount proposed by the Administrator's delegated complainant. See Framework GM-22, 6-16. These policies do not share the infirmities of the FCC standards. Although there is a basic presumption that a penalty amount calculated by applying all particular propositions of an applicable penalty policy's methodology will result in appropriate, fair and consistent penalty amounts being assessed, the policies themselves permit deviation from particular propositions of their methodology, "as long as reasons for the deviations are documented." Policy GM-21, *supra* note 70, at 1. Courts have recognized that "[a]n agency pronouncement is not deemed a binding regulation merely because it may have 'some substantive impact,' as long as it 'leave[s] the administrator free to exercise his informed discretion,'" and that "[p]resumptions, so long as rebuttable, leave such freedom." *Panhandle Producers & Royalty Owners Ass'n v. Econ. Regulatory Admin.*, 822 F.2d 1105, 1110 (D.C. Cir. 1987). "This court and others have consistently stated that an agency may announce presumptions through policy statements rather than notice-and-comment rulemaking." *Id.* (citing *Pacific Gas & Electric Co. v. Fed. Power Comm'n*, 506 F.2d 33, 40-41 (D.C. Cir. 1974)).

111. 40 C.F.R. § 22.27(b) (2006).

112. *Ass'n of Civilian Technicians, Mont. Air Chapter v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive.").

113. 42 U.S.C. § 7413(e)(1) (2000).

reject any or all of the statutory penalty criteria if he thought a resulting penalty amount was too low or excessive, and apply other criteria more to his personal liking. The Eleventh Circuit Court of Appeals, in remanding a CWA penalty case back to the District Court because the judge failed to consider each and every one of the statutory criteria of section 309(d) of the CWA,¹¹⁴ instructed the judge that, in determining the amount of penalty he would assess, the judge must "clearly indicat[e] the weight [he] gives to each of the factors in the statute and the factual findings that support [his] conclusions."¹¹⁵ There is no discernible reason for interpreting the word "consider" as incorporating "reject," whether the word is used by Congress in instructing the Administrator and district court judges, or by the Administrator in instructing the subordinate ALJs on matters of law and policy.¹¹⁶

Therefore, the Administrator's rule is consistent with the subordination of ALJs to the Administrator on matters of law and policy.¹¹⁷ It is consistent with the intent of Congress that the Administrator be responsible for the contents of his final decisions,¹¹⁸ and that his final decisions not be arbitrary and capricious.¹¹⁹ It is also consistent with the intent of Congress in the federal environmental statutes that the Administrator determines the amount of penalty for violations and that, in determining the amount of penalty, the Administrator takes into account the penalty criteria identified in the statute.¹²⁰

Ultimately, whether the final penalty amount determination is made by an ALJ in an initial decision, which becomes a final decision by rule or by adoption by the Board, or is made by the

114. 33 U.S.C. § 1319(d) (2000).

115. *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir. 1990).

116. *See Getty v. Fed. Savings & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986) ("Stating that a factor was considered, however, is not a substitute for considering it. We must make a 'searching and careful' inquiry to determine if [the agency] actually did consider it." (emphasis in original)).

117. *See* 5 U.S.C. § 556(c) (2000); 40 C.F.R. § 22.27 (2006).

118. *See* 5 U.S.C. § 557(b) (2000).

119. *See id.* § 706.

120. *See supra* notes 12-16 (describing delegation of authority for penalties to the Administrator).

Board itself, the Administrator is responsible for the decision.¹²¹ Consequently, the Administrator is obligated by law to establish effective rules and policy which will govern decision makers who, on his behalf, will determine whether a \$ 1 penalty or a \$ 25,000 penalty is appropriate for a particular violation of a federal environmental statute. He clearly stated his intention that the Board, as his final decision maker, "assure[] that final decisions represent with [sic] the position of the Agency as a whole, rather than just the position of . . . one Presiding Officer."¹²² The position of the Agency as a whole is the position taken in the Administrator's Rules and policy, and in the Administrator's published decisions issued by his CJO and the Board.

The Administrator's APA responsibility for the content of his final decisions, and for his decisions not being arbitrary and capricious, cannot be met when the Board interprets his rules to recognize each individual ALJ as possessing broad discretion to determine penalty amounts, holding that an ALJ "has a choice of either following or deviating from" the Administrator's adopted policy, which choice "operates to preserve not restrict the presiding officer's independence."¹²³ The Administrator cannot fulfill his APA responsibility when the Board holds that it is "clear that subsumed within the ALJ's authority to assess a penalty different than one calculated under Agency guidance is the notion that Agency guidance does not limit the ALJ's authority to assess a penalty that is otherwise in accordance with the statutory factors."¹²⁴

It should be noted that, on occasion, the Board has cited the APA in an attempt to explain its recognition of discretion to be given an ALJ's penalty assessment. The Board has stated that, "by reviewing the Region's [Administrator's delegated complainant's, or enforcement staff's] analysis of the statutory factors and

121. *Skokomish Indian Tribe v. Gen. Servs. Admin.*, 587 F.2d 428, 431-32 (9th Cir. 1978) (where an agency head "has broad powers to delegate his authority," the delegation of authority "did not . . . relieve him of the responsibility for action taken pursuant to the delegation.").

122. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 64 Fed. Reg. 40,138, 40,165 (July 23, 1999) (codified at 40 C.F.R. pt. 22).

123. *In re DIC Americas, Inc.*, 6 E.A.D. 184, 191 (1995).

124. *In re U.S. Army Fort Wainwright Cent. Heating & Power Plant*, 11 E.A.D. 126, 172 (2003).

independently determining that the analysis is a reasonable one and that the recommended penalty is supported by analysis, the Presiding Officer acts to ensure that the Agency's penalty assessment satisfies the Administrative Procedure Act's 'abuse of discretion' standard, 5 U.S.C. § 706(2), i.e., that the assessment is neither 'unwarranted in law' nor 'without justification in fact.'¹²⁵

Although ALJs do have a responsibility to assure that penalty determinations in any initial decision are not without justification in fact, unwarranted in law, or an abuse of discretion, and, consequently, that the determination is in accordance with section 706 of the APA,¹²⁶ a review of the applicable law clearly reveals that an ALJ does not "act to ensure that the Agency's penalty assessment satisfies the [APA's review criteria]," as the Board has stated.¹²⁷

ALJs also have attempted to cite the APA for the purpose of asserting decisional independence. Without reference to any particular statutory language, the Chief ALJ of EPA has described the ALJ role by noting that ALJs "have decisional independence pursuant to Section 557 of the Administrative Procedure Act, 5 U.S.C. § 557, which ensures the fair and impartial resolution of adjudicatory proceedings,"¹²⁸ and, without recognizing section 556(c) of the APA,¹²⁹ or making any distinction between factual issues and

125. *In re Employers Ins. of Wausau & Group Eight Tech., Inc.*, 6 E.A.D. 735, 757 (1997). Another word on terminology: federal appellate courts have recognized that, at any hearing to assess noncompliance penalties under a federal environmental statute, it is the Administrator who is the "proponent" of the agency compliance order." *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 367 (D.C. Cir. 1989). The Administrator has delegated that authority to certain persons, identified in his procedural rules as complainants, 40 C.F.R. § 22.3 (2006), not to the various Regions, which are the ten offices he has established at various locations across the nation for purposes of administering the agency. *See* 40 C.F.R. §§ 1.1 to 1.7 (2000). Consequently, throughout this article, including passages in cited decisions, the terms "the Administrator's delegated complainant" or "the Administrator's enforcement staff" or "complainant" are used to designate the proponent of a proposed penalty order rather than "the Region."

126. 5 U.S.C. § 706 (2000).

127. *In re Employers Ins. of Wausau & Group Eight Tech., Inc.*, 6 E.A.D. at 757. *See supra*, Part I(B)(1).

128. Accelerated Decision, *In re U.S. Army, Fort Wainwright Cent. Heating & Power Plant*, U.S. Env't'l Prot. Agency No. CAA-10-99-0121, 7 (Apr. 30, 2002).

129. 5 U.S.C. § 556(c) (2000) (stating that the decisionmaking of ALJs is "subject to the published rules of the agency").

issues of law and policy, stated that ALJs "are institutionally insulated from any bias in favor of EPA's positions in litigation."¹³⁰ Moreover, without any analysis of the language of section 113(d) of the CAA, the operative statute in the case, the Chief ALJ stated that the "EPA litigation team proposes the amount of penalty . . . and [t]he ALJ, on the other hand, independently determines the amount of a penalty."¹³¹

Again, all federal environmental statutes invest exclusive authority to assess penalties in the Administrator, not ALJs, and under section 557(b) of the APA,¹³² an ALJ has authority only to issue initial decisions on behalf of an agency. This same section authorizes only an agency-again, for our purposes, that being the Administrator¹³³ -to issue final decisions, thereby making the Administrator, not an ALJ, responsible for the content of all final decisions.¹³⁴ Consequently, section 706 of the APA makes the agency, i.e., the Administrator, not various individual ALJs, responsible for assuring that final decisions are not arbitrary or capricious or an abuse of discretion, or not in accordance with law.

130. Accelerated Decision, In re U.S. Army, Fort Wainwright Cent. Heating & Power Plant, U.S. Env't Prot. Agency No. CAA-10-99-0121, 7 (Apr. 30, 2002).

131. *Id.* at 7-8 (emphasis in original). The Chief ALJ makes no mention of a number of points of law relevant to a description of the role of an ALJ in the Administrator's penalty assessment process: (1) that section 113(d) of the CAA, 5 U.S.C. § 7413(d), is absolutely silent as to any role played by an ALJ in the Administrator's assessment of civil penalties; (2) that in that same section of the CAA, Congress requires that, prior to assessing any penalty, the Administrator provide to the alleged violator notice of his "proposal to issue such order," and that the complaint prepared by the EPA litigation team is the notice of the proposed penalty order of the same Administrator who is responsible for the contents of the final order, 5 U.S.C. § 7413(d)(2); (3) that in section 557(b) of the APA, 5 U.S.C. § 557(b), Congress authorizes ALJs only to initially decide any matter, making the agency responsible for the contents of any final decision and investing the agency with plenary authority to set aside any finding or conclusion of an ALJ in his or her initial decision; and (4) that in conformance with section 557(b) of the APA, 5 U.S.C. § 557(b), by rule, 40 C.F.R. § 22.27, the Administrator authorizes an ALJ only to issue initial decisions, and invests the Board with authority to make his final decisions, which includes plenary authority to set aside any finding or conclusion made by an ALJ in his or her initial decision, and an obligation to assure that his final decisions are consistent.

132. 5 U.S.C. § 557(b) (2000).

133. *See supra* note 20.

134. *See supra* note 28.

Having delegated his final decision-making authority to the Board, and having specifically declared that the Board "is responsible for assuring consistency in Agency adjudications" and "assur[ing] that final decisions represent with [sic] the position of the Agency as a whole, rather than just the position of . . . one Presiding Officer,"¹³⁵ the Administrator has made the Board itself responsible for assuring that all final decisions of the Administrator meet judicial review criteria identified in section 706 of the APA, not each of the several ALJs assigned to the Administrator.¹³⁶

The Board also has attempted to support its "deference" to ALJ "discretion" in the determination of an appropriate penalty amount by explaining its position in consideration of the subject federal environmental statute. It did this in its decision in *In Re Johnson Pacific, Inc.*¹³⁷ The record reviewed in the matter revealed that the Administrator's enforcement staff filed an administrative complaint proposing a \$ 9,600 penalty-an amount determined by an application of the Administrator's penalty policy-for Respondent's violations of FIFRA. The ALJ found all violations proven, but determined a penalty of \$ 4,080 was appropriate.¹³⁸ The Administrator's enforcement staff appealed to the Board. In the Administrator's final decision, the Board stated that, "[a]lthough the Board has discretion to increase or decrease the amount of a civil penalty assessed by a presiding officer, we customarily defer to the Presiding Officer if the Presiding Officer has provided a reasonable explanation for the assessment and if the penalty amount is within the range prescribed by any applicable guidelines."¹³⁹

The Board went on to state that "no increase in the Presiding Officer's penalty assessment is warranted," and, with regard to certain objections raised by enforcement staff to the ALJ's selected penalty amount, "we are not persuaded that they are sufficiently well founded

135. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 64 Fed. Reg. 40,138, 40,165 (July 23, 1999) (codified at 40 C.F.R. pt. 22).

136. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 64 Fed. Reg. 40,138, 40,165 (July 23, 1999) (codified at 40 C.F.R. pt. 22).

137. *In re Johnson Pacific, Inc.*, 5 E.A.D. 696 (1995).

138. *Id.*

139. *Id.* at 702.

for us to exercise our discretion to interfere with the latitude which FIFRA affords a Presiding Officer when deliberating over the 'appropriateness' of the penalty. See FIFRA § 12(a)(4)."¹⁴⁰

A review, however, of section 14(a)(4) of FIFRA, -there is no section 12(a)(4) of FIFRA, cited by the Board-reveals that Congress does not mention Presiding Officers or ALJs at all, much less grant ALJs latitude when deliberating over the appropriateness of any penalty amount or the authority to assess civil penalties.¹⁴¹ To the contrary, the language of Congress is clear: any violator of FIFRA "may be assessed a civil penalty by the Administrator of not more than \$ 5,000 for each offense," and "[i]n determining the amount of the penalty the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation."¹⁴²

b. Arbitrary and Capricious Penalty Determinations of the Board

The fact that reasonable men and women may be of a different mind regarding appropriate sanctions for violations of the law is well recognized. Indeed, the Board itself has observed that "reasonable people may disagree over the amount of penalty in a particular case."¹⁴³ Given that observation of human nature, it should not be surprising that various Board members, ALJs, and delegated complainants of the Administrator, as individuals, may have differing ideas as to whether a \$ 5,000 or \$ 20,000 penalty is warranted for a particular violation of a federal environmental statute. It is entirely possible that a reasonably plausible explanation could be given to support either penalty amount, depending upon the weight and interpretation given to the various narrative statutory penalty criteria, and the policy adopted by the decision maker.

Regardless of the personal views of any Board member, ALJ, or delegated complainant of the Administrator regarding an appropriate penalty amount for a violation of a federal environmental statute,

140. *Id.*

141. *See* 7 U.S.C. § 1361(a)(4) (2000).

142. *Id.* (emphasis added).

143. *In re Johnson Pacific, Inc.*, 5 E.A.D. at 703.

Congress makes clear in those statutes that it is the Administrator who is responsible for assessing and determining the amount of civil penalties for their violation.¹⁴⁴ Moreover, Congress makes the agency, i.e., the Administrator, responsible for the content of his final decisions.¹⁴⁵

Unfortunately, a review of the Board's decisions reveals that, notwithstanding the statutory requirement that the Administrator not be arbitrary and capricious in his final decisionmaking,¹⁴⁶ and the Board's obligation to the Administrator to "assur[e] consistency in Agency adjudications" and "assure[] that final decisions represent with [sic] the position of the Agency as a whole, rather than just the position of . . . one Presiding Officer,"¹⁴⁷ the Board has been unable to consistently interpret and apply the rules and policies of the Administrator relating to the determination of penalty amounts in final decisions of the Administrator.

With regard to some violators, the Board has adopted ALJ penalty determinations as final decisions of the Administrator, holding that the ALJs were acting within their discretion in finding the full amount of penalty proposed by enforcement staff appropriate, as calculated by an application of the relevant penalty policy of the Administrator.¹⁴⁸ Moreover, "the Board has emphasized that the Agency's penalty policies should be applied whenever possible because such policies 'assure that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner,'"¹⁴⁹ which is what the Administrator's final penalty orders must manifest to satisfy criteria of the federal

144. See *supra*, Part I(B)(1).

145. 5 U.S.C. § 557(b) (2000).

146. *Id.* § 706 (2000).

147. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 64 Fed. Reg. 40,138, 40,165 (July 23, 1999) (codified at 40 C.F.R. pt. 22).

148. See, e.g., *In re Newell Recycling Co., Inc.*, 8 E.A.D. 598, 643 (1999) ("Presiding Officer did not err in determining that the proposed \$ 1.345 million civil penalty was an appropriate one."); *In re Spitzer Great Lakes, Ltd.*, 9 E.A.D. 302, 321-22 (2000) (stating that "we find no error in the Initial Decision issued by the Presiding Officer," and "[a]ccordingly, Spitzer is assessed a civil penalty of \$ 165,000").

149. *In re Carroll Oil Co.*, 10 E.A.D. 635, 656 (2002).

environmental statutes and section 706 of the APA.¹⁵⁰ As to other violators for whom the Administrator's delegated complainants have proposed a penalty amount for violations determined by an application of the Administrator's penalty policy to the evidence, and ALJs in their initial decisions have found a different amount of penalty appropriate for the same violations without reference to the policy, the Board also has found no error on the part of the ALJs, adopting the ALJs' penalty determinations as final decisions of the Administrator.

On the record under review in *In Re V-1 Oil Co.*, the Administrator's delegated complainant proposed a penalty of \$ 36,674 for violations alleged in a complaint, applying the Administrator's penalty policy to the evidence; the ALJ found a penalty amount of \$ 25,000 to be appropriate for the same violations.¹⁵¹ In the Board's own words, the ALJ "based his penalty assessment solely on the statutory criteria of RCRA section 9006(c), rather than on the EPA penalty policy implementing the statute on which the [Administrator's enforcement staff] relied in proposing the penalty."¹⁵² Without comment, the Board quoted the ALJ's analysis supporting his penalty determination as follows, "[w]hile the use of this . . . [p]enalty [p]olicy may provide for a more consistent national approach by EPA, and in some cases may even be helpful to the judge in determining the appropriate penalty to be assessed (see 40 C.F.R. § 22.27(b)), the Environmental Appeals Board is correct in stating [in *In Re Employers Insurance of Wausau and Group Eight Technology, Incorporated*, 6 E.A.D. 735, 759 (1997)] that ultimately it is the statutory penalty criteria against which the judge is to measure the facts adduced at hearing and assess a civil penalty."¹⁵³

Consequently, in contrast to Newel Recycling Company and Spitzer Great Lakes, Ltd., V-1 Oil Company's penalty amount was determined in complete disregard of the Administrator's penalty policy, as if the policy were simply a nullity.

In adopting the ALJ's penalty determination in the final decision of the Administrator, however, the Board did not comment on the

150. 5 U.S.C. § 706 (2000).

151. *In re V-1 Oil Co.*, 8 E.A.D. 729, 753-57 (2000).

152. *Id.* at 753 (emphasis added).

153. *Id.* at 755 n.41.

relevance of the governing statutes to its action. These statutes require a consistent national approach in the Administrator's final decisionmaking¹⁵⁴ and invest the Administrator, not the ALJ, with the authority to determine the penalty amount in consideration of the statutory penalty criteria.¹⁵⁵

In *In re John A. Capozzi*, the Board noted that it "reserves the right to closely scrutinize substantial deviations from the relevant penalty policy" and that it "may set aside the ALJ's penalty assessment" where "the ALJ's reasons for deviating from the penalty policy are not persuasive or convincing."¹⁵⁶ This standard was not applied. In *Capozzi*, the Administrator's enforcement staff proposed a penalty of \$ 156,064 for the violations alleged,¹⁵⁷ the amount determined by an application of the Administrator's RCRA penalty policy.¹⁵⁸ In his initial decision, the ALJ found the respondent liable for the same violations as alleged, but determined that a \$ 37,600 penalty amount was appropriate.¹⁵⁹ Although a review of the initial decision reveals that the ALJ completely ignored the Administrator's

154. See 5 U.S.C. § 706 (stating that agency decisionmaking shall be held unlawful if arbitrary or capricious).

155. See SWDA § 9006(c), 42 U.S.C. § 6991e(c) (2000) (stating that an order "shall . . . assess a penalty, if any, which the Administrator determines is reasonable taking into account" the statutory penalty criteria). Nor did the Board explain its adoption of the ALJ's penalty determination in light of: (1) the governing rule of the Administrator requiring the ALJ to consider the penalty policy, 40 C.F.R. § 22.27(b) (the ALJ "shall consider any civil penalty guidelines issued under the Act" violated)), and the statutory provision making an ALJ's authority subject to the rules of the agency, see 5 U.S.C. § 556(c); (2) the Administrator's recognition in his general penalty policy that "[t]reating similar situations in a similar fashion is central to the credibility of EPA's enforcement effort and to the success of achieving the goal of equitable treatment," Policy GM-22, *supra* note 70, at 27, and; (3) the Administrator's instruction that the Board is "responsible for assuring consistency in Agency adjudications by all of the ALJs" and it "assures that final decisions represent with [sic] the position of the Agency as a whole, rather than just the position of . . . one [ALJ]." Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 64 Fed. Reg. 40,138, 40,165 (July 23, 1999) (codified at 40 C.F.R. pt. 22).

156. *In re John A. Capozzi*, 11 E.A.D. 10, 32 (2003).

157. *Id.* at 19.

158. *Id.* at 38-39.

159. *Id.* at 20.

adopted penalty policy, not even acknowledging its existence,¹⁶⁰ the Board found and held that "while the ALJ's rationale for reducing the penalty is admittedly brief, it is sufficiently reasoned and supported by the record to constitute an adequate justification for departing from the [p]enalty [p]olicy."¹⁶¹

In the final decision of the Administrator, the Board identifies no reasons articulated by the ALJ in his initial decision for deviating from the penalty policy, nor does it offer any explanation as to how an ALJ can identify persuasive or convincing reasons for departing from the Administrator's adopted penalty policy, when the ALJ does not even acknowledge the existence of the policy.¹⁶² As in *V-1 Oil Co.*, the Board does not address governing law.¹⁶³

Persistent in its desire to defer to an ALJ's discretion in his or her assessment of a penalty, the Board has manifested inconsistency with regard to the very same penalty policy of the Administrator. In *In re Pacific Refining Company*, the Board determined appropriate and

160. *In Re Capozzi Custom Cabinets*, U.S. Env't Prot. Agency No. RCRA-5-2000-005, 13-21 (Feb. 11, 2002) (initial decision).

161. *In re John A. Capozzi*, 11 E.A.D. at 38.

162. One cannot assume that an ALJ, or any other decision maker, considers something when there is nothing in the decision maker's written decision to support such a conclusion. Sound decisionmaking requires that there be findings and an articulated rational basis appearing in any written decision to support conclusions and determinations that are made. Final decisions of an administrative agency, such as the one the Board made on behalf of the Administrator in *Capozzi*, must be judged "solely by the grounds invoked by the agency." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962). See also *Harborlite Corp. v. Interstate Commerce Comm'n*, 613 F.2d 1088, 1092 (D.C. Cir. 1979) ("[A]n agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.'"); *Citizens Ass'n of Georgetown, Inc. v. Zoning Comm'n of the Dist. of Columbia*, 477 F.2d 402, 409 (D.C. Cir. 1973) ("[T]he articulation of reasons by an agency-for itself and for the public-does afford a safeguard against arbitrary and careless action and is apt to result in greater consistency in an agency's decisionmaking."); *Saginaw Broad. Co. v. FCC*, 96 F.2d 554, 559 (D.C. Cir. 1938) ("The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law."). If an ALJ's initial decision does not manifest an articulation of reasons to support the penalty determination being made, and the Board adopts that initial decision as the final decision of the Administrator, the Administrator's final decision is likewise legally deficient in this regard.

163. *In re John A. Capozzi*, 11 E.A.D. at 38.

assessed a penalty amount for violations of the Emergency Planning and Community Right-To-Know Act ("EPCRA"), applying the 1992 penalty policy adopted by the Administrator for the purpose of determining appropriate penalty amounts for violations of that statute.¹⁶⁴ The Board found that, "on the record before us, we discern no sound reason why the 1992 [policy's] penalty formula for untimely reporting should not be applied to derive a gravity-based penalty in this case."¹⁶⁵ Three years later, however, an ALJ in a penalty determination in an initial decision found the very same policy to be "arbitrary and unauthorized by . . . statute," and the Board adopted the ALJ's penalty determination as the final decision of the Administrator.¹⁶⁶

In his initial decision in *In Re Hall Signs, Inc.*, the ALJ rejected the penalty formula of the policy itself, noting that, in contrast to the policy's gravity-based penalty formula, "[i]t would be a simple matter to construct a matrix or sliding scale with greater flexibility, based primarily on the amount of chemical involved in the violation, and perhaps secondarily, on the size of the violator's business."¹⁶⁷ He noted that "[i]n its determination of 'extent level,' the [Administrator's penalty policy] in effect considers the size of the violator's business as at least as significant a factor as the amount of chemical involved in the violation," and that in his opinion, "[t]here is nothing in EPCRA that indicates that the size of the business of the violator should be a significant penalty factor."¹⁶⁸ The ALJ found that "the [policy's] figure of \$ 5,000 [w]as an appropriate minimum gravity-based penalty for the 'circumstance level 1' violation of failure to timely report toxic chemical usage . . . for relatively minor violations by businesses of any size," and that, in contrast to the Administrator's policy, "[t]his type of scheme would more fairly assess penalties commensurate with the degree to which the violation actually

164. *In re Pac. Refining Co.*, 5 E.A.D. 607 (1994).

165. *Id.* at 614.

166. *In re Hall Signs, Inc.*, U.S. Env't'l Prot. Agency No. 5-EPCRA-96-026, 8 (Oct. 30, 1997) (initial decision).

167. *Id.* at 6.

168. *Id.* at 7.

impaired EPCRA's mission to inform the community of [the] facilities' release or use of toxic chemicals."¹⁶⁹

The Board, noting that an ALJ "has discretion to assess a penalty different in amount from the penalty requested in the complaint" and "may depart from the penalty policy so long as the reasons for departure are adequately explained,"¹⁷⁰ adopted the initial decision of the ALJ as the Administrator's final decision, stating that "[a]lthough the methodology used by the Presiding Officer in calculating the penalty in this case represents a substantial departure from the [Administrator's penalty policy], his analysis establishes that he considered the [Administrator's penalty policy] as required by the regulations, but did not find it appropriate as applied in this case."¹⁷¹

Although the Board noted that the ALJ limited his finding "to the facts of this case" and "on this record" and "as applied in this case,"¹⁷² the alleged defects identified by the ALJ were defects inherent in the policy itself. The ALJ found that the policy matrix was not sufficiently flexible;¹⁷³ EPCRA did not support the policy's adoption of a "size of violator's business"¹⁷⁴ as a significant factor in determining a penalty amount; and a type of scheme other than that stated in the policy "would more fairly assess penalties commensurate with the degree to which the violation actually impaired EPCRA."¹⁷⁵ Neither the Board nor the ALJ acknowledged that, in decisionmaking, an ALJ is not authorized by law to exercise judicial review of the Administrator's policies, but rather is

169. *Id.* at 9. Note that the language used by the ALJ- "to construct a matrix;" "there is nothing in EPCRA that indicates;" "this type of scheme would more fairly assess penalties commensurate with the degree to which the violation actually impaired EPCRA's mission"-is language of statutory interpretation and policymaking, not fact finding on the evidence of record in the particular case before the ALJ.

170. *In Re Hall Signs, Inc.*, U.S. Env't'l Prot. Agency EPCRA Appeal No. 97-6, 5-6 (Dec. 16, 1998) (final order).

171. *Id.* at 9.

172. *Id.*

173. *In re Hall Signs, Inc.*, U.S. Env't'l Prot. Agency No. 5-EPCRA-96-026, 6 (Oct. 30, 1997) (initial decision).

174. *Id.*

175. *Id.* at 9.

subordinate to the law and policy of the Administrator.¹⁷⁶ Moreover, the Board did not explain how, in adopting the ALJ's finding that the Administrator's penalty policy in these regards was "arbitrary and unauthorized by statute,"¹⁷⁷ such a finding could somehow be restricted to the Hall Signs case. If the policy is arbitrary, unauthorized by the statute, and defective, how, by merely applying it to a different set of facts, can the same policy be cloaked with authorization under the statute?

Three months later, in *In re Catalina Yachts*, the Board found that the very same EPCRA penalty policy "reasonably implements the statutory criteria, with a range of penalties to reflect differing circumstances."¹⁷⁸ The Board made no mention of its earlier adopted findings that the policy matrix was not sufficiently flexible, or that EPCRA did not support the policy's adoption of a "size of the business of the violator"¹⁷⁹ as a significant factor in determining a penalty amount, or that another "type of scheme" other than that stated in the policy would "more fairly assess penalties commensurate with the degree to which the violation actually impaired EPCRA."¹⁸⁰ The final decision of the Administrator in *Catalina Yachts, Inc.* was upheld on judicial review, with the Court finding that the Administrator's EPCRA policy was "reasonable and consistent with the [statute]."¹⁸¹

The Board also has allowed initial decisions of ALJs to become final decisions of the Administrator, notwithstanding the fact that the Board directly acknowledged that the penalty determinations in the decisions were not in compliance with the Administrator's regulations and policies, and that an adequate explanation for the penalty amount determined appropriate had not been articulated.

176. See *supra* note 24 (discussing the distribution of authority between the Administrator and the ALJs).

177. *In re Hall Signs, Inc.*, U.S. Env't'l Prot. Agency No. 5-EPCRA-96-026, 8 (Oct. 30, 1997) (initial decision).

178. *In re Catalina Yachts, Inc.*, 8 E.A.D. 199, 209 (1999) (citing *In re Genicom Corp.*, 4 E.A.D. 426, 431 (1992)).

179. *In re Hall Signs, Inc.*, U.S. Env't'l Prot. Agency No. 5-EPCRA-96-026, 6 (Oct. 30, 1997) (initial decision) (adopted by the Board in *In Re Hall Signs, Inc.*, U.S. Env't'l Prot. Agency EPCRA Appeal No. 97-6 (Dec. 16, 1998) (final order).

180. *Id.* at 9.

181. *Catalina Yachts, Inc. v. EPA*, 112 F. Supp. 2d 965, 969 (C.D. Cal. 2000).

In *In re Lu Vern G. Kienast*, an ALJ issued an initial decision in a civil penalty enforcement action for CAA asbestos violations.¹⁸² Violations were alleged in an eleven count complaint, and the ALJ found the respondent liable for violations in nine of those counts.¹⁸³ In explaining his penalty determination, the ALJ acknowledged his obligations under the Administrator's Rule, 40 C.F.R. § 22.27(b), and the Administrator's adopted penalty policy.¹⁸⁴ The ALJ, however, simply listed the penalty amounts he was selecting for each of the nine counts of different violation he had found proven, with no explanation provided for his selection of those penalty amounts other than "[t]hese penalties are appropriate under the particular facts and circumstances of this case," and this general conclusion, "[p]ursuant to 'other factors as justice may require' under Section 113(e) of the [CAA], the EPA's suggested civil administrative penalty of \$ 113,600 has been reduced to \$ 35,000 to account for the size of Respondents' business, the perceived economic impact of the penalty on the business and Respondents' good faith efforts to comply with the requirements of the asbestos NESHAP."¹⁸⁵

The ALJ conducted no evidentiary analysis in his initial decision to provide support for any of his findings and conclusions regarding his penalty amount determination on any of the nine counts of violation. Nor was any reason provided by the ALJ for not applying the Administrator's penalty policy, or for his selection of the particular amounts of penalty.¹⁸⁶

On September 23, 2003, the Board, on behalf of the Administrator, issued an "Order Electing to Review Sua Sponte" in the matter.¹⁸⁷ The Board had not received an appeal from either party, but "determined that the ALJ's penalty assessment warranted further review" as "the Board had concerns regarding the sufficiency of the ALJ's rationale for reducing [the Complainant's] proposed penalty from \$ 113,600 to \$ 35,000."¹⁸⁸

182. *In re Lu Vern G. Kienast*, No. CAA-5-2001-007 (2003) (initial decision).

183. *Id.* at 28.

184. *Id.* at 23.

185. *Id.* at 24-25.

186. *See id.*

187. *In re Lu Vern G. Kienast*, U.S. Env'tl Prot. Agency Appeal No. CAA 5-2001-007, 2 (Sept. 16, 2004) (Order Revoking Election of Sua Sponte Review).

188. *Id.*

A year later, on September 16, 2004, the Board revoked its earlier order, stating "[n]otwithstanding our reservations about the sufficiency of the ALJ's explanation for reducing the proposed penalty, the Board is disinclined to disturb the ALJ's \$ 35,000 penalty assessment in view of the totality of the circumstances, including the fact that neither of the parties has filed a timely appeal."¹⁸⁹ No further reason is given by the Board for adopting the ALJ's penalty determination and allowing his initial decision to become the Administrator's final decision. Although the Board continues to question "the sufficiency of the ALJ's explanation for reducing the proposed penalty" by 70%, the Board quite simply "is disinclined to disturb" the discretion it believes that the ALJ's "penalty assessment" must have.¹⁹⁰ The Board does not acknowledge that, in an earlier final decision it issued on behalf of the Administrator, it found that the very same penalty policy ignored by the ALJ in *In re Lu Vern G. Kienast* "reasonably implements the statutory criteria for assessment of a penalty under the Clean Air Act,"¹⁹¹ and that the Board itself applied the policy in determining an appropriate penalty amount for CAA asbestos NESHAP violations.¹⁹²

In *F.R. & S, Inc.*, the Board, "on its own initiative," issued an "Order Under 40 C.F.R. § 22.30(b)."¹⁹³ Neither Respondent nor the Administrator's enforcement staff had appealed the ALJ's initial decision in the matter to the Board.¹⁹⁴ The Board acknowledged that it "considered" the initial decision, expressed "concern that the ALJ's penalty analysis does not appear to conform fully to the requirements set forth in the applicable regulations" of the Administrator, but announced that it "decided not to undertake appellate review of the decision."¹⁹⁵

The Board noted that, by 40 C.F.R. § 22.27(b), the Administrator requires that an ALJ, in determining appropriate penalty amounts, "shall consider any civil penalty guidelines issued under the Act,"

189. *Id.*

190. *Id.*

191. *In re House Analysis & Assocs. & Fred Powell*, 4 E.A.D. 501, 508-09 (1993).

192. *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 534-60 (1998).

193. *In re F.R. & S, Inc.*, U.S. Env't'l Prot. Agency Appeal No. CAA 03-2002-0215, 1 (March 17, 2005) (admin. review).

194. *Id.*

195. *Id.*

and that "the ALJ failed to discuss, or even mention, the Agency penalty policy applicable to the four violations."¹⁹⁶ The Board concluded that "it is not clear if the ALJ considered the policy as required."¹⁹⁷ The Board went on to state the following:

In addition, the ALJ significantly reduced the penalty proposed by the complainant for all four of the violations [from \$ 71,500 to \$ 42,000], but the ALJ set forth in the Initial Decision specific reasons explaining the reduction for only one of the violations.¹⁹⁸

Nonetheless, the Board insists on deferring to the ALJ, stating that "the Board has decided not to disturb the ALJ's penalty assessment even though the ALJ's analysis does not fully conform to the regulatory requirements. The Board's decision not to take review on its own initiative in this matter should not be viewed as an endorsement of the ALJ's departure from the regulatory requirements of 40 C.F.R. § 22.27(b)."¹⁹⁹

The Board, in its orders in *In re Lu Vern G. Keinast* and in *F.R. & S.*, does not acknowledge that Congress, in section 113(d) of the CAA, invests authority to assess civil penalties for violations of the CAA exclusively in the Administrator, with no authority invested in ALJs;²⁰⁰ that Congress, in section 556(c) of the APA, provides that an ALJ's decisionmaking is subordinate to the rules and policy of the Administrator;²⁰¹ that Congress, in section 557(b) of the APA, provides that the Administrator is responsible for the contents of all final decisions;²⁰² that Congress, in section 706 of the APA, provides that final decisions of the Administrator must be consistent, not arbitrary and capricious;²⁰³ and that federal courts reviewing final agency action have maintained a "rigorous insistence on the need for the conjunction of articulated standards and reflective findings, in furtherance of even-handed application of law."²⁰⁴

196. *Id.* at 2.

197. *Id.*

198. *Id.*

199. *Id.* at 3.

200. 42 U.S.C. § 7413(d) (2000).

201. 5 U.S.C. § 556(c) (2000); *see also supra* note 24.

202. *See* 5 U.S.C. § 557(b) (2000); *see also supra* note 28.

203. 5 U.S.C. § 706 (2000).

204. *Greater Boston Television Corp. v. FCC*, 444 F.2d. 841, 852 (D.C. Cir. 1970).

Moreover, the Board said nothing in either of these orders regarding the Administrator having invested in the Board plenary authority to "set aside the findings of fact and conclusions of law or discretion contained" in any initial decision of an ALJ,²⁰⁵ with specific instructions that the Board "is responsible for assuring consistency in Agency adjudications by all of the ALJs," and that the Board is to "assure[] that final decisions represent with [sic] the position of the Agency as a whole, rather than just the position of . . . one Presiding Officer [ALJ]."²⁰⁶

Given the Board's willingness to allow initial decisions of ALJs to become final decisions of the Administrator, notwithstanding the Board's open recognition that the ALJ has not conformed with the Administrator's Rules in making the decision, and that it does not endorse the ALJ's position, it is difficult to see how the Board can assure consistency in the Administrator's final decisions. It is also difficult to see how the Board can assure that those decisions represent the position of the agency as a whole rather than the position of an individual ALJ.

Initial decisions of ALJs which have become final decisions of the Administrator by rule,²⁰⁷ as they were not appealed by the Administrator's enforcement staff or otherwise reviewed by the Board, also have been capricious as a consequence of ALJs rejecting the Administrator's penalty policies on an ad hoc basis. In *In Re Gypsum North Corp.*, the Administrator's final decision rejects a penalty amount of \$ 17,600 proposed for a CAA asbestos rule violation, calculated by applying the Administrator's adopted CAA penalty policy for asbestos rule violations.²⁰⁸ The ALJ said this about the Administrator's policy, "Because the [p]olicy operated as an edict, affording no individualized assessment of the particular facts surrounding the violation, it failed to comport with the statutory command that the penalty criteria be considered. Accordingly, the

205. 40 C.F.R. § 22.30(f) (2006).

206. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 64 Fed. Reg. 40,138, 40,165 (July 23, 1999) (codified at 40 C.F.R. pt. 22).

207. 40 C.F.R. § 22.27(c) (2007).

208. *In Re Gypsum North Corp.*, U.S. Env't'l Prot. Agency No. CAA 02-2001-1253, 7, 16 (Nov. 1, 2002) (initial decision).

[ALJ] departs from the [p]olicy and looks to the statutory criteria to determine an appropriate penalty."²⁰⁹

The ALJ assessed a penalty amount of \$ 1,000.²¹⁰ This decision does not recognize, as we have seen, that the Administrator, in an earlier final decision issued by the Board, found that the very same penalty policy "reasonably implements the statutory criteria for assessment of a penalty under the Clean Air Act."²¹¹ Nor does it recognize that the Board had utilized the policy in determining penalty amounts for CAA asbestos rule violations.²¹²

Similarly, in the initial decision in *In re GCA Chemical Corp.*, the ALJ rejected the Administrator's adopted penalty policy, and the penalty amount of \$ 37,400 for a party's failure to file two reports required by TSCA inventory update regulations, because the ALJ disagreed with certain provisions of the policy and found that the policy "operates as an edict."²¹³ The ALJ announced his personal position that a \$ 6,600 penalty was appropriate for the party's failing to file the two reports.²¹⁴ This initial decision, now a final decision of the Administrator, does not recognize that, in an earlier final decision, the Administrator, by the Board, approved the use of the very same penalty policy in determining an \$ 85,000 penalty amount appropriate for a party's failure to file five of the very same reports.²¹⁵ In the final decision in *In re GCA Chemical Corp.*, there is no attempt to explain how it was that GCA Chemical Company's failure to file a TSCA inventory update report warranted a penalty amount 82% below that found appropriate for DIC Americas, Inc., which had failed to file the very same report.

Such penalty determinations are driven by the discretion of the individual ALJs, not the rules and policies of the Administrator. As a consequence, these final decisions of the Administrator are not

209. *Id.* at 11.

210. *Id.* at 16.

211. *In re House Analysis & Assocs. & Fred Powell*, 4 E.A.D. 501, 508-09 (1993).

212. *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 534-60 (1998).

213. *In re GCA Chemical Corp.*, U.S. Env'tl Prot. Agency No. TSCA-4-2000-0130, 1, 11-12 (June 18, 2002) (initial decision).

214. *Id.* at 20.

215. *In re DIC Americas, Inc.*, 6 E.A.D. 184, 188-93 (1995).

consistent, but, contrary to the standards of section 706 of the APA, are arbitrary and capricious.²¹⁶

Although the final decisions here reviewed were written by others, we have seen that the Administrator is responsible for them all.²¹⁷ In some final decisions, the Administrator emphasizes that it is necessary for his penalty policies to be used so as to "assure that statutory factors are taken into account" and that "penalties are assessed in a fair and consistent manner."²¹⁸ As to some violators, such as Newell Recycling Company, Spitzer Great Lakes, Ltd. and Catalina Yachts, Inc., the Administrator issues final decisions finding his penalty policies appropriate vehicles to be used in determining that a substantial penalty is warranted for violations, as proposed by his delegated complainant. Yet, as to other violators, such as Hall Signs, Gypsum North Corporation, GCA Chemical Corporation, Lu Vern G. Kienast, and F.R. & S., Inc., the Administrator issues final decisions in which he rejects or ignores his own penalty policy, or finds his penalty policy defective. Having abandoned his policy in the second group of cases, the Administrator provides little or no articulation of how he arrived at the penalty amount determined appropriate, or how the amount manifests a "conjunction of articulated standards and reflective findings, in furtherance of even-handed application of law."²¹⁹ Nor does the Administrator demonstrate how he determined a penalty amount appropriate that is significantly less than that yielded by his policy.

The Administrator leaves unexplained in his decisions how he can find that his EPCRA penalty policy, as to one violator, is "arbitrary and unauthorized by statute" because the policy's penalty

216. It must be added that there is no explanation in the Administrator's final decisions in either *In re Gypsum North* or *In re GCA Chemical Corp.* that: (1) describes how the particular amount of penalty chosen was selected, (2) distinguishes the earlier decision approving of, and applying, the same policy, or, (3) describes how the selection of the penalty amount chosen manifested "the agency's policies effectuat[ing] general standards, applied without unreasonable discrimination." *Greater Boston Television Corp. v. FCC*, 444 F.2d. 841, 851 (D.C. Cir. 1970).

217. See *Skokomish Indian Tribe v. Gen. Servs. Admin.*, 587 F.2d 428, 431-32 (9th Cir. 1978).

218. *In re Carroll Oil Co.*, 10 E.A.D. 635, 656 (2002).

219. *Greater Boston Television Corp.*, 444 F.2d at 852.

matrix is not appropriate under EPCRA,²²⁰ yet as to another violator find that the very same policy, including its penalty matrix, "reasonably implements the statutory criteria, with a range of penalties to reflect differing circumstances."²²¹ Nor does he explain how his CAA penalty policy, as to one violator, can be found to "reasonably implement[] the statutory criteria for assessment of a penalty under the [CAA],"²²² yet turn around and, as to another violator, reject the policy, finding that the very same policy is "an edict" and "fail[s] to comport with the statutory command that the penalty criteria be considered."²²³ He does not explain how he can find his TSCA penalty policy to be appropriate for determining one person's TSCA reporting violations,²²⁴ yet when confronted with another person committing the same violations, find the same policy to "operate[] as an edict," rejecting the policy as a legitimate tool for use in determining a penalty amount.²²⁵ This is arbitrary and capricious decisionmaking, contrary to section 706 of the APA.²²⁶ Penalty determinations in the Administrator's final decisions turn on the personal notions and beliefs of whichever one of several ALJs presided over the matter, rather than on the promulgated rules and articulated policies of the Administrator. Again, "[w]hen disposition

220. *In re Hall Signs, Inc.*, U.S. Env't Prot. Agency No. 5-EPCRA-96-026, 8 (Oct. 30, 1997) (initial decision).

221. *In re Catalina Yachts, Inc.*, 8 E.A.D. 199, 209 (1999) (citing *In re Genicom Corp.*, 4 E.A.D. 426, 431 (1992)).

222. *In re House Analysis & Assocs. & Fred Powell*, 4 E.A.D. 501, 508-09 (1993).

223. *In Re Gypsum North Corp.*, U.S. Env't Prot. Agency No. CAA 02-2001-1253, 11 (Nov. 1, 2002) (initial decision).

224. *In re DIC Americas, Inc.*, 6 E.A.D. 184, 188-92 (1995).

225. *In re GCA Chemical Corp.*, U.S. Env't Prot. Agency No. TSCA-4-2000-0130, 1, 11-12 (June 18, 2002) (initial decision).

226. 5 U.S.C. § 706(2)(A) (2000). "It is axiomatic that an administrative agency either must conform with its own precedents or explain its departure from them." *Ohio Fast Freight, Inc. v. United States*, 574 F.2d 316, 319 (6th Cir. 1978). "[A]gencies are subject to the requirement that they not act arbitrarily or capriciously and have an obligation to render consistent opinions and to either follow, distinguish or overrule their own precedent." *Chisholm v. Def. Logistics Agency*, 656 F.2d 42, 47 (3d Cir. 1981) (citation omitted). An agency "cannot act arbitrarily nor can it treat similar situations in dissimilar ways," and we remand litigation to the agency when it did not take pains to reconcile an apparent difference in the treatment accorded litigants circumstanced alike." *Garrett v. Fed. Commc'ns Comm.*, 513 F.2d 1056, 1060 (D.C. Cir. 1975) (citations omitted).

depends more on which judge is assigned to the case than on the facts or the legal rules," it has been recognized that "the tendency is to describe the system as lawless, arbitrary, or the like."²²⁷

The point must be emphasized that at issue here is not any specific amount of penalty for the particular violations committed by any particular violator. Specific penalty amounts determined appropriate for violations in specific cases will be fact driven. Although similar violations may warrant different penalty amounts being assessed against different violators, the differences will be predicated on the specific evidence in the case, analyzed in consideration of a consistent interpretation of statutory penalty criteria which the Administrator is required, by law, to take into account in determining the penalty amount he will assess. The amount of pollutant may vary, or the level of culpability of violators may differ, and each violator's ability to pay a particular amount of penalty may differ. As earlier observed, however, Congress permits penalty amounts from \$ 1 or less, up to \$ 25,000, to be assessed by the Administrator for each violation or day of violation of the CAA, RCRA, EPCRA, and others.²²⁸ The interpretation and relative weight to be given to each of the statutory penalty criteria, and the method used to apply those criteria to the evidence in the record of a case, will have a significant impact on whether the penalty amount will be closer to \$ 1 or closer to \$ 25,000. As Congress makes the Administrator, not individual ALJs, responsible for the content of his final decisions assessing penalty amounts,²²⁹ the Administrator, by the Board, must exercise control over law and policy to be applied in his penalty assessment process to assure that arbitrary and capricious decisions will not issue on his behalf.

Finally, if, as the Board has acknowledged, "penalty policies should be applied whenever possible because such policies assure that statutory factors are taken into account and are designed to 'assure that penalties are assessed in a fair and consistent manner'"²³⁰ does it not follow that a failure to apply such policies will increase the likelihood that statutory factors are not taken into account, and

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

228. *See supra* note 59.

229. 5 U.S.C. § 557(b) (2000).

230. *In re Carroll Oil Co.*, 10 E.A.D. 635, 656 (2002) (emphasis added).

that penalty amounts are not assessed in a fair and consistent manner? As demonstrated by the numerous decisions of the Administrator here reviewed-with the Board's explicitly stating its belief that ALJs "assess" penalties; that in determining the amount of any penalty, ALJs have independence; and that it will give deference to penalty determinations of ALJs-the Board's failure to consistently apply the Administrator's penalty policies has resulted in the Administrator issuing final orders which do not articulate a consideration of all statutory penalty criteria, and which assess penalties which have not been determined appropriate in a fair and consistent manner.

B. The Application of Law Governing Litigation in the Administrator's Civil Penalty Process

As earlier observed, in accordance with section 554 of the APA,²³¹ the Administrator promulgated rules to "govern all administrative adjudicatory proceedings" for the assessment of civil penalties under the various federal environmental statutes.²³² Furthermore, Congress invested ALJs with authority "[s]ubject to published rules of the agency,"²³³ and the Circuit Court of Appeals for the District of Columbia has held that, although an ALJ must "conduct the cases over which he presides with complete objectivity and independence," the ALJ is "governed . . . by applicable and controlling precedents," and that these precedents include "agency regulations" and the "agency's policies as laid down in its published decisions."²³⁴ And, consistent with his statutory duty to issue decisions that are not arbitrary and capricious,²³⁵ the Administrator has made the Board "responsible for assuring consistency in Agency adjudications" and for assuring that his "final decisions represent with [sic] the position of the Agency as a whole, rather than just the

231. 5 U.S.C. § 554 (2000).

232. 40 C.F.R. § 22.1 (2006).

233. 5 U.S.C. § 556(c) (2000).

234. *Iran Air v. Kugelman*, 996 F.2d 1253, 1260 (D.C. Cir. 1993).

235. 5 U.S.C. § 706 (2000).

position of . . . one Presiding Officer."²³⁶ Consequently, it is the responsibility of the Board to see that the record of the Administrator's many final decisions manifests a consistent interpretation and application of the Administrator's Rules.

Notwithstanding its obligations under the law, the Board has chosen to defer to various ALJ rulings on issues of law, even though the ALJs have ignored or rejected the Administrator's promulgated rules and published decisions in making their rulings. Capricious decisionmaking has resulted.

1. Motions for Summary Disposition (Accelerated Decision)

By rule, the Administrator provides for summary disposition.²³⁷ Reviewing an initial decision in which an ALJ, without conducting an evidentiary hearing, issued an accelerated decision finding a respondent liable for violations of TSCA and the proposed penalty amount of \$ 1.345 million appropriate, the Board stated that "we find that Newell's penalty arguments fail to raise a genuine issue of material fact and that, consequently, Newell was not entitled to an evidentiary hearing."²³⁸ The Board consequently adopted the ALJ's initial decision as a final decision of the Administrator.²³⁹ In other instances, the Board adopted an initial accelerated decision of an ALJ as the final decision of the Administrator, issued without conducting

236. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 64 Fed. Reg. 40,138, 40,165 (July 23, 1999) (codified at 40 C.F.R. pt. 22).

237. See 40 C.F.R. § 22.20(a) (2006) (describing "accelerated decisions"); see also *Id.* § 22.20(b)(2) (2006) (describing the Presiding Officer's determination of material facts for a "partial accelerated decision"). In a final accelerated decision of the Administrator assessing penalties, citing Supreme Court precedent on the analogous "summary judgment" provision in the Federal Rules of Civil Procedure, Rule 56, the Board noted that "a party waives its right to an adjudicatory hearing where it fails to dispute the material facts upon which the agency's decision rests," and that "[t]he constitutional right to due process requires that the person claiming the benefit of that due process must first place some relevant matter into dispute." In *Re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 792 (March 6, 1997).

238. In *re Newell Recycling Co., Inc.*, 8 E.A.D. 598, 625 (1999).

239. *Id.* at 643.

an evidentiary hearing, and assessed a civil penalty on behalf of the Administrator.²⁴⁰

In a subsequent case, when the Administrator's enforcement staff filed a motion for accelerated decision and the respondent failed to make any answer to the motion, the ALJ denied the motion without citation to the criteria of the Administrator's rule²⁴¹ or agency precedent, which included *In re Green Thumb Nursery, Inc.*, *In re Newell Recycling Co., Inc.*, and *In re Spitzer Great Lakes, Ltd.*²⁴² The Administrator's enforcement staff sought interlocutory review of the ALJ's order pursuant to 40 C.F.R. § 22.29, arguing in its brief before the Board that the ALJ failed to apply the clear law of the agency, as set out in the Administrator's Rules, specifically 40 C.F.R. § 22.20, and numerous final decisions of the Administrator, including *In re Green Thumb Nursery, Inc.*, *In re Newell Recycling Co., Inc.*, and *In re Spitzer Great Lakes, Ltd.*²⁴³

Obviously, as Ritchie Engineering Company made no response at all to the motion, it could not have identified any genuine issue of material fact in response to the motion. Enforcement staff emphasized that if the ALJ's order was allowed to stand, Ritchie Engineering Company would be granted a hearing notwithstanding its failure to raise a genuine issue of material fact, when Green Thumb Nursery, Newell Recycling Company and Spitzer Great Lakes had been denied a hearing for the failure to raise such an issue, and that "inconsistency undermines the even-handed application of law that is essential to the integrity of the adjudicative process under

240. See *In re Spitzer Great Lakes, Ltd.*, 9 E.A.D. 302 (2000) (\$ 165,000 penalty); see also *In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782 (1997) (\$ 3,000 penalty).

241. 40 C.F.R. § 22.20 (2006).

242. *In re Ritchie Eng'g Co., Inc.*, U.S. Env't'l Prot. Agency No. CAA-5-2000-019, 1 (Apr. 19, 2001) (order). In his order, without citation to the criteria of 40 C.F.R. § 22.20(a), or any other legal authority, the ALJ denied the unopposed motion, asserting that documents relied upon in making the motion "are proposed exhibits only" and "are not yet a part of the evidentiary record." *Id.* He went on, "Indeed, whether the proposed exhibits ever become part of the record here, and the weight to be accorded to them, remains to be seen. In that regard, these proposed exhibits may be rejected at hearing, EPA may decide to not offer them into evidence, or they may be explained away by respondent." *Id.*

243. Memorandum in Support of Motion for Interlocutory Review, *In re Ritchie Eng'g Co., Inc.*, U.S. Env't'l Prot. Agency No. CAA-5-2000-019, 1 (Apr. 19, 2001) *Ritchie Eng'g Co.*, 4 (June 1, 2001).

40 C.F.R. Part 22."²⁴⁴ The Board denied interlocutory review in an order consisting of two sentences, "By motion filed June 1, 2001, U.S. EPA Region 5 seeks interlocutory review of an order of the Presiding Officer in this proceeding denying the Regions' motion for accelerated decision as to liability. Upon review, the Region's motion for interlocutory review is hereby denied."²⁴⁵

The Board provided no further explanation for its decision.

While it had the initial decision in *In re Ritchie Engineering Co.* under review, the Board issued a final decision in another matter which involved a respondent's failure to file a response to a motion for accelerated decision.²⁴⁶ On appeal of the initial decision before the Board, Billy Yee challenged the enforceability of the environmental rule he was found to have violated.²⁴⁷ The Board noted that Respondent "did not file any formal opposition" to enforcement staff's motion for accelerated decision on the issue of liability, and that the ALJ "thus concluded that Appellant had waived any objection to the granting of the motion and ruled that the [Administrator's delegated complainant] was entitled to judgment as a matter of law" on Billy Yee's liability for the violations alleged.²⁴⁸ After explaining that accelerated decision in the Administrator's penalty assessment process "is governed by an administrative summary judgment standard, requiring the timely presentation of a genuine and material factual dispute, similar to judicial summary judgment," citing, among other authorities, *In re Green Thumb Nursery, Inc.*, the Board stated, "[the Administrator's] Rule 22.16(b) . . . provides, in pertinent part, '[a]ny party who fails to respond within the designated period waives any objection to the granting of the motion.' 40 C.F.R. § 22.16(b) (2000). Accordingly, by failing to raise the enforceability of the Disclosure Rule argument before the Presiding Officer in connection with the Partial Accelerated

244. *Id.* at 15-16. In support of its argument, enforcement staff cited both *Santise v. Schweiker*, 676 F.2d. 925, 930 (1982), and *Greater Boston Television Corp. v. FCC*, 444 F.2d. 841, 851 (1970).

245. *In re Ritchie Eng'g Co., Inc.*, U.S. Env't'l Prot. Agency No. CAA-5-2000-019, 1 (Apr. 19, 2001) (July 6, 2001) (order denying interlocutory appeal).

246. *In re Billy Yee*, 10 E.A.D. 1 (2001).

247. *Id.* at 8.

248. *Id.* at 10.

Decision, Appellant waived it both below and for purposes of review."²⁴⁹

Given that, on May 29, 2001, Billy Yee's failure to provide any response to a motion for accelerated decision was found, under criteria of the Administrator's Rules and his published decisions, to constitute a waiver of any issue Billy Yee could have raised therein, subjecting him to a judgement as to liability for violations alleged, there would appear to be no reason for the Administrator's process, on July 6, 2001, to make a different ruling against Ritchie Engineering Company for its failure to provide any response to a motion for accelerated decision. By allowing the ALJ's ruling in *In re Ritchie Engineering Co.* to stand, a ruling based upon criteria completely at odds with the precedent cited in *In re Billy Yee*, the Board sanctioned inconsistent results for similarly situated respondents appearing before the Administrator.

2. Determining a Violator's Ability to Pay a Particular Penalty Amount

Under most federal environmental statutes, Congress requires that, in determining an appropriate amount of civil penalty, the Administrator consider the violator's financial status and ability to pay a particular amount of civil penalty.²⁵⁰ A review of the Administrator's final decisions manifests capriciousness in addressing this penalty criteria.

On behalf of the Administrator, the Board has held that, to fulfill the Administrator's obligation to take into account the "ability to pay" statutory penalty criteria in a specific case, when his enforcement staff issues a complaint under his authority, "a respondent's ability to pay may be presumed," and that presumption can continue until the respondent's ability to pay the proposed penalty "is put at issue by a respondent."²⁵¹ As under the Administrator's Rules, a respondent is required in his answer to include his "basis for opposing any proposed relief" and any hearing requested is to be "upon the issues

249. *Id.* at 10-11.

250. See, e.g., CWA, 33 U.S.C. § 1319(g) (2000); TSCA, 15 U.S.C. § 2615(a)(2)(B) (2000); FIFRA, 7 U.S.C. § 1361(a)(4) (2000); EPCRA, 42 U.S.C. § 11045(b)(1)(C) (2000); CAA, 42 U.S.C. § 7413(e)(1) (2000).

251. *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 541 (1994).

raised by the complaint and answer,"²⁵² if the respondent would claim he has an inability to pay the proposed penalty, he must raise the issue in his answer.²⁵³ The Board further held that, where the respondent does raise such a claim, the Administrator's delegated complainant "must be given access to the respondent's financial records before the start of [any] such hearing."²⁵⁴ If the respondent does not "raise its ability to pay as an issue in its answer," or if after having raised the claim, it "fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process," it may be concluded that "any objection to the penalty based upon ability to pay has been waived under the Agency's procedural rules."²⁵⁵

It must be emphasized that in the procedure which it delineated in *In re New Waterbury, Ltd.*, the Board did not relieve the Administrator's enforcement staff of any burden that it has at hearing, imposed by the APA²⁵⁶ and by the Administrator's Rules.²⁵⁷ The Board did recognize that the Administrator, by rule, requires that to preserve for hearing a claim on its ability to pay the penalty amount proposed in the complaint, a respondent must provide notice to the agency by raising the issue in its answer.²⁵⁸ If a respondent does raise this issue, it must submit for the Administrator's enforcement staff's review "financial records before the start of [any] such hearing."²⁵⁹ After a financial analyst retained by the Administrator

252. 40 C.F.R. § 22.15(b)-(c) (2006).

253. *In re New Waterbury, Ltd.*, 5 E.A.D. at 542.

254. *Id.*

255. *Id.*

256. 5 U.S.C. § 556(d) (2000).

257. 40 C.F.R. § 22.24 (2006).

258. 40 C.F.R. § 22.15(a) (2006).

259. *In re New Waterbury, Ltd.*, 5 E.A.D. at 542. Prior to August 23, 1999, the Administrator required, by rule, that notices of the proposed penalty order-identified in his rules as complaints-set forth the amount of civil penalty proposed for the violations alleged. 40 C.F.R. § 22.14(a)(4) (1998). Subsequent to that date, the Administrator amended his rules and removed that requirement, which permitted enforcement staff to issue notices of his proposed penalty orders without identifying a specific penalty amount. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 64 Fed. Reg. 40,138, 40,152 (July 23, 1999) (codified at 40 C.F.R. pt. 22). He did state that "EPA expects that administrative complaints containing specific penalty proposals will continue to be

reviews financial documents submitted by respondent and reports to enforcement staff, if the matter goes to hearing, the Administrator's enforcement staff continues to bear the burden of demonstrating the penalty amount proposed is appropriate considering the respondent's ability to pay as disclosed in its financial records. If the respondent fails to raise the issue in its answer, or having raised the issue, refuses or otherwise fails to submit financial documentation upon which its claim can be determined, the respondent may by rule be deemed to have waived its claim on the issue.²⁶⁰

a central part of the Agency's administrative enforcement program." *Id.* Obviously, if the Administrator's enforcement staff issues a notice of his proposed penalty order, i.e., complaint, that does not identify the penalty amount proposed for the violations alleged, the process identified in *In re New Waterbury, Ltd.* can have no efficacy. Where an agency's rules allow for the resolution of issues on pleadings, the contents of the response are of critical importance, and the need for and importance of the response in turn enhances the significance of the notice given the adverse party. In order to be adequate, such notice given by the agency to an adverse party must contain enough information to provide the respondent a genuine opportunity to identify material issues of fact. This is needful to provide the 'due notice and opportunity for hearing' required by the [APA]. *Hess & Clark, Div. of Rhodia, Inc. v. Food & Drug Admin.*, 495 F.2d 975, 983 (D.C. Cir. 1974). If an alleged violator is not given notice of the amount of penalty proposed for his alleged violations, it hardly can be said that he has been given a genuine opportunity to determine whether he has an ability to pay a particular penalty amount. *Id.*

260. *See In re New Waterbury, Ltd.*, 5 E.A.D. at 541-42. A determination of whether a party is able to pay a particular penalty amount is a conclusion. The probative facts upon which such a conclusion will be based consist of records documenting the party's financial condition. Although not cited by the Board in *In re New Waterbury, Ltd.*, it must be noted that the process which it identified is supported by well-recognized principles of sound decisionmaking. "The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *United States v. N.Y., New Haven & Hartford R.R. Co.*, 355 U.S. 253, 256 n.5 (1957). "Ordinarily a litigant does not have the burden of establishing facts peculiarly within the knowledge of the opposing party." *Browzin v. Catholic Univ. of Am.*, 527 F. 2d 843, 849 (D.C. Cir. 1975). In upholding a regulation of the Secretary of the Interior requiring a mine owner to come forward with information regarding his mine when challenging an imminent danger order issued under the Federal Coal Mine Health and Safety Act of 1969, the Seventh Circuit Court of Appeals noted that "[a]s respondents logically say, it is, after all, his mine and he had the best knowledge of its condition." *Old Ben Coal Corp. v. Interior Bd. of Mine Operation Appeals*, 523 F.2d 25, 36 (7th Cir. 1975). "Simply stated, the [adverse inference] rule provides that when a party has relevant evidence within his control which he

As to some respondents before the Administrator, this is the law that has been applied. The Board adopted in a final decision of the Administrator an ALJ's ruling that the respondent waived its ability to pay claim, as the respondent, despite providing some financial documentation, failed to produce the last five years of its parent corporation's income tax returns.²⁶¹ The ALJ, on motion of the Administrator's enforcement staff, had ordered the respondent to produce the returns so that the ALJ could make a determination of respondent's ability to pay.²⁶² In another matter, the Board adopted in the Administrator's final decision an ALJ's ruling that a respondent had waived an initial claim that paying the penalty amount proposed would "cause a financial hardship that would cause the company to go out of business," as the respondents "did not raise the ability to pay argument again, nor did they provide financial records . . . despite court [ALJ] orders and Complainant requests for such information."²⁶³

Notwithstanding the soundness of the ability to pay determinations in these final decisions of the Administrator, based upon *In re New Waterbury, Ltd.*, the Board also has chosen to allow ALJs the discretion to make ability to pay determinations without regard to the Administrator's Rules and the precedent it has adopted on behalf of the Administrator in these decisions. The Board has

fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *Int'l Union v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972). See also *Newell Recycling Co., Inc. v. EPA*, 231 F.3d 204, 210 (5th Cir. 1972) (as "[s]urely Newell was in possession of such information [of its ability to pay] if anyone was," and, as there was "a complete absence of evidence as to Newell's ability to pay" in the record, the Administrator "correctly declined to mitigate the penalty on the basis of Newell's putative inability to pay it."); *Bluestone Energy Design, Inc. v. Fed. Energy Regulatory Comm'n*, 74 F.3d 1288, 1295 (D.C. Cir. 1996) ("Because Bluestone failed to present a satisfactory picture of its financial status, it was not an abuse of discretion for the Commission to decline to consider Bluestone's ability to pay."). Moreover, as financial records of a party are proprietary in nature, sound policy warrants a rule that allows the party itself to determine whether it might benefit from the release of such records, and whether it wishes to release its records.

261. *In re Spitzer Great Lakes, Ltd.* 9 E.A.D. 302, 306- 07 (2000).

262. *Id.* at 319-20.

263. *In re Roger Antkiewicz & Pest Elimination Prods. of Am., Inc.*, 8 E.A.D. 218, 240 (1999).

adopted such ability to pay determinations in final decisions of the Administrator.

In one proceeding a respondent, Chempace Corporation, claimed it did not have an ability to pay the penalty amount proposed in an administrative complaint filed on behalf of the Administrator. While, initially, it provided financial documents to the Administrator's enforcement staff, two years of negotiation yielded no settlement and a hearing was anticipated. Given the passage of time, the Administrator's enforcement staff asked the ALJ to order the respondent to produce the two most recent years of income tax returns and other financial records, and a financial expert retained by the Administrator explained in a detailed affidavit accompanying the discovery motion why she needed this information to conduct an ability-to-pay analysis.²⁶⁴ Without any discussion of, or reference to, the criteria of the Administrator's discovery rules and precedent,²⁶⁵ the ALJ denied the discovery motion.²⁶⁶ Having denied the Administrator's enforcement staff the prehearing production of the two most recent years of Chempace's financial records, the ALJ at hearing nonetheless permitted the respondent's vice president to testify, without supporting documentation, as to Chempace's financial status over those two years.²⁶⁷ Based upon that testimony, and the two-year-old documentation, the ALJ found the respondent did not have an ability to pay the \$ 200,000 penalty amount proposed, but that \$ 92,123 was an appropriate penalty amount.²⁶⁸

On review, the Board acknowledged that the ALJ "did not explicitly recite the factors under 40 C.F.R. § 22.19(f)(1) in denying the [enforcement staff's] request" for discovery,²⁶⁹ and "it may have been useful for the [Administrator's enforcement staff] to review the specific detailed financial information it sought in this case."²⁷⁰ In

264. *In re Chempace Corp.*, 9 E.A.D. 119, 123-27 (2000).

265. For the current version of these rules, see 40 C.F.R. § 22.19 (2006).

266. *In re Chempace Corp.*, 9 E.A.D. at 126-27.

267. *Id.* at 125. Enforcement staff made the discovery motion on December 10, 1997. *Id.* The ALJ denied the motion on February 27, 1998. *Id.* at 126-27. The hearing was conducted on April 7 and 8, 1998. *Id.* at 127.

268. *Id.* at 121.

269. *Id.* at 135.

270. *Id.* at 134. At the time the ALJ made the decision, the Administrator's Rules provided for "other discovery" after the prehearing exchange upon an ALJ's

issuing the Administrator's final decision, however, the Board would not reverse the ALJ's order denying a discovery request for the two most recent years of Chempace Corporation's financial records, as "it appears from our reading of the reasons given by the Presiding Officer for denying the [motion] . . . that such further discovery would not necessarily have 'significant probative value,'" and, in the Board opinion, the ALJ had not abused his discretion.²⁷¹

A ruling on a discovery motion is an issue of law and should be based on whether the party's written discovery request meets the criteria of the Administrator's rule,²⁷² not whether a particular witness's testimony is credible. The determination of an appropriate penalty amount is an issue of law, policy, and agency discretion, not fact.²⁷³ Furthermore, on matters of law and policy, an ALJ is subordinate to the Administrator.²⁷⁴ Despite these rules, the Board said that "[a]ffording considerable deference to a Presiding Officer's discovery ruling is particularly appropriate where the issue involved is the amount of the penalty, an issue for which the Presiding Officer has broad discretion."²⁷⁵ The Board adopted the ALJ's initial

determination that such discovery will not in any way "unreasonably delay the proceeding"; the information sought is "not otherwise obtainable"; and such information "has significant probative value." 40 C.F.R. § 22.19(e)(1) (1998). The Board quoted the reasons given by the ALJ for denying the motion, as follows, "Chempace had 'already produced five years' tax returns and financial statements If the additional undisclosed documents are shown at the hearing to be relevant to the penalty assessment, adverse inferences could be drawn against [Chempace's] position." *In re Chempace Corp.*, 9 E.A.D. at 135. The rationale of the ALJ incorporated no consideration of the criteria identified by the Administrator in his rule.

271. *In re Chempace Corp.*, 9 E.A.D. at 135.

272. 40 C.F.R. § 22.19(e) (2006).

273. *See In re Chautauqua Hardware Corporation*, 3 E.A.D. 616, 623 (1991); *see also Panhandle Coop. Ass'n v. EPA*, 771 F.2d. 1149, 1152 (8th Cir. 1985).

274. *See supra* note 24.

275. *In re Chempace Corp.*, 9 E.A.D. at 135. The Board does not reconcile its finding that the specific detailed financial information the Administrator's enforcement staff sought to review may have been useful with its adoption of what it identified as the ALJ's reason for excluding that very same information: the information "would not necessarily have 'significant probative value.'" *Id.* Also, the Board does not explain why, if the testimony of Chempace Corporation's vice president regarding the company's financial circumstances over the two years prior to hearing was not only admissible, but conclusive on the issue of Chempace Corporation's ability to pay the penalty amount proposed, copies of actual financial

decision as the final decision of the Administrator, and assessed a \$ 92,123 penalty.²⁷⁶

In *In re CDT Landfill Corp.*, the Administrator's enforcement staff filed a complaint which alleged four counts of CAA violations, and proposed that a \$ 72,380 penalty amount be assessed for those violations.²⁷⁷ The ALJ issued an initial decision finding CDT Landfill liable for three of the four violations alleged, but assessed no penalty as he found it without an ability to pay any penalty.²⁷⁸ The Board adopted the ALJ's initial decision as the final decision of the Administrator.²⁷⁹ The Board acknowledged that CDT Landfill had not raised an ability to pay claim in the answer it filed, and identified no effort by the respondent to amend its answer to include that claim.²⁸⁰ The Board cited the ALJ's pre-hearing order, identifying the following language regarding CDT Landfill's pre-hearing exchange obligations, "[i]f CDT is contending that the proposed penalty exceeds its ability to pay or would jeopardize its ability to continue in business, provide financial statements, copies of income tax returns or other data to support such contention [by June 2, 2000]."²⁸¹

The Board further acknowledged that CDT Landfill "did not address in its prehearing exchange the issue of its ability to pay a penalty and did not provide any additional financial statements to support such an inability-to-pay argument."²⁸² The Board made no mention of any effort by CDT Landfill to amend its prehearing exchange identifying newly discovered evidence.²⁸³ Having failed to

records supporting that testimony "would not necessarily have 'significant probative value.'" *Id.*

276. *Id.* at 143.

277. *In re CDT Landfill Corp.*, 11 E.A.D. 88, 97 (2003).

278. *Id.* at 98-99.

279. *Id.* at 125.

280. *Id.* at 97.

281. *Id.* at 98.

282. *Id.*

283. Notwithstanding CDT Landfill Corporation's failure to raise the issue of its ability to pay in its answer, in communication with enforcement staff prior to the filing of the Complaint, it appears to have submitted "three financial schedules" represented by its attorney to have "estimated CDT's current financial status." *Id.* at 97. The Board acknowledged, however, that this information "appears to fall somewhat short of the financial documentation contemplated by the ALJ's

"raise its ability to pay as an issue in its answer," and having failed to allow enforcement staff "access to financial records before the start of [any] such hearing,"²⁸⁴ CDT Landfill clearly did not meet the requirements set out in the Administrator's Rules and published decisions to raise an inability to pay claim at issue at hearing. Moreover, the Administrator, through the Board, has held "that a respondent's ability to pay may be presumed until it is put at issue by a respondent."²⁸⁵ Therefore, consistent with *In re New Waterbury, Ltd.*, *In re Spitzer Great Lakes, Ltd.* and *In re Roger Antkiewicz & Pest Elimination Products of America, Inc.*, in determining an appropriate amount of penalty for its violations, the presiding ALJ and the Board should have presumed that CDT Landfill could afford to pay the penalty amount proposed or that it had waived any claim regarding its ability to pay a penalty. This is not what happened.

On January 8, 2001, nine days prior to the scheduled hearing, CDT Landfill submitted to the Administrator's enforcement staff a CDT Landfill Corporation "Combined Balance Sheet as of September 30, 2000" ("Combined Balance Sheet").²⁸⁶ This document consisted of one page.²⁸⁷ At the hearing, over objection of enforcement staff, the ALJ admitted the document into evidence.²⁸⁸ The Board noted that "the Combined Balance Sheet ultimately and significantly influenced [the ALJ's] penalty analysis," in that the ALJ cited it "as the only evidence in the record of CDT's financial condition."²⁸⁹ Identifying the balance sheet as evidence of CDT Landfill's financial hardship, the ALJ held that the "[c]omplainant ha[d] totally failed to carry its burden of persuasion as to CDT's ability to pay," and, "[f]or those reasons, he declined to assess any civil penalty against CDT" for the three counts of violation he found proven.²⁹⁰

Prehearing Order," and that it was "not part of the evidence adduced at hearing." *Id.* at 98 n.17.

284. *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (1994).

285. *Id.* at 541.

286. *In re CDT Landfill Corp.*, 11 E.A.D. at 98.

287. *Id.* at 112.

288. *Id.* at 105.

289. *Id.*

290. *Id.* at 100.

Although it adopted the ALJ's ruling that CDT Landfill, at hearing, could proceed on an ability to pay claim and have the issue determined in its favor on doing nothing more than presenting a one page financial summary first tendered nine days prior to the hearing, the Board provided no analysis to demonstrate how it was that CDT Landfill could be found to have met its prehearing obligations under the Administrator's Rules and the precedent of his final decisions.²⁹¹ Rather than evaluate the ALJ's ruling in consideration of legal precedent, the Board deferred to the ALJ, "we find that the ALJ did not abuse his discretion in admitting the Combined Balance Sheet at the evidentiary hearing."²⁹²

The Board noted it "has many times stated that it will generally not substitute its judgment for that of an ALJ absent a showing that the ALJ committed clear error or an abuse of discretion in assessing a penalty."²⁹³ As to the Combined Balance Sheet, the Board stated that "[w]e have also emphasized that '[t]he admission of evidence is a matter particularly within the discretion of the administrative law

291. See 40 C.F.R. § 22.15 (2006) (noting that a respondent must raise the issue of its ability to pay in its answer so as to make it subject matter for hearing); see also *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (1994) ("[I]n any case where ability to pay is put in issue, the [Administrator's enforcement staff] must be given access to the respondent's financial records before the start of such hearing.").

292. *Id.* at 125. Careful analysis reveals that the prehearing order of the ALJ itself was not in accordance with law. See 5 U.S.C. § 706 (2000). As we have seen, relevant agency law is that hearings are to be "upon the issues raised by the complaint and answer." 40 C.F.R. § 22.15(c) (2006). (a respondent must raise an issue in its answer so as to make it subject matter for hearing. This section does not specifically address the ability to pay issue, but rather sets forth a general pleading requirement placed on respondents.). Also, "a respondent's ability to pay may be presumed until it is put at issue by a respondent." *In re New Waterbury, Ltd.*, 5 E.A.D. at 541. CDT Landfill failed to raise the ability to pay issue as required by the Administrator's Rules and published decisions. On the record of the pleadings, CDT Landfill's ability to pay was not at issue and was to be presumed, given that agency precedent governs ALJ decisionmaking. See *Iran Air v. Kugelmann*, 996 F.2d 1253, 1260 (D.C. Cir. 1993). Notwithstanding CDT Landfill's failure to comply with the Administrator's requirements for raising the issue, and the clear agency precedent, the ALJ chose to issue an order informing CDT Landfill that it continued to have the option of raising the ability to pay issue by providing loosely specified financial information in its future prehearing exchange. *In re CDT Landfill Corp.*, 11 E.A.D. at 99-100. Consequently, the ALJ's prehearing order was not in accordance with law.

293. *In re CDT Landfill Corp.*, 11 E.A.D. at 117.

judge."²⁹⁴ In reaffirming its desire to defer to the assigned ALJ on evidentiary rulings, the Board described its relationship with the ALJ as analogous to a federal reviewing court's relationship with an agency by stating, "[f]ederal district and circuit courts have similarly recognized agency discretion in making evidentiary decisions during administrative proceedings."²⁹⁵

The Board's attempted analogy is not in conformance with the law. In contrast to a federal reviewing court's recognition of agency discretion, based upon the court's limited role on review and an acknowledgment of the agency's expertise,²⁹⁶ the APA explicitly

294. *Id.* at 108.

295. *Id.* It must be observed that the evidentiary issue is one of law, not of fact. The issue is whether a one page summary can ever be probative on the issue of a respondent's ability to pay if the respondent has failed to raise that issue, and failed to provide financial documents to support the conclusions of the tendered summary and an ability to pay claim prior to the hearing. Had the Board "exercise[d] its own judgment" in identifying a legal rationale for the admission of the one page summary, "according to its own understanding and conscience," *U. S. of Am. Ex Rel. Joseph Accardi*, 347 U.S. at 266-67, rather than deferring to the ALJ, it would have had a difficult time of it. In addition to the Respondent's failure to raise the "ability to pay" issue in its answer, and to provide its financial records prior to hearing, the Board acknowledged that the ALJ had "not specifically address[ed] the [one page summary's] reliability at the hearing"; that the document itself was "undated and had not been further explained by testimony,"; and that "there was no analysis or explanation for the 'very large closure cost liability' referenced in the document." *In re CDT Landfill Corp.*, 11 E.A.D. at 113. Moreover, in considering the probative value of summaries, federal courts have recognized that "[t]he proponent of a summary must establish a foundation that (1) the underlying materials upon which the summary is based are admissible in evidence; and (2) the underlying documents were made available to the opposing party for inspection." *Paddock v. Dave Christensen, Inc.*, 745 F.2d 1254, 1259 (9th Cir. 1984). See also *White Indus., Inc. v. Cessna Aircraft Co.*, 611 F. Supp. 1049, 1077-78 (W.D. Mo. 1985) (stating that tendered testimony "in verbal summary form" of "personal examination of certain documents" is an "unabashed attempt to prove the contents of document without producing either the originals or appropriate copies thereof."). Whether CDT Landfill Corporation made a sufficient foundation for its one page financial summary to be found probative and admitted into evidence, consistent with 40 C.F.R. § 22.22(a) of the Administrator's Rules, does not depend upon an evaluation of the demeanor of any witness, observed exclusively by the ALJ. It depends upon the persuasiveness of arguments supporting and opposing the admission of the document, arguments as accessible to the Board on review as they were to the ALJ.

296. *Brock v. Dow Chem. U.S.A.*, 801 F.2d. 926, 932 (7th Cir. 1986).

provides that an ALJ is subordinate to the rules of the agency on matters of law.²⁹⁷ Furthermore, the agency is specifically responsible for the contents of its final decisions, with plenary authority to set aside an ALJ's ruling on issues of law,²⁹⁸ and the agency is obliged to issue decisions which are consistent and not arbitrary and capricious.²⁹⁹

Two years after issuing *In re CDT Landfill Corp.*, the Board issued the Administrator's final decision in *In re JHNY, Inc.*³⁰⁰ In this decision, the Board adopted a default order of the ALJ, issued on the failure of JHNY, Inc., to submit a prehearing exchange as required by rule and the ALJ's order.³⁰¹ In the Administrator's final decision, the Board cited *In re CDT Landfill Corp.* not as precedent for the Board's interpretation of any relevant rule, but rather as precedent for its deferential review standard regarding ALJ decisionmaking, stating "it has been the Board's longstanding practice to accord substantial deference to ALJs in conducting proceedings under the [Administrator's Rules], particularly with regard to prehearing exchange and discovery. As we have observed, '[o]ur rules depend on the presiding officer to exercise discretion throughout an administrative penalty proceeding.'"³⁰²

Although JHNY, Inc., had failed to submit a prehearing exchange, it earlier had raised as an issue its ability to pay the penalty amount proposed, and, prior to the ALJ having ordered the prehearing exchange, voluntarily submitted to the Administrator's enforcement staff tax returns, balance sheets and statements of operation.³⁰³ Nonetheless, the Board adopted the ALJ's ruling denying JHNY, Inc. a hearing, noting that "[b]y compelling the parties to provide [all evidence to be used at hearing and other related information] in one central submission, the prehearing exchange clarifies the issues to be addressed at hearing and allows the parties and the [ALJ] an opportunity for informed preparation for

297. See 5 U.S.C. § 556(c) (2000); see also *supra* note 24.

298. 5 U.S.C. § 557(b) (2000).

299. *Id.* § 706.

300. *In re JHNY, Inc.*, 12 E.A.D. 372 (2005) (final order).

301. *Id.* at 374, 380.

302. *Id.* at 385.

303. *Id.* at 379.

hearing."³⁰⁴ The Board observed that JHNY, Inc. "did not provide information documenting its financial condition as prescribed by the prehearing information exchange requirements, and its failure to do so interfered with the purpose of the [Administrator's Rules]."³⁰⁵ The Board specifically reaffirmed the ruling of *In re New Waterbury, Ltd.*, "where a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the prehearing process," the respondent may be found to have waived "any objection to the penalty based upon ability to pay."³⁰⁶

The rules and precedent that the Board, on behalf of the Administrator, identified and applied in JHNY, Inc., however, are rules and precedent the Board ignored in assessing penalties against CDT Landfill, Inc. and Chempace Corporation. As we have seen, CDT Landfill, Inc. failed to raise the ability to pay issue in its answer, and, notwithstanding the requirements of 40 C.F.R. § 22.19 and the ALJ's prehearing order, failed to include any financial information in its prehearing exchange.³⁰⁷ Consequently, if the precedent reaffirmed in *In re JHNY, Inc.* had been applied by the Administrator's decision makers to *In re CDT Landfill Corp.*, CDT Landfill Corporation would have been found to have waived any ability to pay claim it had, and its penalty amount could not have been reduced to \$ 0 based upon nothing more than a one-page unsigned Combined Balance Sheet first submitted a week before the hearing. Regarding Chempace Corporation, as the Administrator's Rules and *In re New Waterbury, Ltd.* provide that, on having raised an ability to pay claim, a respondent must "submit evidence to support i[t]s claim as part of the pre-hearing exchange" or may be deemed to have waived such a claim,³⁰⁸ it follows that the enforcement staff's motion should have been granted over Chempace Corporation's objection, and Chempace Corporation should have been ordered to provide the two most recent years of its financial records. If Chempace Corporation did not provide those records it

304. *Id.* at 382.

305. *Id.* at 391.

306. *Id.* at 397 (citing *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (1994)).

307. *In re CDT Landfill Corp.*, 11 E.A.D. 88, 97 (2003).

308. *In re JHNY, Inc.*, 12 E.A.D. at 397.

would be deemed to have waived the claim. Rather than consistently rule on the ability to pay issue based upon a "conjunction of articulated standards and reflective findings, in furtherance of even-handed application of law,"³⁰⁹ the Board has allowed the disposition of cases to depend more upon which ALJ presided in the case.³¹⁰

Aside from the inconsistent outcomes on the ability to pay issue manifested in these final decisions of the Administrator, the Board's adoption of a deferential standard of review is itself inconsistent with the position of the Administrator announced by his CJO in an earlier final decision. The Board supports its adoption of the deferential review standard of an ALJ's decisionmaking by making an analogy to the deferential standards applied by federal appellate courts when reviewing agency decisions.³¹¹ Citing section 557(b) of the APA and case law, however, the Administrator's CJO recognized that "[t]he Administrator has the responsibility for making final agency decisions, which comprehends the right to review the entire record and draw his own conclusion from the evidence," and that "the relation between the ALJ and agency is not the same as or even closely similar to the relation between agency and reviewing court."³¹² The Board does not explain its departure from *In re Martin Electronics, Inc.*, nor does the Board explain how it can fulfill its obligation to the Administrator to "assur[e] consistency in Agency adjudications by all of the ALJs" and "assure that the final decisions represent with [sic] the position of the Agency as a whole, rather than just the position of . . . one Presiding Officer,"³¹³ when it finds that an ALJ has the discretion to rule on issues of law without regard to

309. *Greater Boston Television Corp. v. FCC*, 444 F.2d. 841, 852 (D.C. Cir. 1970).

310. "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." *Santise v. Schweiker*, 676 F.2d. 925, 930 (1982) (citing *Mashaw, Conflict and Compromise Among Models of Administrative Justice*, 1981 DUKE L.J. 181, 182 n.4. (1981)).

311. *In re CDT Landfill Corp.*, 11 E.A.D. at 108 ("Federal district and circuit courts have similarly recognized agency discretion in making evidentiary decisions during administrative proceedings.").

312. *In re Martin Electronics, Inc.* 2 E.A.D. 381, 394- 95 n.18 (1987) (citing 3 *Kenneth Culp Davis, Administrative Law Treatise* § 17:16 (2d ed. 1980)).

313. *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties*, 64 Fed. Reg. 40,138, 40,165 (July 23, 1999) (codified at 40 C.F.R. pt. 22).

relevant precedent as set forth in provisions of the Administrator's Rules and his published decisions.

CONCLUDING COMMENTS

The Supreme Court has long recognized that, "Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law . . . No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it."³¹⁴

Consequently, agency decision makers must comply with governing statutes and agency regulations. "It is axiomatic that an agency must act in accordance with applicable statutes and its regulations," and "[t]he agency has no discretion to deviate' from the procedure mandated by its regulatory scheme."³¹⁵ In *Service v. Dulles*, the United States Supreme Court sustained the contention that "regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature."³¹⁶ Similarly, in *Tennessee Valley Authority v. Whitman*, the Eleventh Circuit Court of Appeals criticized actions of the Administrator regarding a compliance order because the Board and the presiding ALJ "manufactured the procedures they employed on the fly, entirely ignoring the concept of the rule of law," and applied agency rules "on a purely ad hoc basis."³¹⁷

Moreover, procedures established by Congress, and by executive officers vested with authority by Congress to establish procedures, cannot be set aside by anyone with a preconceived idea that

314. *Butz v. Economou*, 438 U.S. 478, 506 (1978) (citing *United States v. Lee*, 106 U.S. 196, 220 (1882)).

315. *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998) (citing *Berkovitz v. United States*, 486 U.S. 531, 544 (1988)). See also *Associated Builders & Contractors of Tex. Gulf Coast Inc. v. U.S. Dep't of Energy*, 451 F.Supp. 281, 287 (S.D. Tex. 1978) ("[i]t is also true that individual government agents cannot escape adherence to governmental regulations.").

316. *Service v. Dulles*, 354 U.S. 363, 372 (1957).

317. *Tennessee Valley Auth. v. Whitman*, 336 F.3d 1236, 1246 (11th Cir. 2003).

procedure should be something other than that identified by Congress and responsible chief executive officers. Again, according to the Supreme Court, "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."³¹⁸ Consequently, when Congress specifies the process that is to govern penalty assessment and agency adjudications, as it has in the federal environmental statutes and section 554 of the APA, its specification of the identified process includes the negative of any other mode of process.³¹⁹

The law governing the Administrator's assessment of civil penalties for violations of the federal environmental statutes is clear,

"(a)The only person authorized by Congress to assess, and determine the amount of, civil penalties for violations of the federal environmental statutes is the Administrator,³²⁰ the Administrator has promulgated rules to govern the process by which he will exercise his discretion to do so,³²¹ and he has issued policies to guide those who participate in his civil penalty assessment process."³²²

"(b)Congress has vested authority in ALJs only to initially decide a matter on behalf of an agency³²³ - in the circumstances under discussion, the agency being the Administrator-and provided that

318. *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929). *See also* *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

319. This canon of statutory construction also applies to the interpretation of the Administrator's rules and regulations. *Rucker v. Wabash R.R. Co.*, 418 F.2d 146, 149 (7th Cir. 1969) ("[a]dministrative regulations, like statutes, must be construed by courts, and the same rules of interpretation are applicable in both cases."). Consequently, when the Administrator's Rules "limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills*, 278 U.S. at 289. For instance, when the Administrator, by rule and published decisions, identifies three criteria which an ALJ must consider in determining whether to grant a motion for summary disposition and deny an oral evidentiary hearing, an ALJ cannot ignore those criteria and rule on such a motion based upon different criteria more to his own personal liking.

320. *See supra* Part I.B.1.

321. *See supra* Part II.

322. *See supra* note 70.

323. 5 U.S.C. § 557(b) (2000).

decisionmaking of an ALJ shall be subject to the law and policy of the agency."³²⁴

"(c) Congress has provided that the agency, i.e. the Administrator, is responsible for the contents of its final decisions,³²⁵ and it has provided that a reviewing court shall hold unlawful final agency decisions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."³²⁶

Rather than recognize in the process established by Congress that it is the Administrator who is vested with the exclusive authority to assess and to determine civil penalties for violations of the federal environmental statutes, the Board in its decisions has taken the position that each of the several ALJs assess civil penalties under these statutes, and in determining the amount of penalty to assess, each ALJ is independent. The Board has stated that in determining the amount of penalty to assess, the ALJ "has a choice of either following or deviating from" the Administrator's penalty policies, which choice "operates to preserve not restrict the [ALJ's] independence[;]"³²⁷ that an ALJ can "reject[] an 'appropriate' penalty generated in accordance with the [Administrator's] [p]enalty [p]olicy, in favor of another 'appropriate' penalty" amount the ALJ finds "better suited to the circumstances of [the] particular case[;]"³²⁸ and that, given an "ALJ's authority to assess a penalty," the Administrator's policy "does not limit the ALJ's authority to assess a penalty that is otherwise in accordance with the statutory factors."³²⁹

The Board's position does not account for the language of the federal environmental statutes and the APA, as well as efforts made by the Administrator to assure that his final decisionmaking will be in conformance with applicable requirements of those statutes. The Administrator requires ALJs to consider various penalty policies

324. *Id.* § 556(c).

325. *Id.* § 557(b).

326. *Id.* § 706.

327. *In re DIC Ams, Inc.*, 6 E.A.D. 184, 190-91 (1995).

328. *In re Employers Ins. Of Wausau & Group Eight Tech., Inc.*, 6 E.A.D. 735, 759 (1997).

329. *In re U.S. Army, Fort Wainwright Cent. Heating & Power Plant*, 11 E.A.D. 126, 172 (2003).

when determining appropriate penalty amounts in their initial decisions for violations of the federal environmental statutes.³³⁰ The policies are the Administrator's interpretations of statutory penalty criteria which Congress, in the federal environmental statutes, directs the Administrator to consider in determining penalty amounts he will assess.³³¹ These policies, issued by senior officers to whom he has delegated his policy-making authority, incorporate the Administrator's adopted methodologies for determining penalty amounts. The Administrator's use of such policies is based upon sound observation: the "consistent application of a penalty policy" is necessary "because otherwise the resulting penalties might be seen as being arbitrarily assessed," and "[t]reating similar situations in a similar fashion is central to the credibility of EPA's enforcement effort."³³² Is it not true that, in determining appropriate penalty amounts for violations of the federal environmental statutes, treating similar situations in a similar fashion is necessary to assure that penalty amounts assessed by the Administrator against violators will be in conformance with section 706 of the APA,³³³ and not be arbitrary or capricious? Rather than act upon its responsibility to the Administrator for assuring consistency in the Administrator's adjudications, and "assur[ing] that final decisions represent with [sic] the position of the Agency as a whole, rather than just the position of . . . one Presiding Officer,"³³⁴ the Board has "many times stated that it will generally not substitute its judgment for that of an ALJ absent a showing that the ALJ committed clear error or an abuse of discretion in assessing a penalty."³³⁵

While on occasion the Board has articulated the need for applying the Administrator's policies, and used the policies to support penalty amounts assessed in some final decisions of the Administrator,³³⁶ the Board has been equally willing to adopt in other final decisions of the

330. 40 C.F.R. § 22.27(b) (2006).

331. *See supra* note 12.

332. Policy GM-22, *supra* note 70, at 27.

333. 5 U.S.C. § 706 (2000).

334. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 64 Fed. Reg. 40,138, 40,165 (July 23, 1999) (codified at 40 C.F.R. pt. 22).

335. *In re CDT Landfill Corp.*, 11 E.A.D. 88, 117 (2003).

336. *See supra* notes 148-49.

Administrator penalty determinations of an ALJ where the ALJ's determination is based upon the statutory criteria rather than the Administrator's policy,³³⁷ where the ALJ's determination fails to recognize the existence of the Administrator's policy,³³⁸ where the ALJ's determination results from his finding that the Administrator's policy is "arbitrary and unauthorized by the statute,"³³⁹ and where the Board openly recognizes that the ALJ "failed to discuss, or even mention, the Agency penalty policy,"³⁴⁰ that his penalty determination "does not fully conform to the regulatory requirements,"³⁴¹ and that the Board does not endorse the ALJ's determination.³⁴² From the language of its decisions, it appears that the Board, as well as the ALJs assigned to the agency, have overlooked a fundamental and distinctive principle of the statutory administrative process: all authority exercised in the Administrator's penalty assessment process, whether by delegated complainants, ALJs, or the Board, is authority held by the Administrator and assigned to these officers, and, as a consequence of the assignment, each officer acts subject to the Administrator's law and policy.³⁴³

The effect of this principle can be illustrated readily. The federal environmental statutes require that before the Administrator may assess a penalty, which the Administrator must determine by evaluating the evidence in consideration of the statutory penalty criteria, the Administrator must provide to the alleged violator a

337. In re V-1 Oil Co., 8 E.A.D. 729, 753 (2000).

338. In re John A. Capozzi, 11 E.A.D. 10, 38-39 (2003).

339. In re Hall Signs, Inc., U.S. Env't Prot. Agency No. 5-EPCRA-96-026, 8 (Oct. 30, 1997) (initial decision).

340. In re F.R. & S, Inc., U.S. Env't Prot. Agency Appeal No. CAA 03-2002-0215, 2 (March 17, 2005) (order).

341. *Id.* at 1.

342. *Id.* at 3.

343. Although ALJs are independent fact-finders and initial decision makers by statute of Congress, they are subordinate to the Administrator on matters of law and policy. *See supra* note 24. The Board is subordinate to the Administrator as the Board is a creation of the Administrator. *See* 57 Fed. Reg 5320 (Feb. 13, 1992). The Administrator's delegated complainants and enforcement staff, who issue and prosecute his notices of proposed penalty orders (i.e., complaints), are subordinate by virtue of the delegation.

notice of the proposed penalty order.³⁴⁴ Both the Administrator's delegated complainant signing a notice of the proposed penalty order and the Board issuing the final order assessing civil penalties are each delegated authority to so act from the very same Administrator.³⁴⁵ An ALJ's authority to preside over the litigation of an action, and to issue initial decisions, is assigned by the same Administrator.³⁴⁶

The penalty amount found appropriate in the initial decision of an ALJ and the penalty amount assessed in the final decision of the Board may differ from that proposed by the Administrator's delegated complainant. Reasons for this may be that evidence in the final record differs from that relied upon when the complaint was prepared and issued, or the Administrator's delegated complainant incorrectly applied the policy. If consistent, non-arbitrary, and non-capricious agency action is the goal, however, it is irrational for the Administrator to provide one interpretation of the statutory penalty

344. *See, e.g.*, CWA, 33 U.S.C. § 1319(g)(4) (2000); TSCA 15 U.S.C. § 2615(a)(2)(A) (2000); FIFRA, 7 U.S.C. § 136l(a)(3) (2000); EPCRA, 42 U.S.C. § 11045(b)(1)(B) (2000); CAA 42 U.S.C. § 7413(d)(2) (2000); SDWA 42 U.S.C. § 300g-3(g)(3) (2000); MPRSA, 33 U.S.C. § 1415(a) (2000); SWDA, 42 U.S.C. § 6928(a)(2) (2000).

345. The Circuit Court of Appeals for the District of Columbia described the exercise of the Office of Thrift Supervision's statutory enforcement process, which also is governed by the APA, as follows: A notice of charges may be issued when the agency has 'reasonable cause to believe' that the respondent is engaging in unsafe or unsound practices or is otherwise violation the law. 12 U.S.C. § 1818(b)(1). The notice is in the nature of a complaint. In issuing a notice, the OTS Director is performing a prosecutorial function. Ultimately, the Director may perform a different role in the same case, acting as a quasi-judicial officer passing judgment on the evidence bearing on the charges. Although the Administrative Procedure Act generally forbids agency personnel from engaging in both the prosecution and the decision of a case, an exemption permits a member of the body comprising the agency to wear both hats. *Doolin Sec. Sav. Bank v. Office of Thrift Supervision*, 139 F.3d 203, 212 n.8 (D.C. Cir. 1998)(citations omitted). Likewise, in the federal environmental statutes, Congress provides that "the Administrator"-who, as we have seen, is the "agency" under the APA-is to issue both the "notice" of the proposed penalty order, and issue the final order "assessing" the penalty, determining the amount of penalty in consideration of the statutory penalty criteria identified by Congress. *See supra* Part I(B)(1) and note 20. The exemption, in part, reads as follows, "This subsection does not apply . . . (C) to the agency or a member or members of the body comprising the agency." 5 U.S.C. § 554(d)(2)(C).

346. 40 C.F.R. §§ 22.4(c), 22.27(a) (2006).

criteria and a penalty determination methodology for proposing penalty amounts to assess, yet allow other differing interpretations and methodologies, or no interpretation and methodology at all, for use in determining penalty amounts the Administrator will actually assess. Likewise, if consistent, non-arbitrary, and non-capricious decisionmaking is the goal, it is irrational to adopt in final decisions of the Administrator penalty amount determinations made by each of the ALJs based upon their own personal notions of statutory interpretation, policy and fairness, ignoring or rejecting the Administrator's statutory interpretations and adopted penalty calculation methodologies set out in his policies.

The Administrator is also responsible for all rulings of law made in the administrative record out of which the final decision issues. When rulings on points of law—for example, whether an issue has been properly raised for hearing; whether summary disposition is appropriate; whether prerequisites have been met by a party so as to enable it to have information introduced into evidence—are not made by applying the criteria of the Administrator's promulgated rules and published decisions, but are made based upon a particular ALJ's personal notions of fairness, any inconsistencies, i.e., arbitrary and capricious rulings, are the responsibility of the Administrator.³⁴⁷

Inconsistencies in statutory interpretation and penalty calculation methodologies applied by decision makers in determining appropriate penalties to be assessed by the Administrator, and inconsistencies in criteria applied by ALJs in ruling on issues raised in litigation, cannot be written off to the unavoidable diversity in views of each of the several decision makers as, by section 557(b) of the APA, Congress makes the Administrator responsible for all final decisions, allowing him to reject in whole or in part any finding or conclusion in any initial decision of an ALJ.³⁴⁸ Moreover, in section 706 of the APA, Congress requires that the Administrator's final decisions be consistent and not arbitrary and capricious.³⁴⁹ Again, the Administrator's delegation of his decision-making authority

347. 5 U.S.C. § 706 (2000).

348. 5 U.S.C. § 557(b) (2000).

349. *Id.* § 706(2)(a).

"[does] not . . . relieve him of the responsibility for action taken pursuant to the delegation."³⁵⁰

The Circuit Court of Appeals for the District of Columbia recognized the need for administrators to exercise control over their decisionmaking process, and the dangers presented when that responsibility is not met, "To protect these interests [life, health, and liberty] from administrative arbitrariness, it is necessary, but not sufficient, to insist on strict judicial scrutiny of administrative action. For judicial review alone can correct only the most egregious abuses. Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible. Rules and regulations should be freely formulated by administrators, and revised when necessary. Discretionary decisions should more often be supported with findings of fact and reasoned opinions. When administrators provide a framework for principled decision-making [sic], the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative process, and to improve the quality of judicial review in those cases where judicial review is sought."³⁵¹

The Administrator is an administrative officer who, consistent with his obligations under the federal environmental statutes and the APA, has set out in detail standards and principles that are to govern his discretionary decisions. These standards and principles are in his promulgated rules, and the penalty policies he has issued through his delegated policy-making officers. This is the "framework for principled decision-making [sic]"³⁵² that the Administrator has provided for those who serve him and are subordinate to him on matters of law and policy, including the Board, ALJs and his delegated complainants. But the concerns expressed by the Court cannot be satisfied when the Administrator's decision makers adopt a belief that their decisionmaking is independent of this framework established by the Administrator and ignore it. Nor can those

350. *Skokomish Indian Tribe v. Gen. Servs. Admin.*, 587 F.2d 428, 431-32 (9th Cir. 1978).

351. *Env'tl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971) (citations omitted).

352. *Id.*

concerns be met when the Board will adopt as a final decision of the Administrator an initial decision of an ALJ which the Board does not endorse,³⁵³ and which the Board finds "does not appear to conform fully to the requirements set forth in the [Administrator's] regulations."³⁵⁴

The same Court, addressing integrity in a legal process, has recognized that "[s]trategic or merely lazy circumventions of a legal process grounded in a sound policy have the effect of eroding the regularized, rational character of litigation to the detriment of practitioners and clients alike."³⁵⁵

Strategic design and laziness are not the only ways in which a legal process can be circumvented and eroded. When ALJs are recognized to have the discretion to rule on issues of law without regard to criteria established by the Administrator in his promulgated rules and published decisions, and each of several ALJs informs his or her rulings with no more than his or her own personal notions of fairness regarding any issue at hand, there is also a "circumvention[]" of a legal process" which can "have the effect of eroding the regularized, rational character of litigation to the detriment of practitioners and clients alike."³⁵⁶ Under such circumstances, parties to a proceeding cannot know ahead of time whether the particular ALJ presiding will apply the Administrator's rules and policies or whether the ALJ will apply his or her own notions of process and policy, and without knowing what if any legal standards and policy premises will be applied, competent and professional preparation of cases by parties simply is not possible. Moreover, without the consistent application of agency legal standards and policy premises, it is not possible for the agency to provide meaningful training to staff attorneys who prepare and present these cases on behalf of the Administrator. Finally, as the entire purpose of the Administrator's penalty assessment process is to provide a deterrent to those who would otherwise damage the environment or put it at risk, any erosion of the regularized, rational character of litigation carried on

353. *In re F.R. & S, Inc.*, U.S. Env't'l Prot. Agency Appeal No. CAA 03-2002-0215, 3 (March 17, 2005) (admin. review).

354. *Id.* at 1.

355. *Harris v. Sec'y, U.S. Dep't of Veteran Affairs*, 126 F.3d 339, 345 (D.C. Cir. 1997).

356. *Id.*

in that process is a detriment to the Administrator's client, the public interests Congress sought to further in the federal environmental statutes.

A distinctive characteristic of the administrative process is that the judge in the process has legal authority only to issue initial decisions, and in doing so is "[s]ubject to the published rules of the agency," with the agency responsible for the content of the final decision.³⁵⁷ In addressing the role of an ALJ, the D.C. Circuit Court of Appeals has recognized the following, "The basic concept of the independent administrative law judge requires that he conduct the cases over which he presides with complete objectivity and independence. In so operating, however, he is governed, as in the case of any trial court, by the applicable and controlling precedents. These precedents include the applicable statutes and agency regulations, the agency's policies as laid down in its published decisions, and applicable court decisions. . . . [O]nce the agency has ruled on a given matter, [moreover,] it is not open to reargument by the administrative law judge; . . . although an administrative law judge on occasion may privately disagree with the agency's treatment of a given problem, it is not his proper function to express such disagreement in his published rulings or decisions."³⁵⁸

Consequently, in determining an appropriate amount of penalty for violations in an initial decision, an ALJ is bound by law to comply with the Administrator's Rules. Specifically, an ALJ must consider the Administrator's penalty policy, and, if determining a penalty amount appropriate other than the amount proposed by the Administrator's delegated complainant, an ALJ must "set forth in the initial decision the specific reasons for the increase or decrease."³⁵⁹ In determining whether to grant a motion filed during the litigation of any penalty action before the Administrator, the ALJ is bound by law to rule on the motion by applying criteria identified in the Administrator's promulgated rules and published decisions, as such rules and decisions are applicable precedent.

357. 5 U.S.C. §§ 556(c), 557(b) (2000).

358. *Iran Air v. Kugelman*, 996 F.2d. 1253, 1260 (D.C. Cir. 1993) (quoting Joseph Zwerdling, *Reflections on the Role of an Administrative Law Judge*, 25 ADMIN. L. REV. 9, 12-13 (1973)).

359. 40 C.F.R. § 22.27(b) (2006).

No particular penalty policy of the Administrator, or, for that matter, a particular promulgated rule, is sacrosanct. Based upon experience, rules and policies may be in need of periodic revision. On judicial review, a violator who challenges the amount of penalty assessed by the Administrator, determined by an application of his penalty policy, may be able to convince a reviewing court that the policy, in whole or in part, is "arbitrary and unauthorized by statute,"³⁶⁰ that it "operates as an edict,"³⁶¹ or that in some other manner it is defective.³⁶²

Likewise, a court may determine on judicial review that some procedural regulation of the Administrator is defective as a matter of law. When a federal statute provides for judicial review in a U.S. District Court or U.S. Court of Appeals, it is the duty of the reviewing court to make those determinations. Congress, however, has not invested ALJs with the authority of a court of judicial review. An ALJ is a "creature of congressional enactment" and a "semi-independent subordinate hearing officer"³⁶³ whose decisionmaking Congress makes subordinate to the Administrator on matters of law

360. *In re Hall Signs, Inc.*, U.S. Env'tl Prot. Agency No. 5-EPCRA-96-026, 6 (Oct. 30, 1997) (initial decision).

361. *In re GCA Chemical Corp.*, U.S. Env'tl Prot. Agency No. TSCA-4-2000-0130, 12 (2002).

362. When challenged on judicial review, courts have upheld penalty amounts assessed by the Administrator in final decisions issued by the Board, determined by applying the Administrator's adopted penalty policy. An assessed penalty of \$ 108,792 for EPCRA violations was upheld, notwithstanding that, in his initial decision, the ALJ found a penalty amount of \$ 39,792 to be appropriate. See *Catalina Yachts, Inc. v. U.S. EPA*, CV99-07357 (C.D.D.C. Calif. 2000). An accelerated decision assessing a penalty of \$ 1.345 million for TSCA violations was upheld. *Newell Recycling Co., Inc. v. EPA*, 231 F.3d 204, 208-09 (5th Cir. 2000). A final penalty order issued by the Board assessing a \$ 175,000 penalty for FIFRA violations was upheld. *Sultan Chemists, Inc. v. U.S. EPA*, 281 F.3d 73 (3rd Cir. 2002). In *Newell Recycling Company, Inc.*, the Court noted that "[t]he Penalty Policy makes the gravity-based determination process mostly mechanical by pegging the above-described factors (the nature, circumstances, gravity and extent of the violation [footnote omitted]) to statistical benchmarks or fixed formulations," but, based upon the evidence, it held that the penalty amount assessed against Newell "rightly characterized Newell's [violations] as a 'High Range, Level One' violations." *Id.* at 208.

363. *Ramspeck v. Fed. Trial Exam'rs Conference*, 345 U.S. 128, 132-33 (1953).

and policy,³⁶⁴ and, therefore, an ALJ does not have the authority to overturn the Administrator's rulemaking and policies, either directly or simply by ignoring the rulemaking and policies.

If final decisions of the Administrator are to comply with APA criteria and fulfill the Administrator's obligations, the Board cannot defer to the discretion of an ALJ on matters of law and policy. On the contrary, the Board has a duty to assure that findings and conclusions of law and discretion in any final decision issued on behalf of the Administrator are consistent with the rulemaking, policies and precedent of the Administrator, and, therefore, not arbitrary, capricious or "otherwise not in accordance with law."³⁶⁵ If findings and conclusions of law and discretion in the initial decision of an ALJ are consistent with the rulemaking, policies and precedent of the Administrator, the initial decision meets the criteria of section 706 of the APA,³⁶⁶ and the Board is warranted in adopting the ALJ's initial decision as the final decision of the Administrator. If the initial decision does not meet those criteria, the Board must issue a final decision and "modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed," and it must "set forth in the final order the reasons for its actions."³⁶⁷ To fulfill its review obligations, the Board must assure that final decisions issued on behalf of the Administrator are consistent, and not arbitrary, capricious or "otherwise not in accordance with law."³⁶⁸ To this it must be added that, once the

364. *See supra* note 24.

365. 5 U.S.C. 706(2)(A) (2000).

366. *Id.*

367. 40 C.F.R. § 22.30(f) (2006).

368. 5 U.S.C. § 706 (2000). For several years the GAO has been working with EPA in an attempt to remedy the agency's "difficulties in ensuring consistent and equitable enforcement actions among its regions and among the states," and has been reporting to Congress on its efforts. U.S. Gov't Accountability Office, Environmental Compliance and Enforcement: EPA's Effort to Improve and Make More Consistent Its Compliance and Enforcement Activities, 1 (2006) (containing the statement of John B. Stephenson, Director, Natural Resources and Environment, before the Senate Committee on Environment and Public Works, 109th Cong.). A problem area identified by the GAO has been inconsistency in the amount of penalties assessed for noncompliance with environmental regulations. While acknowledging the agency's efforts to address its problems, the GAO concluded, in part, "[w]hile we applaud EPA's actions, they have thus far achieved

Board has ruled on a given matter in a published decision of the Administrator, that ruling becomes agency precedent, and, until such time as the Board might revise it, that precedent "is not open to reargument by the [ALJ]."³⁶⁹

The proposed standard of review clearly is supported by the language of the federal environmental statutes³⁷⁰ and the APA,³⁷¹ as interpreted by the courts; the Administrator's Rules;³⁷² and the Administrator's public pronouncement that the Board "is responsible for assuring consistency in Agency adjudications by all of the ALJs" and that it "assures that final decisions represent with [sic] the position of the Agency as a whole, rather than just the position of" one ALJ.³⁷³ As the proposed standard of review arises from the language of the statutory provisions governing the administrative process rather than a template borrowed from the judicial process, the

only limited success and illustrate both the importance and the difficulty of addressing the long-standing problems in ensuring the consistent application of enforcement requirements, fines and penalties for violations of requirements." *Id.* at 13. It is the author's hope that, in a positive and constructive way, by revisiting the fundamental principles of law governing the administrative process and illustrating the need for those who participate in the process to conform with the governing law, this article contributes to efforts being made to enable the Administrator's civil penalty assessment process to better manifest "the consistent application of enforcement requirements, fines and penalties for violations" of the federal environmental statutes and regulations. When, in accordance with the Administrator's obligations under the governing statutes, the Board takes responsibility for the consistent interpretation and application of the Administrator's rules and policy in his final decisions, and ALJs accept their subordination to agency law and policy as interpreted in the Board's decisions, the uniform law and policy applied in all cases will enable the Administrator to move nearer to realizing the goal of consistency in his penalty assessments. Moreover, the Administrator's enforcement staff in all regions can then look to the Board's decisions to consistently prepare and present the Administrator's enforcement actions, as can all parties who appear before the Administrator, knowing that the principles of law and policy to be applied will not vary from ALJ to ALJ, and from case to case.

369. *Iran Air v. Kugelman*, 996 F.2d. 1253, 1260 (D.C. Cir. 1993).

370. *See supra* note 12.

371. *See* 5 U.S.C. §§ 551-559, 706 (2000).

372. 40 C.F.R. §§ 22.27 & § 22.30 (2006).

373. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 64 Fed. Reg. 40,138, 40,165 (July 23, 1999) (codified at 40 C.F.R. pt. 22).

consistent application of the standard will avoid the pitfall of which Justice Frankfurter many years ago warned: failing to observe the "vital differentiations between the functions of judicial and administrative tribunals," and, as a consequence, "read[ing] the laws of Congress through the distorting lenses of inapplicable legal doctrine."³⁷⁴

374. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 144 (1940).