Errata (Correction Notice)

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Errata (Correction Notice)


The 2007-2008 Journal of the National Association of Administrative Law Judiciary published a republication of Mr. Richard Wagner's article entitled, *Administrative Decisionmaking by Judges in the United States' Environmental Protection Agency Administrator’s Civil Penalty Assessment Process: Whatever Happened to the Law?*. The staff mistakenly published long quotes in an improper format, thus altering Mr. Wagner's article. Please accept J. NAALJ's apology for any inconvenience this has caused Mr. Wagner and our subscribers. The following is a list of corrections from the article published in the Vol. 28.1 issue of J.NAALJ published in Spring 2008. For the original publication of Mr. Wagner's article please see volume 32 of the William and Mary Environmental Law & Policy Review.

**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

1) 28 J.NAALJ 80, 81 n.4 (2008). The following should be in block quote format:

   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.

2) 28 J.NAALJ 80, 81 n.4 (2008). The following should be in block quote format:

   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.

3) 28 J.NAALJ 80, 82 (2008). The following should be in block quote format:

[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.

4) 28 J.NAALJ 80, 83 (2008). The following should be in a block quote format and italicized for emphasis:

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.

5) 28 J.NAALJ 80, 84 (2008). The following should be in block quote format:

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 given 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.

6) 28 J.NAALJ 80, 84-5 (2008). The following should be in block quote format:

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

7) 28 J.NAALJ 80, 85 (2008). The following should be in block quote format:

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.

8) 28 J.NAALJ 80, 88 n.30, The following should be in block quote format:

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.

9) 28 J.NAALJ 80, 89 n.30 (2008). The following should be in block quote format:

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.

10) 28 J.NAALJ 80, 90 (2008). The following should be in a bulleted list format:

- 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,
11) 28 J.NAALJ 80, 91-92 (2008). The following should be in block quote format:

"[t]he EAB is responsible for assuring consistency in Agency adjudications by all of the ALJs and RJOs [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 [sic] the position of the Agency as a whole, rather than just the position of one Region, one enforcement office, or one Presiding Officer."

12) 28 J.NAALJ 80, 92 (2008). The following should be in block quote format:

"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 the complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease."

13) 28 J.NAALJ 80, 93 (2008). The following should be in block quote format:

"[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."

14) 28 J.NAALJ 80, 94 (2008). The following should be in block quote format:

"serves as the principle 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.

15) 28 J.NAALJ 80, 95 (2008). The following should be in block quote format:

[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.

16) 28 J.NAALJ 80, 98 (2008). The following should be in block quote format:

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.

17) 28 J.NAALJ 80, 98 (2008). The following should be in block quote format:

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.

18) 28 J.NAALJ 80, 101 n.95 (2008). The following should be in block quote format:

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 judges; 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.

19) 28 J.NAALJ 80, 107-08 (2008). The following should be in block quote format:

by reviewing the Region’s [Administrator’s delegated complainant’s, or enforcement staff’s] analysis of the statutory factors and 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.’

20) 28 J.NAALJ 80, 110 (2008). The following should be in block quote format:

[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.

21) 28 J.NAALJ 80, 113 (2008). The following should be in block quote format:

[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 access a civil penalty.
22) 28 J.NAALJ 80, 117 (2008). The following should be in block quote format:

Although 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.

23) 28 J.NAALJ 80, 119 (2008). The following should be in block quote format:

Pursuant 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.

24) 28 J.NAALJ 80, 121 (2008). The following should be in block quote format:

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.

25) 28 J.NAALJ 80, 121 (2008): The following should be in block quote format:

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).

26) 28 J.NAALJ 80, 122-23 (2008). The following should be in block quote format:

Because the [policy] 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 [ALJ] departs from the [policy] and looks to the statutory criteria to determine an appropriate penalty.
27) 28 J.NAALJ 80, 130 (2008). The following should be in block quote format:

   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.

28) 28 J.NAALJ 80, 130-31 (2008). The following should be in block quote format:

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

29) 28 J.NAALJ 80, 133 n.259 (2008). The following should be in block quote format:

   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].

30) 28 J.NAALJ 80, 144 (2008). The following should be in block quote format:

   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.’

31) 28 J.NAALJ 80, 145-46 (2008). The following should not have been quoted:

   (a) The only person authorized by Congress to assess, and determine the amount of, civil penalties for violations of the fed-
eral environmental statutes is the Administrator, the Administrator has promulgated rules to govern the process by which he will exercise his discretion to do so, and he has issued policies to guide those who participate in his civil penalty assessment process. [footnotes excluded for errata]

(b) Congress has vested authority in ALJs only to initially decide a matter on behalf of an agency – in the circumstances under discussion, the agency being the Administrator – and provided that decisionmaking of an ALJ shall be subject to the law and policy of the agency. [footnotes excluded for errata]

c) Congress has provided that the agency, i.e. the Administrator, is responsible for the contents of its final decisions, 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. [footnotes excluded for errata]

32) 28 J.NAALJ 80, 149 n.345 (2008). The following should be in block quote format:

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.

33) 28 J.NAALJ 80, 151 (2008). The following should be in block quote format:

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 principals
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 administra-
tive process, and to improve the quality of judicial
review in those cases where judicial review is sought.

34) 28 J.NAALJ 80, 153 (2008). The following should be in block
quote format:

The basic concept of the independent administrative
law judge requires that he conduct the cases over
which he presides with complete objectivity and in-
dependence. In so operating, however, he is gov-
erned, as in the case of any trial court, by the
applicable and controlling precedents. These prece-
dents include the applicable statutes and agency reg-
ulations, 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 ad-
ministrative law judge; ... although an administra-
tive law judge on occasion may privatively 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.