

# CLOSE ENOUGH FOR GOVERNMENT WORK?— USING INFORMAL PROCEDURES FOR IMPOSING ADMINISTRATIVE PENALTIES

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## INTRODUCTION

No regulatory system can be effective without enforcement, and monetary penalties are both historically accepted and generally believed to be an important enforcement tool. There are several models for monetary penalties. One is the model of criminal fines.<sup>1</sup> As practically the only criminal penalty available to non-natural persons, and as an adjunct to other criminal sentences, criminal fines continue to play an important role in regulatory enforcement. Both the nature of the offense and the resources required to prosecute criminal cases, however, necessarily limit their reach.

Another model is the judicially imposed civil penalty.<sup>2</sup> Under this model, the burden of proof is on the agency to prove the violation, and the determination of the violation is a jury question.<sup>3</sup> The court determines the amount of the penalty.<sup>4</sup> Traditionally,

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<sup>1</sup> See, e.g., 33 U.S.C. § 1319(c) (1988) (providing criminal penalties of not less than \$2500 nor more than \$25,000 per day for a first time negligent violation, rising to \$50,000 per day for subsequent negligent violations; not less than \$5000 nor more than \$50,000 per day for a first time knowing violation, rising to \$100,000 per day for subsequent violations; not more than \$250,000 for a violation which the person knows places another person in imminent danger of death or serious bodily injury, rising to \$1 million if the person is an organization; and \$10,000 for a first time false statement, rising to \$20,000 for subsequent violations).

<sup>2</sup> See, e.g., 33 U.S.C. § 1319(d) (1988) (up to \$25,000 per day for each violation).

<sup>3</sup> See *Tull v. United States*, 481 U.S. 412 (1987).

<sup>4</sup> See, e.g., 33 U.S.C. § 1319(d) (1988) (listing factors court shall consider in “determining the amount of a civil penalty”). The law does not appear to be clear as to whether the burden of proof or persuasion lies with the government to support a particular money penalty or with the defendant to reduce the maximum statutory amount below its maximum level. See, e.g., *Atlantic States Legal Found. v. Tyson Foods*, 897 F.2d 1128, 1142 (11th Cir. 1990) (holding that once a violation of the Clean Water Act is made out, some fine is required and remanding to district court

this judicial model was the primary means provided for assessing a civil penalty. The amount of government resources necessary to bring such a case, however, militates against using this tool except in "big" cases.

A third model involves the administrative assessment of a monetary penalty, but this model has at least three subsets. At one pole is the administrative penalty imposed through a formal adjudication under the Administrative Procedure Act (APA).<sup>5</sup> Here the administrative adjudication mirrors the trial in the judicially imposed civil penalty. The agency has the burden of proving the violation.<sup>6</sup> An Administrative Law Judge (ALJ) generally makes a recommended or initial decision as to the violation and the amount of the penalty.<sup>7</sup> After the opportunity for parties to file exceptions, the agency makes the final decision based on the record. This decision may then be reviewed under the APA or a specific review statute, which usually would require the reviewing court to uphold the agency determination and penalty amount if supported by substantial evidence in the record.<sup>8</sup> If the penalty amount is not adequately justified, the court should not itself set the penalty amount at the right level but should remand to the agency to set the amount, because it is the agency that is to assess the penalty.

At the other pole is an agency assessment of a penalty after informal or no procedures at all. Here the administrative assessment is more like an administrative complaint; it is what the agency thinks to be the case, what the agency alleges to be true, and what the agency thinks is appropriate as a penalty. The agency need not involve the Department of Justice or the courts when making the assessment or, most importantly, when compromising the penalty amount. Traditionally, the understanding was that the agency could not collect this assessment, absent agreement, without a judicial proceeding in which the agency assessment would be subject to *de novo* review.<sup>9</sup> What both these poles have in common is that the defendant has an opportunity for a full trial as to liability and pen-

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first to determine maximum statutory fine applicable to defendant and then to determine whether a lesser amount is appropriate in light of penalty factors).

<sup>5</sup> See 5 U.S.C. §§ 554, 556, 557 (1988).

<sup>6</sup> See 5 U.S.C. § 556(d) (1988).

<sup>7</sup> See, e.g., *All Regions Chem. Labs, Inc. v. EPA*, 932 F.2d 73 (1st Cir. 1991).

<sup>8</sup> See, e.g., 5 U.S.C. § 706(2)(E) (1988). Review of the penalty amount, as opposed to the fact of violation, may also be reviewed on the basis of abuse of discretion, because of the notion that setting a penalty amount is an exercise of discretion. See, e.g., 33 U.S.C. § 1319(g)(8) (1988).

<sup>9</sup> Colin Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1439 (1979).

alty amount before a strictly neutral judge, in one instance before a court, in the other before an ALJ.

These two poles, however, do not exhaust the possibilities of the administrative penalty assessment model. Between them is the situation where the statute calls for or allows the use of informal administrative procedures—that is, something less than a formal, APA proceeding<sup>10</sup>—but the judicial review is not *de novo*. Instead, it is deferential review; either substantial evidence review<sup>11</sup> or arbitrary, capricious, or abuse of discretion review.<sup>12</sup> Here the defendant does not receive a full trial anywhere.

In 1986, for apparently the first time, Congress expressly provided for the last of these situations, authorizing the Administrator of the Environmental Protection Agency (EPA) to impose administrative penalties using procedures “not . . . subject to Section 554 or 556 of Title 5” but which “shall provide a reasonable opportunity to be heard and to present evidence.”<sup>13</sup> A person assessed a penalty under these procedures could seek review before a district court, which could set aside the penalty assessment only if there was not substantial evidence on the record, taken as a whole, to support the finding of violation, or if the amount of the penalty assessed constituted an abuse of discretion.<sup>14</sup> Within a year, Congress passed three more laws with similar provisions.<sup>15</sup> Each of these three created a two-tier penalty structure, specifically requiring a formal, APA adjudication for the larger (Class II) penalties, while explicitly or implicitly providing for informal procedures to

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<sup>10</sup> See, e.g., 33 U.S.C. § 1319(g)(2)(A) (1988) (requiring an opportunity to request a hearing at which one might be heard and present evidence, but not a formal, APA hearing before assessing a penalty not to exceed \$25,000 for violating requirements of the Clean Water Act).

<sup>11</sup> See, e.g., 33 U.S.C. § 1319(g)(8) (1988) (substantial evidence review of the violation and abuse of discretion review for the amount of the penalty).

<sup>12</sup> See 5 U.S.C. § 706(2)(A) (1988). Absent a specific review statute, which, however, is increasingly evident, the fall-back position of APA review might have been *de novo* review under 5 U.S.C. § 706(2)(F) (1988), but that provision has been largely eliminated from administrative law after the Court's explanation in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

<sup>13</sup> Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, § 202, 100 Stat. 654 (1986) (codified at 42 U.S.C. § 300h-2(c)(1988)).

<sup>14</sup> See 42 U.S.C. § 300h-2(c)(6) (1988).

<sup>15</sup> Water Quality Act of 1987, Pub. L. No. 100-4, § 314(a), 101 Stat. 46 (1987) (codified at 33 U.S.C. § 1319(g) (1988)); Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, § 109(a), 100 Stat. 1633 (1986) (codified at 42 U.S.C. § 9609(a)(1988)); Emergency Preparedness and Community Right-to-Know Act, Pub. L. No. 99-499, § 325(b), 100 Stat. 1753 (1986) (codified at 42 U.S.C. § 11045(b)(1988)).

govern lesser (Class I) penalties.<sup>16</sup>

While these were not the first and are not the only administrative penalties to be imposed after only informal procedures,<sup>17</sup> they are different because Congress apparently made a conscious decision that the formal procedures of the APA should not apply, and there is some indication that this decision in 1986 and 1987 was not an isolated incident. In 1990, Congress expressly provided in two more statutes for the two-tier penalty system where the larger penalties require formal, APA adjudication but the lesser penalties do not.<sup>18</sup>

If this constitutes a trend toward greater use of informal procedures for assessing administrative penalties, it would be in tension with the long-standing and consistent recommendations of the Administrative Conference of the United States,<sup>19</sup> as well as the views and recommendations of administrative law scholars of all stripes.<sup>20</sup> The purpose of this Article is to explore this development and its implications. Part I briefly surveys the history of administrative penalties to provide the legal background against which Congress's recent actions take place. Part II explores the legislative history of the recent statutes to determine why Congress wished to make the formal procedures of the APA inapplicable to the particular penalties involved. Part III describes the informal procedures EPA, the Corps of Engineers and the Coast Guard have used to implement their penalty programs. Part IV then relates the

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<sup>16</sup> Compare 33 U.S.C. § 1319(g)(2)(A) (1988) (requiring formal adjudication for Class II penalties) with 33 U.S.C. § 1319(g)(2)(B) (1988) (explicitly mandating non-APA proceedings for Class I penalties); 42 U.S.C. § 9609(a) (1988) (requiring formal adjudication for Class II penalties) with 42 U.S.C. § 9609(b) (1988) (implicitly providing for non-APA proceedings for Class I penalties); 42 U.S.C. § 11045(b)(1) (1988) (requiring formal adjudication for Class II penalties) with 42 U.S.C. § 11045(b)(2) (1988) (implicitly providing for non-APA proceedings for Class I penalties).

<sup>17</sup> See, e.g., *United States v. Indep. Bulk Transport, Inc.*, 480 F. Supp. 474 (S.D.N.Y. 1979) (Coast Guard assessment of penalties under Federal Water Pollution Control Act).

<sup>18</sup> Oil Pollution Control Act of 1990, Pub. L. No. 101-380, § 4301(b)(6), 104 Stat. 51 (1990) (codified at 33 U.S.C. § 1321(b)(6) (Supp. III 1990)); Clean Air Act Amendments of 1990, Pub. L. No. 100-549, § 701, 104 Stat. 2672 (1990) (codified at 42 U.S.C. § 7413(d) (Supp. III 1990)).

<sup>19</sup> See Recommendation No. 79-3, Agency Assessment and Mitigation of Civil Money Penalties, 1 C.F.R. § 305.79-3(c) (1991); Recommendation No. 72-6, Civil Money Penalties as a Sanction, 1 C.F.R. § 305.72-6 (1991).

<sup>20</sup> See, e.g., Diver, *supra* note 9; Antonin Scalia & Frank Goodman, *Procedural Aspects Of The Consumer Product Safety Act*, 20 U.C.L.A. L. Rev. 899 (1973); Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction By Federal Administrative Agencies*, in 2 Recommendations and Reports of the Administrative Conference of the United States 896 (1972) [hereinafter Goldschmid].

experience that EPA has had using the informal penalty procedures. Finally, Part V addresses the issues raised by these laws, regulations, and practice, especially due process limitations.

This Article concludes that the perception that APA proceedings are more costly and time consuming than non-APA penalty proceedings is not supported by adequate evidence. First, the APA adjudication procedures themselves provide a number of means by which to reduce the time and formality of the particular proceedings. Agencies could, by rule, require ALJs to use various time-saving procedures. Second, the evidence suggests that the length of time involved in penalty proceedings is related more to the amount of the penalty involved than to the type of procedure by which it is assessed. Third, it is the rare penalty case that actually goes to a hearing before an ALJ or hearing officer. Virtually all cases are settled rather than tried.

Agencies have also argued that the cost and limited availability of ALJs also justify exempting administrative penalty proceedings from the APA. Given the few cases that actually need to be tried, it is doubtful whether the cost and limited availability of ALJs would have any significant impact. If, however, the only purpose of exempting the administrative penalty proceedings from the APA is to avoid the requirement for ALJs, the exemption need not be total and should include some requirement for assuring the neutrality and fairness of the substitute hearing officer.

## I. THE HISTORY

Administratively imposed civil penalties are not new to administrative law. For example, as early as 1853, the Supreme Court upheld a Customs-imposed 20-percent penalty duty for an undervaluation of imported goods.<sup>21</sup> The penalty did not rely on judicial enforcement, because Customs merely withheld the imported goods until the entire duty was paid. There was even a provision for an "administrative appeal" of the alleged undervaluation in a hearing before two "discreet and experienced merchants." Their determination was to be "final and conclusive," which the Court interpreted to mean not subject to review by courts except as to their lawful authority. Despite this early endorsement of administratively imposed penalties, certain legal issues kept administrative penalties relatively controversial.

One such issue involved the question whether or when "civil"

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<sup>21</sup> *Bartlett v. Kane*, 57 U.S. (16 How.) 263 (1853).

penalties are really criminal penalties. The issue is an important one, because if the penalty is "criminal," a host of additional procedural and other protections must be afforded defendants. Indeed, defendants have often claimed that the designation of a penalty as civil is just an attempt to avoid providing the protections otherwise available to them. In probably the best known case on the subject, *Helvering v. Mitchell*,<sup>22</sup> Justice Brandeis approached the issue by asking whether the sanction imposed was criminal or civil in its nature. To answer that question he considered four factors: congressional intent, history of similar provisions, whether a government regulatory or revenue purpose was involved, and whether the penalty was "free of the punitive criminal element."<sup>23</sup> In *Helvering v. Mitchell* was accused of fraudulently withholding over \$700,000 in taxes, and the IRS assessed a 50 percent penalty of that amount. The Court had little difficulty in determining that the 50 percent penalty was a "civil," not criminal, penalty. Congress had clearly denominated it civil; there was a long history of civil penalties for underpayment of taxes; the penalty was directly involved in the enforcement of the revenue laws; and there was no stigma or moral reprobation in assessing the penalty.

Many have criticized the *Helvering* analysis as insufficiently determinative,<sup>24</sup> but its example of virtually complete deference to the legislative classification of a penalty is consistent with the Court's treatment of the civil/criminal issue both before and after *Helvering*.<sup>25</sup> Moreover, academic efforts to articulate a clear distinction between civil and criminal penalties have not been wholly successful.<sup>26</sup> Nevertheless, the ability to define a penalty as "civil" is critical to its administrative imposition, because it is widely ac-

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<sup>22</sup> 303 U.S. 391 (1938).

<sup>23</sup> *Id.* at 399-402.

<sup>24</sup> See, e.g., Robert B. McKay, *Sanctions In Motion: The Administrative Process*, 49 IOWA L. REV. 441 (1964). See also *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 554 (1943) (Frankfurter, J., concurring).

<sup>25</sup> See, e.g., *United States v. Ward*, 448 U.S. 242 (1980); *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); *Hepner v. United States*, 213 U.S. 103 (1909) (no 6th Amendment right in judicial assessment of penalty duty); *Ocean Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909); *Stockwell v. United States*, 80 U.S. (13 Wall.) 531 (1871) (100% penalty duty for violating customs law a civil penalty). But see *Lipke v. Lederer*, 259 U.S. 557 (1922) (Court characterized as criminal a tax "penalty" of 100 percent the normal rate of tax for the sale of liquor in violation of National Prohibition Act). Cf. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (deprivation of citizenship penal in character requiring safeguards of Fifth and Sixth Amendments applicable to criminal trials).

<sup>26</sup> McKay, *supra* note 24; Walter Gellhorn, *Administrative Prescription and Imposition of Penalties*, 1970 WASH. U. L.Q. 265 (1970); Goldschmid, *supra* note 20.

cepted that administrative agencies cannot impose criminal penalties.<sup>27</sup>

A perhaps related question involves the Seventh Amendment's right to a jury trial in cases at common law where the amount in controversy exceeds twenty dollars.<sup>28</sup> It was not until 1977 that the Supreme Court decided that whatever the Seventh Amendment required with respect to cases in judicial fora, it did not bar the assignment to an administrative agency of the adjudication of "public rights," including the imposition of money penalties.<sup>29</sup> Thus, agency determination of liability and assessment of money penalties is not subject to the Seventh Amendment, even though, *were the penalty imposed by a court*, the Seventh Amendment would require a jury trial as to liability for civil money penalties (but not of the amount of the penalty to be imposed).<sup>30</sup>

Another legal issue raised in objection to the administrative imposition of civil penalties is the constitutionality of delegating to administrative agencies the legal authority to impose monetary penalties. In *Oceanic Steam Navigation Co. v. Stranahan*,<sup>31</sup> Customs assessed a penalty against a steamship company for bringing diseased aliens to an American port under circumstances where the disease could have been reasonably detected before sailing. The company argued that even if Congress could impose civil penalties for violation of a statutory duty, the collection of the penalty could not be "committed to an administrative officer without the necessity of resorting to the judicial power. . . . [Otherwise,] the distinction between judicial and administrative functions cannot be preserved . . . ." <sup>32</sup> The Court was not persuaded, finding numerous and longstanding examples of administratively imposed sanctions and concluding that where Congress had imposed a statutory penalty, enforcement and collection of that penalty was at least as much an executive as judicial function. A quarter century later in

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<sup>27</sup> See Goldschmid, *supra* note 20, at 898; 1 KENNETH DAVIS, ADMINISTRATIVE LAW TREATISE § 2.13, at 133 (1958); McKay, *supra* note 24, at 443-45; Bernard Schwartz, ADMINISTRATIVE LAW § 2.24, at 89 (3d ed. 1991). Characterization of a penalty as civil is also necessary, although not sufficient, to overcome a charge of double jeopardy when the person penalized is also subjected to criminal penalties. See *United States v. Halper*, 490 U.S. 435 (1989).

<sup>28</sup> U.S. CONST. AMEND. VII. The Seventh Amendment provides, in pertinent part, that "[i]n Suits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

<sup>29</sup> See *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n.*, 430 U.S. 442 (1977).

<sup>30</sup> *Tull v. United States*, 481 U.S. 412 (1987).

<sup>31</sup> 214 U.S. 320 (1909).

<sup>32</sup> *Id.* at 338.

*Lloyd Sabauda Societa v. Elting*,<sup>33</sup> the Court reaffirmed its conclusion despite a claim that because the penalty here was ten times that in *Oceanic Steam* only judicial imposition of the penalty would suffice.<sup>34</sup>

Finally, there remains the question as to the due process requirements applicable to administratively imposed penalties. Here there are no Supreme Court precedents directly on point. Rather, as is the case with other deprivations of property, the three-part test of *Mathews v. Eldridge*<sup>35</sup> should apply.<sup>36</sup>

Given these various questions, despite the Court's general approval of administratively imposed penalties, it is perhaps not surprising that there existed a common prejudice against such penalties. In 1952, for instance, Professor Bernard Schwartz wrote in criticism of a New York law allowing the Superintendent of Insurance to impose money penalties administratively: "It is difficult to imagine a statutory provision more repugnant to the basic principles upon which our administrative law is grounded. It violates the fundamental rule that the imposition of a money penalty is, with us, a judicial, not an administrative function."<sup>37</sup> In 1965, Professor Jaffe suggested that "[c]onstitutional doubts and scruples aside," "it is a close question whether there is sufficient advantage in conferring the power to fine [on administrative agencies]."<sup>38</sup> He concluded that "[i]f resort to the judiciary is tried and turns out to be clumsy, inefficient, or ineffective, there is then a good case for administrative penalty powers."<sup>39</sup> Even here, however, he counselled that rather than have the agency actually determine liability,

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<sup>33</sup> 287 U.S. 329 (1932).

<sup>34</sup> In the federal cases, the challenge was to the ability of an agency to determine the liability for the penalty, where the amount of the penalty was set by statute. Some state cases have distinguished between statutory schemes that set a fixed penalty and those that authorize the agency to set the amount of the penalty, finding the latter impermissible. See, e.g., *Tite v. State Tax Comm'n.*, 57 P.2d 734, 741 (Utah 1936); *Broadhead v. Monaghan*, 117 So. 2d 881 (Miss. 1960); *State ex rel. Lanier v. Vines*, 164 S.E.2d 161 (N.C. 1968). Federal cases apparently have never recognized this distinction.

<sup>35</sup> 424 U.S. 319 (1976).

<sup>36</sup> Cf. *Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477, 1483 (D.C. Cir. 1989) (informal, non-APA adjudicatory hearing for imposing "corrective action orders" satisfies *Mathews v. Eldridge* test).

<sup>37</sup> Bernard Schwartz, *1952 Survey Of New York Law—Administrative Law*, 27 N.Y.U.L. REV. 928 (1952). To Professor Schwartz's credit, he was able to reevaluate and later repudiate this conclusion. See Bernard Schwartz, *1969 Survey of New York Law—Administrative Law*, 21 SYRACUSE L. REV. 389-90 (1970); Schwartz, *supra* note 27, § 2.28 at 96-97 (1991).

<sup>38</sup> LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 114 (1965).

<sup>39</sup> *Id.*



it should only make an "apparent liability" finding, which would require a trial *de novo* in court to enforce, thereby "avoiding all constitutional doubts."<sup>40</sup>

This advice accorded with the prevailing congressional practice. Thus, in 1972, when Professor Goldschmid made his report to the Administrative Conference on civil money penalties,<sup>41</sup> he concluded that of the 104 civil penalty provisions he identified, only four involved "true administrative imposition" of penalties.<sup>42</sup> The others required the agency to "be successful in a *de novo* adjudication in a district court (whether or not an administrative proceeding [had] previously occurred) before a civil money penalty [could] be imposed."<sup>43</sup> In order to provide agencies more enforcement flexibility, particularly by avoiding the necessity of obtaining approval of the Department of Justice, and at the same time to enhance fairness, Professor Goldschmid recommended increased use of administratively imposed penalties that would not require *de novo* judicial proceedings to enforce. Rather, persons who wished to contest a penalty would have the opportunity for a hearing under Sections 554, 556, and 557 of the APA.<sup>44</sup> Such adjudications, Professor Goldschmid wrote, should be "just, inexpensive, and speedy."<sup>45</sup> The administrative decision would be final unless appealed within a limited period to a federal court, where the review would be limited to substantial evidence review under the APA.

The Administrative Conference, thereafter, formally adopted a recommendation approving the increased use of civil money penalties as an alternative to criminal penalties and other draconian

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<sup>40</sup> *Id.*

<sup>41</sup> See Goldschmid, *supra* note 20.

<sup>42</sup> *Id.* at 908. The four were the Occupational Safety and Health Review Commission, the Immigration and Naturalization Service, the Postal Service, and the Federal Home Loan Bank Board. Professor Goldschmid quotes from testimony by a congressman in opposition to a bill proposing to authorize the Federal Maritime Commission to impose a penalty by administrative procedure alone:

[T]he legislation your Committee is now considering is *not* routine; is *not* in any sense commonplace or comparable to existing agency powers elsewhere; but would, to the contrary, represent a highly unusual, unprecedented and indeed revolutionary development in administrative law.

*Id.* at 907 (quoting from F. Conger Fawcett, Statement on S. 2138 before the Merchant Marine Subcommittee of the Senate Committee on Commerce, 92d Cong., 1st Sess. 10-11 (1971)).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 930.

<sup>45</sup> *Id.*

measures.<sup>46</sup> It also recommended the administrative imposition of those penalties, at least where the penalty amount is small (less than \$5000) and is imposed pursuant to a system affording parties an opportunity for a hearing on the record under Sections 554, 556, and 557 of the APA.<sup>47</sup>

By 1979, when the Administrative Conference next addressed the issue, the number of civil penalty provisions had mushroomed. Professor Diver's report to the Administrative Conference on administrative civil penalties identified 141 "agency-assessment" penalty provisions as well as 207 "court-assessment" provisions.<sup>48</sup> Of these 141 "agency-assessment" provisions, however, Professor Diver believed that not all involved "true administrative imposition" of penalties. Because a "full-scale trial-type hearing [must] be provided before a civil penalty can be exacted,"<sup>49</sup> Professor Diver stated, true administrative imposition of penalties could only occur where those type of hearings were provided by the agency. Only 27 of the 141 "agency-assessment" provisions provided explicitly for a formal hearing on the record under the Administrative Procedure Act,<sup>50</sup> however, while only 27 more required an otherwise unspecified notice and a hearing.<sup>51</sup> From this, Professor Diver concluded, most of the so-called administrative assessment provisions, those which did not in fact provide "full-scale trial-type hearings," still implicitly required a *de novo* judicial trial on the merits in order to enforce the administrative penalty determination.<sup>52</sup> His recommendation was that agencies provide the opportunity for a "full-scale trial-type hearing" even when the governing statute did not require it, thereby forestalling the need for a *de novo* judicial trial.<sup>53</sup>

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<sup>46</sup> See Recommendation 72-6, Civil Money Penalties as a Sanction, 1 C.F.R. § 305.72-6 (1991).

<sup>47</sup> *Id.*

<sup>48</sup> Diver, *supra* note 9, at 1441.

<sup>49</sup> *Id.* at 1487.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1443 n.43.

<sup>52</sup> See *id.* at 1485-89. See also Recommendation No. 79-3, Agency Assessment and Mitigation of Civil Money Penalties, 1 C.F.R. § 305.79-3(d) (1991). Whether a "full-scale trial-type hearing" was necessary to determine the amount of penalty, as opposed to liability for having violated the law, Diver found unclear. See Diver, *supra* note 9, at 1487.

<sup>53</sup> Diver, *supra* note 9, at 1490. In 1986, Senator Cohen published in the Congressional Record a table of statutes authorizing administrative penalties. See 132 CONG. REC. S 13009 (daily ed. September 19, 1986). It indicated 141 separate statutory provisions authorizing administrative penalties. Of these, however, now 69 explicitly required an APA hearing. These involved nine different departments or their subdivisions, as well as ten other independent agencies. Seventy-two provisions did not explicitly require an APA hearing, but 67 of them required a "hearing" and judi-

The Administrative Conference affirmed its 1972 recommendation, noting that the "constitutionality and desirability of administratively imposed penalties have been widely recognized."<sup>54</sup> It also called upon Congress to provide expressly for formal adjudication under the APA when a person sought a hearing and for agencies voluntarily to provide such adjudications where the law was silent or unclear on the issue.<sup>55</sup> In this way, the need for a *de novo* judicial trial could be avoided.<sup>56</sup>

Both Professors Goldschmid and Diver seem to have assumed that if a defendant challenged the assessment of a penalty, either the agency had to provide a "full-scale trial-type hearing," as provided by Sections 554, 556, and 557 of the APA, or a court would have to hold a trial *de novo* on liability. The Administrative Conference shared this assumption.<sup>57</sup>

This assumption appears to proceed from equating the procedures of Sections 554, 556, and 557 of the APA with the requirements of due process. That is, if due process required a full-scale hearing, then the procedures of the APA defined the nature of that hearing. There was case law to support such a belief. Probably the most important precedent was *Wong Yang Sung v. McGrath*.<sup>58</sup> There Wong Yang Sung was ordered deported pursuant to a hearing before an "immigrant inspector," a person involved in the investigation and prosecution of deportable aliens, not before an ALJ,<sup>59</sup> as would be required under the APA. The issue was whether the APA applied to the deportation hearing, requiring independent examiners rather than immigrant inspectors. Section 554, by

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cial review on the basis of substantial evidence, suggesting perhaps an intent to require formal adjudication. *See, e.g.,* Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir.), *cert. denied*, 439 U.S. 824 (1978). It is worthy of note that all of these 67 provisions were enforced by the Coast Guard. Only four provisions did not by their terms require a hearing at all and provided for *de novo* judicial review, while one provision required a "hearing" and *de novo* judicial review. Under Professor Diver's analysis, these latter five provisions should not be considered true administrative penalty provisions.

<sup>54</sup> Recommendation No. 79-3, Agency Assessment and Mitigation of Civil Money Penalties, 1 C.F.R. § 305.79-3(c) (1991).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *See id.* § 305.79-3(d), 1 C.F.R. § 305.79-3(d) (1991) ("[some statutes] confer on the agency only a power to 'assess' or to 'mitigate' penalties, thereby expressly or implicitly reserving to the respondent the right to seek a subsequent *de novo* fact-finding hearing by the court in a collection proceeding").

<sup>58</sup> 339 U.S. 33 (1950).

<sup>59</sup> At the time, the APA provided for "examiners" rather than Administrative Law Judges. Administrative Procedure Act, Pub. L. No. 404, ch. 324, § 7(a), 60 Stat. 237 (1946).

its terms, applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . . ."<sup>60</sup> No "statute" required a deportation hearing, but the Supreme Court had long held that due process required a hearing in deportation cases.<sup>61</sup> Against this background, the Court deemed the statute providing for deportation, which constitutionally could not be exercised without a due process hearing, to require a hearing, thereby triggering application of the APA.<sup>62</sup>

This interpretation of the APA's language in its early years reflected the Court's view that the APA "represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest."<sup>63</sup> Accordingly, the Court believed it appropriate to read the APA to apply broadly to the wide range of situations that raised the issues that gave rise to the APA provisions. Here, the use of an investigating officer as a hearing officer in deportation cases by the Immigration and Naturalization Service seemed to raise the very problem of combining in one person the prosecutor and the judge, at which some of the provisions of the APA were addressed.<sup>64</sup>

The logical implication of *Wong Yang Sung*, therefore, was that if the Constitution requires a hearing on the record, the APA's provisions should provide the procedures for that hearing.<sup>65</sup> Subsequent Supreme Court cases, however, substantially undercut such an interpretation.

First, in *Marcello v. Bonds*,<sup>66</sup> the Court found that, in light of specific amendments to the immigration laws,<sup>67</sup> the APA did not apply to deportation proceedings, and due process did not prohibit the Immigration and Naturalization Service from using "special inquiry officers" in such proceedings, even though they were to take the role of both prosecutor and judge. *Marcello*, therefore, ap-

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<sup>60</sup> 5 U.S.C. § 554(a) (1988).

<sup>61</sup> See, e.g., *Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86 (1903).

<sup>62</sup> *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950).

<sup>63</sup> *Id.* at 40.

<sup>64</sup> *Id.* at 41-42.

<sup>65</sup> See, e.g., *Riss & Co., Inc. v. United States*, 341 U.S. 907 (1951) (per curiam) (denial of ICC certificate of public convenience and necessity requires due process hearing, so APA procedures apply); *Cates v. Haderlein*, 342 U.S. 804 (1951) (per curiam) (Solicitor General confessed error where Postal Service issued a mail fraud order without giving an APA hearing).

<sup>66</sup> 349 U.S. 302 (1955).

<sup>67</sup> See Immigration and Nationality Act of 1952, Pub. L. No. 414, ch. 477, § 242, 66 Stat. 280 (1952).

proves an outcome directly opposite that in *Wong Yang Sung*. Nevertheless, there is nothing inconsistent in their treatments of the APA or due process. *Marcello* does not question that deportation proceedings still must provide hearings that satisfy due process requirements. Nor does it suggest any doubt that in the absence of explicit congressional language the APA is presumed to provide the procedures for those hearings. Because *Wong Yang Sung* was, at bottom, an issue of statutory interpretation of the APA, there is nothing inconsistent in giving effect to a later specific statute that excepts a due process hearing from the APA procedures. The question then becomes what procedure is required by due process. In *Marcello*, the Court determined that due process did not strictly require a judge who had no role in the prosecution, a determination that the Court has consistently followed.<sup>68</sup>

Second, in *United States v. Florida East Coast Railway Co.*,<sup>69</sup> the Court interpreted restrictively the APA phrase, "required by statute to be determined on the record after an opportunity for an agency hearing," so that a statute requiring a "hearing" prior to adoption of a rule did not trigger the formal hearing requirements of the APA. While *Florida East Coast Railway* is easily distinguishable from *Wong Yang Sung* because it dealt with rulemaking rather than adjudications, much less adjudications requiring provision of "due process" procedures, its thrust of restricting the application of the APA provisions in light of practical concerns and in contrast with historical understandings<sup>70</sup> is in tension with the tendency of *Wong Yang Sung* to apply the APA provisions in circumstances of doubt. Some courts, moreover, have looked to *Florida East Coast Railway* for guidance in determining when adjudicatory hearings required by statute trigger the APA's formal adjudication procedures,<sup>71</sup> and the Supreme Court has never ruled on the issue of when an adjudicatory hearing required by statute triggers the APA.

Third and most importantly, in *Mathews v. Eldridge*,<sup>72</sup> the Court adopted a specific balancing test for determining what process is due; it did not presume that the APA was the applicable procedure

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<sup>68</sup> See, e.g., *Withrow v. Larkin*, 421 U.S. 35 (1975).

<sup>69</sup> 410 U.S. 224 (1973).

<sup>70</sup> *Id.* at 246 (Douglas, J., dissenting); Attorney General's Manual on the Administrative Procedure Act (quoted in WALTER GELLHORN ET AL., *ADMINISTRATIVE LAW* 238-39 (8th ed. 1987)); *Long Island R.R. Co. v. United States*, 318 F. Supp. 490 (E.D.N.Y. 1970) (three judge court) (Friendly, J.), *rev'd sub nom.* *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224 (1973).

<sup>71</sup> See, e.g., *United States Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519 (D.C. Cir. 1978).

<sup>72</sup> 424 U.S. 319 (1976).

once it decided that due process was required. Professor Diver argues that *Mathews* is not inconsistent with the notion that a full-scale trial-type hearing is required in penalty cases,<sup>73</sup> and presumably that the APA specifies the procedures for this full-scale trial-type hearing. This is so, he says, because *Mathews* and most of the cases applying it involve a question of the adequacy of pre-termination hearings when full-scale trial-type post-termination hearings were available later.<sup>74</sup> Thus, the issue was really one of timing rather than the availability of a full-scale trial-type hearing. Nevertheless, as he concedes, the Court has approved less than formal adjudication procedures even when there is neither a subsequent full-scale trial-type administrative proceeding nor a trial *de novo* in court.<sup>75</sup> While each of these instances may be characterized as "peculiar,"<sup>76</sup> they are numerous and diverse enough to support the conclusion that they are the result of a *Mathews*-type balancing approach, not that they are exceptions to a general rule.

Moreover, a flexible notion of the procedures dictated when due process is required accords with both the judicial evolution of due process law and scholarly commentary. As the Court expanded the universe of government actions that required due process, it inevitably created a strain on the historical notion of what constituted due process. Perhaps nothing illustrates the development better than the devolution of "rudimentary due process" providing "minimum procedural safeguards"<sup>77</sup> from the extensive protections afforded in 1970 in *Goldberg v. Kelly*<sup>78</sup> to the procedures afforded a suspended public school student in 1975: oral notice, an explanation of evidence against him, and an opportunity to present his side of the story. Judge Henry Friendly probably best articulated the felt necessity to develop a balancing approach to determine the appropriate procedure in his celebrated article, "*Some Kind of Hearing*."<sup>79</sup>

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<sup>73</sup> See Diver, *supra* note 9, at 1487 n.277.

<sup>74</sup> *Id.*

<sup>75</sup> See, e.g., *Hewitt v. Helms*, 459 U.S. 460 (1983) (prisoner placed in solitary confinement); *Schweiker v. McClure*, 456 U.S. 188 (1982) (denials of Medicare Part B claims); *Board of Curators v. Horowitz*, 435 U.S. 78 (1978) (academic dismissal of medical student); *Ingraham v. Wright*, 430 U.S. 651 (1977) (corporal punishment of school children); *Baxter v. Palmigiano*, 425 U.S. 308 (1976) (prison disciplinary hearings); *Goss v. Lopez*, 419 U.S. 565 (1975) (suspension of school children from school); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (deprivation of prisoner's "good time" credits).

<sup>76</sup> Diver, *supra* note 9, at 1487 n.277.

<sup>77</sup> *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

<sup>78</sup> *Id.*

<sup>79</sup> Henry J. Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267 (1975).

In any case, the inexorable development of a balancing approach to determine the procedure required by due process for different kinds of proceedings has displaced the simple presumption of *Wong Yang Sung* that APA procedures define the due process procedures. Indeed, more recent commentators observe that “[i]n federal due process cases, . . . the APA is rarely consulted as a source of governing procedure.”<sup>80</sup>

Perhaps Professor Diver’s and the Administrative Conference’s assumption that administrative penalty proceedings would be conducted pursuant to the APA stemmed from a belief that the statutes authorizing the administrative penalties triggered, or at least should trigger, the formal adjudication provisions of the APA. For example, the original Federal Water Pollution Control Act of 1972 (FWPCA)<sup>81</sup> authorized both the Coast Guard and EPA to assess a civil penalty not to exceed \$5000, the Coast Guard against persons discharging oil or hazardous substances in navigable waters and EPA against other persons who violated regulations adopted to prevent and clean up spills of oil or hazardous substances.<sup>82</sup> The statute specified that no penalty was to be assessed unless the person charged “shall have been given notice and opportunity for hearing on such charge.”<sup>83</sup> The question naturally arises, therefore, whether this language mandates use of Section 554, which applies “in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing.”<sup>84</sup>

Neither the Coast Guard nor EPA believed the language required an APA hearing. Both provided only an informal procedure without an ALJ.<sup>85</sup> In its preamble, EPA made clear that it viewed the informal procedure to be adequate “since full de novo trials in the United States District Court are available to alleged violators upon request.”<sup>86</sup> It is not clear whether the Coast Guard took this position. The history is inconsistent. The legislative history of the FWPCA suggests that normal Coast Guard practice was to use informal penalty procedures, but that collection proceed-

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<sup>80</sup> GELLHORN, ET AL., *supra* note 70, at 247.

<sup>81</sup> Pub. L. No. 92-500, 86 Stat. 862 (1972).

<sup>82</sup> 33 U.S.C. § 1321(b)(6) (1988) (Coast Guard); 33 U.S.C. § 1321(j)(2) (1988) (EPA).

<sup>83</sup> 33 U.S.C. § 1321(b)(6) (1988) (Coast Guard); 33 U.S.C. § 1321(j)(2) (1988) (EPA).

<sup>84</sup> 5 U.S.C. § 554(a) (1988).

<sup>85</sup> See 43 Fed. Reg. 54186 (1978); 33 C.F.R. Subpart 1.07 (1978) (Coast Guard). 39 Fed. Reg. 31602 (1974); 40 C.F.R. Part 114 (1992).

<sup>86</sup> 39 Fed. Reg. 31602 (1974).

ings in court would be a *de novo* hearing.<sup>87</sup> In some cases brought under the FWPCA, the Coast Guard either brought or acquiesced in *de novo* collection proceedings.<sup>88</sup> In other cases, however, courts reviewed the Coast Guard's penalty assessment on the record under substantial evidence or "arbitrary and capricious" review, denying claims of a right to a *de novo* hearing or review.<sup>89</sup> When the issue was raised, the courts were also split as to whether the FWPCA's language required an APA hearing or merely an informal hearing.<sup>90</sup> A constitutional due process challenge to the informal hearing was rejected.<sup>91</sup> Despite this uncertain background, however, the Coast Guard continues to proceed informally for virtually all of its many administrative penalties.<sup>92</sup>

To conclude that Professor Diver and the Administrative Conference erred in assuming that true administrative penalties could only be imposed using the formal procedures of Sections 554, 556, and 557 of the APA is not to determine what the constitutionally

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<sup>87</sup> See H.R. REP. No. 911, 92d Cong., 2d Sess. 117-18 (1972). According to this history:

[T]he respondent has the opportunity of a *de novo* hearing in any collection proceeding initiated by a United States Attorney after the conclusion of the administrative procedures. The net result is to parallel the penalty assessment method which the Coast Guard has used in the past in connection with laws which it administers.

*Id.*

<sup>88</sup> See *United States v. Malitovsky Cooperage Co.*, 472 F. Supp. 454 (W.D. Pa. 1979); *United States v. General Motors Corp.*, 403 F. Supp. 1151 (D.Conn. 1975). See also *United States v. Delian Cruises*, 505 F. Supp. 79 (E.D. La. 1980) (holding over Coast Guard objection that *de novo* review is available).

<sup>89</sup> See *United States v. Healy Tibbitts Constr. Co.*, 713 F.2d 1469 (9th Cir. 1983); *Commonwealth of Puerto Rico v. S.S. Zoe Colocatroni*, 456 F. Supp. 1327 (D. P.R. 1978); *In re Vest Transp. Co.*, 434 F. Supp. 748 (N.D. Miss. 1977). See also *United States v. Atlantic Richfield Co.*, 429 F. Supp. 830 (E.D. Pa. 1977), *aff'd sub nom.*, *United States v. Gulf Oil Corp.*, 573 F.2d 1303 (3d Cir. 1978).

<sup>90</sup> See *United States v. Indep. Bulk Transp., Inc.*, 480 F. Supp. 474 (S.D.N.Y. 1979) (APA does not apply); *Healy Tibbitts Constr. Co.*, 713 F.2d at 1476 n.6 (APA would apply—dictum).

<sup>91</sup> See, e.g., *United States v. Chotin Transp., Inc.*, 649 F. Supp. 356 (S.D. Ohio 1986).

<sup>92</sup> See 33 C.F.R. Subpart 1.07 (1991). In April 1993, the Coast Guard adopted an interim final rule to establish procedures for implementing the Class II administrative penalty authority it shares with EPA under Section 109(b) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9609(b) (1988), and Section 111(b) of the Clean Water Act, 33 U.S.C. § 1321(b) (Supp. III 1990). See 58 Fed. Reg. 17926 (1993). These procedures provide for APA hearings in assessing the Class II penalties. EPA continued to use its Part 114 procedures until 1992, when as a result of amendments to 33 U.S.C. § 1321(b) made by the Oil Pollution Control Act of 1990, see *supra* note 18, it announced that it would use its 40 C.F.R. Part 22 procedures for the new Class II penalties and its proposed 40 C.F.R. Part 28 procedures for the new Class I penalties. See 57 Fed. Reg. 52,704 (1992).



required procedures might be. For this, the *Mathews v. Eldridge* calculus must be used. In *Mathews*, the Court identified three factors which should determine the procedures required.<sup>93</sup> The first factor is the private interest affected by the government action; the greater or more significant the interest, the more procedures the private person should be able to invoke. The second factor is the risk of erroneous decision under the procedures used and the likelihood that more procedures would reduce that risk. This factor reflects the context in which most cases arise—as challenges by a person asserting that the procedures used were inadequate. This factor, therefore, attempts to measure the marginal utility of additional procedures. The third factor is the government's interest in avoiding additional procedures. That interest is usually expressed in terms of time, money, and efficient administration of the government program.

Applied to civil penalties, the private interest is primarily money, or the amount of the penalty. This can vary to extreme degrees. Thus, the maximum civil penalty for the failure to file certain manifests with Customs is \$20.<sup>94</sup> At the same time, the maximum civil penalty for certain banking violations is \$1,000,000.<sup>95</sup> Moreover, the impact of a given penalty amount may differ significantly depending on the nature of the financial circumstances of the defendant. Accordingly, for purposes of *Mathews*, the weight of the first factor may vary greatly.<sup>96</sup>

With respect to the second *Mathews* factor, the risk of an erroneous determination and the likelihood additional procedures would reduce that risk, the focus is on the contested facts. Absent contested facts, the procedures applicable to trial-like proceedings are generally inappropriate.<sup>97</sup> In administrative penalty assessments, contested facts may be of two kinds: those related to liability

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<sup>93</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>94</sup> See 19 U.S.C. § 292 (1988) (assessed in judicial proceeding).

<sup>95</sup> See 12 U.S.C. § 1833a(b)(1) (1988) (assessed in judicial proceeding).

<sup>96</sup> There is undoubtedly some stigma attached to assessment of a civil penalty of any amount, but it is not considered of the same nature as that of a "criminal" sanction. Presumably, it would marginally increase the private interest in more procedures.

<sup>97</sup> See, e.g., R. PIERCE ET AL., *ADMINISTRATIVE LAW AND PROCESS* 245 (2d ed. 1992). This black-letter rule arose in the environment of the then-extant understanding that courts reviewed questions of law *de novo*. Accordingly, there was no need for an administrative hearing on questions of law. Subsequent to *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), however, the Court has recognized that agencies may in the course of an administrative proceeding interpret law which in effect binds courts. If this is so, it is at least arguable that due process should require a hearing on such legal questions as well. Obviously, the procedures incident to a right to a "hearing"

(i.e., whether or not the defendant committed the acts charged) and those related to the amount of the penalty (i.e., facts relevant to setting the actual dollar amount of the penalty).<sup>98</sup> As *Mathews* explained, however, the accurate determination of contested facts is not always aided by trial-like procedures.<sup>99</sup> Scientific, financial, and business information is often better proved through paper exchange than trial procedure with testimony and cross-examination. Even where trial-like procedures may increase reliability of determinations, the degree of increase may not be significant. Given the wide variety of administrative penalty provisions, the nature of the facts likely to be contested is apt to differ from provision to provision, if not from case to case. This suggests that little can be said in general about the weight to be given to the second *Mathews* factor in penalty cases.

The cost to the Government, the third *Mathews* factor, is generally a function of the number of the type of cases the government processes as well as the complexity of each. Thus, the extensive procedural protections provided welfare recipients in *Goldberg* were a burden to government because of the number of cases involved.<sup>100</sup> Consequently, "mass justice" cases have been prime candidates for less than full trial-type procedures. Moreover, as cases increase in complexity, it may be that the costs of trial-type procedures increase substantially. For example, if expert witnesses are necessary, their costs can be phenomenal, or if program officers need to be involved in the particular cases, the ongoing functioning of the government programs may be substantially burdened. Penalty cases run the gamut. While few penalty provisions are likely to involve the volume of Social Security or welfare cases, the trend in Federal enforcement is to authorize inspec-

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on legal questions would be different from and undoubtedly less trial-like than a right to a hearing on factual issues.

<sup>98</sup> See, e.g., 42 U.S.C. § 9609(a)(3) (1988). Section 9609(a)(3) states:

In determining the amount of any penalty assessed [for violations of requirements of the Comprehensive Environmental Response, Compensation and Liability Act], the President shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

*Id.*

<sup>99</sup> *Mathews v. Eldridge*, 424 U.S. 319, 343-44 (1976).

<sup>100</sup> See especially Jerry L. Mashaw, *The Management Side Of Due Process: Some Theoretical And Litigation Notes On The Assurance Of Accuracy, Fairness and Timeliness in Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974).

tors to assess smaller penalties.<sup>101</sup> Many cases involve little or no factual dispute, such as when the defendant self-reports the violation. At the same time, some cases may involve highly complex factual questions involving engineering or scientific data. Thus, again it is not possible to generalize about the cost to the government of additional procedures in penalty cases, other than to say that they would increase the cost to some degree.

The need for speed in adjudication is sometimes a relevant government consideration, for example, where public health or safety might be endangered. This consideration, however, would not seem applicable to penalty determinations.

Many have criticized the *Mathews* factors because of their indeterminacy.<sup>102</sup> As one treatise says, "it is difficult to predict the precise result of application of the *Mathews* test to a class of disputes until the Court decides a case within that class."<sup>103</sup> Moreover, as that treatise suggests, this indeterminacy leads courts generally to defer to legislative or administrative determinations of adequate procedural safeguards where the legislature or agency has acted in good faith.<sup>104</sup> Consequently, in deciding what are the appropriate procedures for assessing a particular set of administrative penalties, agencies are probably best advised to be sensitive to the *Mathews* factors in light of the size of the penalties involved and the nature of the likely type of violations and penalty considerations involved.

Such advice would be consistent with the limited judicial treatment of informal procedures for assessing penalties prior to 1986. Thus, in the cases brought under the oil spill provisions of the Federal Water Pollution Control Act,<sup>105</sup> the courts have considered Congress's perceived determination that, in light of the relative simplicity of the factual issues likely to be involved, the procedures should be "expeditious and free from the procedural complexities of the APA"<sup>106</sup> and that trial-type procedures are better "reserved for the more factually complex and higher liability actions"<sup>107</sup> as well as for those actions that have greater impacts on the public.<sup>108</sup>

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<sup>101</sup> See, e.g., 42 U.S.C. § 7413(d)(3) (Supp. III 1990) ("field citations" of up to \$5000 may be assessed for violations of the Clean Air Act subject to an opportunity for a non-APA hearing to contest the citation).

<sup>102</sup> See, e.g., *PIERCE ET AL.*, *supra* note 97, at 249-51.

<sup>103</sup> *Id.* at 250.

<sup>104</sup> *Id.*

<sup>105</sup> See *supra* note 82.

<sup>106</sup> *United States v. Indep. Bulk Transp., Inc.*, 480 F. Supp. 474, 481 (S.D.N.Y. 1979).

<sup>107</sup> *Id.*

<sup>108</sup> See *id.* See also *Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477 (D.C.

## II. THE STATUTES

Consistent with the Administrative Conference's recommendations to Congress to make greater use of administrative penalties as a means of enforcing regulatory provisions,<sup>109</sup> new regulatory provisions increasingly included administrative penalty provisions. Yet, early on, Congress expressed concern about the time and complexity associated with formal adjudication. For example, the legislative history of the penalty assessment provision in the original Federal Water Pollution Control Act<sup>110</sup> explained that: "The language 'notice and opportunity for a hearing' . . . is not intended to impose in every instance the complex procedural requirements associated with formal adjudicatory hearings on the record before a hearing examiner. . . . The committee believes that effective administrative enforcement will be enhanced by assessment procedures which are expeditious."<sup>111</sup> Nevertheless, the statutory language used was ambiguous, requiring "notice and an opportunity for a hearing,"<sup>112</sup> resulting in litigation over whether a formal, APA adjudication was required<sup>113</sup> and, if not, whether *de novo* judicial review was required.<sup>114</sup>

A decade later, EPA was to have much the same problem with respect to amendments to the Resource, Conservation, and Recovery Act<sup>115</sup> (RCRA). In the Hazardous and Solid Waste Amendments of 1984,<sup>116</sup> Congress authorized EPA to order "corrective

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Cir. 1989) (upholding EPA's informal adjudicatory procedures for "corrective action" orders against a facial due process attack but noting that "the absence of formal safeguards could prove troublesome" in a particular case where there were both high stakes and issues for which trial-type procedures would be important).

<sup>109</sup> Recommendation 72-6, Civil Money Penalties as a Sanction, 1 C.F.R. § 305.72-6 (1991); Recommendation 79-3, Agency Assessment and Mitigation of Civil Money Penalties, 1 C.F.R. § 305.79-3 (1991).

<sup>110</sup> 33 U.S.C. §§ 1321(b)(6), (j)(2) (Supp. III 1990).

<sup>111</sup> H.R. REP. NO. 911, 1972 U.S.C.C.A.N. (86 Stat.) at 3668. The report went on to explain that defendants' rights would be protected by the APA because they would have "the opportunity for a *de novo* hearing in any collection proceeding initiated by the United States Attorney after the conclusion of the administrative procedures." *Id.* It is this latter statement that was ignored by the Coast Guard and EPA and by most of the courts that addressed the procedures for assessing oil spill penalties. *See particularly Independent Bulk Transp. Inc.*, 480 F. Supp at 479 (court leaves out sentence on *de novo* review, while quoting the three sentences before it and the sentence after it).

<sup>112</sup> 33 U.S.C. § 1321(j)(2) (Supp. III 1990). *See also* 33 U.S.C. § 1321(b)(6) (Supp. III 1990).

<sup>113</sup> *See, e.g.*, *United States v. Healy Tibbitts Constr. Co.*, 713 F.2d 1469 (9th Cir. 1983).

<sup>114</sup> *See, e.g.*, *United States v. Delian Cruises*, 505 F. Supp. 79 (E.D. La. 1980).

<sup>115</sup> 42 U.S.C. §§ 6901-6992 (1988).

<sup>116</sup> Pub. L. No. 98-616, 98 Stat. 3256 (1984).

action” whenever it determined that an “interim status facility” had released, or was about to release, hazardous waste into the environment.<sup>117</sup> If a defendant requested a “public hearing,” the corrective action order could only be final after the hearing.<sup>118</sup> Again, whether Congress intended this hearing requirement to invoke the APA’s formal adjudication requirements was unclear, but EPA took the position that it did not. The D.C. Circuit upheld EPA’s conclusion, relying on *Chevron’s* deference<sup>119</sup> to the agency’s interpretation of the statutory language.<sup>120</sup>

Given the costs of the statutory ambiguity in the applicable procedures to be afforded, as well as the general judicial approval of informal procedures for penalty assessments, it is not surprising that EPA began to suggest specific language to Congress that would authorize administrative penalties without the necessity of formal adjudication. This was apparently first done in 1982 in the Administration’s bill to reauthorize the Clean Water Act.<sup>121</sup> EPA explained that its proposed amendment would authorize EPA to assess civil penalties up to \$10,000 a day and up to \$75,000 maximum after an informal proceeding, which could be reviewed in court in an appellate manner, not *de novo*.<sup>122</sup> This, it was stated, would be a new, needed enforcement tool, because under the then-existing law, while EPA could issue administrative orders to comply with the law, it could assess penalties only through judicial civil actions.<sup>123</sup> EPA explained in detail the extensive procedural steps involved in judicial proceedings, suggesting that these cases could take protracted periods of time.<sup>124</sup> EPA also indicated that in order to go to court, EPA must refer the case to the Department of Justice, which actually would bring the action.<sup>125</sup> Although nothing more was made of this referral requirement in the testimony and documents provided to Congress, many within EPA viewed the burden of obtaining Department of Justice approval as substantial and resulted in fewer penalty cases being brought, especially where the amount of the monetary penalty would not be sub-

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<sup>117</sup> 42 U.S.C. § 6928(h)(1) (1988).

<sup>118</sup> 42 U.S.C. § 6928(b) (1988).

<sup>119</sup> See *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

<sup>120</sup> See *Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989).

<sup>121</sup> See S. 2652, 97th Cong., 2d Sess., § 8 (1982).

<sup>122</sup> See *Hearings before the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works*, 97th Cong., 2d Sess. 78 (1982) [hereinafter *Senate Hearings*] (statement of Dr. John W. Hernandez, Jr., Deputy Administrator, EPA).

<sup>123</sup> *Id.* at 78-79, 174.

<sup>124</sup> *Id.* at 79-80.

<sup>125</sup> See *id.* at 79.

stantial.<sup>126</sup> In contrast, EPA noted, administrative proceedings would be quicker and simpler.<sup>127</sup> While the proposed statutory language explicitly ruled out any requirement for formal adjudication under the APA, the testimony did not distinguish between formal and informal procedures, except to note that the Coast Guard was using informal hearings under Section 311 of the Act.<sup>128</sup> Instead, EPA referred generally to a hearing before "a neutral hearing officer," which would assure due process and provide a hearing record for judicial review.<sup>129</sup>

The Natural Resources Defense Council (NRDC) was the only outside group to comment on the provision in the bill. While characterizing it as "non-controversial,"<sup>130</sup> NRDC warned that the administrative penalty procedure should not interfere with citizens' suits, be used to slap the wrist of major violators, or result in frittering away EPA resources "through endless administrative hearings and appeals."<sup>131</sup> EPA had already indicated that it would not use this new administrative penalty procedure for major violations or complex cases. Rather, EPA's intent was to use the procedure only for "clear and well documented violations of the Act which may not be serious enough to require judicial enforcement."<sup>132</sup>

Congress's response was not immediately to adopt EPA's suggestion. Thus, a subsequent bill from the Senate Committee on Environment and Public Works provided an informal proceeding but required *de novo* judicial review of the determination.<sup>133</sup> In the House, subsequent bills gave EPA the authority to assess civil penalties administratively, but only after a formal APA proceeding.<sup>134</sup> By 1985, however, the Senate had come around to EPA's position, providing explicitly for an informal hearing and judicial review of a finding of violation on the basis of substantial evidence in the record and of the amount of the penalty on the basis of whether it was an abuse of discretion.<sup>135</sup> The Senate Report went on at some

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<sup>126</sup> See *id.* at 174 ("the threat of judicial action is not a realistic deterrent since cases with small proposed penalties must often wait to be filed, because these smaller cases are assigned lower enforcement priority."). See also Goldschmid, *supra* note 20, at 900 ("the Department of Justice presents an immovable roadblock; we cannot get our cases into court").

<sup>127</sup> See *Senate Hearings*, *supra* note 122, at 80.

<sup>128</sup> See *id.* at 80-81.

<sup>129</sup> See *id.* at 81, 174.

<sup>130</sup> See *id.* at 237.

<sup>131</sup> *Id.* at 281.

<sup>132</sup> *Id.* at 81.

<sup>133</sup> See S. REP. NO. 233, 98th Cong., 1st Sess. 20 (1983).

<sup>134</sup> See H.R. REP. NO. 827, 98th Cong., 2d Sess. 32 (1984).

<sup>135</sup> See S. REP. NO. 50, 99th Cong. 1st Sess. 27-28 (1985).

length to describe and justify these new provisions.<sup>136</sup>

First, the committee accepted the need for a penalty procedure that could be used more expeditiously and cheaply than judicially assessed penalties. Thus, the committee believed the addition of this procedure would increase the total number of enforcement actions.<sup>137</sup> Second, the committee indicated its agreement that this new procedure should be used for "the less complex cases," "where violations are straightforward, self-reported and likely uncontested by the violator," because these violations are "clearly documented and easily corrected."<sup>138</sup> Third, given the nature of the expected violations, the committee believed that the procedures for determining the violation and assessing the penalty should be "as flexible and unencumbered by procedural complexities as possible, consistent with due process considerations."<sup>139</sup> Finally, the committee responded to NRDC's concerns by making specific provision to deal with the interplay of citizen enforcement suits and administrative assessment of penalties<sup>140</sup> and by providing for public oversight of the penalty assessments through public notice-and-comment procedures.<sup>141</sup>

At approximately the same time, Congress was also considering a reauthorization bill for the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>142</sup> and amendments to the Safe Drinking Water Act.<sup>143</sup> In the House, the bills to reauthorize and make certain amendments to CERCLA only permitted administrative penalties to be imposed pursuant to formal adjudication under the APA.<sup>144</sup> EPA objected to this approach, stating that such procedures were "lengthy and laborious" and would "require creation of a new layer of bureaucracy."<sup>145</sup>

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<sup>136</sup> See *id.* at 26-29.

<sup>137</sup> See *id.* at 26.

<sup>138</sup> *Id.* at 27.

<sup>139</sup> *Id.*

<sup>140</sup> See *id.* at 28.

<sup>141</sup> *Id.* at 27.

<sup>142</sup> Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified at 42 U.S.C. §§ 9601-9675 (1988)).

<sup>143</sup> Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified at 42 U.S.C. §§ 201, 300f-i (1988)).

<sup>144</sup> See, e.g., H.R. REP. NO. 253, Part 5, 99th Cong., 1st Sess. 10, 77 (1985) (requiring the procedure used in the Toxic Substances Control Act, which requires the APA's formal adjudication, see 15 U.S.C. § 2615 (1988)); H.R. REP. NO. 253, Part 5, 99th Cong., 1st Sess. 19-20, 173 (1985).

<sup>145</sup> *Superfund Reauthorization: Judicial and Legal Issues, Oversight Hearings before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee*, 99th Cong., 1st Sess. 64 (1985) [hereinafter *Oversight Hearings*] (statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division).

Rather, EPA suggested the provision in the administration bill that only required notice and a hearing before assessing an administrative penalty,<sup>146</sup> which had already been accepted by the relevant Senate committee without comment.<sup>147</sup> The conference committee adopted both approaches, again without explanation, allowing informal adjudication for penalties of not more than \$25,000 per violation, denominated Class I Administrative Penalties, but requiring formal adjudication for penalties over that amount but up to \$25,000 per day for each day of violation, denominated Class II Administrative Penalties.<sup>148</sup> Inasmuch as EPA had consistently indicated its desire to use informal proceedings for "relatively small penalty cases and minor violations,"<sup>149</sup> this solution directly responded to its desires.

Much the same scene was being played out with respect to the Safe Drinking Water Act Amendments. While the House was adding administrative penalty provisions requiring formal adjudication to EPA's enforcement arsenal under the Act,<sup>150</sup> the Senate was providing informal procedures for administrative penalties virtually identical to those in its bill to amend the Clean Water Act.<sup>151</sup> Indeed, the Senate Environment and Public Works Committee reported the Safe Drinking Water Act amendments and the Clean Water Act amendments within a day of each other, and language from one report explaining and justifying the informal penalty procedures was cribbed from the other.<sup>152</sup> The conference committee on the Safe Drinking Water Amendments adopted the Senate provision with respect to the so-called Underground Injection Control program, providing informal procedures for assessing administra-

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<sup>146</sup> *Id.*

<sup>147</sup> See S. REP. NO. 11, 99th Cong., 1st Sess. 8, 81 (1985).

<sup>148</sup> See H.R. REP. NO. 962, 99th Cong., 2d Sess. 22-23, 207 (1986). See also 42 U.S.C. § 9609 (1988). As part of the Superfund Amendment and Reauthorization Act, Congress also enacted the Emergency Planning and Community Right-to-Know Act (EPCRA), Pub. L. No. 99-499, Title III, 100 Stat. 1729 (1986) (codified at 42 U.S.C. § 11001-11050 (1988)). As enacted, EPCRA also contains a two-tier administrative penalty scheme. See Section 325(b), 42 U.S.C. § 11045(b) (1988). It was added in the Conference Committee, see H.R. REP. NO. 962, 99th Cong., 2d Sess. 308-09 (1986), as a combination of the House version, which required judicial proceedings to assess civil penalties, see H.R. REP. NO. 253, Part I, 99th Cong., 1st Sess. 115-16 (1985), and the Senate version, which, because there EPCRA was merely part of CERCLA, only required informal procedures for administrative penalties, see S. REP. NO. 11, 99th Cong., 1st Sess. 10 (1985).

<sup>149</sup> *Oversight Hearings*, *supra* note 145, at 65.

<sup>150</sup> See H.R. REP. NO. 168, 99th Cong., 1st Sess. 5, 8, 27, 31 (1985).

<sup>151</sup> See S. REP. NO. 56, 99th Cong., 1st Sess. 17-18 (1985).

<sup>152</sup> Compare S. REP. NO. 50, 99th Cong., 1st Sess. 26-27 (1985) with S. REP. NO. 56, 99th Cong., 1st Sess. 17-18 (1985).



tive penalties up to \$125,000.<sup>153</sup>

The bills to amend the Clean Water Act, although having started earlier, were delayed and were the last to be considered. The conference committee followed the lead of the conference committee on the CERCLA amendments, creating a two-tier administrative penalty system, with Class I penalties up to \$25,000 imposed without formal adjudication and Class II penalties up to \$125,000 imposed only after formal adjudication.<sup>154</sup> In addition, the same administrative penalty authority was given to the Secretary of the Army to enforce Section 404 of the Clean Water Act.<sup>155</sup> These provisions became part of the Water Quality Act of 1987.<sup>156</sup>

Subsequent environmental statutes reflect this trend. Thus, the Oil Pollution Act of 1990 revised the administrative penalty provisions relating to discharges of oil or hazardous substances into the navigable waters.<sup>157</sup> In place of the previous, uniform but ambiguous requirement for "notice and opportunity for a hearing" before assessing a penalty not to exceed \$5,000, with judicial actions for any larger amount, Congress generally copied the two-tier administrative penalty procedure applicable to the enforcement provisions of the rest of the Clean Water Act.<sup>158</sup> Similarly, the Clean Air Act Amendments of 1990 added a two-tier administrative penalty authority to EPA's enforcement arsenal: a formal APA penalty procedure with penalties up to \$25,000 per day, not to exceed \$200,000 per violation, and an informal, "field citation" program, with penalties up to \$5,000 per day.<sup>159</sup>

This legislative history reveals a number of purposes behind these administrative penalty procedures. The Administrative Conference had recommended increased authorization of administrative penalties, in contrast to the existing judicially imposed penalties. Its purpose had been two-fold, to expedite and facilitate enforcement, but at the same time to increase fairness to defendants. The two went hand-in-hand, because the cost and time involved in judicial proceedings first provided significant disincen-

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<sup>153</sup> See H.R. REP. NO. 575, 99th Cong., 2d Sess. 15 (1986). See also 42 U.S.C. § 300h-2(c) (1988).

<sup>154</sup> See H.R. REP. NO. 1004, 99th Cong., 2d Sess. 138-39 (1986). See also 33 U.S.C. § 1319(g) (1988).

<sup>155</sup> *Id.*

<sup>156</sup> See Pub. L. No. 100-4, § 314, 101 Stat. 46 (1987).

<sup>157</sup> See 33 U.S.C. § 1321(b)(6) (Supp. III 1990).

<sup>158</sup> Compare 33 U.S.C. § 1321(b)(6) (Supp. III 1990) with 33 U.S.C. § 1309(g) (1988). See also H. REP. NO. 653, 101st Cong., 2d Sess. 153 (1990).

<sup>159</sup> See Pub. L. No. 549, § 701, 104 Stat. 2672 (1990) (codified at 42 U.S.C. § 7413(d) (Supp. III 1990)).

tives to agencies' use of these penalty provisions and second created substantial disincentives to defendants to contest a case. As a result, defendants would almost always settle the case, even if they believed they had a legitimate defense. The Conference expected that the use of administrative penalties would enable agencies to use penalties more effectively in their enforcement programs, while at the same time affording defendants a more cost-effective forum in which to contest a case. The Conference's recommendation presumed that the administrative penalty procedure would be formal adjudication under the APA. Nevertheless, these formal proceedings were seen as much less cumbersome, time-consuming and expensive than judicial proceedings. The fact that agencies would no longer need to obtain Justice Department approval was no small part of this increased efficiency.

EPA, however, argued to Congress that formal adjudication procedures were themselves too "lengthy and laborious."<sup>160</sup> EPA cited no figures or particular experience to justify this conclusion, but members of Congress have heard many complaints about long, involved formal administrative proceedings, and it is true that the procedures for formal adjudication do not emphasize, much less guarantee, expeditious case-handling. Consequently, it is not surprising that EPA's argument found sympathetic ears in Congress. In addition, EPA argued that formal, APA adjudication would "require creation of a new layer of bureaucracy."<sup>161</sup> What EPA meant by this is not entirely clear, but it apparently referred to the need for ALJs in formal adjudications. How a handful of ALJs could be considered "a new layer of bureaucracy" is not self-evident, but this reference seems to reflect a deep-seated, negative perception of ALJs as a group, shared by a number of EPA personnel involved in the enforcement program. ALJs were perceived as having no interest in expediting cases, minimizing costs, or facilitating resolution. Moreover, these personnel believe the independence afforded ALJs makes it virtually impossible for the agency to alter whatever culture exists among ALJs to afford maximum procedural rights, rather than balance the cost and time of particular procedures against the need.<sup>162</sup>

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<sup>160</sup> See *Oversight Hearings*, *supra* note 145.

<sup>161</sup> *Id.*

<sup>162</sup> In the course of separate interviews with EPA enforcement officials involved in the administrative penalty program, I was told of "horror stories" involving ALJs. When I asked for specifics, however, the speakers admitted they were referring to what others had said. Whatever the facts, there is clearly a perception by EPA officials involved in enforcement that ALJs are responsible for "long and frustratingly ineffi-

Nevertheless, Congress did not generally provide for exclusively informal procedures. Instead, the informal proceedings are part of a two-tiered system of administrative penalties, plus provision for judicial imposition of civil penalties.<sup>163</sup> Generally, these are rationally tiered, so that the lowest penalty amount can be assessed informally, a higher amount in a formal adjudication, and a still higher amount in a judicial proceeding.<sup>164</sup> This tiering was responsive to EPA's representation that the informal penalty procedures were to be used for the less complex cases, where the factual issues and compliance questions would be straight-forward, and where the nature of the violation was less serious. Absent such facilitation, EPA had suggested, these cases simply would not be brought because they would be too time and resource intensive to justify, given their relatively minor nature. EPA represented that the more serious cases would still be brought judicially, or at least through more formal adjudication.

### III. THE IMPLEMENTATION

#### A. *The Regulations*

The 1986/87 legislation empowered two agencies to assess administrative penalties without using APA procedures: EPA and the Army Corps of Engineers. The 1990 legislation added the Coast Guard. EPA, within months of the passage of the Water Quality Act of 1987, published guidance in the Federal Register, which amounted to rules of procedure governing the Class I informal penalty assessments.<sup>165</sup> That guidance announced "the expectation that EPA will later notice [the procedures] for proposed rulemaking."<sup>166</sup> It was not until 1991, however, that EPA in fact proposed rules to implement all of its various informal penalty pro-

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cient proceedings." It is, therefore, not surprising that EPA has in recent years sought to have all new administrative penalties imposed through non-APA procedures, *see text supra* at notes 122, 145, 151, and even to remove some remedial order proceedings from APA procedures, *see* *Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989) (regulations requiring only informal hearings for imposing "corrective action orders" under the Resource Conservation and Recovery Act).

<sup>163</sup> The exception is the provision in the Safe Drinking Water Act, 42 U.S.C. § 300h-2(c) (1988).

<sup>164</sup> *See* 33 U.S.C. § 1319(d) & (g) (1988); 33 U.S.C. § 1321(b)(6) & (7) (Supp. III 1990); 42 U.S.C. § 7413(b) & (d) (Supp. III 1990); 42 U.S.C. § 9609(a)-(c) (1988) (judicial assessment at same level as formal adjudication); 42 U.S.C. § 11045(b) (1988) (judicial assessment at same level as formal adjudication).

<sup>165</sup> *See* 52 Fed. Reg. 30,730 (1987).

<sup>166</sup> *Id.*

grams other than the Clean Air Act field citation program.<sup>167</sup> These proposed rules were to be field-tested for a year before EPA would adopt final rules.<sup>168</sup>

The Corps, while it initially took longer to act, then proceeded with dispatch. The Corps issued a proposed rule in 1989,<sup>169</sup> and later the same year it issued a final rule.<sup>170</sup> The rule adopted procedures governing the Corps assessment of administrative penalties for violations of permits issued under Section 404 of the Clean Water Act.<sup>171</sup>

The Coast Guard, as discussed earlier, had used informal penalty procedures under the original FWPCA with its ambiguous administrative penalty procedures. In 1978, the Coast Guard adopted rules to govern all its penalty assessments, not just those under the FWPCA.<sup>172</sup> These rules established an informal proceeding for assessing all penalties. The Oil Pollution Act of 1990, however, amended the FWPCA framework, creating the two-tier system of Class I and Class II administrative penalties.<sup>173</sup> The Class I penalties were potentially larger than the old FWPCA penalties and were explicitly to be assessed in an informal proceeding. The Class II penalties were potentially larger yet, but they required formal adjudication under the APA. The Coast Guard took no action to change its penalty procedures to include Class II penalties until March 1993, when it adopted an interim final rule establishing for-

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<sup>167</sup> See 56 Fed. Reg. 29,995 (1991).

<sup>168</sup> Interview with Elyse DiBiagio-Wood, Office of Enforcement, Water Division, United States Environmental Protection Agency, in Washington, D.C. (October 10, 1991).

<sup>169</sup> See 54 Fed. Reg. 20,608 (1989).

<sup>170</sup> See 54 Fed. Reg. 50,708 (1989) (codified at 33 C.F.R. § 326.6 (1991)). The Corps did not achieve the same dispatch with respect to Class II penalty procedures which it had demonstrated with respect to the Class I penalty procedures. The Corps' last several Regulatory Agendas have included schedules for developing those procedures, but those schedules have yet to be met. See, e.g., 56 Fed. Reg. 53,207 (1991). As of February 1992, the Corps had yet to propose procedures for Class II penalties.

<sup>171</sup> Apparently, however, this rule has never been used. Interview with Lance Wood, Office of Chief Counsel, U.S. Army Corps of Engineers, in Washington, D.C. (March 13, 1992). It is not clear why the Corps has not used this authority, although it may relate to the fact that the Corps has no history of administrative adjudication, lacking any ALJs, and therefore is institutionally ignorant of administrative adjudication.

<sup>172</sup> See 43 Fed. Reg. 54,186 (1978), *adopting* 33 C.F.R. Subpart 1.07.

<sup>173</sup> 33 U.S.C. § 1321(b)(6)(B) (Supp. III 1990). Also, pursuant to the SARA amendments to CERCLA, see note 15 *supra*, the President delegated his authority to assess both Class I and Class II administrative penalties under 42 U.S.C. § 9609(b), not only to EPA, but also to the Coast Guard when the violation occurs in waters of the United States. See Section 4(c)(2), Exec. Order No. 12580, 52 Fed. Reg. 2923 (1987), *reprinted in* 42 U.S.C. 9609 note (1988).

mal, APA procedures for these Class II penalty proceedings.<sup>174</sup>

EPA's proposed rule would create a new Part 28 in title 40 of the Code of Federal Regulations. This Part 28 would contain the consolidated rules of practice for informal penalties imposed under the Clean Water Act, CERCLA, EPCRA, and the Safe Drinking Water Act. At 13 pages of Federal Register, however, this Part would be longer than EPA's consolidated rules of practice for *formal* penalties in Part 22. It is also over four times the length of the penalty procedures used by the Coast Guard or the Corps of Engineers for their informal penalty proceedings.<sup>175</sup> The preamble to the rule extends to 25 Federal Register pages. What is it that makes these "informal" proceedings so complicated?

Under both the Clean Water Act and Safe Drinking Water Act administrative penalty provisions, EPA is required to give "public notice" before assessing a penalty, so that "interested persons" may comment on the proposed penalty and, if the defendant requests a hearing, participate in the hearing.<sup>176</sup> Under the Clean Water Act provision, even if the defendant does not request a hearing, any interested person who comments on the proposed penalty may petition EPA within 30 days of the issuance of the order to set aside the order and to provide a hearing.<sup>177</sup> EPA is required to set aside the order and hold a hearing if evidence contained in the petition is material and was not considered in issuing the order.<sup>178</sup> In addition, under the Clean Water Act, EPA must consult with the state in which the violation occurs in assessing the administrative penalty.<sup>179</sup>

These public procedures are unusual for an adjudication. EPA's proposed rule provides that public notice should be given by

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<sup>174</sup> See 58 Fed. Reg. 17,926 (1993).

<sup>175</sup> See 33 C.F.R. Subpart 1.07 (1991); 33 C.F.R. § 326 (1991).

<sup>176</sup> See 33 U.S.C. § 1319(g)(4)(A), (B) (1988); 42 U.S.C. § 300h-2(c)(3)(B), (C) (1988). Under the Clean Water Act, if the Corps of Engineers is assessing an administrative penalty for a violation of a Section 404 permit, these same public procedures would apply to the Corps' proceeding. See 33 U.S.C. § 1319(g)(4) (1988). Similar public participation rights exist with respect to Class II penalties only under the Oil Pollution Act provisions. 33 U.S.C. § 1321(b)(6)(C) (Supp. III 1990).

<sup>177</sup> See 33 U.S.C. § 1319(g)(4)(C) (1988). Again, this is also true of Corps' proceedings under the same section for violations of § 404 permits. Again, also, there is a similar provision with respect to Class II penalties only under the Oil Pollution Act. 33 U.S.C. § 1321(b)(6)(C) (Supp. III 1990).

<sup>178</sup> 33 U.S.C. § 1319(g)(4)(C) (1988). Again, this is also true of Corps' proceedings under the same section for violations of § 404 permits. Again, also, there is a similar provision with respect to Class II penalties only under the Oil Pollution Act. 33 U.S.C. § 1321(b)(6)(C) (Supp. III 1990).

<sup>179</sup> See 33 U.S.C. § 1319(g)(1) (1988).

mail to "any person who requests such notice."<sup>180</sup> In addition, notice should be given to "potentially affected persons" in an unspecified manner.<sup>181</sup> The preamble states that EPA intends "ordinarily" in these circumstances to publish notice in a local newspaper or other media.<sup>182</sup> The public notice is a document that identifies the respondent, the EPA office involved, any permit involved, the alleged violations, the Hearing Clerk whom interested persons may contact for further information, and EPA's authority to issue a default order if respondent does not respond in a timely manner.<sup>183</sup> In addition, the notice includes the information that a member of the public may submit written comments on the complaint to the Hearing Clerk and become a participant in the proceeding.<sup>184</sup> Any comments must be filed within 30 days of receipt of the notice.<sup>185</sup> They then become part of the administrative record, subject to certain limitations.<sup>186</sup>

Participation by commenters in the proceeding itself is strictly limited. Classifying commenters as "participants,"<sup>187</sup> but not "parties,"<sup>188</sup> EPA does not allow commenters to take part in the pre-hearing conference, engage in any discovery, or have any participation in default or consent orders or summary or accelerated decisions.<sup>189</sup> Commenters are allowed to call witnesses and introduce evidence after the conclusion of both EPA's and the respondent's case,<sup>190</sup> but commenters are not allowed to cross-examine either the agency's or the respondent's witnesses.<sup>191</sup> The parties, however, may cross-examine the commenters' witnesses.<sup>192</sup> Com-

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<sup>180</sup> 56 Fed. Reg. 30,027 (1991) (to be codified at 40 C.F.R. § 28.16(d)) (proposed July 1, 1991).

<sup>181</sup> *Id.*

<sup>182</sup> See 56 Fed. Reg. 30,010 (1991).

<sup>183</sup> See 56 Fed. Reg. 30,023 (1991) (to be codified at 40 C.F.R. § 28.2(q)) (proposed July 1, 1991).

<sup>184</sup> *Id.*

<sup>185</sup> See 56 Fed. Reg. 30,027 (1991) (to be codified at 40 C.F.R. § 28.20(c)) (proposed July 1, 1991).

<sup>186</sup> See 56 Fed. Reg. 30,021 (1991) (to be codified at 40 C.F.R. § 28.2(b)(9)) (proposed July 1, 1991).

<sup>187</sup> See 56 Fed. Reg. 30,022 (1991) (to be codified at 40 C.F.R. § 28.2(l)) (proposed July 1, 1991).

<sup>188</sup> See 56 Fed. Reg. 30,022 (1991) (to be codified at 40 C.F.R. § 28.2(m)) (July 1, 1991).

<sup>189</sup> See 56 Fed. Reg. 30,028-30 (1991) (to be codified at 40 C.F.R. §§ 28.21 - 28.25) (July 1, 1991).

<sup>190</sup> See 56 Fed. Reg. 30,031 (1991) (to be codified at 40 C.F.R. § 28.26(g)(5)) (proposed July 1, 1991).

<sup>191</sup> See 56 Fed. Reg. 30,031 (1991) (to be codified 40 C.F.R. § 28.26(f)) (proposed July 1, 1991).

<sup>192</sup> *Id.*

menters may participate in closing arguments and submit proposed findings of fact and conclusions of law to the Presiding Officer.<sup>193</sup>

In the event that a hearing is not held, EPA's proposed rule reiterates that a commenter may petition the Regional Administrator to set aside the order and to hold a hearing, if the commenter has material information not already considered.<sup>194</sup> If the petition is granted, there is a hearing; if the petition is denied, the participants are notified, and the denial is noticed in the Federal Register.<sup>195</sup>

Despite the rather elaborate public procedures, interested persons rarely, if ever, either comment on a proposed order or participate in a hearing.<sup>196</sup> This may be because there are not very many persons who would be interested in penalty orders, other than perhaps some environmental groups. Environmental groups were, after all, the ones who raised the specter that EPA might use these administrative penalties only to slap offenders on the wrist, and the public procedure requirements were placed in the law presumably so that environmental groups could monitor EPA's activity. This does not appear to be happening.

There are a number of possible explanations. One is that environmental groups may not be getting effective notice. The proposed rule states that public notice will be provided to "any person who requests such notice."<sup>197</sup> Because penalty actions are initiated at the regional level, this means that persons must request such notice from regional offices. It is doubtful, however, whether regional environmental groups are even aware of this opportunity or requirement for notice. EPA's preamble suggests that the agency will maintain "an appropriate mailing list."<sup>198</sup> An FOI request to each of the EPA regions, however, resulted in many offices indicat-

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<sup>193</sup> See 56 Fed. Reg. 30,031 (1991) (to be codified at 40 C.F.R. § 28.26(i) & (k)) (proposed July 1, 1991).

<sup>194</sup> See 56 Fed. Reg. 30,033 (1991) (to be codified at 40 C.F.R. § 28.30(a)) (proposed July 1, 1991).

<sup>195</sup> See 56 Fed. Reg. 30,033 (1991) (to be codified at 40 C.F.R. § 28.30(b) & (c)) (proposed July 1, 1991).

<sup>196</sup> In talking to a number of EPA personnel involved in Class I penalty proceedings, I have found only one person who knows of instances when there have been comments filed by interested persons. Apparently, sometimes mining or "right wing public interest groups" comment in Alaska. The Federal Register fails to show any case where a hearing has been required because a commenter has petitioned for one.

<sup>197</sup> 56 Fed. Reg. 30,027 (1991) (to be codified at 40 C.F.R. § 28.16(d)) (proposed July 1, 1991).

<sup>198</sup> 56 Fed. Reg. 30,010 (1991).

ing no list, because no one has requested to be given notice.<sup>199</sup> Some offices provided a general notification list, but an addressee on one of the lists does not recall ever receiving public notice of an administrative penalty action.<sup>200</sup> The preamble also states that notice to potentially affected members of the public is also to be given, "ordinarily" by publishing notices in local newspapers.<sup>201</sup> Assuming such notice is given, it still would not be surprising if environmental groups or others with an interest in penalty actions do not discover it.

Another explanation is that environmental groups simply may not have the time or resources to research the issues in the penalty orders about which they receive notice. Most environmental groups, even well-funded ones, are stretched in terms of the issues and projects they can cover. The administrative penalties assessed under the Clean Water Act and Safe Drinking Water Act, and especially the Class I penalties under the Clean Water Act, are relatively small in amount and the cases relatively straightforward. Consequently, environmental groups may not see commenting on or participating in administrative penalties as an efficient use of their resources.<sup>202</sup>

A third explanation may be that EPA's actions under the administrative penalty program are satisfactory to environmental groups, so they see no need to comment or participate in the hearings. Perhaps the most likely explanation is a combination of all three. Only a subset of potentially interested persons are probably receiving effective notice, and the environmental groups who do receive notice probably do not see that the marginal benefit from their commenting or participation in the proceeding is worth the cost to their organizations.

Consultation with the state is achieved by notice of the action to the agency with the most direct authority related to the matters in the action.<sup>203</sup> EPA must give this notice within 30 days of the respondent's receipt of the complaint.<sup>204</sup> No further specification

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<sup>199</sup> See, e.g., letter from Veronica Harrington, Chief, NPDES Program Operations Section, Region I, EPA, Boston, Massachusetts to the author (Feb. 11, 1992) (on file with the author).

<sup>200</sup> Letter from Kirk Cunningham, Water Quality Chair, Sierra Club, Boulder, Colorado, to the author (Feb. 3, 1992) (on file with author).

<sup>201</sup> 56 Fed. Reg. 30,010 (1991).

<sup>202</sup> See Letter from Kirk Cunningham, Water Quality Chair, Sierra Club, Boulder, Colorado to the author (Feb. 3, 1992) (on file with author).

<sup>203</sup> 56 Fed. Reg. 30,027 (1991) (to be codified at 40 C.F.R. § 28.19) (proposed July 1, 1991).

<sup>204</sup> *Id.*



is given as to the nature or method of the state consultation.<sup>205</sup> The preamble states that the nature or substance of the consultation need not be part of the administrative record.<sup>206</sup>

There is little evidence that this consultation with the state is meaningful. Generally, EPA's enforcement is coordinated so as not to interfere with state enforcement, so there develops a division of labor. EPA generally monitors the states' enforcement activities and the states generally monitor EPA's, but normally there is little overlap. Consequently, it seems unlikely that states are using their limited resources to become actively involved in administrative penalty cases, which are of the smallest consequence and are the least problematic of enforcement cases.

The public procedures, however, are not the source of the complexity of EPA's proposed rules. After all, the Corps of Engineers is under identical statutory requirements for its enforcement of Section 404 of the Clean Water Act, and the Coast Guard is under identical requirements with respect to its Class II administrative penalties.<sup>207</sup> Rather, the complexity arises out of two potentially conflicting purposes of EPA's rules. One purpose is to assure sufficient procedures to satisfy due process; the other is to assure the most timely conclusion of informal penalty cases and to constrain substantially the discretion of the hearing officer both with respect to the procedure and the substance of the penalty proceeding, presumably also to assure expedition. The procedures of the Corps and the Coast Guard share the former purpose, but not the latter.

Both the Corps and EPA procedures establish a Presiding Officer,<sup>208</sup> while the Coast Guard provides for a Hearing Officer.<sup>209</sup> Under EPA's procedures the Regional Administrator appoints a Presiding Officer for a case within 20 days of service of the complaint.<sup>210</sup> The Presiding Officer is to be "an Agency attorney"<sup>211</sup>

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<sup>205</sup> The Corps of Engineers' rule specifies that the appropriate state agency shall have the same opportunity to comment and participate in the hearing as a public commenter. See 33 C.F.R. § 326.6(d)(3) (1991).

<sup>206</sup> 56 Fed. Reg. 30,011 (1991). The actual regulatory language, however, is ambiguous on this issue. See 56 Fed. Reg. 30,021 (1991) (to be codified at 40 C.F.R. § 28.1(b)(4)) (proposed July 1, 1991).

<sup>207</sup> See 33 U.S.C. § 1321(b)(6)(C) (Supp. III 1990).

<sup>208</sup> 56 Fed. Reg. 30,023 (1991) (to be codified at 40 C.F.R. § 28.2(n), 28.4) (proposed July 1, 1991); 33 C.F.R. §§ 326.6(a)(3)(v), 326.6(h)(3) (1991).

<sup>209</sup> See 33 C.F.R. §§ 1.07-5(b), 1.07-15 (1991).

<sup>210</sup> See 56 Fed. Reg. 30,027 (1991) (to be codified at 40 C.F.R. § 28.16(h)) (proposed July 1, 1991).

<sup>211</sup> 56 Fed. Reg. 30,022 (1991) (to be codified at 40 C.F.R. § 28.2(n)) (proposed July 1, 1991).

who has no interest in the outcome of the case or any prior connection with the case before her, whether investigative, prosecutorial, or supervisory.<sup>212</sup> Under the Corps procedures, the District Engineer appoints as Presiding Officer a member of "Corps counsel staff or other qualified person," who likewise is to have had no prior connection with the case<sup>213</sup> and is to have no investigative, prosecutorial, or supervisory responsibility with respect to the case before her.<sup>214</sup> Both sets of procedures prohibit *ex parte* communications with the Presiding Officer<sup>215</sup> and provide for removal of the Presiding Officer for making prohibited *ex parte* communications.<sup>216</sup> Both allow for sanctions against a participant for making *ex parte* communications.<sup>217</sup> Unlike EPA and the Corps Presiding Officer, the Coast Guard's Hearing Officer need not be an attorney.<sup>218</sup> The neutrality requirements are stricter, however, prohibiting the Hearing Officer not only from having any prior connection or responsibility with respect to the particular case, but also from having any "other responsibility, direct or supervisory, for the investigation of cases referred for the assessment of civil penalties."<sup>219</sup> In other words, unlike the EPA and Corps Presiding Officer, the Coast Guard Hearing Officer cannot otherwise be involved in enforcement activities. There are, however, no prohibitions on *ex parte* communications with respect to the Hearing Officer.

The general role of the Presiding Officer and Hearing Officer is similar under the three sets of procedures. The Presiding Officer or Hearing Officer is responsible for conducting any hearing.<sup>220</sup> The Presiding Officers make a recommended decision,<sup>221</sup> while the Hearing Officer makes a decision that may be ap-

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<sup>212</sup> See 56 Fed. Reg. 30,024 (1991) (to be codified at 40 C.F.R. § 28.4(c)(1), (2)) (proposed July 1, 1991).

<sup>213</sup> 33 C.F.R. § 326.6(h)(4) (1991).

<sup>214</sup> 33 C.F.R. § 326.6(h)(3) (1991).

<sup>215</sup> See 56 Fed. Reg. 30,023 (1991) (to be codified at 40 C.F.R. § 28.2(p)) (proposed July 1, 1991); 33 C.F.R. § 326.6(a)(3)(vi) (1991).

<sup>216</sup> See 56 Fed. Reg. 30,025 (1991) (to be codified at 40 C.F.R. § 28.13(a)) (proposed July 1, 1991); 33 C.F.R. § 326.6(h)(5)(iii) (1991).

<sup>217</sup> See 56 Fed. Reg. 30,025 (1991) (to be codified at 40 C.F.R. § 28.12) (proposed July 1, 1991); 33 C.F.R. § 326.6(h)(5)(iv) (1991).

<sup>218</sup> See 33 C.F.R. § 1.07-5(b) (1991).

<sup>219</sup> 33 C.F.R. § 1.07-15(a) (1991).

<sup>220</sup> 56 Fed. Reg. 30,023 (1991) (to be codified at 40 C.F.R. § 28.4(a)(2)) (proposed July 1, 1991); 33 C.F.R. § 1.07-55 (1991); 33 C.F.R. § 326.6(i) (1991).

<sup>221</sup> 56 Fed. Reg. 30,023 (1991) (to be codified 40 C.F.R. § 28.4(a)(1)(xii)) (proposed July 1, 1991); 33 C.F.R. § 326.6(j) (1991).

pealed.<sup>222</sup> The Coast Guard and the Corps' regulations, however, address the hearing procedures rather generally, providing a fair degree of discretion to the Presiding Officer in terms of controlling the hearing.<sup>223</sup> EPA's proposed regulations read like a detailed cookbook.

First, there are specified procedures separately governing consent orders, summary determinations, and accelerated recommended decisions.<sup>224</sup> There are no comparable Coast Guard or Corps provisions. The proposed EPA regulations authorize consent orders between the parties at any time, which immediately have binding legal force without further action by the Presiding Officer or the Regional Administrator.<sup>225</sup> If, however, the case arises under the Clean Water Act or Safe Drinking Water Act and members of the public have commented, the parties must propose the consent order to the Regional Administrator, who must approve or disapprove it.<sup>226</sup> Elaborate procedures are provided for summary determinations as to liability, which may be made by the Presiding Officer *sua sponte* or at the request of any party.<sup>227</sup> If the Presiding Officer determines there is no genuine issue of material fact with respect to liability, she may "accelerate" a recommended decision, unless "there is compelling need for further fact-finding" with respect to the amount of penalty.<sup>228</sup>

Second, EPA procedures go into substantial detail as to default proceedings,<sup>229</sup> while the Coast Guard and Corps provisions merely state that failure to request a hearing within 30 days waives the right to a hearing.<sup>230</sup> The EPA provisions distinguish here, as they do elsewhere, between determinations of liability and determinations of remedy (penalty amount).<sup>231</sup> Failure to respond within the required 30 days results in a default as to liability, so long as the

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<sup>222</sup> 33 C.F.R. § 1.07-65 (1991).

<sup>223</sup> See generally 33 C.F.R. §§ 1.07-55, 326.6(i) (1991).

<sup>224</sup> See 56 Fed. Reg. 30,028-31 (1991) (to be codified at 40 C.F.R. §§ 28.22 & 28.25) (proposed July 1, 1991).

<sup>225</sup> See 56 Fed. Reg. 30,028 (1991) (to be codified at 40 C.F.R. § 28.22(a)) (proposed July 1, 1991).

<sup>226</sup> See 56 Fed. Reg. 30,028 (1991) (to be codified at 40 C.F.R. § 28.22(b)) (proposed July 1, 1991).

<sup>227</sup> See 56 Fed. Reg. 30,030 (1991) (to be codified at 40 C.F.R. § 28.25) (proposed July 1, 1991).

<sup>228</sup> *Id.*

<sup>229</sup> See 56 Fed. Reg. 30,028 (1991) (to be codified at 40 C.F.R. § 28.21) (proposed July 1, 1991).

<sup>230</sup> 33 C.F.R. §§ 1.07-25(b) & 326.6(g)(2) (1991).

<sup>231</sup> See 56 Fed. Reg. 30,028 (1991) (to be codified at 40 C.F.R. § 28.21) (proposed July 1, 1991).

Presiding Officer finds that the complaint states a cause of action.<sup>232</sup> The allegations in the complaint become the Presiding Officer's recommended findings of fact and conclusions of law.<sup>233</sup> Where there has been default as to liability, EPA must submit "written argument (with any supporting documentation) regarding the assessment of an appropriate civil penalty" to the Presiding Officer.<sup>234</sup> Each of the separate statutes authorizing EPA's administrative penalties contains "factors" to be considered in setting the penalty amount.<sup>235</sup> This requirement to justify the penalty amount even in default cases is directly responsive to *Katzson Bros., Inc. v. EPA*,<sup>236</sup> which remanded a penalty assessment order because there was no evidence of consideration of the statutory factors, even though the defendant had never requested a hearing and a default judgment had been entered against him.

Third, the EPA procedures contain provisions on a prehearing conference and discovery.<sup>237</sup> There are no comparable Corps provisions, and the Coast Guard merely provides that generally the defendant may receive a free copy of all written evidence in the case file.<sup>238</sup> EPA's prehearing conference, which may be conducted by telephone,<sup>239</sup> must be held not later than 30 days after the defendant's response to the complaint.<sup>240</sup> Its purpose is to schedule and limit discovery, to simplify issues, and establish the time and place for the proceeding on the merits.<sup>241</sup> The proposed regulations specify that the Presiding Officer issue a prehearing order memorializing rulings in the conference within 20 days of the conference<sup>242</sup> and that the hearing on the merits occur not sooner than 30 days following the conference and not sooner than seven days

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<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> 56 Fed. Reg. 30,028 (1991) (to be codified at 40 C.F.R. § 28.21(b) (proposed July 1, 1991).

<sup>235</sup> See 56 Fed. Reg. 30,028 (1991) (to be codified at 40 C.F.R. § 28.21(b)) (proposed July 1, 1991).

<sup>236</sup> 839 F.2d 1396 (10th Cir. 1988).

<sup>237</sup> See 56 Fed. Reg. 30,029 (1991) (to be codified at 40 C.F.R. §§ 28.23 & 28.24) (proposed July 1, 1991).

<sup>238</sup> 33 C.F.R. § 1.07-30 (1991).

<sup>239</sup> See 56 Fed. Reg. 30,029 (1991) (to be codified at 40 C.F.R. § 28.23(a)) (proposed July 1, 1991).

<sup>240</sup> *Id.*

<sup>241</sup> See 56 Fed. Reg. 30,029 (1991) (to be codified at 40 C.F.R. § 28.23(b)) (proposed July 1, 1991).

<sup>242</sup> See 56 Fed. Reg. 30,029 (1991) (to be codified at 40 C.F.R. § 28.23(d)) (proposed July 1, 1991).

after completion of discovery.<sup>243</sup>

Discovery is denominated "information exchange" and is limited by the proposed regulation to the name of each witness, a brief description of the witness's connection to the case, the witness's qualifications (if the person is to be an expert witness), the subject matter of the intended testimony, and a copy of any documents intended to be introduced.<sup>244</sup> In addition, EPA is allowed to require the defendant to produce any information relating to the defendant's net profits, delayed or avoided costs or other benefit derived from the alleged violation, as well as any information relevant to defendant's inability to pay a penalty.<sup>245</sup> The defendant, however, is precluded from discovering the basis for a proposed penalty amount,<sup>246</sup> and the proposed regulation prohibits the Presiding Officer from requiring any discovery not mandated in the regulation.<sup>247</sup>

Fourth, the EPA proposed regulations bifurcate the administrative proceeding into two components: a liability determination and a penalty determination. For example, while the proposed regulations presume the right of participants to introduce testimony as to liability, only if there is "a compelling need for additional fact-finding on issues material to remedy" is the Presiding Officer granted discretion to allow testimony as to penalty.<sup>248</sup> This arises from EPA's view that, whereas decisions as to liability involve questions of fact as to which EPA has the burden of proof,<sup>249</sup> "penalty issues are matters of persuasion rather than proof."<sup>250</sup> Thus, EPA envisions hearings as to liability, but only argument with respect to penalty amount. Moreover, whereas EPA has the burden of going forward with respect to establishing liability, the defendant has the burden of going forward to show that the penalty requested should not be granted.<sup>251</sup> This differs from EPA practice in formal, APA adjudications.<sup>252</sup>

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<sup>243</sup> See 56 Fed. Reg. 30,029 (1991) (to be codified at 40 C.F.R. § 28.23(c)) (proposed July 1, 1991).

<sup>244</sup> See 56 Fed. Reg. 30,029 (1991) (to be codified at 40 C.F.R. § 28.24(b)(1)) (proposed July 1, 1991).

<sup>245</sup> *Id.*

<sup>246</sup> See 56 Fed. Reg. 30,006 (1991).

<sup>247</sup> See 56 Fed. Reg. 30,015 (1991).

<sup>248</sup> 56 Fed. Reg. 30,031 (1991) (to be codified at 40 C.F.R. § 28.26(h)) (proposed July 1, 1991).

<sup>249</sup> See 56 Fed. Reg. 30,006 (1991).

<sup>250</sup> *Id.*

<sup>251</sup> See 56 Fed. Reg. 30,025 (1991) (to be codified at 40 C.F.R. § 28.10(b)) (proposed July 1, 1991). See also 56 Fed. Reg. 30,006 (1991).

<sup>252</sup> See 56 Fed. Reg. 30,009 (1991).

The proposed regulation is not entirely clear, but EPA appears to suggest that it may include the statutory maximum penalty in its complaint without any underlying support.<sup>253</sup> If the defendant does not meet its burden of going forward to reduce that amount, EPA need not submit any evidence on the penalty amount.<sup>254</sup> Only in the course of its "argument" as to application of the appropriate penalty factors, after liability has been established, might EPA even indicate the actual penalty amount requested. Presumably, this strategy provides an additional incentive for defendants to settle.

Fifth, to assure expedition, the proposed regulation sets strict page limits on written arguments<sup>255</sup> and strict time limits for every stage of the proceeding.<sup>256</sup>

Finally, unlike the Coast Guard and Corps regulations, the EPA proposed regulation places the Presiding Officer under severe restraints, rather than relying upon her discretion. This is most apparent in Proposed Section 28.4, which purports to list all the authorities and duties of the Presiding Officer, and which contains various limitations on the Presiding Officer.<sup>257</sup> Failure to fulfill these duties or a violation of these limitations may result in removal of the Presiding Officer.<sup>258</sup> Although the limitations to assure the Presiding Officer's neutrality are unexceptional, other limitations on the Presiding Officer are noteworthy. First, EPA enforces the limitation on discovery by allowing for removal of the Presiding Officer if she grants any delay, continuance, or stay to a participant because the participant is awaiting information sought under the Freedom of Information Act (FOIA).<sup>259</sup> While EPA cannot restrict a defendant's (or commenter's) ability to make FOIA requests for whatever reason, including discovery, EPA can effectively limit the usefulness of the FOIA by setting time schedules, such that the requester would be unlikely to receive a response in time. Were the defendant able to obtain a stay or delay, however,

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<sup>253</sup> See 56 Fed. Reg. 29,999, 30,008-09 (1991).

<sup>254</sup> See 56 Fed. Reg. 30,006 (1991). The preamble states, however, that "in the absence of any support" in the record the Regional Administrator "should" impose only a "token or symbolic amount." *Id.*

<sup>255</sup> See 56 Fed. Reg. 30,024 (1991) (to be codified at 40 C.F.R. § 28.8) (proposed July 1, 1991).

<sup>256</sup> See 56 Fed. Reg. 30,027, 30,029 (1991) (to be codified at 40 C.F.R. §§ 28.20, 28.23 & 28.24(c)) (proposed July 1, 1991).

<sup>257</sup> 56 Fed. Reg. 30,023-24 (1991).

<sup>258</sup> See 56 Fed. Reg. 30,025 (1991) (to be codified at 40 C.F.R. § 28.13(a)) (proposed July 1, 1991).

<sup>259</sup> See 56 Fed. Reg. 30,024 (1991) (to be codified at 40 C.F.R. § 28.4(c)(4)) (proposed July 1, 1991). See also 56 Fed. Reg. 30,004 (1991).

perhaps FOIA requests could be successful. This limitation assures that FOIA will not be a useful tool. Second, the Presiding Officer may be removed if she allows the introduction of any evidence relating to the settlement of any action.<sup>260</sup> This reflects an underlying concern of EPA's not to allow its policies or practices regarding settlements of violations to affect its prosecution of violations.<sup>261</sup> Presumably, EPA fears that defendants will argue that under similar circumstances others have settled for far less, hoping that the Presiding Officer will set a like penalty amount. It is important to EPA to maintain substantial differentials between penalties imposed by settlement and those imposed by order so as to create a significant incentive to settle. Third, the Presiding Officer may be removed if she hears or considers any challenge to a final State or EPA action, including a permit issuance.<sup>262</sup> Clearly, EPA does not want the administrative proceeding to become a forum for a challenge to the lawfulness of the underlying legal requirements alleged to have been violated. Fourth, the Presiding Officer may be removed for dismissing the administrative complaint.<sup>263</sup> Under EPA's scheme, if the Presiding Officer believes an administrative complaint is defective, she has no authority to dismiss it. Rather she is limited to recommending its withdrawal to the Regional Administrator.<sup>264</sup> None of these substantive policies is particularly objectionable, but as even EPA notes, to make their violation grounds for removal of a Presiding Officer "goes beyond the usual."<sup>265</sup>

After the proceeding before the Presiding Officer, both the Corps and EPA procedures require the Presiding Officer to send a recommended decision to the District Engineer and Regional Administrator, respectively.<sup>266</sup> Unlike the procedure under the

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<sup>260</sup> 56 Fed. Reg. 30,024 (1991) (to be codified at 40 C.F.R. § 28.4(c)(5)) (proposed July 1, 1991).

<sup>261</sup> See, e.g., 56 Fed. Reg. 30,001 (1991) (discussing content of administrative record).

<sup>262</sup> See 56 Fed. Reg. 30,024 (1991) (to be codified at 40 C.F.R. § 28.4(c)(6)) (proposed July 1, 1991).

<sup>263</sup> 56 Fed. Reg. 30,024 (1991) (to be codified at 40 C.F.R. § 28.4(c)(7)) (proposed July 1, 1991).

<sup>264</sup> See 56 Fed. Reg. 30,023 (1991) (to be codified at 40 C.F.R. § 28.2(r)) (proposed July 1, 1991). Under the Coast Guard procedures, the Hearing Officer may dismiss a case without prejudice once, but thereafter the Hearing Officer may dismiss the complaint with prejudice. 33 C.F.R. § 1.07-65(a) (1991).

<sup>265</sup> See 56 Fed. Reg. 30,007 (1991) (discussing request for alternate Presiding Officer).

<sup>266</sup> 56 Fed. Reg. 30,032 (1991) (to be codified at 40 C.F.R. § 28.27) (proposed July 1, 1991); 33 C.F.R. § 326.6(j) (1991).

APA,<sup>267</sup> the parties have no opportunity to comment on the recommended decision before the superior makes the final decision. Under the Coast Guard procedures, the Hearing Officer actually makes the final decision.<sup>268</sup> Neither the Corps nor EPA provide for an administrative appeal of a final penalty assessment. EPA goes one step further, specifically prohibiting any request for reconsideration or administrative appeal.<sup>269</sup> Moreover, any attempt to appeal is defined as a "prohibited communication" that can lead to sanctions against the "appellant."<sup>270</sup> The Coast Guard, on the other hand, provides for an administrative appeal to the Commandant of the Coast Guard.<sup>271</sup>

Emphasis on settlement is explicit in the EPA proposed rules.<sup>272</sup> The strict, 30-day deadline for an answer to the complaint is automatically extended 30 days if the defendant files notice of a settlement offer,<sup>273</sup> and with EPA's agreement can be extended 90 days.<sup>274</sup> Settlement can be reached and confirmed in a consent order at any time before final EPA action.<sup>275</sup> The proposed regulations allow the Presiding Officer no role in the settlement negotiations or the issuance of any consent order.<sup>276</sup> Except in Clean Water Act and Safe Drinking Water Act cases in which commenters have participated, the regional enforcement office and the defendant may negotiate a final consent order without the need to obtain approval of either the Presiding Officer or the Regional Administrator.<sup>277</sup> Where members of the public have become participants in Clean Water Act or Safe Drinking Water Act cases, the consent order must be approved by the Regional Administrator, who may

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<sup>267</sup> See 5 U.S.C. § 557(c) (1988).

<sup>268</sup> 33 C.F.R. § 1.07-65 (1991).

<sup>269</sup> See 56 Fed. Reg. 30,026 (1991) (to be codified at 40 C.F.R. § 28.14) (proposed July 1, 1991).

<sup>270</sup> See 56 Fed. Reg. 30,023 (1991) (to be codified at 40 C.F.R. § 28.2(p)) (proposed July 1, 1991).

<sup>271</sup> 33 C.F.R. § 1.07-70-75 (1991).

<sup>272</sup> See 56 Fed. Reg. 30,012 (1991). ("EPA favors the resolution of disputes in the most timely and effective manner possible, and is particularly concerned that it not burden small or unsophisticated respondents with unnecessary proceedings. . . . Consequently, these proposed rules favor the settlements of disputes.")

<sup>273</sup> See 56 Fed. Reg. 30,027 (1991) (to be codified at 40 C.F.R. § 28.20(b)(2)) (proposed July 1, 1991).

<sup>274</sup> See 56 Fed. Reg. 30,027 (1991) (to be codified 40 C.F.R. § 28.20(b)(1)) (proposed July 1, 1991).

<sup>275</sup> See 56 Fed. Reg. 30,028 (1991) (to be codified at 40 C.F.R. § 28.22(a)) (proposed July 1, 1991).

<sup>276</sup> See 56 Fed. Reg. 30,013-14 (1991).

<sup>277</sup> See *id.*



require the settling parties to explain in writing the legality of the consent order.<sup>278</sup>

#### IV. THE EXPERIENCE AT EPA<sup>279</sup>

The position of "Presiding Officer" at EPA is not limited to the function of adjudicating informal penalty proceedings.<sup>280</sup> EPA assigns other informal adjudications to Presiding Officers<sup>281</sup> and, depending upon the region, other non-formal public hearings.<sup>282</sup> For example, under the Clean Air Act and Clean Water Act, if persons are convicted of criminal violations, they are placed on a list of persons barred from performing any government contract at the facility involved until EPA determines that the condition has been corrected.<sup>283</sup> Under EPA's regulations, the hearings governing

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<sup>278</sup> See 56 Fed. Reg. 30,028 (1991) (to be codified at 40 C.F.R. § 28.22(b)) (proposed July 1, 1991).

<sup>279</sup> As indicated in Part I of this Article, the Coast Guard's experience with informal penalty procedures predates EPA's. Moreover, in the volume of cases the Coast Guard dwarfs EPA, processing some 20,000 informal penalty cases a year. See John H. Frye III, *Survey of Non-ALJ Hearing Programs In The Federal Government*, ADMIN. L. REV. 261, 283 (1992). These cases arise under a number of statutes. See, e.g., 33 U.S.C. §§ 495(b), 499(c), 502(c), 1232(a), 1236, 1321(b)(6), 1608, 2072, 2107 (1988 & Supp. III 1990); 46 U.S.C. § 2107 (1988); 49 U.S.C. app. § 1809 (Supp. III 1990). Many of the penalties under these provisions amount to the equivalent of traffic tickets for pleasure boats. See, e.g., *Green v. United States Coast Guard*, 642 F. Supp. 638 (N.D. Ill. 1986). Only 33 U.S.C. § 1321(b)(6)(B)(i) (Supp. III 1990), however, expressly authorizes a non-APA proceeding. While the Coast Guard says that it uses its informal procedures under 33 C.F.R. 1.07 for all its civil penalty enforcement, see 33 C.F.R. § 1.07-1 (1991), this obviously cannot be true for those civil penalties expressly required to be conducted pursuant to the APA. See, e.g., 33 U.S.C. § 1321(b)(6)(B) (Supp. III 1990). Moreover, as indicated in Part I, while the Coast Guard has been generally successful in its attempts to deny *de novo* review of its informal administrative penalty determinations, the case law is sufficiently confused not to rule out the possibility of a successful challenge. Despite this caseload, the Coast Guard has only 10 Hearing Officers, who are headquartered in the various Coast Guard districts. See Frye, *supra*, at 283. This is explained by the fact that only five-to-seven percent of the cases involve hearings. *Id.*

Because of the peculiarities of the Coast Guard's penalty regime and the inability readily to compare it to a formal adjudication regime, the focus of this Article is on EPA's implementation.

<sup>280</sup> To confuse the issue, EPA regulations use the term "presiding officer" to refer not only to non-ALJ presiding officers, but also to those ALJs designated to be "presiding officers" in particular, formal adjudications. See, e.g., 40 C.F.R. § 27.11 (1991). In this Article, the term "presiding officer" will be used to refer only to non-ALJ hearing officers.

<sup>281</sup> See, e.g., 40 C.F.R. §§ 24.09, 24.13 & 222.6 (1991). See also 40 C.F.R. § 124.119 (1991) (ALJ normally responsible for hearing, but upon agreement of parties a non-ALJ presiding officer may be assigned).

<sup>282</sup> See generally EPA, REGIONAL PRESIDING OFFICER/REGIONAL JUDICIAL OFFICER ACCOMPLISHMENTS REPORT 1 (November 1992) [hereinafter ACCOMPLISHMENTS REPORT].

<sup>283</sup> See 33 U.S.C. § 1368 (1988); 42 U.S.C. § 7606 (Supp. III 1990).

those lists are conducted by "case examiners,"<sup>284</sup> who are Presiding Officers.<sup>285</sup> Moreover, there is a related position of "Regional Judicial Officer" to which the Regional Administrator may delegate her authority to act in formal APA penalty proceedings.<sup>286</sup> As a matter of practice, several Regional Judicial Officers have been authorized to issue final orders on consent and on default and to handle pre-answer motions in these formal proceedings.<sup>287</sup> Unlike a "Presiding Officer," a Regional Judicial Officer cannot be employed by the Region's enforcement office or by the office associated with the violation at issue.<sup>288</sup>

Most regions have appointed one attorney to be both the standing Presiding Officer and Regional Judicial Officer.<sup>289</sup> While EPA's workload model indicates that this standing position constitutes only three-tenths of a work year, several regions have found it to require more resources than the model indicates.<sup>290</sup> The persons appointed to these positions in January 1990 formed a workgroup to share information and experiences.<sup>291</sup>

Most, if not all, of the Regional Presiding Officers are experienced enforcement attorneys with substantial background enforcing the types of cases that they would be called upon to adjudicate. There is some question how the assignment as a Presiding Officer affects one's career path. Apparently, it is not seen as a step up, but as more a lateral, part-time assignment. Among younger, ambitious attorneys, such a position might be viewed as actually interfering with their plans for advancement. Because the Presiding Officers who have been assigned are for the most part senior attorneys who probably have already reached the peak of their career ladder before their assignment, this issue does not seem to have raised problems.

A related issue is the system for evaluating Presiding Officers. In those regions where the Judicial Officer and Presiding Officer are not the same standing position, the person acting as Presiding Officer is likely to come from the office of Regional Counsel and may continue to be evaluated by the Regional Counsel, as head of enforcement within the region. This is understandable in light of

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<sup>284</sup> See 40 C.F.R. § 15.4 (1991).

<sup>285</sup> See ACCOMPLISHMENTS REPORT, *supra* note 282, at 6.

<sup>286</sup> See 40 C.F.R. § 22.04(3) (1991).

<sup>287</sup> See ACCOMPLISHMENTS REPORT, *supra* note 282, at 5.

<sup>288</sup> See 40 C.F.R. § 22.04(2) (1991).

<sup>289</sup> See ACCOMPLISHMENTS REPORT, *supra* note 282, at 2.

<sup>290</sup> See *id.* at 7-8.

<sup>291</sup> See *id.* at 2.

the fact that the person probably only acts as Presiding Officer on a part-time basis and as an enforcement attorney for the remainder of her time. Most regions have not adopted this model, however. In Region IX, for example, the Regional Administrator is the person who rates the Presiding Officer, and the Presiding Officer does not have an active role in enforcement.<sup>292</sup>

At EPA, the total volume of administrative actions, including formal and informal, penalty and compliance actions, is on the order of 4000 per year.<sup>293</sup> Of these, about 1400 are administrative penalty cases.<sup>294</sup> Unfortunately, EPA does not break this figure down into informal and formal proceedings. The Office of Wastewater Enforcement and Compliance, however, does maintain some statistics distinguishing between its formal and informal penalty proceedings. Of the total of 242 proposed administrative penalty orders for violations of NPDES permits or pretreatment standards in FY 1991, 191 were proposed Class I (informal) penalties and 91 were Class II (formal) penalties.<sup>295</sup> While these figures do not include all the informal administrative penalty cases,<sup>296</sup> of the other programs utilizing informal administrative penalties only the Safe Drinking Water Underground Injection Control (UIC) program involves numbers of cases comparable to the NPDES and pretreatment program enforcement.<sup>297</sup> This suggests that the overwhelming proportion of the 1400 administrative penalty cases in FY90 were pursuant to formal proceedings.

The Clean Water Act Class I penalty cases are not spread evenly among EPA's ten regions. Thus, in FY90 Regions 4 and 6 each accounted for more than one-third of all the proposed Class I administrative penalty orders issued, while none of the remaining

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<sup>292</sup> Phone interview with Steven Anderson, Region IX Presiding Officer, July 1991.

<sup>293</sup> See EPA, ENFORCEMENT ACCOMPLISHMENTS REPORT, FY 1990, 3-3 (February 1991).

<sup>294</sup> See OFFICE OF ENFORCEMENT, COMPLIANCE POLICY AND PLANNING BRANCH, NATIONAL PENALTY REPORT, OVERVIEW OF EPA FEDERAL PENALTY PRACTICES, FY 1990 7 (April 1991).

<sup>295</sup> See EPA, OFFICE OF WASTEWATER ENFORCEMENT AND COMPLIANCE, ENFORCEMENT DIVISION, POLICY DEVELOPMENT BRANCH, FY 1991 ADMINISTRATIVE ENFORCEMENT REPORT 4 (April 1992) [hereinafter FY 1991 ADMINISTRATIVE ENFORCEMENT REPORT].

<sup>296</sup> Specifically, they do not include Safe Drinking Water Underground Injection Control (UIC) cases, CERCLA cases, Section 404 cases, or Oil Pollution Act cases.

<sup>297</sup> In Region II, there were fifteen informal penalty proceedings in UIC cases compared with seven informal penalty proceedings in Clean Water Act cases. See Attachment to letter from Charles E. Hoffman, Assistant Branch Chief, Water, Grants and General Law Branch, Region II, U.S.E.P.A., to William Funk, dated September 26, 1991 [hereinafter *Hoffman letter*] (on file with author).

regions had as many as ten, and two regions had none at all.<sup>298</sup> These differences reflect both different regional enforcement strategies and differences in state environmental enforcement.<sup>299</sup>

The number of informal penalty cases brought (or disposed of) by EPA, however, may not accurately reflect the load placed on Presiding Officers. On the one hand, they may understate the load. Regional Presiding Officers/Judicial Officers may be assigned duties not related to informal penalty proceedings.<sup>300</sup> For example, in Region 10 the Presiding Officer in FY90 was assigned to conduct over 40 "public hearings," non-adjudicatory hearings such as NEPA hearings or public participation hearings under various environmental statutes.<sup>301</sup> In Region 9, the Regional Judicial Officer was assigned to hear pre-hearing motions in over 130 cases in both FY91 and FY92.<sup>302</sup>

On the other hand, the number of penalty cases may imply a greater load than exists. Class I penalty cases can be disposed of without involving a Presiding Officer. Under the guidance in effect at the time,<sup>303</sup> a Presiding Officer was only assigned to a case when a defendant requested a hearing. Thus, if a defendant simply did not respond to a complaint or settled with EPA without requesting a hearing, no Presiding Officer would have been assigned, but a proposed and final administrative penalty order would have been issued. This may explain why, for example, despite Region 6's 44 proposed Class I penalty orders in FY90, only about five cases were assigned to the Regional Presiding Officer.<sup>304</sup> As a matter of statistics, this discrepancy should disappear under EPA's proposed regulations, because the Regional Administrator is to designate a Presiding Officer not later than 20 days after service of the complaint.<sup>305</sup> Nonetheless, the evidence suggests that the vast majority of informal penalty cases never involve a Presiding Officer in a meaningful way. This is consistent with the fact that all

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<sup>298</sup> Memorandum from Richard G. Kozlowski, Director, Enforcement Division, to Regional Water Management Division Directors, Use of Administrative Penalty Orders (APOs) in FY90 [hereinafter *1991 Kozlowski Memorandum*], March 14, 1991, at Appendix (FY90 Proposed APOs By Region).

<sup>299</sup> For example, the fact that Region 10 brought no cases in Washington but brought eleven in Alaska reflects Washington's aggressive environmental enforcement and Alaska's non-enforcement of the Clean Water Act.

<sup>300</sup> See *supra* notes 280-88 and accompanying text.

<sup>301</sup> See ACCOMPLISHMENTS REPORT, *supra* note 282, Table 6.

<sup>302</sup> See *id.* at Table 5.

<sup>303</sup> See 52 Fed. Reg. 30,730 (1987).

<sup>304</sup> See ACCOMPLISHMENTS REPORT, *supra* note 282, Table 4.

<sup>305</sup> See 56 Fed. Reg. 30,027 (1991) (to be codified at 40 C.F.R. § 28.16(h)) (proposed July 1, 1991).

but a very few informal penalty cases are settled.<sup>306</sup>

Further evidence of the limited role of Presiding Officers is the corpus of written decisions they have rendered. In FY90, Regional Presiding Officers/Judicial Officers issued written decisions in 16 cases, only five of which were informal penalty cases.<sup>307</sup> In FY91, there were written decisions in 14 new cases, only six of which were informal penalty cases.<sup>308</sup> In FY92, there were written decisions in 19 new cases, only seven of which were informal penalty cases.<sup>309</sup>

Settlement, rather than litigation, is also the norm for Class II penalties and other administrative penalties for which formal adjudication would be required.<sup>310</sup> As a result, figures comparing the average time to conclude Class I and Class II penalty orders<sup>311</sup> are not measurements of the time saved by the informal proceeding as compared to a formal, APA adjudication. Nevertheless, the average time for resolution of Class I penalties is less than that for Class II penalties.<sup>312</sup>

	Average Days for Class I Penalties	Average Days for Class II Penalties
FY 88	129	152
FY 89	136	210
FY 90	169	247
FY 91	167	242

<sup>306</sup> See letter from Robert A. DiBiccaro, Regional Presiding Officer/Judicial Officer, Region I, U.S.E.P.A., to William Funk, dated September 26, 1991 (showing that of the 27 informal civil penalty cases begun and concluded in Region I between October 1, 1988, and July 15, 1991, all were settled); *Hoffman letter*, *supra* note 297 (stating that of the 18 Class I Clean Water Act cases brought and concluded between February 1989 and February 1991, none required hearings, with 17 settling, and that with respect to the nine outstanding cases, only one will require a written decision).

<sup>307</sup> See ACCOMPLISHMENTS REPORT, *supra* note 282, Appendix, Cumulative List of Decisions.

<sup>308</sup> See *id.*

<sup>309</sup> See *id.*

<sup>310</sup> I have found no statistics to support this statement, but everyone I talk to involved in EPA enforcement says this is the case.

<sup>311</sup> This is the average time from the issuance of the proposed order, which is the equivalent of a complaint, and a final order.

<sup>312</sup> See 1991 *Kozlowski Memorandum*, *supra* note 298, at 9; Memorandum from Richard G. Kozlowski, Director, Enforcement Division, Office of Water, U.S.E.P.A., to Compliance Branch Chiefs and Regional Counsels, re: Use of Administrative Penalty Orders (APs) in FY 89, dated March 13, 1990 [hereinafter 1990 *Kozlowski Memorandum*], at 6; FY 1991 ADMINISTRATIVE ENFORCEMENT REPORT, *supra* note 295, at 9-10. The rapidly increasing length of time for both Class I and Class II penalty proceedings

Those involved in the process perceive the reason for the greater period of time for resolving Class II penalties as the fact that Class II penalties are for larger dollar amounts than Class I penalties, and therefore demand and justify greater attention.<sup>313</sup>

## V. THE ISSUES

### A. Due Process

A fundamental question is whether the "informal" administrative procedures adopted by EPA, the Corps of Engineers, and the Coast Guard satisfy the requirements of procedural due process for the assessment of monetary penalties. The paucity of case law on the subject means that the answer cannot be certain, but at the same time the lack of serious constitutional challenge suggests that litigants have not thought it to be worth the effort.

Earlier, this Article addressed the *Mathews v. Eldridge* three-factor test for determining the required due process procedures. There, the conclusion was that, given the variety of different types of administrative penalties, it was not possible to state a meaningful

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from 1989 and 1990 probably is the result of the rapidly increasing number of proposed orders being issued in 1988 and 1989 without a concomitant increase in personnel and resources. The 1991 reduction in time would be explained by the decrease in proposed orders in 1990.

<sup>313</sup> See *Hoffman letter*, *supra* note 297, at 2; Interview with Elyse DiBiagio-Wood, Office of Enforcement, U.S.E.P.A., Washington, D.C. (October 9, 1991); Phone interview with Theodore Rogowski, Office of Regional Counsel, Region X, U.S.E.P.A. (July 2, 1991).

Within the categories of Class I and Class II penalties, the faster cases were not necessarily the smaller cases. Indeed, generally, the faster cases were those that settled for greater than average penalties. See 1991 *Kozlowski Memorandum*, *supra* note 298, at 9; 1990 *Kozlowski Memorandum*, *supra* note 312, at 7; FY 1991 ADMINISTRATIVE ENFORCEMENT REPORT, *supra* note 295, at 10.

	Average Penalty in Slower than Average Class I Penalty Cases	Average Penalty in Faster than Average Class I Penalty Cases	Average Penalty in Slower than Average Class II Penalty Cases	Average Penalty in Faster than Average Class II Penalty Cases
FY 89	\$7,651	\$8,715	\$30,200	\$49,631
FY 90	\$8,641	\$7,572	\$43,663	\$52,462
FY 91	\$N/A	N/A	\$46,697	\$55,946

It is possible that within each class of penalty, the higher penalties reflect cases where the violations are most clear cut and the mitigating factors relatively insubstantial, so that there simply is not as much to negotiate about. Similarly, the lower penalties might reflect cases where the violations are less clear or the mitigating factors are more substantial, so that more time is required to negotiate a proper resolution.

general requirement. It may be possible, however, to find more guidance with respect to a particular set of administrative procedures. Accordingly, I will focus on EPA's proposed Part 28 rules in terms of due process requirements.

As indicated before, *Mathews v. Eldridge* establishes a three-factor test to assess the adequacy of any given set of procedures. The first factor is the private interest involved. The private interest involved in EPA's penalty provisions is primarily the cost of the penalty. Even within the relatively limited universe of EPA's informal administrative penalty provisions, there is substantial variation in the potential cost. Thus, under the UIC Safe Drinking Water provisions EPA may impose a maximum administrative penalty of \$125,000 without subjecting the hearing to the requirements of the APA,<sup>314</sup> under the Clean Water Act the maximum amount of a Class I penalty is \$25,000.<sup>315</sup> Nevertheless, these penalties are substantial in everyday terms and thus should elevate the private interest in sufficient procedures to a high level. Moreover, beyond the mere monetary cost of the penalty, for most persons there is a cost to reputation in being determined a law-breaker, even if in the relatively arcane world of environmental regulation. Indeed, for many companies, to be deemed a violator of environmental standards may seriously impact its relations with its neighbors and its status with customers. Finally, the private interest affected is affected forever. Unlike many of the cases raising due process issues,<sup>316</sup> the informal procedure contained in EPA's proposed Part 28 is not to make a temporary determination pending a final and formal adjudication of the issues. Rather it is the final determination.

The second *Mathews* factor is the risk of an erroneous determination as a result of informal procedures and the likely improvement that would result from more formal procedures. This factor is undoubtedly the most important, because unless there is harm caused by the informal procedures, which can be relieved or mitigated by more formal procedures, there is little reason to make the procedures more formal, no matter what the relative weight of the

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<sup>314</sup> See 42 U.S.C. § 300h-2(c) (1988).

<sup>315</sup> See 33 U.S.C. § 1319(g)(2)(A) (1988).

<sup>316</sup> See, e.g., *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987) (procedures used to order temporary reinstatement of discharged employees pending final determination); *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985) (procedures used to terminate employee for cause pending final determination); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (procedures used to terminate disability benefits pending final determination).

private and government interests.<sup>317</sup> To apply this factor, one must focus on two issues: the nature of the determinations the adjudication is to make and, in light of the nature of those determinations, what additional procedures might reduce error.

The nature of the determinations to be made is important, because the appropriateness or desirability of a particular procedural enhancement may turn on the nature of the factual determination to be made.<sup>318</sup> In *Mathews*, for example, the Court found direct and cross-examination to be unnecessary to determine the accuracy of the medical assessments of a person's impairment, because adjudicatory procedures used to determine the credibility and veracity of a witness were largely irrelevant to evaluate medical determinations.<sup>319</sup> In many EPA cases, the factual issues as to the presence of a violation are likely to involve written reports concerning pollution discharges and laboratory testing or on-site monitoring of the discharge.<sup>320</sup> A review of the handful of informal penalty determinations which have actually been litigated before a Presiding Officer indicates that factual issues do not predominate and those that exist do not seem to demand trial-type techniques to resolve them.<sup>321</sup>

As EPA's proposed Part 28 procedures recognize, a determination of a violation is only half the proceeding. There remains the issue of the amount of the penalty to be assessed. Under each of the penalty provisions, EPA is required to consider various factors in setting the penalty amount.<sup>322</sup> Several of these are heavily based

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<sup>317</sup> This statement reflects a strictly utilitarian, risk/benefit view of the *Mathews* test. While this is undoubtedly the thrust of *Mathews*, there are those who believe that the calculus perhaps should reflect other values as well. See, e.g., Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976). Occasionally, members of the Supreme Court have suggested relevant other factors as well. Cf. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 274 n.2 (1987) (Stevens, J., dissenting in part) (suggesting different considerations apply when government affects "traditionally guaranteed" rights rather than "new property").

<sup>318</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 343-44 (1976).

<sup>319</sup> *Id.*

<sup>320</sup> Cf. *Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477, 1484 (D.C. Cir. 1989).

<sup>321</sup> See, e.g., *In re Ashland Oil, Inc., Floreffe, Pa. Facility*, Docket No. PA-88-0001, Order denying motion for accelerated decision, dated May 14, 1990 (deciding that whether a change in oil tank size materially affected the potential for the discharge of oil into navigable waters was a disputed material fact requiring a hearing).

<sup>322</sup> See 33 U.S.C. § 1319(g)(3) (1988) ("the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.");



upon facts that may be disputed. This is particularly true of questions regarding the degree of culpability and the extent of economic benefit or savings attributable to the violation.<sup>323</sup> Nevertheless, most of these questions too seem not to call for trial-type techniques as the most effective means of determining truth.

Unlike *Mathews* and similar cases, however, the asserted deficiencies in EPA's procedures do not directly relate to trial-type procedures involving direct and cross-examination of witnesses. Compared to many "informal" proceedings, EPA's proposed Part 28 procedures retain most of the trial-type procedures of a formal adjudication. This is not to say that there are not procedures that might increase accuracy of determinations.

The most obvious complaint with EPA's procedures is the identity of the Presiding Officer. The failure to assure that he or she is not involved in enforcement activities was the primary objection made in the public comments on EPA's proposed rule.<sup>324</sup> This objection has two aspects. First, the commenters believed that senior attorneys from the enforcement office would likely have a built-in enforcement bias or mind-set that would detract from being a neutral Presiding Officer. Certainly it conforms to ordinary experience that persons who have been enforcers for a substantial number of years tend to approach related legal issues from an enforcer's perspective. While it is not unheard of for federal or state judges, or even ALJs, to come from an enforcement background, at

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42 U.S.C. § 9609(a)(3) (1988) (same); 42 U.S.C. § 11045(b)(1)(C) (1988) (same). 33 U.S.C. § 1321(b)(8) (Supp. III 1990) ("the seriousness of the violation or violations, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require"); 42 U.S.C. § 300h-2(c)(4)(B) (1988) ("(i) the seriousness of the violation; (ii) the economic benefit (if any) resulting from the violation; (iii) any history of such violations; (iv) any good-faith efforts to comply with the applicable requirements; (v) the economic impact of the penalty on the violator; and (vi) such other matters as justice may require.").

<sup>323</sup> The extent of economic benefit or savings resulting from the violation is determined by EPA according to its BEN computer model. See generally Jonathan D. Libber, *Penalty Assessment at the Environmental Protection Agency: A View from Inside*, 35 S.D. L. REV. 189 (1990).

<sup>324</sup> See Comments of American Paper Institute and National Forest Products Ass'n, August 30, 1991, at 2; Duquesne Light, August 30, 1991, at 7; McDonnell Douglas, August 30, 1991, at 1; Chemical Manufacturers Ass'n, August 30, 1991, at 6; Barnes & Thornburg, August 30, 1991, at 1; Piper & Marbury for Edison Electric Institute, August 30, 1991, at 3, 10; Texaco, August 26, 1991, at 1; Eli Lilly, August 30, 1991, at 2; Coalition for Clean Air Implementation, August 30, 1991, at 7; Hunton & Williams for Utility Air Regulation Group, August 30, 1991, at 3; Cincinnati Gas & Electric, August 21, 1991, at 1.

least once they have ascended the bench, they will not be called upon to continue to exercise an enforcement orientation. This is potentially different for EPA's Presiding Officers, who may continue to exercise enforcement office functions, so long as it is not on a case in which they are presiding. The second aspect of the commenters' objection is that Presiding Officers can continue to be evaluated for pay and advancement purposes by the enforcement office of EPA. One need not assume that Presiding Officers will curry favor with their supervisors by consciously making favorable rulings to fear that an unconscious anxiety of subtle reprisal might affect a close ruling.

The case law is clear that it is not a *per se* violation of due process to combine the functions of prosecutor and adjudicator.<sup>325</sup> The leading case on the subject, *Withrow v. Larkin*,<sup>326</sup> set a high threshold for claims of unconstitutional bias or prejudice. In challenging a particular adjudication, a complainant must "overcome the presumption of honesty and integrity in those serving as adjudicators" and must show "a risk of actual bias or prejudgment . . . ."<sup>327</sup> Consequently, the possible enforcement bias or enforcement "mind-set" of a Presiding Officer or the fact that the Presiding Officer might be subject to evaluation by enforcement personnel would not necessarily violate due process. Nevertheless, this does not rule out including such considerations as part of the *Mathews* factor, because they might affect the possible accuracy of determinations. By requiring the Presiding Officer to be an ALJ or an attorney not from or subject to enforcement personnel, EPA could eliminate this possible source of inaccurate determinations.

It should be noted that this possible threat to accuracy does not rely on the nature of the determinations to be made. Indeed, to the extent that the determinations are technical in nature, any enforcement bias or mind-set might increase the likelihood of inaccuracy by imbedding the Presiding Officer's EPA-orientation on technical issues.

Besides the absence of an ALJ as presiding officer, probably the other feature of the Part 28 procedures which most differs from a formal, APA adjudication is the inability of parties to com-

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<sup>325</sup> See, e.g., *Withrow v. Larkin*, 421 U.S. 35 (1975); *Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477, 1484 (D.C. Cir. 1989) (finding EPA's Presiding Officer under Part 24 procedures not a violation of due process by reason of possible relationship to enforcement activities).

<sup>326</sup> 421 U.S. 35 (1975).

<sup>327</sup> *Id.* at 47.

ment on the presiding officer's proposed decision.<sup>328</sup> This also was a feature uniformly criticized by commenters on EPA's proposed rule.<sup>329</sup> In its preamble to the proposed rule even EPA drew attention to this decision.<sup>330</sup> EPA indicated that one case raises a due process concern about denying parties an opportunity to comment on proposed decisions, but EPA found that case to be distinguishable.

The one case is *Koniag, Inc., the Village of Uyak v. Andrus*.<sup>331</sup> In that case, the Secretary of Interior was responsible for determining the eligibility of Native Alaskan villages to obtain lands under the Alaska Native Claims Settlement Act (ANCSA). While the APA did not govern the means by which these determinations were to be made, the Secretary adopted procedural regulations that provided that initial determinations could be challenged in a *de novo* hearing before an ALJ. Under this procedure, parties were permitted to file proposed findings and conclusions to the ALJ, who in turn made a recommended decision to the Secretary. But, as the D.C. Circuit noted, "[a]t this point, the procedure veered from the usual course of administrative law."<sup>332</sup> The recommended decision was not filed on the parties, and the parties were not able to file exceptions to the recommended decisions. The D.C. Circuit held this to be a violation of due process. This conclusion derived from a combination of considerations. First, the court, citing *Wong Yang Sung*, believed that the APA, and particularly § 557(c), guides the requirements imposed by due process, where there are no other prescribed statutory requirements. Second, citing *Mathews v. Eldridge*, the court found that the great private interest involved and "the minimal cost to administrative expediency"<sup>333</sup> required the Secretary to allow parties to take exceptions to the ALJ's recommended decisions and to submit briefs thereon. Third, ANCSA's statement of congressional findings and purpose included the language that the settlement of native lands "should be accomplished . . . with maximum participation by Natives in decisions affecting their rights and property,"<sup>334</sup> and to deny Native Alaskans the ability to

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<sup>328</sup> Compare 56 Fed. Reg. 30,026 (1991) (to be codified at 40 C.F.R. § 28.14) (proposed July 1, 1991) with 5 U.S.C. § 557(c) (1988).

<sup>329</sup> See, e.g., Comments of American Paper Institute and National Forest Products Association, August 30, 1991, at 6; Comments of Duquesne Light, August 30, 1991, at 3; Comments of Piper & Marbury for Edison Electric Institute, August 30, 1991, at 19.

<sup>330</sup> See 56 Fed. Reg. 29,998 (1991).

<sup>331</sup> 580 F.2d 601 (D.C. Cir.), cert. denied, 439 U.S. 1052 (1978).

<sup>332</sup> *Id.* at 605.

<sup>333</sup> *Id.* at 609.

<sup>334</sup> 43 U.S.C. § 1601(b) (1988).

take exceptions from proposed decisions was inconsistent with this exhortation. Finally, while the parties were able to submit proposed findings of fact and conclusions of law to the ALJ, these submissions apparently were not included in the record that was submitted to the Secretary for the final decision.

Some of these considerations are not present under EPA's proposed rule. Thus, where Congress has explicitly ruled out the use of §§ 554, 556, and 557, it would seem inappropriate to use § 557's procedures as a model to determine the contours of due process.<sup>335</sup> Moreover, under EPA's proposed rule, when parties are permitted to submit findings of fact and conclusions of law, they are to be part of the record submitted to the Regional Administrator.<sup>336</sup> However, EPA's proposed rule is less protective than the procedures in *Koniag* to the extent that it does not assure that parties will be able to submit findings of fact and conclusions of law at all. Instead, this is left to the discretion of the Presiding Officer.<sup>337</sup> Consequently, the failure to assure that parties will be able to submit *either* findings and conclusions *or* exceptions to a proposed decision makes the proposed rule much like the procedures in *Koniag*. EPA further distinguished *Koniag* in the preamble to its proposed rule by stating that there is no equivalent in the statutes creating the administrative penalties to ANCSA's exhortation to provide "maximum participation" to parties involved. Instead, Congress called for expedited enforcement procedures.<sup>338</sup> This is true, but it should be noted that ANCSA's statement of congressional findings and purpose also explicitly called for expedition, stating that the settlement process "should be accomplished . . . rapidly, with certainty, without litigation . . ." <sup>339</sup> The D.C. Circuit apparently did not perceive a requirement to allow parties to file exceptions from recommended decisions to interfere with this purpose of ANCSA.

Nevertheless, the most important consideration must be the *Mathews* analysis. Here, the D.C. Circuit's *Mathews* calculus in *Koniag* would seem quite comparable. That is, parties' interest in

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<sup>335</sup> See *Marcello v. Bonds*, 349 U.S. 302 (1955).

<sup>336</sup> See 56 Fed. Reg. 30,021, 30031-32 (1991) (to be codified at 40 C.F.R. §§ 28.2(b)(9), 28.26(k) & 28.27(a)(2)) (proposed July 1, 1991).

<sup>337</sup> See 56 Fed. Reg. 30,031 (1991) (to be codified at 40 C.F.R. § 28.26(k)) (proposed July 1, 1991). Here is an example where the lack of a truly neutral Presiding Officer might have substantial impacts on the fairness and accuracy of the decisionmaking.

<sup>338</sup> 56 Fed. Reg. 29,998 (1991).

<sup>339</sup> 43 U.S.C. § 1601(b) (1988).

the penalty proceedings is of "great importance,"<sup>340</sup> and there seems little reason why the "minimal cost to administrative efficiency" in *Koniag*<sup>341</sup> would be any higher for EPA in penalty proceedings. Given the evidence that very few penalty cases ever get to the recommended decision stage,<sup>342</sup> to allow parties to file exceptions to recommended decisions would seem to have little effect on EPA's enforcement.

All this being said, *Koniag* does not seem to be a strong case upon which to rely for its due process analysis. The D.C. Circuit's activism in fine-tuning the agency's procedure in that case is out of character with more recent Supreme Court and circuit court cases. Whatever the merits of allowing comment on the Presiding Officer's recommended decisions,<sup>343</sup> it stretches the notion of fundamental due process to include such a technical requirement.

More fundamentally, a number of other features of EPA's proposed regulation, which differ from what is provided in ordinary formal adjudications or even what is provided in many informal adjudications, might be said to affect the accuracy of the determinations. These were detailed at some length in Part III.<sup>344</sup> They include: EPA's shifting to the defendant of the burden of going forward to show why the requested penalty amount should not be granted, while prohibiting any discovery as to EPA's basis for the proposed amount and generally not allowing the defendant to introduce testimonial evidence as to penalty amount; serious constraints placed upon the Presiding Officer's exercise of discretion, including prohibitions on additional discovery beyond what is expressly provided in the regulation, on extending time for defendants to obtain information, and on the Presiding Officer dismissing EPA's complaint; very short page limits on parties' legal submissions; and short, strict deadlines for every step of the process, with default a threat at each stage. Individually, each of these limitations can be explained and perhaps justified. Indeed, an agency might be able to impose many of these limitations by rule on formal, APA adjudications of a particular type. Nonetheless, viewed together, especially in light of the lack of a functionally-neutral hearing officer and the inability to file exceptions to a proposed

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<sup>340</sup> *Koniag, Inc., the Village of Uyak v. Andrus*, 580 F.2d 601, 609 (D.C. Cir.), *cert. denied*, 439 U.S. 1052 (1978).

<sup>341</sup> *Id.*

<sup>342</sup> See *supra* note 306 and accompanying text.

<sup>343</sup> See *infra* note 355 and accompanying text.

<sup>344</sup> See *supra* notes 229-78 and accompanying text.

decision, one might conclude that there are a number of procedures which could be added to increase accuracy.

This raises the question of *Mathews'* third factor—the government's interest in not affording additional procedures. Here the EPA's interest in general is to reduce the time and cost involved in assessing penalties for violations. But this is not just an end in itself but also a means to more effective environmental regulation. The argument is that to the extent that EPA can only enforce its regulations against violators by means of formal proceedings, EPA's enforcement efforts will necessarily be substantially limited. Such a limitation will meaningfully reduce deterrence and predictably lead to more violations.<sup>345</sup> It was this very argument that convinced Congress to adopt the informal procedures.

If one assumes EPA's predicate to be true (that formal procedures necessarily would reduce enforcement), EPA's argument has substantial weight. Nevertheless, the implication of the argument may reduce that weight. That is, the same could be said for the War on Drugs or any other law enforcement activity. The less procedural constraints on agencies in their adjudication of law violations and assessment of penalties, the easier it will be for those agencies to enforce the law. This, however, cannot lead to a logical conclusion that elimination of all procedural constraints is justified by the increased effectiveness of law enforcement. Thus, while effective law enforcement certainly is a positive government interest worthy of consideration under *Mathews'* third factor, our conceptions of due process cannot give it overwhelming weight.

There is also a question of the accuracy of the assumption that EPA's Part 28 procedures reduce the time and cost of enforcement compared with formal procedures. The statistics quoted in Part IV of this Article support EPA's view, but, as indicated there, it is not clear whether informal penalties take less time *because* of the informal procedures. Rather, the persons involved in the process believe that the amount of money and inherent problems of the particular case are the determinative factors in governing the time and cost of the proceedings. The extent or existence of a causal relationship between the procedures prescribed and the length of time between proposal and final order has not been established and may be questioned, especially because so few of the cases, whether formal or informal, actually involve any adjudicatory proceedings. Absent a meaningful causal relationship between informal procedures and reduced time and cost of enforcement

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<sup>345</sup> 56 Fed. Reg. 29,998 (1991).

activities, the government's interest in the informal procedures becomes tenuous.

In assessing the government interest in avoiding additional procedures, it may be worthwhile to focus on the EPA's response to the primary complaint with the Proposed regulation. For example, why not use ALJs instead of Presiding Officers, if that would meaningfully increase accuracy?

Initially, there is some question whether ALJs are rightfully permitted to preside over non-APA adjudications, and many of these penalty provisions explicitly bar APA adjudications.<sup>346</sup> The source of the question is 5 U.S.C. § 3105, which states that each agency shall appoint "as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Administrative law judges . . . may not perform duties inconsistent with their duties and responsibilities as administrative law judges." This language first suggests that an ALJ's responsibilities are to conduct proceedings under §§ 556 and 557 and, second, that to conduct other proceedings might be inconsistent with their duties and responsibilities.

This interpretation, however, is hardly compelled. Agencies do in fact use ALJs for non-APA proceedings.<sup>347</sup> Nevertheless, ALJs tend to jealously guard their prerogatives and their neutrality,<sup>348</sup> and if they can be compelled to conduct proceedings that are not the basis for their appointment, they may see this as an interference with their core duties. This would especially be true if the non-APA proceedings became a major or *the* major portion of their work. Inasmuch as EPA only has seven ALJs, were they to be used for the non-APA penalty proceedings, they might consider that additional work substantially burdensome.

Indeed, EPA has suggested that assigning all its Part 28 penalty proceedings to ALJs would "overwhelm" the agency's ALJs.<sup>349</sup> Assuming this to be true, EPA would not be able to appoint additional ALJs, because, as noted above, agencies are authorized to appoint ALJs only as necessary to conduct formal APA proceedings. Similarly, while 5 U.S.C. § 3344 provides for the temporary assignment of ALJs from other agencies when an agency "occasionally or temporarily is insufficiently staffed" with ALJs, it would be

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<sup>346</sup> See, e.g., 33 U.S.C. § 1319 (g)(2)(A) (1988).

<sup>347</sup> See, e.g., *Koniag, Inc., the Village of Uyak v. Andrus*, 580 F.2d 601 (D.C. Cir.), *cert. denied*, 439 U.S. 1052 (1978).

<sup>348</sup> See, e.g., Debra Cassens Moss, *Judges Under Fire*, A.B.A. J., November 1991, at 56.

<sup>349</sup> See 56 Fed. Reg. 29,998 (1991).

extraordinary for the Office of Personnel Management to select ALJs for assignment to an agency for *non-APA* adjudications. Moreover, EPA, like other agencies, would also likely be leery of using Presiding Officers with no background in the substantive law being adjudicated. Consequently, there seem to be insuperable obstacles to routinely using ALJs for the informal penalty proceedings.

Nevertheless, it is not clear that other alternatives to assure neutral Presiding Officers are not available. One suggestion made by a commenter was that EPA use attorneys from the Office of General Counsel rather than enforcement. This would eliminate or neutralize an enforcement bias or mind-set. Another suggestion was that EPA use attorneys from different regions as Presiding Officers, presumably to avoid having the Presiding Officer subject to the evaluation of the Regional Counsel or Administrator. Other possibilities include making the Presiding Officer essentially a full-time position subject to the evaluation of the Regional Administrator. This would eliminate the Presiding Officer at least prospectively from the evaluation and responsibilities of the enforcement office.

The proposed Part 28 procedures do not preclude a Region from using one or another means to assure neutrality, but they do not require any more than that the Presiding Officer be "neutral to the controversy."<sup>350</sup> If greater neutrality of the Presiding Officer can be achieved without significant interference with EPA's operations or budget, it would seem advisable, if not compelled, for the agency to achieve that neutrality. Not only would such an increase in neutrality be desirable to increase both the reality and perception of fairness for their own sake, but it would also affect the *Mathews'* calculus with respect to other aspects of the informal penalty procedures. That is, as Paul Verkuil has recently reminded us,<sup>351</sup> Henry Friendly's monumental "*Some Kind of Hearing*"<sup>352</sup> suggests that due process can accommodate trade-offs between the neutrality of the decisionmaker and the informality of procedures.<sup>353</sup> In short, the judicialization of administrative procedures is partially a response to a lack of true neutrality of the decisionmaker, the procedures constituting a felt need to constrain the decisionmaker. If,

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<sup>350</sup> 56 Fed. Reg. 30,003 (1991). This is equally true of the procedures of the Corps of Engineers. See 33 C.F.R. § 326.6(a)(3)(v), (h)(3) (1991). The Coast Guard insures greater neutrality. See 33 C.F.R. § 1.07-15 (1991).

<sup>351</sup> Paul R. Verkuil, *Reflections Upon The Federal Administrative Judiciary*, 39 U.C.L.A. L. Rev. 1341, 1362 n.90 (1992).

<sup>352</sup> Friendly, *supra* note 79.

<sup>353</sup> *Id.* at 1279.



however, the decisionmaker is truly neutral, the same need to formalize the process does not exist, for we can trust to the fairness of the decisionmaker.<sup>354</sup>

If we similarly ask what is EPA's interest specifically in not having parties be able to file exceptions to the Presiding Officer's recommended decision, EPA would likely respond that allowing such exceptions would interfere with Congress's desire for streamlined and expedited procedures.<sup>355</sup> Again, however, given the incredibly small number of cases that reach a recommended decision stage, it would seem that Congress's or EPA's desire for expedited procedures in general would be satisfied. Undoubtedly, providing for filing exceptions would take additional time for EPA's enforcement personnel as well as the Regional Administrator in deciding the case. If the defendant has pressed the case this far, however, the additional time and effort is not likely to be significant as a percentage of the total time and effort devoted to the case. Moreover, if the defendant has himself expended the time and effort to press the case this far, it would seem more likely that the defendant has a meritorious or, at least, contestable case. These cases probably should receive somewhat more attention.

In weighing the three *Mathews* factors in this case, it is clear that the private interest is great, and it is relatively clear that EPA could accede to many of the requests by commenters without significant cost to EPA or its enforcement efforts. At the same time, the additional procedures that might be included to reduce the risk of error, certainly individually, if not in combination, would likely have only a marginal effect. On their face, it is difficult to perceive the procedures *precluding* due process. If they were challenged as applied, the challenge might turn on the particular facts and circumstances of the case, including how the Part 28 procedures were implemented.

To assess the *Mathews* factors inevitably involves a fair amount of subjectivity. Where there are few if any cases on point, the task is even harder. Here there is one case which some might find comparable. That is *Chemical Waste Management* decided by the D.C.

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<sup>354</sup> While the analytical force of this suggestion or argument cannot be gainsaid, it is a fact of administrative law that precisely the more neutral the decisionmaker, the more formal the procedures. Thus, informal proceedings are invariably before agency employees not enjoying the protections of ALJs; formal adjudications are before neutral ALJs, even if formalistically they are employees of the agency; and the most formal proceedings, civil judicial trials, are before Article III judges.

<sup>355</sup> See 56 Fed. Reg. 29,998 (1991).

Circuit in 1989.<sup>356</sup> There, EPA had adopted a set of informal adjudicatory procedures to govern the issuance of certain corrective action orders to certain facilities which treat, store, or dispose of hazardous wastes.<sup>357</sup> Those procedures were like those under Part 28 in that they utilized the same Presiding Officer to preside at hearings, but they were unlike the Part 28 procedures in that they did not allow for the direct or cross-examination of witnesses by parties. Rather, the hearing was more like a legislative-type hearing, with the parties allowed to make presentations to the Presiding Officer and the Presiding Officer allowed to ask the parties questions. These procedures were challenged on their face as violative of due process.<sup>358</sup>

The court applied the *Mathews* test and upheld the informal procedure. As to the private interest, the court found that the financial stakes for potential defendants could vary widely, but there was no evidence that EPA was incorrect in expecting the great majority of cases to involve only small sums of money. Here, where the challenge was to the regulations on their face, the court indicated that judgments on the basis of a worst case were inappropriate. The court held open the possibility, however, that in an actual case where the impacts were particularly great, those impacts could be factored into the *Mathews* calculus.<sup>359</sup>

The two primary claims as to the risk of error were that the failure to allow trial-like procedures and the use of an agency attorney instead of an ALJ increased the risk of error. The court rejected the first claim on the basis that the plaintiffs had failed to explain how trial-like procedures "will significantly advance the accuracy of an adjudicative process in which the issues typically do not require determinations of witness credibility but turn instead upon technical data and policy judgments."<sup>360</sup> The court noted that the same point had been made in *Mathews*.<sup>361</sup> As to the request for the ALJ, the court pointed out that in *Withrow v. Larkin*<sup>362</sup> the Supreme Court had established a stringent standard for an "as

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<sup>356</sup> 873 F.2d 1477 (D.C. Cir. 1989).

<sup>357</sup> See 40 C.F.R. Part 24 (1991).

<sup>358</sup> The procedures were also challenged on the grounds that the statute implicitly required formal adjudication under the APA. The D.C. Circuit, applying the *Chevron* analysis, rejected this argument. See *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

<sup>359</sup> *Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477, 1484 (D.C. Cir. 1989).

<sup>360</sup> *Id.*

<sup>361</sup> *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 343-44 (1976)).

<sup>362</sup> 421 U.S. 35 (1975).

applied” attack on procedures that allow the combination of investigative and adjudicative functions. When the attack is a facial one, the court concluded that it is impossible to find the actual bias or prejudgment which the Court found necessary for a constitutional violation.

As to the government’s interest, the court accepted EPA’s estimate that the informal procedure would save half the cost of a formal, APA hearing, and that the cost of formal procedures would significantly impair EPA’s ability to enforce the statute. Interestingly, the court did not address EPA’s further, and perhaps more compelling, argument that most corrective action orders would involve regulatory violations threatening the public health and safety, so that informal procedures to speed up the process were justified by the need for expedition.<sup>363</sup>

Applying the *Mathews* cost/benefit analysis, the court found that “to the modest extent that EPA’s [informal procedures] do implicate the private interest in avoiding the expense of unnecessary corrective actions, formal procedures do not promise a sufficient lowering of the risk of error to justify their significant expense to the Government.”<sup>364</sup>

While much of the D.C. Circuit’s analysis seems transferable to EPA’s Part 28 procedures, which after all are substantially more trial-like than those upheld in *Chemical Waste Management*, there still may be some significant differences. First, unlike corrective action orders, which do not necessarily indicate that the defendant violated any law, orders assessing penalties necessarily stigmatize the defendant as a law-violator.

Second, and more importantly, EPA itself distinguished Part 24 corrective action orders from “RCRA 3008(a) compliance orders.”<sup>365</sup> “RCRA 3008(a) compliance orders” may include civil penalties of up to \$25,000 per day.<sup>366</sup> These orders, EPA said, were more likely to involve factual issues such as “questions whether certain events or violations occurred, the timing of certain events/vio-

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<sup>363</sup> See 53 Fed. Reg. 12,256-57 (1988). The court in its *Chevron* analysis rejected EPA’s argument that the legislative history behind the corrective action provisions indicated a legislative intent that the proceedings be expedited. See *Chemical Waste Management, Inc.*, 873 F.2d at 1483. However, whether or not Congress specifically intended informal procedures so as to quicken the response time to releases of hazardous waste, if informal procedures do in fact expedite such responses, it would seem that for the *Mathews* analysis an important government interest in the informal procedures would be the need to expedite responses to releases of hazardous waste.

<sup>364</sup> *Chemical Waste Management, Inc.*, 873 F.2d at 1485.

<sup>365</sup> 53 Fed. Reg. 12,256-57 (1988).

<sup>366</sup> See 42 U.S.C. § 6928(a)(1), (3) (1988).

lations, the seriousness of the violation, [and] the economic benefit to the respondent of the violation."<sup>367</sup> These characteristics would seem equally applicable to penalty proceedings under the various statutory provisions to be enforced under Part 28. In addition, whereas the court in *Chemical Waste Management* might note the imperfect fit between direct and cross-examination of witnesses and the "technical data and policy judgments" involved in corrective action order proceedings,<sup>368</sup> here the additional procedures commenters seek are more responsive to the nature of the issues. Thus, the desire to file exceptions to the recommended decision, the objection to the procedure for the penalty phase of the proceeding, and the short page limits for legal and policy arguments, for example, all arguably would be means of increasing accuracy more directly tailored to the nature of disputes likely to arise.<sup>369</sup> Moreover, *Chemical Waste Management's* analysis of the lack of strict neutrality of the Presiding Officer, while accurate as a response to a due process challenge based solely upon the hearing officer's alleged bias or prejudgment, simply is not responsive to the inclusion of the lack of strict neutrality into the *Mathews* analysis.

As to the Government's interest, it is clear that with respect to penalty assessments there can be no claim that health and safety considerations suggest expedition. There is, nevertheless, a clear similarity between EPA's claims in promulgating Part 24 under RCRA and Part 28, when it stated that requiring formal, APA proceedings would "enormously increase the costs and personnel time incurred for such hearings and cause significant delays. It would decrease the important deterrent value of these enforcement efforts and potentially cripple enforcement efforts Agency-wide by overwhelming the Agency's Administrative Law Judges."<sup>370</sup> As indicated earlier, however, this claim is easy to make; it is more difficult

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<sup>367</sup> 53 Fed. Reg. 12,256-57 (1988).

<sup>368</sup> *Chemical Waste Management, Inc.*, 873 F.2d at 1484.

<sup>369</sup> As indicated earlier, *see supra note 97*, the traditional notion that the purpose of a hearing was to address contested facts, not questions of law, was premised on the notion that courts decided questions of law *de novo*, whereas they deferred to agency determinations of fact. Hence, unless the court was to provide a trial *de novo*, the process for determining facts before the agency had to mimic a court's process. After the Supreme Court's decision in *Chevron, U.S.A. v. NRDC*, 467 U.S. 837 (1984), however, it appears that agencies can decide questions of law in a manner that effectively binds courts. If this is so, the post-*Chevron* concept of what process is due in an agency proceeding might include procedures whose purpose is to mimic court procedures for determining questions of law.

<sup>370</sup> 56 Fed. Reg. 29,998 (1991).

to substantiate, especially given the infrequency with which hearings on the merits actually take place.

*Chemical Waste Management* cannot, accordingly, be deemed dispositive of the due process adequacy of Part 28. Nonetheless, its thrust is clear, and it is consistent with the general lack of serious due process challenges to the Coast Guard's informal penalty procedures. Indeed, one must conclude that if a court were to strike down Part 28's procedures as inadequate under the due process clause, it would likely be headline news in the administrative law world. This should not, however, make EPA sanguine about its prospects if the regulations were seriously challenged. Part 28 is sufficiently different from procedures challenged before, particularly in the very notion that "penalties" are involved and the fact that the decision rendered is final, not interim, to make any prognostication difficult.<sup>371</sup>

#### B. Policy Issues

Assuming that due process is satisfied by the informal procedures provided in EPA's and the Corps' regulations, there remain policy questions raised by some aspects of those regulations. Again, the lack of assured neutrality of the Presiding Officer must be addressed. Whether or not ALJs are used, there are ways that EPA could better insulate the Presiding Officers from both the reality and appearance of enforcement oversight and influence. Some of these ways, such as making the job fulltime and not having the Presiding Officer rated by persons in the enforcement office, would be inexpensive, but effective, methods. The fact that most EPA regions and the Coast Guard have ensured greater neutrality demonstrates its feasibility.

Given the nature of the issues likely to be involved in EPA penalty proceedings, as well as the truncated papers allowed to be filed initially, there would seem to be positive value in allowing parties to file exceptions to the Presiding Officer's recommended decision. Concededly, this would add a significant amount of time to the proceeding, but the infrequency with which these proceedings

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<sup>371</sup> The author was invited to write the problem for the 1992 National Administrative Law Moot Court Competition and to judge in the final round of competition. One of the issues in the problem was a due process challenge to EPA's procedures under proposed Part 28 for imposing administrative penalties. After the competition was concluded and the prizes awarded, the author asked the other two final round judges, a federal district court judge and a federal magistrate, what their reaction was on the merits. Both expressed the view that the procedures were unconstitutional. Although moot court is not real court, the judges' initial reaction cannot be ignored.

will ever reach the recommended decision stage and the lack of need for speed in individual cases—as opposed to generally having these cases handled expeditiously—suggest this added time would not be a great burden. EPA appears to be seriously considering this issue, because it specifically asked for comments concerning it.<sup>372</sup> Again, the fact that the Coast Guard with its vastly greater number of cases can allow for the equivalent—an administrative appeal—suggests that allowing such comments would not meaningfully burden EPA.

A larger issue, and one beyond the control of EPA or the Corps of Engineers, is the requirement for providing an opportunity for public comment that is attached to the penalty provisions under Section 309(g) of the Clean Water Act and Section 300h of the Safe Drinking Water Act, as well as the Class II penalty provisions of the Oil Pollution Act.<sup>373</sup> There seems little question that this requirement complicates and extends the time necessary for completing even simple consent orders.<sup>374</sup> At the same time, there is virtually no evidence that the public participation requirements have resulted in any public participation. For the reasons indicated earlier,<sup>375</sup> this is not surprising, given EPA's method of notification. Nevertheless, even a more effective notification system seems highly unlikely to result in meaningful public participation in all but the most unusual case.<sup>376</sup> This suggests that the idea behind the public participation requirement was initially flawed, and probably the provisions should be repealed.

The largest policy issue, again beyond the agencies' control, is the decision to create a non-APA adjudication for administrative penalties. It cannot be gainsaid that this decision in certain statutes has been the result of conscious congressional action, but that

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<sup>372</sup> See 56 Fed. Reg. 29,998 (1991). Subsequent to the publication of the proposed rule, EPA created a new administrative appellate body, the Environmental Appeals Board, which has been delegated the Administrator's authority with respect to the final agency decision on appeal from a number of agency adjudications, including all administrative penalties assessed by formal adjudication. See 40 C.F.R. § 1.25(e), 57 Fed. Reg. 5320 (1992). EPA should consider whether to allow appeals to this new body from its administrative penalty proceedings under proposed Part 28.

<sup>373</sup> See *supra* note 176.

<sup>374</sup> For example, a consent order cannot be signed before the period for public comments is over. See 56 Fed. Reg. 30,028 (1991) (to be codified at 40 C.F.R. § 28.22(b)(1)(i)) (proposed July 1, 1991).

<sup>375</sup> See *supra* notes 197-202 and accompanying text.

<sup>376</sup> See letter from Kirk Cunningham, Water Quality Chair, Sierra Club, Boulder, Colorado, to the author (February 3, 1992) (on file with author) (indicating the limited resources and time available and the need to focus only on big issues, not on details; "The administrative penalties business sounds like a detail to me.").

action has been inconsistent. First, there is inconsistency in the maximum penalty amount that can be assessed in an informal proceeding.<sup>377</sup> Second, there is inconsistency between what requires a formal adjudication and what does not.<sup>378</sup> Moreover, other than penalty amount, there is usually no distinguishing feature between when or under what circumstances the agency is to use informal as opposed to formal adjudication.<sup>379</sup> The inconsistency or irrationality between statutes is compounded by agency practice. Thus, EPA has formal procedures for certain orders and penalties,<sup>380</sup> informal procedures for certain orders,<sup>381</sup> and informal procedures for certain penalties.<sup>382</sup> In addition, the procedures applicable to violations of the same law and penalized under the same statutory provision may be governed by different procedures, depending upon which agency is doing the enforcement.<sup>383</sup>

Why Congress has chosen to create a category of non-APA penalty procedures is not entirely clear. The agencies have requested it, they say, to avoid the cost and effort they believe is in-

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<sup>377</sup> Compare 42 U.S.C. § 7413(d)(3) (Supp. III 1990) (up to \$5000 per day for violations of Clean Air Act) with 42 U.S.C. § 300h-2(c) (1988) (up to \$10,000 per day, not to exceed \$125,000, for certain violations of underground injection control regulations under the Safe Drinking Water Act) and 33 U.S.C. § 1319(g)(2)(A) (1988) (up to \$10,000 per violation, not to exceed \$25,000 for violations of the Clean Water Act).

<sup>378</sup> For example, the administrative penalty provisions added to the Safe Drinking Water Act in 1986 authorized EPA to assess penalties by non-APA procedures of up to \$10,000 per day (not to exceed \$125,000) for certain violations of the underground injection control regulations and of up to \$5,000 per day (not to exceed \$125,000) for certain other violations of the underground injection control program. See 42 U.S.C. § 300h-2(c) (1988). In the same amendment, however, Congress authorized EPA to assess only by formal, APA procedures penalties up to \$5,000 for violations of compliance orders under the Safe Drinking Water Act's public water system regulations. See 42 U.S.C. § 300g-3(g) (1988). Penalties for greater than \$5,000 are required to be assessed by courts. *Id.*

<sup>379</sup> See 33 U.S.C. § 1319(g)(1)-(3) (1988); 33 U.S.C. § 1321(b)(6)(A)-(B), (8) (Supp. III 1990); 42 U.S.C. § 7413(d)(1)-(3) (Supp. III 1990); 42 U.S.C. § 9609(a)(1)(A)-(E), (b)(1)-(5) (1988).

<sup>380</sup> See 40 C.F.R. Part 22 (1992) (general procedures for most APA adjudications); 40 C.F.R. Part 27 (1992) (procedures for assessing penalties in program fraud).

<sup>381</sup> See 40 C.F.R. Part 24 (1992) (procedures for issuing corrective action orders under RCRA); 40 C.F.R. Part 142, Subpart J (1992) (procedures for issuing compliance orders under the public waters systems provisions of the Clean Water Act).

<sup>382</sup> See Proposed 40 C.F.R. Part 28.

<sup>383</sup> For example, both EPA and the Coast Guard are authorized to assess administrative penalties for violations of Section 311 of the Clean Water Act, see 33 U.S.C. § 1321(b)(6) (Supp. III 1990), but they have different procedures for informal penalty assessments. If the Coast Guard enforces the Hazardous Materials Transportation Act, 49 U.S.C. app. § 1809 (Supp. III 1990), it uses its informal procedures under 33 C.F.R. § 1.07 (1991), but if the Federal Aviation Administration enforces the same statutory provision, it uses formal, APA procedures, see 14 C.F.R. § 13.201(a)(2) (1991).

volved in formal adjudications. Congress has apparently accepted that representation. In the context of EPA's administrative penalty program, however, it is not clear that much cost and effort are in fact saved by instituting informal procedures. At one level this is due simply to the fact that most cases are settled before any meaningful hearing procedures have been utilized. There is no harm in a high settlement rate, but it might suggest that those few who do not settle may have a legitimate defense, one worthy of the requisite formalities to protect its effective articulation and proof.

The assumption underlying the creation of these new informal penalty provisions must be that APA adjudication, which was created as a more expeditious, less formal proceeding than its alternative—a judicial proceeding—is itself so cumbersome and immune to expedition that a new type of proceeding is required. Undoubtedly many hold this view, and neither it nor the reaction that results from it are limited to administrative penalty proceedings.<sup>384</sup> Nevertheless, this view and assumption need examination and confirmation.

The perception that formal, APA adjudication is complex, costly, and slow is widespread. It extends from Congress to the Casebooks.<sup>385</sup> Yet, if this perception is true, it is not necessarily due to the procedural requirements of the APA. Sections 554, 556, and 557 do not mandate long, drawn-out proceedings. Indeed, they allow for limiting depositions,<sup>386</sup> excluding irrelevant, immaterial, and unduly repetitious evidence,<sup>387</sup> for precluding cross-examination that is not required for a full and true disclosure of the

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<sup>384</sup> A recent survey of non-APA hearing proceedings identified 129 types of cases for which hearings are provided but which are not APA hearings. Frye, *supra* note 279, at 264.

<sup>385</sup> In GELLHORN ET AL., *supra* note 70, at 892, there is a picture of an ALJ literally surrounded by the record of one case. The caption, quoting from Fortune magazine reads in part:

This paper mountain is only part of the testimony and documents pertaining to a single FPC gas case. The hearings to determine which new pipe line should be certified to serve midwestern markets ran for 143 days. Every one had his say *in extenso* and no doubt FPC hearing examiners like Edward B. Marsh, above, read each of the thousands of transcript pages.

However dated this particular example, its presence as the only picture in the most popular administrative law casebook reflects and reinforces the popular conception of formal adjudication. See also Jerry L. Mashaw, *Organizing Adjudication: Reflections on the Prospect for Artisans in the Age of Robots*, Administrative Law News (American Bar Association Section of Administrative Law and Regulatory Policy) Spring 1992, at 1.

<sup>386</sup> 5 U.S.C. § 556(c)(4) (1988).

<sup>387</sup> 5 U.S.C. § 556(d) (1988).



facts,<sup>388</sup> and for deciding a case or issues therein by summary judgment.<sup>389</sup> There are no particular restrictions on an agency's ability to set deadlines for filing documents or holding hearings or to set page limits governing documents filed. Indeed, other than EPA's denial of the ability to file exceptions to a recommended decision, virtually all of EPA's procedural shortcuts in its proposed Part 28 could be adopted with respect to formal, APA adjudications. Nevertheless, the history of agencies attempting to expedite APA adjudications is not one to instill confidence in an agency proposing such an undertaking.<sup>390</sup>

This history is fraught with conflicts between agencies and ALJs over ALJ independence.<sup>391</sup> Rather than attempt by rule to structure an expedited proceeding, however, agencies have traditionally attempted to identify those ALJs who resolved significantly less cases than their peers and to take some remedial action against them.<sup>392</sup> These reviews almost of necessity involve evaluation of how the ALJ is doing his job and consequently are viewed by ALJs as interfering with their independence.

This history, however, does not indicate that ALJs are unresponsive to rules adopted by agencies governing adjudicatory procedures. Thus, were EPA, for example, to impose most of the requirements in its proposed Part 28 to formal, APA adjudications, many might question their wisdom or efficacy, but those requirements would not raise the issue of ALJ independence as evaluation programs have in the past. Even those requirements specifically aimed at controlling Presiding Officer discretion, such as the prohibition on granting any delay based on a party's request for information beyond that mandated in the rule, with disqualification of the Presiding Officer as a penalty for violation,<sup>393</sup> relate to open enforcement of clear rules of procedure by parties to the adjudica-

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<sup>388</sup> *Id.*

<sup>389</sup> 5 U.S.C. § 554(e) (1988).

<sup>390</sup> Often the focus is not expedition generally but increased productivity of the ALJs. Invariably, attempts to evaluate or enforce productivity become caught up in charges of interference with the independence of ALJs. *See, e.g.,* Moss, *supra* note 348, at 56-58. *See also* Nash v. Bowen, 869 F.2d 675 (2d Cir. 1989); Nash v. Califano, 613 F.2d 10 (2d Cir. 1980). For a general review of attempts to evaluate ALJ performance, *see The Federal Administrative Judiciary*, The Administrative Conference of the United States (draft report, May 1992) at 152-162.

<sup>391</sup> *Id.*

<sup>392</sup> *See, e.g.,* COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO CONGRESS, ADMINISTRATIVE LAW PROCESS: BETTER MANAGEMENT IS NEEDED (May 15, 1978).

<sup>393</sup> *See* 56 Fed. Reg. 30,024-25 (1991) (to be codified at 40 C.F.R. §§ 28.4(c)(4), 28.13) (proposed July 1, 1991).

tion. Thus, it is not clear that expedited procedures could not be mandated by rule even in formal, APA adjudications.

The difficulty lies in the fact that inevitably even the expedited procedure rules must allow discretion to the Presiding Officer. Thus, for example, EPA's proposed procedures can afford extremely short page limits for written legal arguments, because there is the loophole that the Presiding Officer can grant exceptions for good cause.<sup>394</sup> If the agency trusts the judgment of the Presiding Officer, it is more willing to provide for that discretion. Agencies, however, do not appear to "trust" ALJs to exercise that discretion in the manner desired by the agency, at least compared to other agency employees. That is, agencies expect the ALJs to exercise that discretion not according to the spirit intended in the regulation, as a necessary loophole to provide for the unexpected contingency, but according to their own lights as to the needs of justice. Other agency personnel, however, are viewed as more likely to reflect the institutional desires for expedited proceedings. Whether this perception is accurate is difficult to assess, but inasmuch as ALJs are not supposed to be "part of the team" for substantive purposes in the adjudication, it would not be surprising if they did not see as their mission furthering the agency's case management goals, as opposed to doing justice in some abstract sense. Thus, the agency is more likely to "trust" an employee other than an ALJ to internalize the agency's case management philosophy. Moreover, if this "trust" is not borne out, the agency is free to utilize a different employee as Presiding Officer, an option not available if an ALJ is required to be the hearing officer. Accordingly, the dynamics of ALJ independence conspire against an agency even by rule substantially expediting formal, APA adjudications.

#### CONCLUSION

When the procedures for formal adjudication were adopted in the APA, they were to be broadly applicable to the range of adjudications which were required to be made on the record after an opportunity for an agency hearing. The contemporaneous Attorney General's Manual makes clear that the applicability of Section 554 was not to be narrowly interpreted.<sup>395</sup> Moreover, its purpose was to provide uniform procedures for this class of hearings that

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<sup>394</sup> See 56 Fed. Reg. 30,024 (1991) (to be codified at 40 C.F.R. § 28.8) (proposed July 12, 1991).

<sup>395</sup> See Att'y General's Manual on the Administrative Procedure Act 91 (1947).

were to be on the record.<sup>396</sup>

This broad applicability and uniformity of procedure has been seriously eroded, not just in the area of administrative penalties, but with respect to administrative adjudications generally.<sup>397</sup> On-the-record hearings not subject to Section 554 have proliferated in the law. *The Frye Report*<sup>398</sup> documents its extent.

Agencies clearly prefer non-APA adjudication. They lobby for it with Congress, and they interpret ambiguous statutory provisions to allow for it. Their motives are equally clear. One motive is overt—the wish to avoid the perceived complexity, cost, and delay associated with formal, APA adjudications. The other motive is more covert—the desire to exercise more control both procedurally and substantively over the adjudication process—especially by avoiding the need to use independent ALJs.

With respect to administrative penalties, the claim has been made that requiring formal adjudication would seriously harm enforcement efforts, because of the time and cost required by such adjudications. This claim, made to Congress, was not supported by any documentation contained in the legislative history. The evidence that only a relatively small number of cases actually require any hearing casts doubt on the accuracy of this claim. Moreover, as three Presiding Officers have written, “[i]n terms of procedural formality, these proceedings are the functional equivalent of hearings under the APA.”<sup>399</sup> This suggests that EPA’s informal procedures will not save any time or money compared to APA procedures. This is especially likely considering that EPA has not made any attempt to utilize expedited procedures under the APA.

As to the more covert motive, it is understandable why it is covert. An agency cannot come out and say that it prefers non-APA adjudications because it is easier for the agency to win if the proceeding is not governed by an independent ALJ. Nevertheless, this belief undoubtedly motivates part of the desire for non-APA adjudications. But this invidious concept of control is not the only aspect of control. Agencies may appropriately desire to control the procedure of adjudications, to ensure expeditious case manage-

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<sup>396</sup> *Id.* at 9.

<sup>397</sup> See generally *Frye*, *supra* note 279.

<sup>398</sup> *Id.*

<sup>399</sup> Letter to Nancy Miller, Administrative Conference of the United States, from Benjamin Kalkstein, Region III Presiding Officer, February 25, 1993, at 4; letter to Nancy Miller, Administrative Conference of the United States, from Steven Anderson, Region 9 Presiding Officer, and Al Smith, Region 8 Presiding Officer, March 4, 1993, at 1.

ment, so long as they do so by rules applicable to classes of cases, rather than by influencing hearing officers in particular cases. Attempts to expedite case handling by ALJs have not been notably successful under the APA, precisely because of the independence of ALJs, but agencies have not used procedural rules to limit the discretion of ALJs or to establish particular deadlines. Rather, agencies have tended to resort to oversight of particular judges, thereby raising questions as to interference with their independence. Until agencies have tried and failed to achieve expedition by using procedural rules governing APA proceedings, agency pleas for relief should be subject to doubt.

While this Article has been skeptical of the need to except administrative penalty proceedings from the APA in order to achieve expeditious and efficient case handling, Congress has nevertheless accepted the argument, at least for "lesser" penalties. Congress too is interested in effective enforcement of its laws, and it has found that criminal and civil enforcement in the courts is time-consuming and expensive. Accordingly, Congress has increasingly provided for administrative orders and administrative penalties as alternatives to civil injunctions or penalties.<sup>400</sup> Within the universe of administrative penalties, there is a certain intuitive sense that if large penalty amounts can be assessed using formal, APA procedures, smaller penalty amounts should be able to be assessed using less formal procedures. Indeed, even defendants may prefer informal proceedings if they are cheaper but provide an adequate opportunity to defend oneself given the possible penalty to be inflicted. It is this distinction between greater and lesser penalties associated with more elaborate and less elaborate procedures that seems to characterize Congress's response to agency requests for informal penalty assessment procedures. That is, the "need" for non-APA procedures relates solely to the relatively smaller amount of the penalty to be imposed.<sup>401</sup>

If informal adjudications for orders and penalties are to become widespread, Congress would do well to consider an amendment to the APA. At present, each agency is required to re-invent

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<sup>400</sup> See, e.g., 42 U.S.C. § 9606(a) (1988) (authorizing President to seek court injunction or to issue an order to protect the public health and welfare and the environment); 42 U.S.C. § 9609(a)-(c) (1988) (providing for informal and formal administrative penalties and civil penalties assessed by court; the amount and standards for penalties identical between formal adjudication and judicial imposition).

<sup>401</sup> Unfortunately, Congress is not consistent with respect to what lesser penalties are, see *supra* note 377, and Congress's idea that "lesser" or "minor" penalties can reach six figures may not accord with common understandings.

the wheel with only the vague contours of due process and *Mathews v. Eldridge* as a guide. Despite the lack of serious judicial challenge to the Coast Guard's informal administrative penalty procedures in the past, expansion to other agencies and programs of non-APA penalty assessment power is likely to spawn new challenges.<sup>402</sup> This all involves substantial transaction costs to widespread use of informal adjudications for on-the-record hearings. An amendment to the APA to provide in addition for a less formal or non-ALJ adjudication could further the original goals of the APA's adjudication provisions: to provide uniformity in the law and to enact "a formula upon which opposing social and political forces have come to rest,"<sup>403</sup> thereby earning the respectful consideration of the courts.

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<sup>402</sup> Cf. *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991) (en banc) (holding EPA's lien procedure under Superfund a violation of procedural due process).

<sup>403</sup> *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950).