

Litigation with EPA Region III

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Most of this book has focused on statutes, regulations, and agencies organized under the laws of the Commonwealth of Pennsylvania. Environmental practitioners and lawyers having some involvement with an environmental matter may find, however, that they are confronted not with Pennsylvania regulations or agencies, but those of the United States. This may arise with respect to discharges into waters of the United States, air discharges, Superfund matters, Right-to-Know matters, hazardous waste issues, and many others. The primary agency involved with the enforcement of federal environmental laws, or the issuance of permits under the laws of the United States is the United States Environmental Protection Agency (EPA). Many other federal agencies are also involved in the federal system of enforcement and regulation. These agencies include, but are not limited to, the Federal Office of Surface Mining (OSM), the Army Corps of Engineers, the U.S. Fish and Wildlife Service, the U.S. Department of the Interior, United States Coast Guard, and others. The principal agency, however, with whom most practitioners and their clients likely will interact is the EPA.

This chapter is intended to provide basic guidance for the practitioner who is not experienced in EPA administrative proceedings. Given that this chapter is part of a volume on Pennsylvania environmental law, the focus where relevant is on EPA Region III, the region in which Pennsylvania is located. The chapter also describes the organization of EPA Region III and its Office of Regional Counsel.

The chapter begins by providing basic information on the organization of EPA Region III, the functions of regional attorneys, and an overview of the administrative process. Thereafter, each step in an administrative proceeding is examined in more detail, with emphasis on tactical considerations for the practitioner. Since a large portion of such proceedings involve penalty assessments, consideration in the assessment of penalties will be discussed, using a particular EPA penalty policy as an example. Finally, some general

¹The author wishes to gratefully acknowledge the contributions of Michael Crane and Phillip Bower, associates in the Environmental Practice Group at Wolf, Block, Schorr & Solis-Cohen. This chapter was originally co-written with Benjamin Kalkstein, who, at the time, served as EPA Regional Judicial and Presiding Officer for Region III.

enforcement issues that may arise in or provide the context for an administrative proceeding are briefly discussed.

When confronted with what it regards to be a violation of a law over which it has jurisdiction, EPA typically has a number of choices. Among those choices are instituting a judicial proceeding to compel compliance and/or to impose civil penalties, and issuing an administrative order compelling compliance. Violation of an administrative order usually results in a judicial action for civil penalties. While the substantive law applied in judicial enforcement proceedings may require special expertise, from a procedural standpoint, little distinguishes these cases from other types of litigation. Many environmental laws provide EPA with another option: administrative enforcement. In contrast to judicial enforcement, which necessitates the involvement of the Department of Justice, administrative proceedings are instituted and managed by, and up to a point heard, within EPA's regional offices. The respondent to the proceeding (the respondent) will be a party to a proceeding before an administrative law judge (ALJ) or a regional judicial officer, with the relevant EPA regional office director as the adverse party or complainant.²

Even many experienced environmental practitioners have had little contact with EPA administrative proceedings. Perhaps because such proceedings at least appear to be straightforward and typically do not involve, relatively speaking, large sums of money, it is not uncommon for practitioners with little familiarity with environmental law in general to handle an EPA administrative proceeding. While EPA administrative proceedings vary depending on the regulatory program being enforced, in many instances they are part of a mature legal system with established rules of practice, experienced, knowledgeable, and often surprisingly independent tribunals, and a system of reported cases. The regulations that give rise to EPA administrative proceedings are often complex and highly technical. Penalty assessments rely to a high degree on EPA guidance documents. As a result, EPA administrative proceedings can prove to be a difficult area for the uninformed practitioner.

20-1

ORGANIZATION OF EPA REGION III AND ITS ATTORNEYS

20-1.1

Organization of Region III

Region III's most recent reorganization took place late in 1997. In its current structure, Region III has five operating divisions and seven regional support service offices. The region's Water Protection Division, Air Protection Division, and Environmental Services Division are long-established operations, administering the Clean Water Act and Safe Drinking Water Act; the Clean Air Act; and the National Environmental Policy Act, the Wetlands Protection Program, and environmental monitoring programs, respectively. The former Hazardous Waste Management Division has become the Hazardous Site Cleanup Division and a new division, the Waste and Chemicals Management Division. The Hazardous Site Cleanup Division administers the federal Superfund program, while the new division administers a number of regulatory programs, including the Resource Conservation and Recovery Act (RCRA), the Toxic Substances Control Act (TSCA), the Emergency Planning and Community Right-To-Know Act (EPCRA), and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Within each of the operating divisions there are a number of smaller branches or offices, responsible for one or more discrete elements of a program.

²The term "presiding officer" will be used in this chapter to refer generically to the official presiding at the administrative proceeding, which, depending on the type and stage of the proceeding may be an ALJ or regional judicial officer.

The seven regional support offices are the Chesapeake Bay Program Office; the Office of the Assistant Regional Administrator for Policy and Management; the Office of Enforcement, Compliance and Environmental Justice; the Office of Communications and Government Relations; the Office of Environmental Innovation; the Office of Environmental Data; and the Office of Regional Counsel. The Chesapeake Bay Program Office might better be described as an operational office, because it runs a host of environmental awareness, education, and improvement programs in the bay and its watersheds. The Policy and Management Office is responsible for virtually all of Region III's internal functions, from payroll, to human resource management, to contracts, to budget, to information services, etc. The Office of Communications and Government Relations provides liaison with the press and the public, and works with federal, state, and local governments in an ongoing effort to enhance intergovernmental relations. The region's Office of Environmental Data collects, analyzes, and reports on statistical trends in a number of environmental indicators. The Office of Environmental Innovation, formerly the Office of Reinvention, administers several nonregulatory programs such as Project XL and the Green Light program. The Office of Enforcement, Compliance and Environmental Justice helps coordinate enforcement activities among the operating divisions, leads regional environmental justice initiatives, coordinates with state enforcement programs, and handles a number of multimedia enforcement cases. This is a relatively new office, still developing its "institutional identity," composed of several attorneys drawn from the Office of Regional Counsel, staff from the Office of Communications and Government Relations, and the operating programs. Any formal enforcement actions developed by this office are reviewed by the Office of Regional Counsel.

The current Region III organizational chart is shown in appendix 20A.

20-1.2

Organization of the Office of Regional Counsel

EPA's Office of Regional Counsel in Philadelphia was reorganized in 1998 to complement the larger reorganization of the Regional Office while assuring the provision of continuous legal services to all of the operating and support functions of the Region. In the current organizational structure, the Office of Regional Counsel has three "regulatory branches" and an Office of Remediation, with four branches. Specialized functions, like criminal enforcement work, administrative adjudication, and "cross-media" case coordination, are performed in the immediate office of the regional counsel.

The three "regulatory branches" include the Air Branch, which handles air and asbestos matters. The Water and General Law Branch handles surface water and groundwater cases, and represents the Region's management in a wide variety of general law matters. The Waste and Chemical Branch is responsible for matters arising under the Resource Conservation and Recovery Act, the Federal Insecticide, Fungicide & Rodenticide Act, the Toxic Substances Control Act, and certain aspects arising under the Emergency Planning and Community Right-To-Know Act.

The Office of Site Remediation and its four branches handle virtually all legal aspects of the Region's Superfund Program, from emergency response counselling, to remedy negotiation, to cost recovery. The Office Director assigns individual cases to various branch chiefs, who assign them to staff attorneys within their respective branches.

Appendix 20A shows the organizational structure of the Office of Regional Counsel.

20-1.3

Role of Regional Attorneys in Regard to EPA Headquarters and the Department of Justice

The role of the Region III Attorney in litigation depends primarily upon the forum of litigation. There are three primary forums: the administrative enforcement forum, the civil judicial (enforcement and defensive) forum, and the criminal enforcement forum. The administrative forum, which is the focus of this chapter, is primarily before the EPA itself, while the other two forums are in the federal court system. In federal court litigation, Department of Justice lawyers, from the Environment and Natural Resources Division in Washington, and the United States Attorney's Office for the district in which the case is heard, represent EPA, usually with the assistance of a Region III Attorney. In federal court litigation, the Region III Attorney's role depends upon the degree of national significance attached to the case, the experience of the Region III Attorney in comparison to the experience of other participants on the government's side, and the quality of the working relationship of the government's litigation team.

In virtually all administrative enforcement cases, the Region III Attorney is lead counsel from initiation of the case through final agency action. Every case that EPA litigates is developed by a team approach, in which environmental engineers, environmental scientists, economists, and whatever other disciplines are needed in a given case, work together from the early stages of case development through resolution of the case by negotiated settlement or by litigation. In some cases, EPA's case development team will include personnel from other local, state, and federal agencies, and occasionally contractors will be retained for specialized tasks. In cases of national significance, an attorney from EPA Headquarters may participate to some degree, but this is quite rare. If the case is appealed to EPA's Environmental Appeals Board (EAB), headquarters attorneys and often attorneys from other regions may have some degree of participation, but it is rare for headquarters attorneys to take over the case in the administrative appeal stage. If the case goes to the federal court on appeal by the respondent, attorneys from the Department of Justice's Environmental Defense Section and sometimes the Appellate Section in the department's Environment and Natural Resources Division assume the lead counsel role.

In both enforcement and defensive litigation in the federal courts, the role of the Region III Attorney is to assist Department of Justice litigators by marshaling EPA's evidence, identifying and preparing witnesses, assembling discovery materials, and educating the Department of Justice litigator, if necessary, on the nature of the cause of action, the theory of liability, the relief sought, and EPA's settlement position. On rare occasions, the Region III Attorney may be asked to conduct some portion of negotiations, or to participate in a trial as a Special Assistant U.S. Attorney.

20-2

OVERVIEW OF ADMINISTRATIVE PROCEEDINGS BEFORE EPA REGION III

20-2.1

Types of Proceedings

Most of the administrative proceedings before EPA in Region III are enforcement proceedings, in which EPA seeks to assess monetary penalties for alleged violations under the several federal environmental statutes that authorize such actions. A larger number of administrative compliance orders and notices of violation are issued by Region III each year, but these actions usually do not involve any form of legal proceeding, either before or after the action is issued. Under some statutory provisions, the region combines penalty assessment and compliance orders in a single administrative proceeding. Region III also issues corrective action orders that may entail semi-formal administrative proceedings. Region III also holds administrative proceedings involving financial matters, such as bid protests, grant appeals, and liens. Finally, there are occasional administrative proceedings involving employee complaints, employee conduct, and employment status.

20-2.2

Procedural Regulations

In 1999, EPA revised its procedural regulations for the various administrative enforcement proceedings in its "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits."³ The rule is often called the "CROP." The revised rule became effective on August 23, 1999, and was applied to all pending cases as well as to new ones. The changes on cases statutorily required to be adjudicated under the Administrative Procedures Act were largely technical, but the revised rule added a new "Subpart I" to govern non-APA⁴ cases, which previously had been governed by a mix of proposed regulations and EPA "Guidance." The revision has allowed for more consistency in EPA administrative practice and for less confusion at the EPA administrative bar. Separate non-APA procedural rules for litigating corrective action orders for interim status under section 3008(h) of RCRA, 42 U.S.C. 6928(h), are published at 40 C.F.R part 24.

Disputes arising in connection with EPA grants and cooperative agreements to state and local governments are resolved under 40 C.F.R. 31.70. Bid protests proceedings are held under 40 C.F.R. 31.36(b)(12) and 35.939. Although EPA is under no statutory obligation to do so, it affords owners of property subject to a federal Superfund lien under section 107(l) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9607(l), in a non-APA hearing, an opportunity to show why EPA does not have the requisite grounds to perfect the lien. These proceedings are held under procedural guidance issued July 29, 1993. Claims against the Superfund are adjudicated by the EAB, under guidance issued October 9, 1996.

20-2.3

The EPA-Neutral Official

In Region III, authority to act on matters arising before the filing of an answer (e.g., a motion for extension of time to file an answer) has been delegated to the regional judicial officer, a senior EPA attorney with no enforcement responsibilities or advocacy roles. The functions of the regional judicial officer are completely separated from the functions of the rest of the Office of Regional Counsel. The regional judicial officer also presides at the hearing stage of non-APA cases, such as proceedings involving superfund liens, and prepares an initial decision based upon the record of the proceeding. The regional judicial officer is also authorized to issue consent orders resolving cases negotiated to settlement. In APA cases, once an answer has been filed, the case is forwarded by the regional hearing

340 C.F.R part 22. At 64 Fed.Reg. 40138 (July 23, 1999).

⁴Several of EPA's enforcement statutes contain provisions authorizing EPA to assess a penalty after an opportunity for a hearing, which "shall not be subject to section 554 or 556 of Title 5" (the APA). See, e.g., sections 309(g)(2)(A) and 311(b)(6)(B)(i) of the Clean Water Act, 33 U.S.C. 1319(g)(2)(A), 1321(b)(6)(B)(i); section 1423(c)(3)(A) of the Safe Drinking Water Act, 42 U.S.C. 300h-2(c)(3)(A). The primary difference between an APA proceeding and a non-APA proceeding is that the presiding officer in an APA proceeding must be an administrative law judge; in a non-APA proceeding the presiding officer need not be an ALJ, but must be a competent, unbiased EPA neutral.

clerk to EPA's chief administrative law judge for assignment to one of EPA's ALJs,⁵ all based in Washington, D.C.

⁵EPA's ALJs are selected from a national pool of ALJs "qualified" by standard procedures of the U.S. Office of Personnel Management. The ALJ qualification process involves a lengthy application, writing sample, seven years of litigation experience, a background investigation, a panel interview, and a lengthy written examination. EPA has a very small number of ALJs compared to the Social Security Administration, which employs over 800 ALJs. As a practical matter, new federal ALJs work for Social Security for some time, and then some "migrate" to other federal agencies, EPA being one of the most favored agencies to work for. Thus, EPA is quite fortunate to have hired experienced, efficient, and knowledgeable ALJs.

The parties are often offered an opportunity to engage in alternative dispute resolution under the supervision of another ALJ. The presiding ALJ conducts an APA hearing, and prepares an initial decision based on the administrative record. A settlement negotiated at this stage is also reviewed by, and if ratified, a final order is issued by, the regional judicial officer.

The Consolidated Rules of Practice (CROP) also govern combined penalty and RCRA section 3008(h) corrective action orders for interim status facilities. If no penalty is sought, the RCRA corrective action proceeding is governed by non-APA procedures under 40 C.F.R. part 24. The regional judicial officer presides at these hearings and prepares a recommended decision for the regional administrator.

20-2.4

The Environmental Appeals Board

EPA's Environmental Appeals Board (EAB) is a four-member board of senior executive service attorneys, with lengthy EPA experience in enforcement management or adjudication, established to provide administrative review of permit and enforcement adjudications rendered by both ALJ and non-ALJ presiding officers. Members of the EAB are appointed by the administrator, in some instances after notice and competition for a vacancy on the board. Cases before the EAB are heard by three-member panels. In most cases, the EAB's action on a matter constitutes final EPA action for purposes of judicial review. The EAB decides the majority of appeals on the parties' briefs; oral argument is rare.

20-3

STEPS IN ADMINISTRATIVE ENFORCEMENT PROCEEDINGS; PRACTICE AND TACTICAL CONSIDERATIONS

20-3.1

Introduction

Practitioners will readily recognize the basic elements of the procedures established by the CROP from their experience with litigation in other forums. The proceedings are initiated by a complaint, the respondent responds with an answer, motions may be filed, information is exchanged through discovery, and the proceeding culminates in a hearing. While these basic elements parallel those in proceedings before judicial tribunals, the CROP are significantly less elaborate than rules of civil procedure. This is most apparent in the rules regarding motions and discovery. As noted above, EPA recently revised the CROP, intending to further simplify, rather than fundamentally change, the CROP. Relevant aspects of those revisions will be addressed below with respect to each step in the process.

Because there are fewer rules and fewer steps in the proceeding, compared to other forms of litigation, there are fewer opportunities for argument between the parties and the resulting delay. This helps accomplish one of the overall goals of the CROP, which is to encourage settlements. In addition to its structure, the CROP contains an explicit statement encouraging settlement.⁶ Settlement has also been encouraged in practice through liberal use of stipulations and extensions to permit settlement discussions. The revised CROP contains further encouragement in the form of a quick resolution procedure whereby a proceeding can be resolved by immediate payment of the proposed penalty or through filing a statement agreeing to pay the assessed penalty without admission and a provision for the parties to engage in alternative dispute resolution, which is broadly defined.⁷ Parties contemplating settlement should keep in mind that (1) the consent agreement will expressly waive the respondent's right to a hearing and to appeal (specifically required in the CROP), (2) the settlement will not be effective without a corresponding final order issued by the regional judicial officer, and (3) EPA will reserve the right to pursue injunctive relief and criminal action (also made explicit in the CROP).

Another fundamental aspect of EPA administrative proceedings that further encourages settlement is the relatively narrow range of possible outcomes in most cases. EPA will be seeking penalties for specifically identified regulatory violations and possibly correction of continuing violations. EPA will have proposed a penalty in its complaint which then effectively serves as a ceiling for negotiations. It is rare, except in the case of comprehensive complaints issued to very large facilities, that the total penalty assessment exceeds \$100,000. EPA penalty policies further constrain the range of possible outcomes. This being the case, the proceeding need not go very far before legal fees rival the possible gain from further litigation. Issues of fundamental principle are relatively rare except for operators of multiple similarly regulated facilities. This is not to say, however, that the process does not provide opportunities for improved outcomes, particularly where there has been little prior contact with EPA or the case involves difficult and complex issues of regulatory interpretation, of which there are many.

20-3.2

Pre-enforcement Actions

Some administrative proceedings are the culmination of a long history of dealings between EPA and the respondent, probably beginning with an inspection and involving extensive negotiations, while others may come as a surprise. In the former circumstance, prior discussions between the respondent and EPA will establish the context for the proceeding. The more extensive the contact, the greater the tendency for the party's positions to have become firmly established. Since unsuccessful settlement discussions have probably occurred, it will be less likely that the proceeding will be resolved during its initial stages, when the respondent probably will be dealing with the same individuals. In this situation the respondent's goal will likely be to test the resolution underlying EPA's position and/or to present arguments to higher levels of EPA and the presiding officer.

640 C.F.R. 22.18(a).

763 Fed.Reg. 9470 (February 25, 1998).

Pre-enforcement discussions between EPA and the respondent may become important issues in the proceeding and a factor in penalty calculations. Accordingly, whether counsel should be part of these discussions is an important tactical consideration. Since EPA technical staff often, if left to their own devices, will meet with a private party without counsel, this consideration may be within the respondent's control. In many instances, however, particularly as compared to small companies, the EPA technical staff may have more knowledge of the regulations. It is highly recommended that counsel be involved early in these discussions if an issue of regulatory interpretation is involved. The client may also have had relevant discussions with the Pennsylvania Department of Environmental Protection (DEP) prior to commencement of the proceeding.

Circumstances in which the client's first relevant contact with EPA may be receipt of a complaint include instances in which (1) EPA wishes to maximize publicity and the resulting perceived deterrent impact, which would be the case, for example, with a targeted enforcement initiative, (2) EPA concludes that DEP action was insufficient, and (3) the client is viewed as having a poor compliance history. In these circumstances, since there have not been prior negotiations, there may be more negotiating room than would be the case if the party's position were firmly established. On the other hand, the circumstances causing EPA to have avoided prior contact with the respondent are likely to weigh in favor of EPA seeking to drive a harder bargain.

20-3.3

Pleadings

The CROP is most similar to litigation before a judicial tribunal in its pleadings. The CROP provides for a complaint and an answer. The pleadings and any other documents served in the proceeding must be filed with the regional hearing clerk. The rules of service are less stringent; service can be made personally or by certified mail. In recognition of the unfamiliarity of many practitioners with the CROP, a copy of the CROP must be served with the complaint.⁸

The complaint must contain a concise statement of the factual basis for the alleged violation and specific reference to the regulatory provisions allegedly violated. Under the current rule the complaint must either (1) propose the assessment of a penalty in a specific dollar amount and contain a statement of the reasoning for the proposed penalty in accordance with the criteria in the relevant act and any guidelines issued under the act, or (2) include the number of violations, a brief explanation of the severity of each violation, and the statutory penalty authority invoked for each violation.⁹ In the latter case, specification is required at the prehearing exchange.¹⁰

⁸40 C.F.R. 22.14(b).

⁹Id. 22.14(a).

¹⁰Id. 22.19(a)(4).

The answer must deny or explain each factual allegation of which the respondent has knowledge. Failure to do so will constitute an admission. It cannot be emphasized enough that a hearing must be requested in the answer or a final order will be entered.¹¹ Some practitioners style their response to an EPA complaint as "Answer and Request for Hearing" to ensure that this important right is not waived. Particularly when there have been limited prior discussions with EPA, the practitioner should use the answer as an opportunity to describe the reasons why the assessed penalty is inconsistent with the act, the relevant penalty policy, or is inequitable. This portion of the answer may read more like an argument than a pleading. It is in effect a free shot for the respondent to raise potentially relevant factors not necessarily raised by the complaint, which often doesn't exist in other forms of litigation. This portion of the answer, if well-drafted, will establish the groundwork for settlement negotiations. The CROP specifically requires that the answer state the basis for opposing the assessed penalty.¹²

20-3.4 Motions

The CROP provides little guidance with respect to motions, except briefly as to form and process. Motions shall state the grounds therefor with particularity, set forth the relief sought, and be accompanied by an affidavit, other evidence, or legal memorandum. A response is specifically permitted, which shall also be accompanied by an affidavit, other evidence, or legal memorandum.¹³ The CROP specifically limits motion practice to a motion, response, and reply addressing issues raised for the first time in the response.¹⁴

In practice, perhaps because the issues are inherently much narrower, motions are less elaborate and less frequently used than is the case in litigation in court. However, in cases that proceed to that point, EPA will often move for an accelerated decision, the functional equivalent of summary judgment, as to issues of liability, hoping to leave the amount of the penalty as the only issue for the hearing.

20-3.5 Discovery

In sharp contrast to litigation before a judicial tribunal, the primary vehicle for discovery is an exchange at the prehearing conference of lists of witnesses intended to be called, together with a summary of testimony expected from each witness, and copies of documents intended to be introduced into evidence.¹⁵ Documents and witnesses not so identified may not be introduced or testify, without specific permission of the presiding officer. Other discovery will be permitted only upon a determination by the presiding officer that the information is not otherwise obtainable, has significant probative value, and the discovery will not unreasonably delay the proceeding.¹⁶ As a result, depositions and production of documents are rare. Parties instead often will rely on informal exchanges. The limited nature of discovery reflects the relatively limited nature of the proceeding: the prehearing exchange is intended to avoid surprises while limiting fishing expeditions. Respondents often eschew discovery and use Freedom of Information Act requests to find out what information EPA has about the facility in question.

¹¹Id. 22.15(c).

¹²Id. 22.15(b).

¹³Id. 22.16.

¹⁴Id. 22.16(a).

¹⁵Id. 22.19(a).

¹⁶Id. 22.19(f).

The CROP contains substantial revisions relating to discovery intended to make information exchange more "timely and efficient," primarily by expanding the scope of the prehearing exchange. All relevant information must be exchanged at a time established by the presiding officer. The CROP expressly prohibits discovery of a party's settlement position.¹⁷

20-3.6 Hearings and Appeals

Most of the cases that reach the hearing stage without settlement are EPA actions to assess monetary penalties for past alleged violations.¹⁸ EPA's ALJs usually travel to Philadelphia to conduct most of these hearings under the CROP's APA provisions. A smaller number of non-APA hearings for penalty assessments for past alleged violations are conducted by the regional judicial and presiding officer under the CROP's non-APA rules. Safe Drinking Water Act enforcement actions to compel compliance and/or assess a penalty are also conducted by non-ALJ presiding officers. All of these types of proceedings typically involve one or more prehearing conferences, usually conducted by telephone. A regular topic at such prehearing conferences is the prehearing exchange of information, consisting of documents and witness lists, and summaries of witnesses' expected testimony is routinely required by the presiding officer, to avoid surprise at the hearing.

In format, both kinds of hearings are quite similar to a civil trial. The presiding officer (ALJ or non-ALJ) calls the hearing to order, usually in a borrowed courtroom. A court reporter is present to make a stenographic record of the proceeding, which is converted into a written transcript within three weeks. The presiding officer usually allots two days for a hearing; they are frequently concluded in one day.

The presiding officer will address any outstanding motions or other matters, and may make a procedural opening statement. Counsel for the complainant, and then counsel for the respondent, are offered an opportunity to make an opening statement. Respondent's counsel may often choose to wait until the complainant has rested to make his or her opening statement.

Complainant's counsel presents the complainant's case. Pre-numbered documentary evidence, much of which has been the subject of a prehearing stipulation, is usually presented in binders for the presiding officer's convenience. Demonstrative evidence and other materials are placed upon easels. All witnesses are requested to swear or affirm as to the truth of their testimony. They are subject to direct and cross-examination, and frequently to redirect and recross examination. Often, the presiding officer may ask questions to clarify matters for the record. The respondent presents the defensive case in the same manner, and then the complainant may offer rebuttal. Surrebuttal may be allowed at the presiding officer's discretion.

¹⁷Id. 22.19(a).

¹⁸Region III may also invoke CROP procedures to suspend or to revoke permits, but rarely does so. In addition, EPA rules governing permit-related decision-making, codified at 40 C.F.R. part 124, still apply in Pennsylvania to the Underground Injection Control program of the Safe Drinking Water Act, 42 U.S.C. 300h et seq.

After all the evidence has been heard and incorporated into the record to the extent appropriate, the presiding officer will either ask for, or offer an opportunity for, closing statements. Obviously, if the presiding officer asks for a closing statement, the competent practitioner will present one, even if it is merely a summary of the case just presented.

The CROP provides for the submission of post-hearing briefs, proposed findings of fact, and conclusions of law.¹⁹ These documents provide the parties with an opportunity to refresh the presiding officer's recollection of the hearing, and to suggest a structure for the legal analysis of the case. Following the submission of the post-hearing documents, the presiding officer reviews the administrative record and prepares the initial decision. The initial decision becomes final EPA action within 45 days of service, unless it is appealed to the EAB or the EAB decides on its own to review the case. The initial decision may be appealed to the EAB within 20 days of service.²⁰

As stated above, the majority of EAB appeals are decided on the briefs without oral argument. If the EAB grants a request for oral argument, or orders argument on its own, the proceeding is held in the EAB's courtroom in Washington, D.C. A three-member panel of the board reviews each appeal, unless two board members have conflicts of interest or are otherwise disqualified under 40 C.F.R. 22.04(d). The EAB panel members discuss the merits of the appeal, and a tentative decision is reached. One board member takes responsibility for preparing the EAB's decision, and all three panel members review the decision and finalize it. EAB decisions are final EPA action for purposes of judicial review.

20-3.7

Administrative Opinions

Because of the exhaustion doctrine and the factors favoring settlement described above, few judgments from EPA administrative proceedings are appealed to the court system. Except for the extraordinarily large cases and ones involving issues of critical importance to a business (e.g., RCRA issues for the hazardous waste treatment industry and FIFRA issues for pesticide formulators), the potential gain from an appeal is rarely worth the cost. As a result, the important case law to consider when interpreting the EPA regulations to which the CROP applies is often ALJ, EAB, or regional judicial officer case law (which will be referred to generally as "administrative opinions"). This is particularly true with respect to regulatory programs such as RCRA and TSCA, which are highly technical, complex, and at times difficult to interpret.

For example, the landmark cases at both ends of the spectrum regarding overfiling (discussed below) were decided by administrative tribunals,²¹ as were the principal cases interpreting ownership in landlord/tenant and multiple ownership situations under RCRA.²²

1940 C.F.R. 22.26.

²⁰The CROP rules on appeals to the EAB are codified at 40 C.F.R. 22.29–22.32. The EAB has published a Practice Manual, available upon request to the EAB Clerk at (202) 501-7060.

²¹*In re Martin Electronics, Inc.*, RCRA (3008) App. No. 86-1 (order for sua sponte review, July 18, 1986); *In re BKK Corp.*, RCRA (3008) App. No. 84-5 (final order, May 13, 1985); *In re Employers Ins. of Wausau*, TSCA App. No. 95-6 (EAB, February 11, 1997).

²²*In re Hawaiian Western Steel, Ltd.*, RCRA (3008) App. 88-2 (November 17, 1998); *In the Matter of J.V. Peters & Co.*, RCRA Dkt. V-W-81-R-75 (initial decision, September 26, 1988).

Administrative decisions are almost the exclusive source of case law with respect to procedural aspects of administrative enforcement proceedings, appropriate penalty amounts, and the use of EPA penalty policies.²³ The importance of administrative opinions is sometimes missed by inexperienced practitioners. It is appropriate for the presiding officer to expect that lawyers appearing before them are familiar with relevant administrative decisions. Supporting memoranda that do not contain appropriate citations to administrative opinions both neglect important precedent, providing the tribunal with little guidance in resolving the issue at hand, and reveal the practitioner's lack of familiarity with the subject matter.

Having said this, unfortunately, the accessibility of administrative opinions varies substantially. On the one hand, opinions in the more mature programs, such as TSCA and RCRA, are generally readily accessible, including through Westlaw and Lexis, while others, particularly older Clean Water Act opinions, may be obtainable only with considerable effort from a specific office of EPA, usually located in Washington. In the latter instances opinions are available only through determined research. The difficulty in obtaining administrative opinions can significantly increase the cost of research, which may become yet another factor favoring settlement.

The advent of the Internet has made access to administrative decisions considerably easier. EPA's Office of ALJs, the EAB, and the regional judicial officers all have a home page.²⁴ It should be emphasized that the ALJ home page contains most, but not all ALJ decisions. Since the EAB is still relatively new, its home page should be complete. The EAB has also published its decisions in the *Environmental Administrative Decisions*, currently six volumes, which is available at EPA Headquarters and at Region III's library. In general, the Region III library is usually the best place for Pennsylvania practitioners to conduct extensive research of administrative decisions. Most ALJ decisions and all regional judicial officer and EAB decisions are also available on CD-ROM discs from a commercial service.²⁵ Hard copies of administrative decisions can be obtained from the hearing clerk, Office of ALJs, and the EAB in Washington and the regional judicial officer, Region III. Decisions of the regional judicial officer are also available on Lexis.

20-4 EPA PENALTY POLICIES

20-4.1 EPA Penalty Policies Generally

The statutes that authorize EPA to assess penalties through administrative proceedings typically identify the factors that are to be taken into account in doing so. The following factors identified by TSCA are typical: (1) gravity and extent of violation, (2) the violator's ability to pay the assessed penalty and continue in business, (3) the violator's compliance history, and (4) the violator's culpability. Gravity refers to the potential for harm posed by the violation, while extent refers to the degree of deviation from the regulatory requirement. The penalty provision in the Emergency Planning and Community Right-To-Know Act (EPCRA) contains these factors and adds to them the economic benefit obtained by the violator, usually expressed in terms of the savings obtained from not expending the

²³See the discussion in section 20-4 of this chapter.

²⁴The Office of ALJ and EAB home page addresses are <http://www.epa.gov/oalj/orders.htm> and <http://www.epa.gov/boarddec> respectively. The URL for the RJOs is <http://cfpub.epa.gov/compliance/resources/rjo/>. (For other environmental websites, see A Practical Guide to Websites and Other Internet Resources, in the Practical Guides section of this book.)

²⁵The service is located in Bowie, Maryland, known as Shadowlaw.

cost of compliance.²⁶ FIFRA contains a factor that is uniquely relevant to the activities it regulates: the size of the violator's business.²⁷ Finally, RCRA contains an abbreviated list of factors: seriousness of the violation (which can be interpreted to encompass gravity and extent) and any good-faith attempt to comply (which can be interpreted to encompass ability to pay and culpability).

²⁶42 U.S.C. 11045(b).

²⁷*Id.* 11045(a).

Building on these statutory factors, EPA has issued administrative penalty policies specific to nearly all of the provisions it enforces. These policies follow a pattern. Typically they begin by providing a basis for classifying violations as to their gravity and extent, using a matrix. The matrix provides a range for the base penalty amount for different combinations of gravity and extent. The base amount may then be adjusted upward or downward using additional factors that, like the classification factors, parallel the statutory factors. The policies are drafted by EPA Headquarters for use by the EPA regional offices. EPA uses the relevant penalty policy to calculate the penalty amount assessed in the complaint and during any settlement negotiations. One of the major functions of the practitioner, assuming that no basis exists to argue that no violation occurred, is to persuade EPA and, if necessary, the presiding officer, that based on the relevant policy, EPA's penalty assessment is incorrect.

In general, EPA's penalty policies attempt to balance the competing goals of deterrence, swift resolution, fair and equitable enforcement of the regulations, appropriateness of penalty to the gravity of the violation, and recapturing financial gain derived from the violation.²⁸ The policies attempt to provide a straightforward procedure to the regional offices that will generate a specific amount for the penalty to be calculated, while at the same time allowing enough flexibility to account for the circumstances of a particular case.

20-4.2

EPCRA Civil Penalty Policy as an Example

Because the EPA penalty policies typically have a significant influence on the outcome of a proceeding, one such policy, the policy for administrative civil penalties pursuant to EPCRA, will be described in detail here.²⁹ Penalties are typically calculated in two stages. The first, referred to as the base penalty, addresses factors applicable to the violation (nature, extent, gravity, and circumstances), while the second addresses factors applicable to the violator (ability to pay, compliance history, culpability, and economic benefit), by way of adjustment to the base penalty. The base penalty methodology is presented by way of a matrix. The following is a matrix from the EPCRA penalty policy:

²⁸Id. 11045.

²⁹Final Penalty Policy for EPCRA 302, 303, 304, 311, and 312, and for CERCLA 103 (EPA, September 30, 1999) ("EPCRA Penalty Policy"), and Penalty Policy Supplements Pursuant to the 2004 Civil Monetary Penalty Inflation Adjustment Rule (EPA, June 5, 2006).

CIVIL PENALTY MATRIX FOR CERCLA SECTION 103,
EPCRA SECTION 304,[†] AND EPCRA SECTION 312

GRAVITY (Quantity Released/Stored)

Extent (timeliness of notification/timeliness of inventory submission)	Level A (greater than 10 times the RQ/MTL)	Level B (greater than 5 but less than or equal to 10 times the RQ/MTL)	Level C (greater than 1 but less than or equal to 5 times the RQ/MTL)
LEVEL 1: (more than 2 hours/30 days)	\$32,500	\$24,179	\$16,119
	\$24,180	\$16,120	\$8,061
LEVEL 2: (between 1 and 2 hours/after 20 but within 30 days)	\$24,179	\$16,119	\$8,060
	\$16,120	\$8,061	\$4,032
LEVEL 3: (within 1 hour, but after 15 minutes/after 10 but within 20 days)	\$16,119	\$8,060	\$4,030
	\$8,061	\$4,032	\$2,014

[†] While the penalty amounts in this matrix apply to EPCRA 304(c), the criteria associated with the levels do not apply. To determine the appropriate extent level for violations of 304(c), see pp. 12–13. [Note: This page reference refers to the source document for this matrix, not included in this book.]

This EPCRA penalty matrix shares several interesting features with nearly all EPA penalty matrices. The statutory maximum penalty amount is available only for violations deemed to be of both the highest gravity and extent. The penalty amounts work down from there. Since gravity and extent are weighted equally, the matrix is symmetrical. Thus, the amount for a level 1, level C violation is the same as a level 3, level A violation. Each box in the matrix contains a range of penalty amounts, allowing the EPA regional case development team to account for circumstances not addressed otherwise by the matrix.

The EPCRA penalty policy, like many other recent penalty policies, identifies the level or extent of violation that should be assigned to different regulatory provisions. The levels range from substantial noncompliance to substantial compliance with minor deviation. Gravity of violation in the EPCRA penalty policy is classified based on the amount of material released. Other penalty policies contain similar shorthand methods for approximating potential for harm.

While the penalty policies are relatively simple to use, they leave ample room for EPA personnel to exercise discretion with regard to what level of gravity or extent to assign to the alleged violation or what penalty amount to assign within the range provided by the resulting box in the matrix. Negotiations in effect will boil down to in which box of the matrix the alleged violation belongs. The respondent will attempt to argue that EPA misapplied its own penalty policy. Moreover, practitioners are well-advised to gather as much information potentially relevant to the extent, gravity, and circumstances surrounding the violation as they can so as to influence EPA's determinations. It is not unusual for EPA to assess a penalty knowing less than the entire story or for certain facts to be known only to the respondent. Presenting additional facts to EPA may result in a reclassification of the alleged violation within the matrix, thereby reducing the penalty.

In many instances a penalty assessment will cover multiple alleged violations. Accordingly, the practitioner may need to go through the exercise described above numerous times for a single penalty assessment, analyzing each violation based on the elements of penalty policy, attempting to convince EPA or the presiding officer that a reclassification of their extent, gravity, or circumstances is warranted, leading to a penalty reduction of a few thousand dollars in each instance. Sometimes a single fact may be relevant to multiple alleged violations. In this situation a small dollar impact resulting from the reclassification of a single violation may have a magnified impact when multiplied several times.

The practitioner should also consider whether the alleged violations are truly independent or whether the violation of one requirement necessarily caused the violation of other requirements. EPA regulations often are structured so that the results of an initial required action compel different follow-up actions, what might be called consequential requirements. An example of such a regulatory provision that is frequently the subject of penalty assessment is the RCRA groundwater monitoring requirements. The respondent may be able to argue in this situation that a single (admittedly significant) violation occurred warranting a single penalty assessment, and other alleged violations are redundant.

In addition, EPA has the authority to assess penalties for each day of a violation occurring over multiple days. Obviously penalties will add up very quickly when they are calculated on a multi-day basis. It is relatively unusual for EPA to administratively assess multi-day penalties. Typically it will do so when a violation is continuing or there are other egregious circumstances; such circumstances typically will warrant the filing of a civil action seeking injunctive relief, rather than an administrative action.³⁰

In contrast to the base penalty phase, which has at least the appearance of a rigorous methodology, the adjustment phase is largely with the discretion of the EPA regional case development team. As a result, there may be considerable room for argument regarding the appropriate application of the adjustment factors. In addition, since some of these factors are likely to relate to information within the possession of the respondent, EPA may not be able to account for them in the first instance.

The penalty matrix assumes that the violator has the ability to pay the assessed penalty. EPA will not ordinarily seek a penalty that will force a violator out of business unless the facility in question has a long history of violations.³¹ EPA will typically require a significant amount of documentation, in the form of tax returns, balance sheets, and income statements to support an inability to pay claim. EPA will regard the burden to demonstrate inability to pay, like other mitigating factors, to be on the violator. EPA likely will use a computer model known as ABEL, to calculate the amount of penalty a violator can pay while remaining in business. Frequently a settlement reached on an ability-to-pay basis will involve payments over time.

EPA's view is that compliance history of a violator is relevant only in a negative sense; i.e., penalty assessments should only be adjusted upward to account for a bad compliance history, thus eliminating the possibility of "credit" being given for a good enforcement history.³² The relevant statutes, however, typically express compliance history as a factor in a neutral fashion. Accordingly, the practitioner is well-advised to research the respondent's compliance history and submit relevant positive information to EPA and reference it in the answer. Such information may influence the presiding officer and, from a practical standpoint, even EPA, notwithstanding the policies. Generally, the policies provide that only violations occurring within a limited prior time period resulting in a formal enforcement response will be considered.³³

³⁰See EPCRA Penalty Policy, at 21.

³¹Id. at 22.

³²Id. at 23.

³³Id.

The respondent's culpability can be used to adjust a penalty upward or downward. Facts potentially relevant to a respondent's culpability are knowledge of the requirements, and control over the violative conduct.³⁴ In short, a conscious violation will be more severely penalized, while penalties are likely to be reduced when there was a good-faith attempt to comply and the violation was subsequently corrected. EPA's recent audit policy may bear on this aspect of the penalty assessment.

EPA has placed increasing emphasis in recent years on using penalty assessments as a means of eliminating any financial advantage potentially gained from a violation. In EPA's view, as stated in the EPCRA penalty policy "[w]henver there is an economic incentive to violate the law, it encourages noncompliance and thus weakens EPA's ability to implement the Acts and protect human health and the environment."³⁵ In other words, a segment of the regulated community may choose to violate regulations, notwithstanding the potential for a penalty, if the savings for noncompliance exceed the penalty. To avoid this result, EPA will, where relevant, calculate the economic benefit to the respondent using a computer model called BEN, and add that amount to the base penalty, provided that the total does not exceed the statutory maximum. At the other end of the spectrum, EPA generally will not settle a case for an amount less than the economic benefit to the violator. Some penalty policies contain unit cost calculations of the benefit derived from particular violations. The EPCRA Penalty Policy, for example, contains a table that sets forth the estimated per hour cost for different types of employees to become familiar with the EPCRA rules and prepare reports.³⁶ Reflecting a general recent trend of reducing regulatory burdens on small businesses, EPA penalty policies often allow reductions to a penalty for businesses employing fewer than a certain number of people and having annual total sales below a certain amount.³⁷

One final note regarding penalty amounts. EPA has issued a rule implementing the Debt Collection Improvement Act of 1996, which adjusts civil penalties amounts to reflect inflation.³⁸ The rule increases maximum penalties across the board, including those included in the EPCRA Penalty Policy, by 10 percent. For this reason, the EPCRA Penalty Policy contains a separate set of penalty matrices for violations occurring after January 30, 1997.³⁹

The CROP requires that the presiding officer consider any penalty guidelines issued under the relevant act.⁴⁰ From a practical standpoint the structure of the process makes it inevitable that penalty policies will be considered, since EPA's initial assessment will be based on the relevant policy and the respondent is likely to answer at least in part based on that policy. It is well established, however, that the penalty policies are not binding on judicial officers.⁴¹ A recent EAB decision upheld and explained this basic principle.⁴² The presiding officer is not bound to follow penalty policies in a given case because those policies are not rules that were subject to notice and comment rulemaking. Adherence by EPA to a penalty policy, however, provides some evidence that the assessed penalty is appropriate, but the presiding officer is to be guided by statutory factors, rather than the penalty policy and its matrix. Thus, the presiding officer must either (1) ensure that EPA took into account the statutory factors in the assessed penalty, or (2) provide reasons for disagreeing with EPA's analysis and assess a different penalty that correctly applies the statutory penalty factors to the facts of the violation. In practice, presiding officers vary in the extent to which they will rely on EPA penalty policies.

³⁴Id. at 24.

³⁵Id. at 25.

³⁶Id. at 26.

³⁷Id. at 28.

³⁸61 Fed.Reg. 69360 (December 31, 1996).

³⁹See EPCRA Penalty Policy, at 6 and 19.

⁴⁰40 C.F.R. 22.27(b).

⁴¹E.g., *In re A.Y. McDonald Industries, Inc.*, RCRA (3008) App. No. 86-2 (Final Decision, July 23, 1987).

⁴²*In re Employers Ins. of Wausau, Inc.*, TSCA App. No. 95-6 (EAB, February 11, 1997).

20-5

GENERAL EPA ENFORCEMENT ISSUES

This section briefly addresses several issues that commonly arise in EPA enforcement actions, including administrative proceedings, which either provide an overall context to the action or are important considerations for the practitioner. This section is intended to highlight these issues as a reminder to practitioners involved in an administrative enforcement proceeding.

20-5.1

Use of Model Documents

As any environmental practitioner is well aware, EPA relies heavily on form documents, particularly with respect to settlement. EPA generally will stick pretty closely to its form in its initial draft of a document and generally will deviate from the form only for good reason. That being said, there are alternative versions of many provisions of form documents, which are available in specific circumstances or sometimes just if the respondent asks and is not otherwise making unreasonable demands. Some form documents are used nationwide so that deviations require the concurrence of EPA Headquarters. Others are developed by regional offices. In those instances deviation from the form document would not require headquarters concurrence, but probably would require the concurrence of the staff attorney's supervisor. Frequently, when negotiating from form documents, the practitioner will be told that checking with management is necessary. In the vast majority of cases the issues that arise in an administrative enforcement action, particularly those relating to penalties, can be resolved within the region. Headquarters is likely to get involved only with regard to regulatory interpretation.

If the administrative proceeding relates only to penalty assessment, the consent agreement and final order will be rather limited. The consent agreement and final order will include findings of fact, which may warrant some negotiation, but will also include a non-admission provision. EPA may wish to reserve certain rights, such as to pursue criminal prosecution or injunctive relief. Consent agreements addressing an ongoing violation or one that necessitates corrective action, on the other hand, will likely address the manner in which compliance is to be achieved or corrective action is to be performed and their timing. In those instances the consent agreement to settle the administrative proceeding will raise the same issues as any consent order requiring the performance of work, including admissions, releases, stipulated penalties, force majeure, review of submissions, and dispute resolution. EPA likely will be negotiating from a form agreement with respect to each of these issues.

20-5.2

Negotiations with EPA Region III

The practitioner negotiating with EPA Region III in the context of an administrative proceeding will face many of the same issues faced in any negotiation with EPA regional offices. The practitioner will be negotiating with a staff attorney and an enforcement official from the media-specific program office. They are likely to be the same individuals who drafted the complaint. An inspector who has frequent contact with the facility may be involved. As a result, the attorney and enforcement official may already be invested in the positions taken in the complaint and will need to be convinced that adjustments are appropriate. Unless they are newly hired or newly assigned to their duties, they are likely to be quite familiar with the regulatory requirements they are enforcing. They are somewhat less likely to be familiar with rules of administrative proceedings and will vary in their level of experience with litigation generally.

As with any other negotiation, it is important for practitioners to recognize who the important decision makers are and attempt to persuade them toward their client's position. Doing so involves subtle tactical considerations, however. Although regional lawyers and enforcement officers function as a team, some issues that arise during the proceeding will be within the prerogative of the program officials and others within the prerogative of the Office of Regional Counsel. The regional case development team never has full settlement authority; ultimate decision-making authority resides at the management level. Nevertheless, the regional case development team is likely to resist any effort to get management directly involved and may be alienated by an attempt to do so. EPA management, unless there is a specific reason to do otherwise, prefers to stay removed from individual cases. Moreover, except for the very largest administrative cases and those involving unusual issues of regulatory interpretation, most administrative proceedings are simply too small for management to feel a need to get involved. From a practicable standpoint, alienating EPA staff is rarely beneficial to the respondent, unless there is no alternative, because it is difficult to reach EPA management without the assistance of staff. Favorable resolutions for the respondent, particularly those that depart from the model, are most likely to occur when the EPA regional case development team is persuaded and becomes an advocate to EPA management. In addition, in many instances the prohibition on contacting represented parties will make it impossible for the practitioner to contact EPA program management without the EPA attorney being involved. On the other hand, the practitioner often will want to obtain information regarding potentially relevant EPA policies. Such contacts should not be barred, provided they are of a general nature.

20-5.3

Targeted Enforcement by EPA

From time to time in order to increase deterrent impact or to draw attention to a particular environmental problem, EPA will take an enforcement initiative. Such initiatives may relate to a set of regulatory requirements or to an industry. Often enforcement initiatives are accompanied by extensive publicity announcing that a certain number of cases were filed on a particular day. Typically, so as not to disrupt simultaneous filing, EPA will intentionally not communicate with the targets of the initiative before the announcement is made, which obviously eliminates any opportunity for settlement prior to filing.

Parties caught in the web of an enforcement initiative are likely to find their plight more difficult than it would be otherwise. First, they will need to deal with the adverse publicity resulting from the filing announcement. The reality is that any positive actions the target takes to address the violation are likely to get less attention than the violation itself. EPA may include cases in the initiative that it wouldn't ordinarily pursue in order to boost its numbers. So as not to undercut the intended deterrent impact of the initiative, EPA's position regarding settlement may be more firm than it would be in the ordinary case. The proceeding is likely to receive more scrutiny within EPA, which may reduce negotiating flexibility. Many initiatives cover the entire nation and are developed in the headquarters office of EPA, which may result in some headquarters review. Often among the reasons for the initiative is a perception that significant environmental risk is associated with the targeted industry or violation of the targeted regulatory requirements, or that the industry has a poor compliance history. These perceptions will likely influence the region's assessment of the extent and/or gravity of the violation within the penalty matrix. Aside from such formal initiatives, regional personnel may decide based on their experience with a facility or group of facilities that particularly aggressive enforcement is warranted.

20-5.4

Federal/State Coordination or Lack Thereof

Most federal environmental statutes provide for delegation of authority to states. In many other instances states have statutory authority that parallels the authority in federal environmental statutes. There are a few instances, the primary examples being FIFRA and TSCA, in which a federal regulatory program not providing for delegation dominates the field to the point where states have chosen not to get involved. In administrative proceedings pursuant to virtually every other federal environmental program, however, the respondent will face at least the theoretical prospect of an enforcement action by the state agency as well. This issue is likely to increase in importance given the overall trend toward further delegation to states.

The respondent, of course, will not want to go through two proceedings or pay two penalties. Hence, one of a respondent's primary goals in resolving an administrative proceeding will be finality. Since a state cannot be a party to a proceeding, the means available to ensure this result are limited.

While the prospect of dealing with two agencies is certainly daunting, it arises in a relatively small percentage of cases. DEP and EPA are unlikely to feel that a second enforcement action is a good investment of their resources unless they have very serious

objections to the resolution obtained by the other. In the typical situation, the respondent will deal with DEP first. When negotiating an enforcement action with DEP, it is advisable to inquire, if you don't already know, whether EPA has any interest in the matter. If the answer is yes, the practitioner should consider finding out what EPA has in mind before resolving the DEP proceeding, and weigh the advisability of getting EPA involved. If the answer is no, since it is unlikely that a definitive answer could be obtained from EPA, the better course is likely to be to let sleeping dogs lie. It is very rare for DEP to commence an enforcement proceeding after EPA has concluded one.

When a state has been specifically delegated a program and has taken an enforcement action pursuant to that program, an interesting legal issue arises as to whether EPA is precluded from “overfiling.” An analysis of this complex issue is well beyond the scope of this chapter, but the issue is one that the practitioner should carefully consider. Past ALJ opinions have held that a nominal state penalty will not preclude a federal action, while a substantial state penalty may.⁴³

A major development in this area is the Eighth Circuit’s decision in *Harmon Industries, Inc. v. Browner*.⁴⁴ Harmon Industries and the Missouri Department of Natural Resources entered into a consent order in Missouri state court, while an EPA administrative enforcement action was pending. The Missouri consent decree required cleanup by Harmon, but based on Harmon’s self-reporting and cooperation, did not impose a penalty. Later, an EPA ALJ assessed a penalty of \$586,716 against Harmon, which was affirmed by the EAB. The U.S. District Court for the Western District of Missouri reversed the EAB and the Eighth Circuit affirmed the district court’s decision.

Harmon holds that EPA cannot “overfile” pursuant to RCRA against a person who has resolved a state enforcement action for the same violation under an EPA-authorized hazardous waste management program. The Eighth Circuit concluded that the “in lieu of” language used by RCRA with regard to delegated state programs reveals a congressional intent that such programs “supplant the federal hazardous waste program in all respects including enforcement,” leaving EPA with a secondary enforcement right except when the state fails to initiate an enforcement action regarding the violation or EPA rescinds delegation. The court also held that the doctrine of *res judicata* applies, in the process concluding that EPA and the state have identical enforcement interests under RCRA.

EPA adamantly opposed the *Harmon* decision and subsequent decisions have universally supported EPA’s position. Some district court decisions have distinguished *Harmon*, while others have outright rejected it. Several district courts refused to extend *Harmon* to other delegated programs such as the Clean Water Act and Clean Air Act because of the differences in statutory language between the acts.⁴⁵ Other courts have distinguished their cases on the facts and opted not to apply *Harmon* to RCRA enforcement actions.⁴⁶ Finally, in *United States v. Power Engineering Co.*, the Tenth Circuit, the only other circuit to address the issue to date, systematically rejected each of *Harmon*’s interpretations of RCRA and held that EPA’s interpretation allowing overfiling was reasonable.⁴⁷ Since the Supreme Court denied certiorari in *Power Engineering*, the split among the circuits is likely to continue. However, in view of the overwhelming weight of authority in support of overfiling, other than in the Eighth Circuit, respondents are not likely to get very far relying

⁴³See footnote 21 in this chapter.

⁴⁴*Harmon Industries, Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999), aff’g 19 F.Supp.2d 988 (W.D. Mo. 1998).

⁴⁵See *United States v. City of Youngstown*, 109 F.Supp.2d 739 (N.D. Ohio 2000) (holding that the plain language of the Clean Water Act provides that federal enforcement is not limited by state actions); *United States v. LTV Steel Co.*, 118 F.Supp.2d 827 (N.D. Ohio 2000) (holding that the plain language of the Clean Air Act anticipates overfiling); *United States v. City of Rock Island*, 182 F.Supp.2d 690 (C.D. Ill. 2001) (holding that the language of the Clean Water Act does not limit the enforcement action of EPA); *United States v. Murphy Oil USA, Inc.*, 143 F.Supp.2d 1054 (W.D. Wis. 2001) (holding that the language of the Clean Air Act anticipates overfiling).

⁴⁶*United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001) (holding that under RCRA the federal government retains its criminal and civil enforcement powers even when a state counterpart exists); *United States v. Flanagan*, 126 F.Supp.2d 1284 (C.D. Cal. 2000) (holding that EPA can bring an enforcement action in a RCRA authorized state when the state has brought no action against defendants).

⁴⁷*United States v. Power Eng’g Co.*, 303 F.3d 1232 (10th Cir. 2002), cert denied, 538 U.S. 1012 (2003).

on *Harmon.*

20-5.5

Criminal Matters

EPA has placed increasing emphasis on criminal enforcement in recent years. Many of the statutes that contain administrative enforcement provisions also contain criminal penalty provisions. Often the distinction between the circumstances in which criminal or civil penalties are appropriate is less than clear. While they present difficulties with respect to evidence gathering, parallel criminal and civil enforcement proceedings are not unheard of. EPA zealously guards its right to institute criminal proceedings, as witnessed by the standard reservation of rights in settlement documents. Given the relatively small magnitude of administrative proceedings, it is rare that the facts giving rise to such a proceeding would warrant criminal prosecution. It is far more likely in that case that any civil enforcement would be judicial. The practitioner cannot assume, however, that the resolution of an administrative proceeding eliminates the possibility of criminal prosecution.

20-5.6

Supplemental Environmental Projects

If one is not familiar with the term supplemental environmental projects (SEP), its meaning may not be apparent. They are sometimes referred to as beneficial environmental projects, which is somewhat more descriptive. The underlying principle is that the performance by the respondent of projects benefiting the environment, which are not otherwise legally required, should be encouraged and result in a penalty reduction. This principle has been part of EPA's enforcement program on an informal basis for a long time. Some penalty policies specifically permit reduction of penalties where the respondent agrees to conduct SEPs.⁴⁸ EPA has placed greater emphasis on SEPs in recent years, issuing a comprehensive policy document in 1998 and several others thereafter addressing specific aspects of SEPs and promoting their use.⁴⁹

Over the years EPA has deemed a wide variety of things to be SEPs. The recent EPA policy includes a list of the categories of projects that may be considered SEPs: (1) public health; (2) pollution prevention and reduction; (3) environmental restoration and protection; (4) assessments and audits; (5) promotion of environmental compliance; and (6) emergency planning and preparedness. The policy also contains a detailed description of the methodology used for calculating the resulting penalty reduction. As a general rule, a percentage of the after-tax cost of the SEP will be deducted from the penalty that would be otherwise assessed, provided that the penalty must be at least (1) the amount of the economic benefit derived from the violation plus 10 percent of the base penalty, or (2) 25 percent of the base penalty, whichever is greater. Capital, operating, and one-time non-depreciable costs can be included in the cost of the SEP. EPA has developed a computer model for the calculation of such costs called PROJECT. THE PORTION OF THE SEP COSTS THAT CAN BE DEDUCTED WILL DEPEND ON EPA'S ASSESSMENT OF THE QUALITY OF THE SEP, WITH PRIORITY BEING GIVEN TO INNOVATIVE PROJECTS, THOSE INVOLVING COMMUNITY INPUT, AND THOSE ADDRESSING ENVIRONMENTAL JUSTICE AND POLLUTION PREVENTION. UNDER THE NEW POLICY THE PERCENTAGE WILL NOT EXCEED 80 PERCENT, UNLESS THE RESPONDENT IS A SMALL BUSINESS OR THE PROJECT IS OF OUTSTANDING QUALITY.

⁴⁸EPCRA Penalty Policy, above, at 30.

⁴⁹Policy Document on Supplemental Environmental Projects (EPA, April 10, 1998).

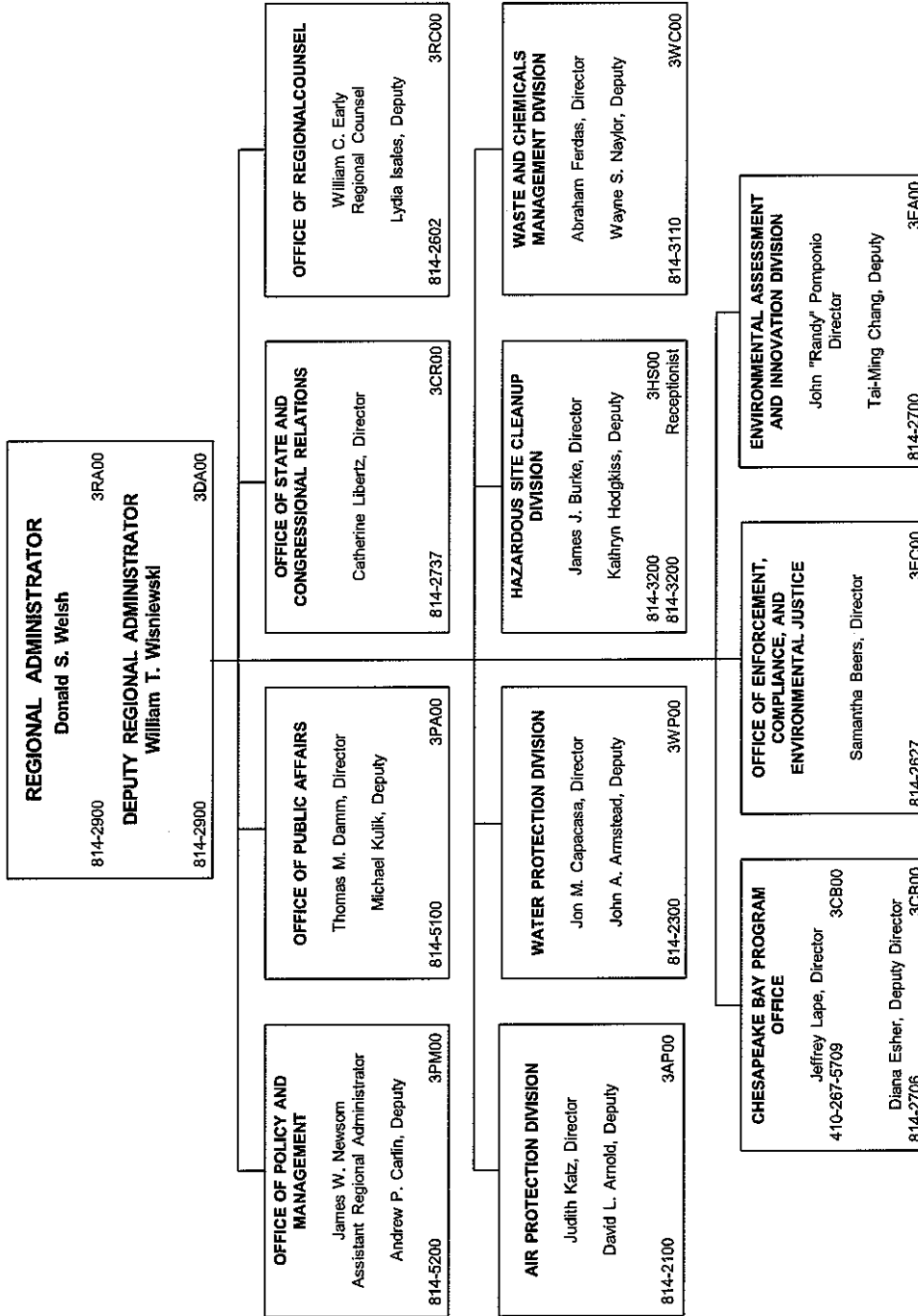
As one would expect, there are considerable strings attached. The SEP will become part of the settlement agreement and the agreement will include stipulated penalties for failure to satisfactorily perform the SEP. There are also general limitations on the types of projects that will qualify for penalty reduction. The project must have some connection to the violation (i.e., a public health project must reduce the type of risk to public health associated with the violation), it must not require extensive EPA oversight, the benefit must accrue to the general public, rather than the respondent, any publicity must mention that the project is being performed as part of a settlement and, as mentioned above, the project cannot be legally required. Additionally, EPA may audit the SEP following the conclusion of the project.

In the past EPA did not actively solicit SEPs; instead it responded to respondents' proposals. In view of the new policy, EPA can be expected to look for opportunities to include SEPs in penalty assessment negotiations, including proposing specific SEPs to respondents. When faced with a significant penalty assessment, the respondent is well-advised to think hard about possible SEPs. Some SEPs, the best examples being those involving pollution prevention or reduction and audits, may have significant independent benefits to the respondent. In the most fortunate of circumstances, the SEP will be something the respondent was already considering doing. The SEP is likely to garner favorable publicity or at least ameliorate the unfavorable publicity that would result from the penalty assessment.

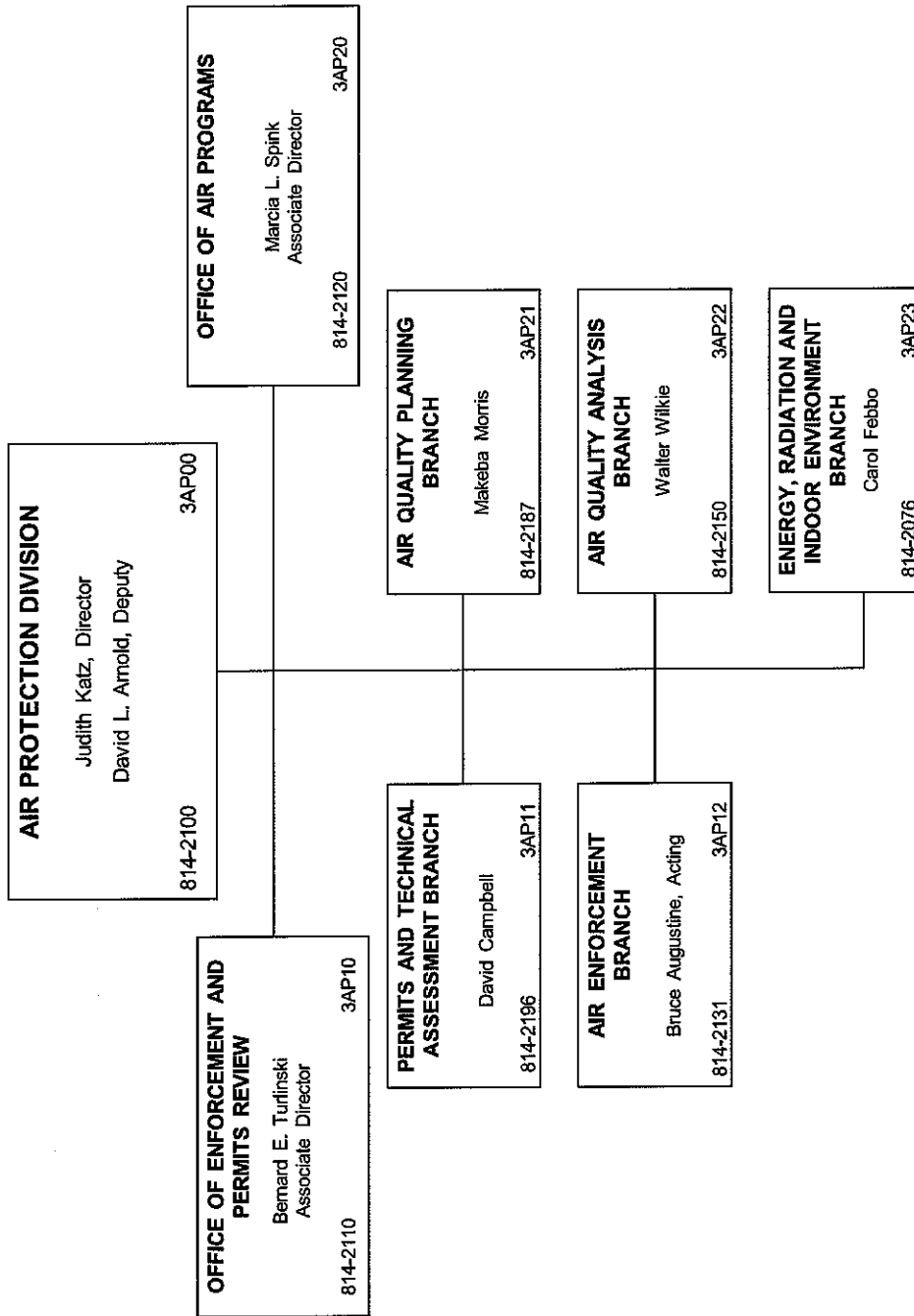
Chapter 20 Appendix

20A *Environmental Protection Agency, Region III Administrative Charts*

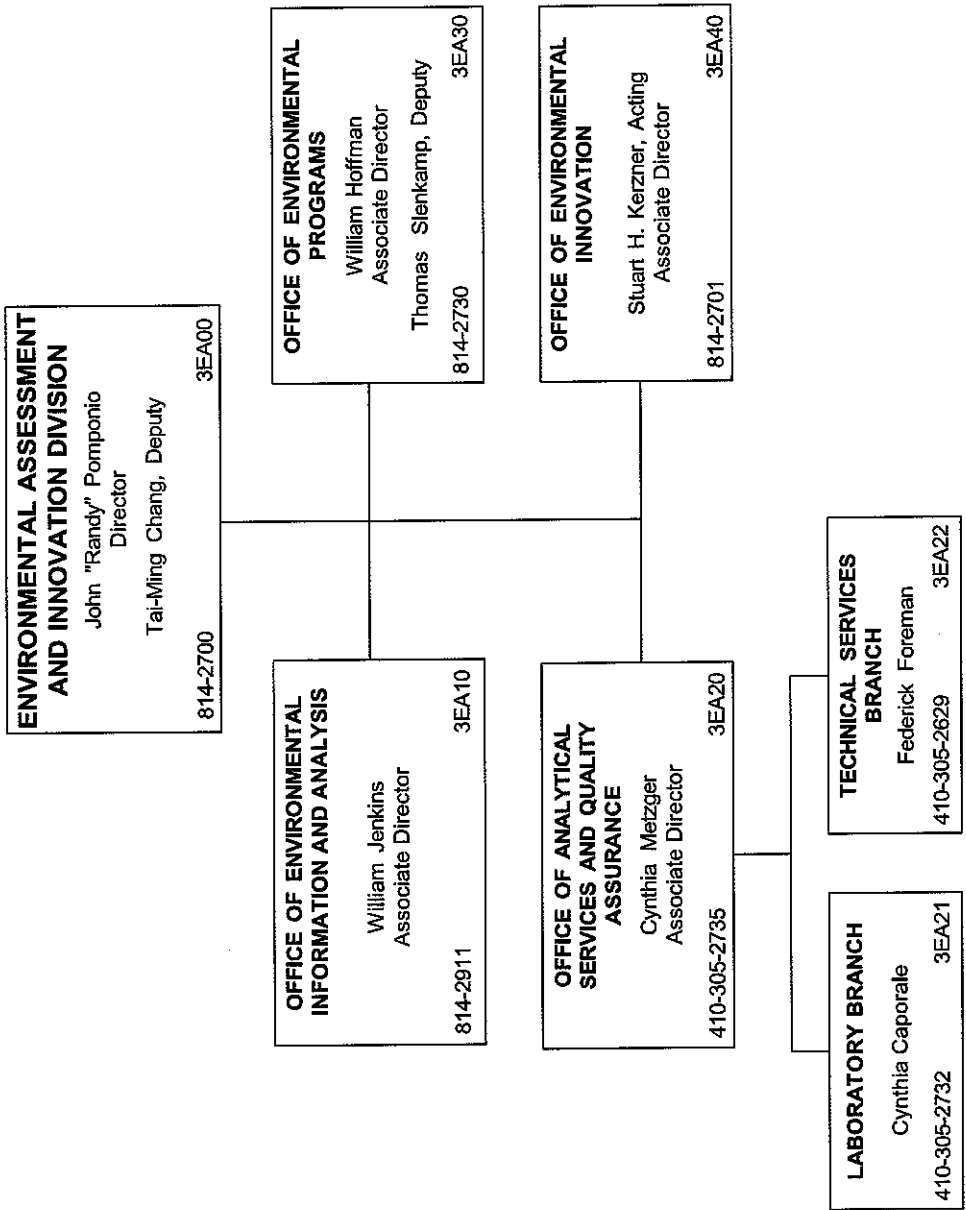
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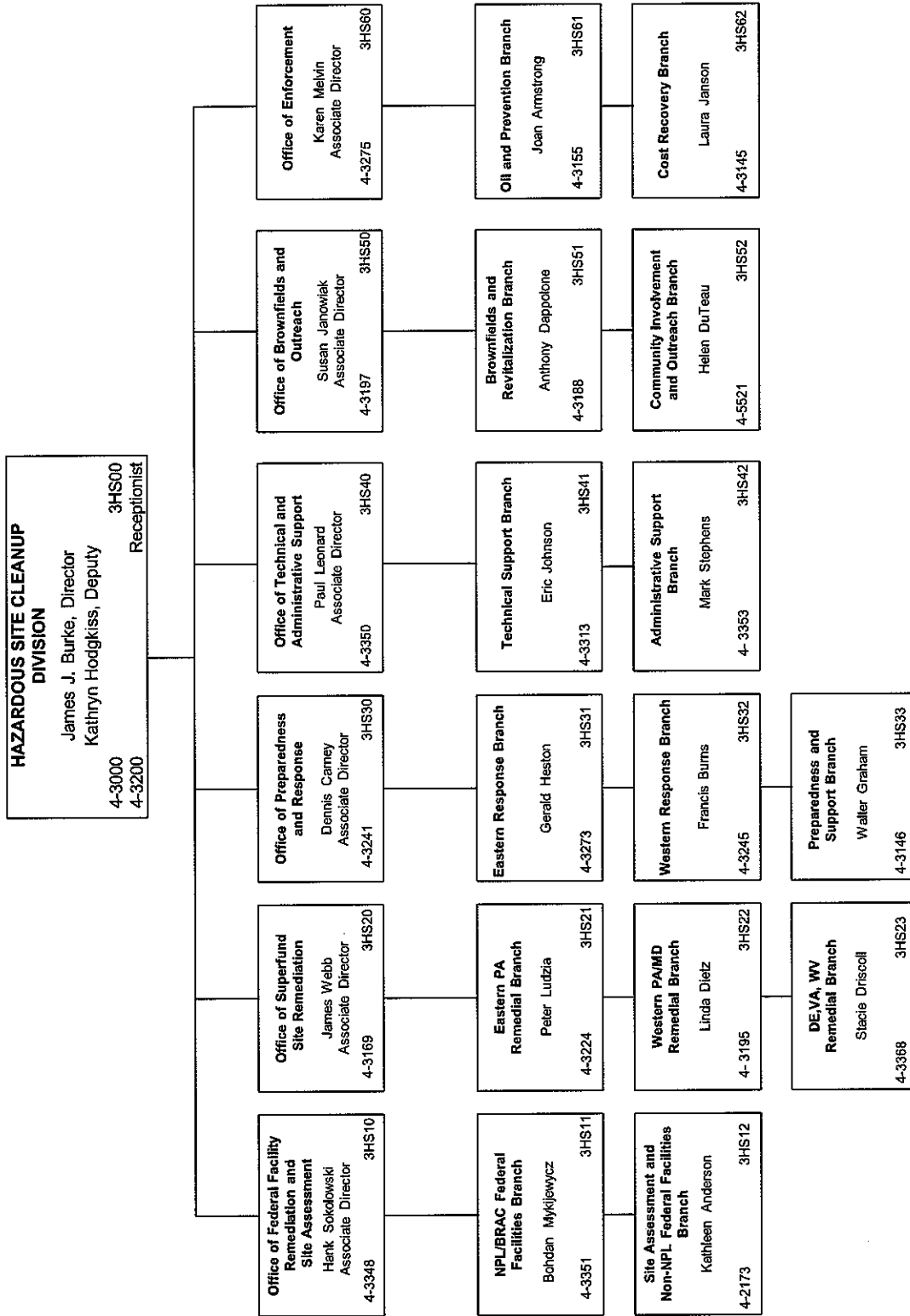


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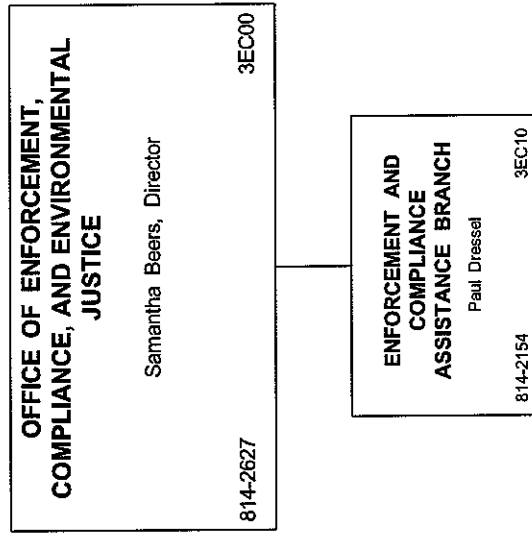


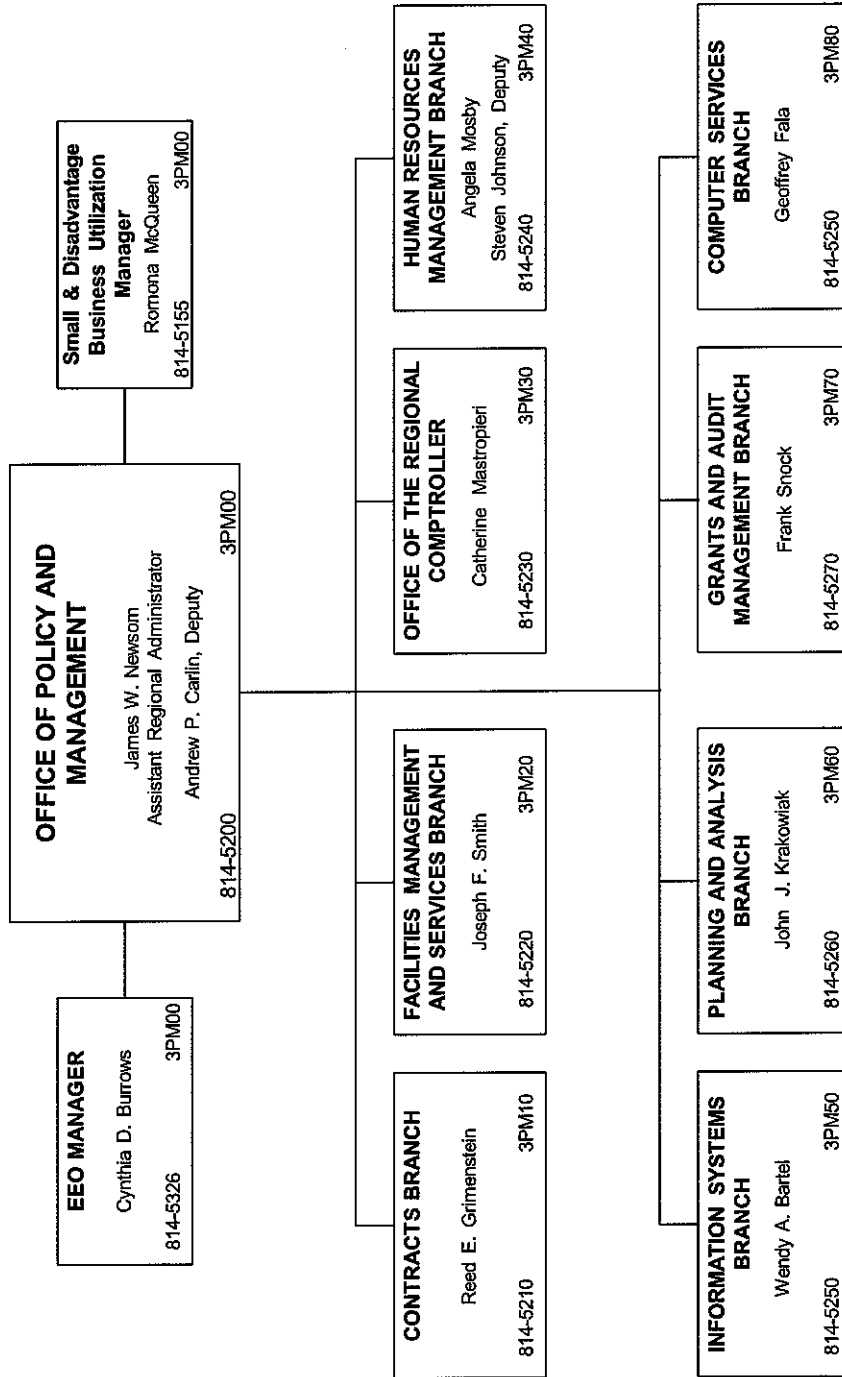
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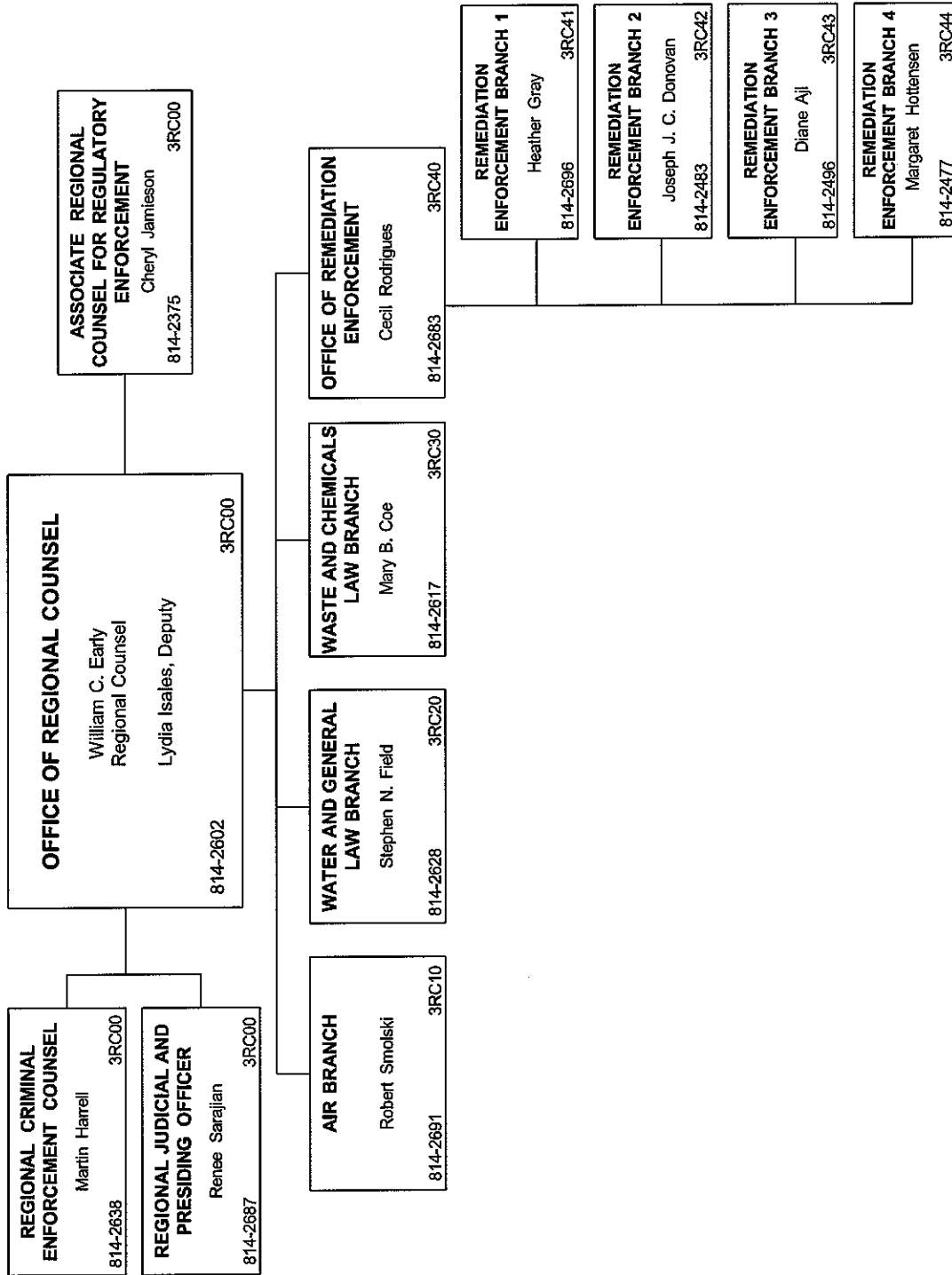


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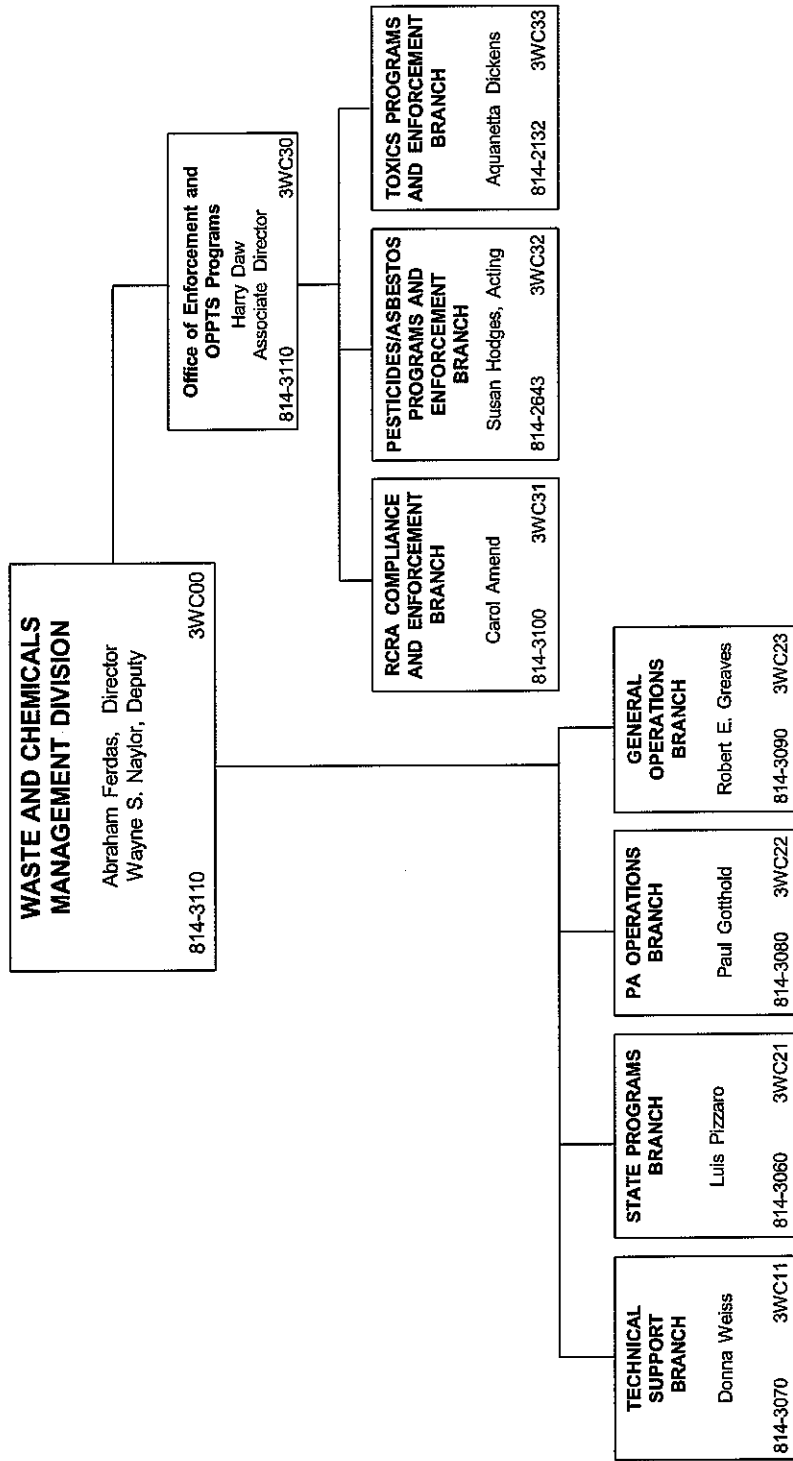
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