U.S. ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF INSPECTOR GENERAL

Catalyst for Improving the Environment

Public Liaison Report

A Region 5 Penalty Reduction Was Unjustified and Undocumented

Report No. 08-P-0291

September 29, 2008

Report Contributors: Edward Baldinger
Larry Dare
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Abbreviations

ALJ	Administrative Law Judge
EPA	U.S. Environmental Protection Agency
MMF	Minnesota Metal Finishing, Inc.
OIG	Office of Inspector General
ORC	Office of Regional Counsel
RCRA	Resource Conservation and Recovery Act
WPTD	Waste, Pesticides, and Toxics Division

U.S. Environmental Protection Agency
Office of Inspector General

08-P-0291
September 29, 2008

At a Glance

Catalyst for Improving the Environment

Why We Did This Review

We conducted this review in response to a complaint alleging that the U.S. Environmental Protection Agency's (EPA's) Region 5 Regional Counsel arbitrarily reduced a civil penalty against Minnesota Metal Finishing, Inc. (MMF), without justification.

Background

MMF is a plating and anodizing company in Minneapolis, Minnesota. Based on a May 2001 inspection, EPA determined that MMF was in noncompliance with the Resource Conservation and Recovery Act (RCRA) and designated it a significant noncomplier. In August 2005, the Region filed a complaint to fine MMF $300,000 for its noncompliance. After negotiating with EPA, in April 2007 MMF agreed and signed a settlement agreement to pay a $110,000 civil penalty. However, Regional Counsel subsequently reduced the fine to $85,000.

For further information, contact our Office of Congressional and Public Liaison at (202) 566-2391.

To view the full report, click on the following link:
www.epa.gov/oig/reports/2008/20080929-08-P-0291.pdf

A Region 5 Penalty Reduction Was Unjustified and Undocumented

What We Found

EPA Region 5 Regional Counsel's decision to reduce the $110,000 penalty MMF had already agreed to pay to $85,000 was unjustified. Further, the Regional Counsel's basis for the reduction was not documented. Regional Counsel relied on information in an internal Office of Regional Counsel memorandum. He did not have current reliable financial information to justify the decision nor a complete understanding of the owner's prior relationship with the company. In addition, Regional Counsel believed that when the Administrative Law Judge terminated and closed the case on May 14, 2007, after an agreement between MMF and EPA had been reached, EPA could be left with no agreement. However, in its correspondence to MMF on May 17, 2007, the Region noted it would process the earlier agreement if the company turned down the Region's offer to settle for a reduced penalty amount.

As a result of the Regional Counsel's actions, the government received $25,000 less than it could have. In addition, Region 5 may have sent a signal to other violators that they may have their civil penalties reduced regardless of the evidence supporting EPA's decision.

What We Recommend

We recommend that Region 5's Regional Administrator direct the Regional Counsel and the Land and Chemicals Division Director to document their rationale for reducing the amount of MMF's penalty, and properly determine and document all future penalty decisions. We also recommend that the Regional Administrator direct Regional Counsel and the Director to follow through on hiring staff who can provide the necessary financial and accounting expertise to understand and assess a violator's financial health. Region 5 has already directed staff to properly document in the future, and has begun the process to hire a civil investigator and attorney to ensure future penalties are properly calculated and documented. However, we do not consider Region 5's plans for documenting the MMF penalty rationale to be sufficient. Further, Region 5 needs to clearly define the difference between an ability-to-pay memorandum and a bottom-line settlement amount.

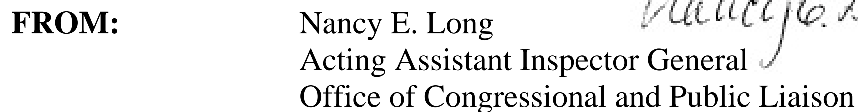
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
INSPECTOR GENERAL

September 29, 2008

MEMORANDUM

SUBJECT: A Region 5 Penalty Reduction Was Unjustified and Undocumented
Report No. 08-P-0291



FROM: Nancy E. Long
Acting Assistant Inspector General
Office of Congressional and Public Liaison

TO: Lynn Buhl
Regional Administrator, EPA Region 5

This is our final report on the subject review conducted by the Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA). This report represents the opinion of the OIG and the findings in this report do not necessarily represent the final EPA position. Final determinations on matters in this report will be made by EPA managers in accordance with established resolution procedures.

The findings in this report are not binding in any enforcement proceeding brought by EPA or the Department of Justice under the Comprehensive Environmental Response, Compensation, and Liability Act to recover costs incurred not inconsistent with the National Contingency Plan.

The estimated cost of this report – calculated by multiplying the project's staff day by the applicable daily full cost billing rates in effect at the time – is $276,287.

Action Required

In accordance with EPA Manual 2750, you are required to provide this office with a written response within 90 days of the date of this report. We have no objection to the further release of this report to the public. This report will be available at http://www.epa.gov/oig.

If you or your staff has any questions regarding this report, please contact me at 202-566-2391 or long.nancy@epa.gov, or Eric Lewis at 202-566-2664 or lewis.eric@epa.gov.

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Purpose

On May 30, 2007, the U.S. Environmental Protection Agency (EPA) Office of Inspector General (OIG) received a complaint alleging the inappropriate reduction of a settlement amount for Minnesota Metal Finishing, Inc. (MMF), by Region 5's then Acting Regional Counsel.[1] The complainant alleged that the reduction of a signed Resource Conservation and Recovery Act (RCRA) enforcement settlement from $110,000 to $85,000 was arbitrary and without justification.

Based on the initial complaint and subsequent discussions with the complainant, we sought to answer the following two questions:

- Was the enforcement settlement in the amount of $85,000 justified?
- Did the Region's process for determining this RCRA settlement amount follow established EPA processes?

Background

MMF operates a plating and anodizing company in Minneapolis, Minnesota. In May 2001, EPA and the State of Minnesota performed a compliance inspection at the company's facility. EPA determined that MMF was in noncompliance with RCRA and designated MMF a significant noncomplier. EPA did so because MMF did not: (1) minimize the potential releases of hazardous waste to the environment, (2) manage its hazardous waste containers properly, and (3) complete its waste stream documentation when it shipped hazardous waste off-site. Soon after EPA's May 2001 inspection, its current owner purchased the company. Prior to the purchase, that person had been a part owner and long-time employee who was plant manager.

For 4 years following the May 2001 inspection, EPA requested additional information. In August 2005, EPA Region 5 filed a Complaint and Compliance Order (complaint) with EPA's Office of Administrative Law Judges alleging that MMF had violated RCRA since the 1980s. EPA proposed a $300,000 civil penalty. The complaint was amended twice in 2006. The penalty amount remained at $300,000.

On April 24, 2007, staffs of EPA Region 5's Office of Regional Counsel (ORC) and the Waste, Pesticides, and Toxics Division[2] (WPTD) agreed to offer MMF $150,000 to settle the case. MMF made a $110,000 counteroffer that ORC staff found to be acceptable. On April 26, 2007, MMF's president signed a Consent Agreement and Final Order (subsequently referred to as "settlement document") for a $110,000 civil penalty, plus interest. The next day, EPA informed the Administrative Law Judge's (ALJ's) office that MMF had executed a settlement agreement and the Region would sign and file the agreement by May 11, 2007. On May 14, 2007, the ALJ terminated and closed the case based on the Region's April 27, 2007, motion.

[1] The Acting Regional Counsel has since been appointed to the position on a permanent basis.
[2] Name changed to Land and Chemicals Division in August 2007.

On May 9, 2007, between the time MMF signed the settlement document and the ALJ terminated and closed the case, the Regional Counsel directed his staff to gather tax returns, financial statements, and other financial documents to help determine an appropriate penalty amount. He also stated that he was concerned with a statement in his staff's April 23, 2007, memorandum that indicated MMF's cash flow was insufficient to finance a large penalty and the possibility the current owner could become bankrupt if the penalty was more than $80,000. On May 16, 2007, during the process to finalize the settlement document, Regional Counsel reduced the civil penalty amount from $110,000 to $85,000. Two days later, MMF signed the revised settlement document.

Although MMF signed the settlement document on May 18, 2007, for $85,000, the Region's Enforcement and Compliance Branch Chief was not convinced the Region should accept the lesser amount, and he refused to sign the settlement document. Officially, the Region's complainant for this case was the Enforcement and Compliance Branch Chief. On May 30, 2007, in a memorandum to the WPTD Director, this chief wrote:

> *… I wish to clarify that I was not among the "Region's decision-makers" who were persuaded that a civil penalty of $85,000 was more appropriate than a civil penalty of $110,000. Because (1) I have not been given an opportunity to review and assess the additional information which Respondent has provided and (2) I have read the attached review of that information by the ORC litigators, I remain unpersuaded that a civil penalty of $85,000 is more appropriate than a well documented civil penalty of $110,000.*
>
> *Therefore, I respectfully request that my duly delegated authority to participate as complaint [sic] in the instant case be withdrawn.*

However, on May 31, the WPTD Director signed the settlement agreement for the Enforcement and Compliance Branch Chief, and the Director's signature made the settlement final. On the same day, MMF made its first payment to the government. EPA inspected MMF in October 2007 and determined that MMF's noncomplier designation could be removed, even though the company still had not yet completed actions to correct all its environmental problems. Appendix A is a timeline of significant events from January 2005 until EPA's final settlement with MMF in May 2007.

Noteworthy Achievements

Region 5's ORC revised its internal procedures to include the Regional Counsel in all penalty decisions before draft settlement documents are sent to the company for signature. Region 5 also announced that it intends to hire a civil investigator and an attorney who have an understanding of financial accounting matters and can help determine a company's ability to pay.

Scope and Methodology

We conducted work from September 2007 to May 2008. We performed our work in accordance with generally accepted government auditing standards issued by the Comptroller General of the

United States, except we limited the scope of our review to areas identified by the complainant. The standards that we followed require that we plan and perform the review to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our review objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our review objectives. We did not use computer-processed data to support our findings.

We collected records from Region 5 and interviewed staff and senior managers in Region 5's ORC and WPTD to understand the events and circumstances leading to the decision to reduce the civil penalty. We also interviewed individuals from EPA Headquarters' Office of Enforcement and Compliance Assurance and staff from EPA's ALJ about procedural matters related to our review. In addition, we interviewed Region 5's outside ability-to-pay financial expert about issues related to MMF's financial condition. We assessed whether the Region followed its internal procedures as they relate to the issues in this complaint. On April 3, 2008, we discussed our preliminary findings with Region 5 representatives and made changes where warranted.

Results of Review

Region 5's Regional Counsel adjusted MMF's $110,000 penalty amount downward to $85,000 without convincing evidence to justify the reduction. EPA Region 5 Regional Counsel's decision to reduce MMF's civil penalty by $25,000 was unjustified, and the basis for the reduction was not documented. The Regional Counsel did not have current reliable financial information to justify the decision nor a complete understanding of the owner's prior relationship with the company. As a result, the government received $25,000 less than it could have. Also, Region 5 may have sent a signal to other violators that they may have their civil penalties reduced regardless of the evidence supporting EPA's decision.

Regional Counsel Did Not Justify the Penalty Reduction

EPA procedures permit enforcement personnel, at their discretion, to adjust the amount of a proposed penalty downward where the violator or other sources convincingly demonstrate that additional adjustment is warranted by facts. Region 5's Regional Counsel stated he believed reducing MMF's civil penalty from $110,000 to $85,000 was justified because:

- MMF could not afford to pay the $110,000 penalty it had already agreed to pay because information in an April 23, 2007, ORC staff memorandum raised questions about whether MMF could pay the $110,000.

- Region 5 needed to quickly settle with MMF because the ALJ's office terminated and closed the pending case and the Region was thus subject to significant litigation risk.

- EPA's reduced $85,000 settlement offer could have been considered a counteroffer, nullifying MMF's original offer to settle for $110,000.

- MMF's violations occurred prior to the current company president's ownership and the president corrected the RCRA violations after buying the company.

However, Regional Counsel's decision is not justified or supported based on the evidence we gathered. Details follow.

Regional Counsel Believed MMF Could Not Afford the $110,000 Penalty

Regional Counsel said he relied primarily on information in an April 23, 2007, internal memorandum to establish his belief that MMF could afford to pay about $80,000 rather than the $110,000 that MMF agreed to pay. ORC and WPTD staffs maintained that MMF could pay the $110,000.

The RCRA June 2003 Civil Penalty Policy provides EPA with options when it determines the violator cannot afford to pay the penalty. It allows enforcement personnel, as a last resort, to adjust proposed penalties downward. Before doing so, EPA must consider delayed payment and installment options. The policy notes information from the violator or other sources must convincingly demonstrate that such a reduction is warranted by the facts. RCRA Civil Penalty Policy clearly places the burden of proof on the violator to show it is unable to pay a specific penalty amount.

Regional Counsel believed that the April 23, 2007, memorandum was the ORC staff's recommendation for the maximum amount MMF could pay. However, ORC staff who wrote the April 23 memorandum stated its purpose was not to establish a maximum amount (i.e., $80,000). Rather, the memorandum was a "bottom line document" used to determine the least amount EPA should accept. Also, the memorandum was written to portray a worst case scenario, consider EPA's litigation risk, and determine the least amount of civil penalty EPA should accept to settle the case. Staff's analysis was never intended to establish MMF's ability to pay. An ability-to-pay analysis is a document prepared by a financial expert that determines a financial range a company could pay over a period of time. ORC staff stated they are not qualified to conduct an ability-to-pay analysis.

Because the April 23 memorandum used a worst case scenario, some critical information about MMF's financial condition was omitted or did not agree with the analysis provided by the financial expert. Also, conclusions reached in the memorandum focused on the financial condition of the owner, who was not named as a respondent to EPA's August 2005 complaint, rather than MMF's financial condition. Since MMF is a corporation, it is separate and distinct from its owners and managers, and is liable for its own debts and payments. Regional Counsel and ORC staff did not make that distinction. Additionally, the financial expert's April 19, 2007, report concluded that MMF continues to be a financially healthy and profitable firm and, based on 2 years of available cash flow, MMF could pay between $80,000 and $110,000. However, the expert's conclusions were based on MMF's 2001-2004 financial statements and 2001-2003 and 2005 tax returns.

EPA's Environmental Appeals Board has ruled that, as a matter of law, tax returns are entitled to little weight. Accordingly, as stated in the Board's Bill-Dry Corporation decision,[3] if a company fails to provide sufficient information to substantiate its inability to pay, claim enforcement personnel should disregard this factor in adjusting the civil penalty. Regional Counsel stated that

[3] Environmental Appeals Board decision at 9 E.A.D 575.

the April 23, 2007, memo was based on MMF's financial statements. However, at the time EPA made its ability-to-pay determination in 2007, MMF only provided its financial statements for 2001 through 2004. In addition, those 2001-2004 financial statements were unaudited and, according to MMF's certified public accounting firm, MMF elected to omit all disclosures required by generally accepted accounting principles. Moreover, the accounting firm, in its cover letter, warned that if the omitted disclosures were included, they might influence users' conclusions about the company's financial position, its results of operations, and cash flows. In addition, the financial statements were not designed for those who were not informed about such matters.

Signing New Agreement Not Urgent/Not Clear How Agreement Could Be Null

We do not believe reducing the penalty was urgent. For example, when the Region notified MMF that its new settlement offer was for $85,000 it also noted that the offer could be withdrawn and the previous offer, for $110,000, processed. Regional Counsel believed it was urgent that EPA settle with MMF as quickly as possible. He said that because the ALJ terminated and closed the case rather than postpone it as the Region requested, MMF could have, at any time, withdrawn its $110,000 offer to settle and EPA would be left with no agreement. Regional Counsel also believed that MMF could have considered the Region's offer to reconsider the penalty amount a counteroffer, thereby nullifying the previous settlement document MMF had already signed.

Regional Counsel continued to assess the fairness of the $110,000 penalty even after the ORC staff, on April 27, 2007, had notified the ALJ there was no need for a hearing. The notification stated that the Region and MMF had reached a settlement agreement and on April 26 MMF had signed the agreement. Also, the ALJ was told that the Region expected to sign the settlement agreement by May 11.

However, on May 9, 2007, just 2 days before the ALJ expected the Region's completed settlement agreement and 5 days before the ALJ's decision to terminate and close the case, Regional Counsel met with ORC staff and instructed them to obtain tax returns, financial statements, and other information from MMF to help determine an appropriate amount and consider reducing the penalty amount. On the same day, ORC staff requested the additional information from MMF.

On May 14, 2007, MMF provided its 2006 tax return, which the Region immediately had analyzed by its financial expert. The financial expert told ORC staff that his opinion had not substantially changed from his April 19, 2007, analysis, in which he concluded MMF was healthy and profitable and could pay a civil penalty between $80,000 and $110,000.

Regional Counsel said he also believed he had to settle quickly because the ALJ terminated and closed the case on May 14, 2007. Two days later, Regional Counsel instructed his Branch Chief to settle for either $80,000 or $85,000. The next day, on May 17, Regional Counsel's Branch Chief offered MMF an $85,000 settlement amount. In his offer to MMF, the Branch Chief stated:

If I do not receive them [a signed settlement document] by the close of business on that date [May 21, 2007] EPA's offer to resolve this matter on terms set forth in the attached settlement document may be withdrawn, in which case we still will likely forward the earlier version of the settlement document, which your client has already executed, for final agency approval.

The Branch Chief's memorandum does not indicate that the Region had made a counteroffer and nullified the April 26, 2007, signed version of the settlement agreement. Because the Region already had a signed agreement for $110,000, we do not agree that settlement for a lesser amount was urgent. ORC staff also did not agree that the Region made a counteroffer.

Regional Counsel had other options besides making a straight $25,000 reduction in the penalty amount. For example, if MMF could not afford the $110,000 civil penalty, the RCRA civil penalty policy directs enforcement personnel to consider other options before making a straight reduction in the civil penalty as a last resort. The policy allows Regional Counsel to extend the installment payment terms over a number of years. This option would have resolved the urgency issue without resorting to reducing MMF's agreed-upon $110,000 civil penalty amount, and would have given MMF some additional time to pay the penalty.

Regional Counsel Did Not Have Sufficient Information Regarding New Owner

Regional Counsel stated that he believed the current MMF owner was eager to fix the company's environmental violations. He noted that violations occurred prior to the current president's ownership and, despite existing violations, the president bought the company and invested considerable money to correct existing RCRA violations. As a result, Regional Counsel believed he should not be unduly aggressive in setting the penalty amount.

Regional Counsel's characterization of MMF's owner was based on incomplete and inaccurate information. Regional Counsel believed the new owner should be commended for agreeing to clean up MMF's environmental violations. However, clean-up of major problems had not begun until about 4 years after the current owner purchased MMF and after EPA issued its complaint (September 2005). Region 5 WPTD inspection staff noted, in its October 2007 inspection report, that MMF's attorney stated the company had not completed its clean-up. However, recognizing that MMF had made significant progress, the Region removed MMF's significant noncomplier designation. Although the current president was not named in the August 2005 complaint, he was a minority owner and plant manager at the time of the Region's May 2001 inspection. Also, regional staff told us the owner's efforts had already been considered in establishing the initial $300,000 penalty amount. Further, because the new owner had already agreed to settle for $110,000, the need to reduce the penalty amount remains unclear.

Decision to Reduce Civil Penalty Not Documented

Neither the ORC nor WPTD offices documented the decision to reduce the penalty amount from $110,000 to $85,000. EPA's June 2003 RCRA Civil Penalty Policy requires that a proposed and final settlement amount be justified and documented. It states that in administrative civil penalty cases such as this, EPA will perform and document two separate calculations. EPA must first

determine an appropriate amount to seek in the administrative complaint and subsequent litigation. Second, EPA must explain and document the process by which it arrived at the penalty figure it agreed to accept in the final settlement.

ORC or WPTD staffs calculated and properly documented the initial proposed settlement amount. They followed procedures in the RCRA Civil Penalty Policy to develop worksheets and narratives that supported the $300,000 civil penalty. ORC staff prepared and described their rationale to settle the case with MMF for $110,000.

Regional Counsel and the WPTD Director offered conflicting information regarding the reason for the penalty reduction. The only support we found for the $85,000 amount was in a footnote to a May 23, 2007, memorandum from an ORC Branch Chief to the signer of the final order, the WPTD Director. In the memorandum, the Branch Chief stated that on April 25, 2007, MMF agreed to pay $110,000 in civil penalties. The footnote to the memorandum states that "At the Region's request, Respondent [MMF] provided additional information [MMF's 2006 Federal Income Tax Return] on May 14, 2007, which persuaded the Region's decision-makers that an $85,000 settlement figure was more appropriate." However, Regional Counsel stated he did not have the analysis of MMF's 2006 tax return at the time he made the decision to reduce the amount, which raises questions about the statement in the footnote. The WPTD Director stated that, prior to signing the May 31, 2007, settlement document, she relied on the Regional Counsel's advice and she never saw the May 16, 2007, memorandum. The ORC staff's May 16, 2007, memorandum disagreed with the Regional Counsel's decision. In it, ORC staff strongly recommended accepting the $110,000 penalty. The WPTD Director also stated that if she had seen the document, she may have reconsidered giving approval to the $85,000 settlement document.

Recommendations

We recommend that the Regional Administrator, Region 5, direct Region 5's Regional Counsel and the Director for the Land and Chemicals Division (formerly WPTD) to:

1. Document in the case file the Region's rationale for reducing the amount of MMF's penalty.

2. Properly determine and document all future penalty decisions.

3. Follow through on (a) hiring staff that can provide the enforcement and legal staff with the financial analysis expertise necessary to properly analyze violators' financial health, and (b) instruct staff to clearly define the difference between an ability-to-pay memorandum and a bottom line settlement figure.

Region 5 Response to Draft Report and OIG Evaluation

Region 5 generally disagreed with our conclusions and recommendations. Region 5's complete response is in Appendix A. Where appropriate, we have made changes to reflect the Region's comments. Region 5 stated that it nonconcurs in each of the report's first three findings and they

should have been withdrawn. The Region agrees, with comments, with the last finding ("Documentation"). Even though it nonconcurs with the findings, Region 5 noted that it will implement the recommendations according to the schedule it set out in its response.

Region 5 agreed with our first recommendation to document in its MMF case file its rationale for reducing the amount of MMF's penalty. However, in the body of the response, Region 5 notes that it intends to restate conclusions reached in its April 23 and May 23, 2007, memoranda into a single justification document.

OIG disagrees that combining the April 23, 2007, document and the May 16, 2007, document provides justification to reduce the $110,000 agreed-upon penalty to $85,000. Region 5's response states that the April 23 and May 23, 2007, memoranda set out all the reasons for its actions. As we pointed out in our draft report, ORC staff who wrote the April 23 memorandum stated its purpose was not to establish a maximum penalty amount. They noted that it was written to portray a worst case scenario, consider EPA's litigation risk, and determine the least amount of civil penalty EPA should accept to settle the case. Its authors also noted that the memorandum was never intended to establish MMF's ability to pay. Moreover, the financial information in the April 23 memorandum was not supported by Region 5's independent financial expert's April 17 analysis. During our discussions with the expert, the expert confirmed our understanding. Similarly, we disagree that the $25,000 penalty reduction was supported by the footnote to the May 23, 2007, memorandum as the Region asserts. Regional Counsel agreed that a tax return standing alone carried little weight in making an ability-to-pay decision. Therefore, since Region 5 had no current or reliable financial information about MMF or its current owner to make an informed decision, it had no basis for reducing the $110,000 agreed-upon penalty to $85,000.

OIG also disagrees with Region 5's assertions about MMF's new owner. MMF's 2000 accounting records and 2001 response to EPA's request for information showed that MMF's current owner was a part-owner and the company's plant manager at the time of the May 2001 inspection. Also, in October 2007, Regional Counsel stated that he was unaware of the new owner's prior ownership, and if he had known he would have made a different decision. ORC staff also confirmed that they were unaware of the new owner's prior ownership and position at MMF when they wrote the April 23, 2007, memorandum. Moreover, MMF's owner and MMF are separate entities. EPA's August 26, 2005, complaint and subsequent amendments clearly show that MMF, not its owner or previous majority owner, was listed as the Respondent.

Region 5's Regional Counsel stated that he made his decision, in part, because he believed a penalty of more than $80,000 would bankrupt the new owner. However, ORC staff confirmed that they did not have any proof at the time of the April 23, 2007, memorandum that MMF's owner was vulnerable to bankruptcy because Region 5 did not have any personal financial documents (i.e., personal tax returns, bank statements, or personal financial statements) to support the statement.

OIG also disagrees with Region 5's rationale that signing the revised settlement agreement (for $85,000) was urgent because the ALJ had terminated the pending hearing and June 4, 2007, was the date for MMF's first payment. Region 5 already had a signed agreement with MMF for

$110,000 that ORC staff had negotiated with the company and they found acceptable. The ALJ relied on this information when the case was terminated and closed.

OIG disagrees that the Region has complied with our recommendation to adequately document all future penalty decisions. Managers and staff should be instructed to fully document the basis for their decisions. During our review, Regional Counsel made improvements to its internal procedures regarding the process for issuing draft settlement documents. Region 5 has partially complied with Recommendation 2.

OIG agrees with Region 5's response to Recommendation 3 regarding the need to hire a financial expert. The Region is following through to hire staff who can provide expert financial analysis. However, we disagree with the Region's response about what constitutes an ability-to-pay memorandum and a bottom-line settlement figure. Staff are not clear about the difference, and the difference of opinion between staff and Regional Counsel should be resolved.

Status of Recommendations and Potential Monetary Benefits

RECOMMENDATIONS						POTENTIAL MONETARY BENEFITS (in $000s)	
Rec. No.	Page No.	Subject	Status[1]	Action Official	Planned Completion Date	Claimed Amount	Agreed To Amount
1	7	Direct Region 5's Regional Counsel and the Director for the Land and Chemicals Division (formerly WPTD) to document in the case file the Region's rationale for reducing the amount of MMF's penalty.	U	Regional Administrator, Region 5			
2	7	Direct Region 5's Regional Counsel and the Director for the Land and Chemicals Division (formerly WPTD) to properly determine and document all future penalty decisions.	U	Regional Administrator, Region 5			
3	7	Direct Region 5's Regional Counsel and the Director for the Land and Chemicals Division (formerly WPTD) to follow through on:					
		(a) hiring staff that can provide the enforcement and legal staff with the financial analysis expertise necessary to properly analyze violators' financial health, and	O	Regional Administrator, Region 5	12/31/08		
		(b) instruct staff to clearly define the difference between an ability-to-pay memorandum and a bottom line settlement figure.	U	Regional Administrator, Region 5			

[1] O = recommendation is open with agreed-to corrective actions pending
C = recommendation is closed with all agreed-to actions completed
U = recommendation is undecided with resolution efforts in progress

Appendix A

Region 5 Response to Draft Report

Comments of EPA Region 5 on "A Region 5 Civil Penalty Reduction Was Unjustified and Undocumented"

September 4, 2008
(revised)

MEMORANDUM

SUBJECT: Comments of EPA Region 5 on "A Region 5 Penalty Reduction was Unjustified and Undocumented."

FROM: Lynn Buhl
Regional Administrator

TO: Eric Lewis
Director of Special Review and Inspection

EPA Region 5 appreciates the opportunity to provide comments on "A Region 5 Penalty Reduction Was Unjustified and Undocumented," (the Report) as well as to provide comments on an earlier draft, and discuss these comments with you on April 2, 2008.

EPA Region 5 begins its response by noting that the Office of Inspector General's (OIG's) investigation into this matter not only errs in its conclusions as set out herein, but was also an exercise without result. As shown, the recommendations of the Report had been undertaken long before OIG produced a draft report. For example, for more than a year, ORC has required Regional Counsel concurrence on all draft Consent Agreements and Final Orders (CAFOs). The system has worked well. Also, Region 5 had made the decision to hire a civil investigator with financial expertise in January 2008. In the interim, EPA Region 5 made use of the same highly regarded contractor the Department of Justice uses in litigation — and it was this information that formed the basis of the Acting Regional Counsel's actions. In addition, the reasons for the decision were documented, and in the year and half since the events here, the hundreds of penalty matters handled by the Office of Regional Counsel and its program clients have been properly determined and documented. OIG reports should guide conduct. Here, as the actions recommended had been undertaken prior to the Report, Region 5 questions why OIG chose to spend nearly a year of investigation an a project without benefit. Furthermore, the penalty at issue was fully consistent with the penalty policy, was above EPA's bottom line, and did not compromise economic benefit, thereby assuring a "level playing field." It usually falls to OIG to ensure the Agency's scarce investigative and enforcement resources are being used in a way that benefits the environment. Here, Region 5 questions the use of resources on this matter.

In addition, the Report makes a number of errors in arriving in its investigative conclusions. Region 5 nonconcurs on each of OIG's first three findings. As explained herein, Region 5 concurs, with comments, on the last finding ("Documentation"). The first three findings are so flawed that OIG should have withdrawn them.

First, the Acting Regional Counsel sought more information because of the financial analysis submitted with the approval package showed that the proposed penalty had the potential to bankrupt the new owner, and was significantly higher than the maximum penalty that the government's financial analysis expert could support. Region 5 supports the request for more

information. Region 5 does not accept the conclusion that the Acting Regional Counsel was obligated to ignore the potentially ruinous effect of the penalty sought. This conclusion is incorrect.

Second, as shown below, the Report is an attempt to second-guess a litigation risk decision. In doing so, OIG supplants its own conjecture in place of the Region's reasoned analysis. It is also troubling that the Report is unable to distinguish between internal evaluations of litigation risk and external positions taken in letters to opposing counsel. The selective reliance on documents in an attempt to bolster an erroneous conclusion is particularly disappointing. This conclusion is incorrect.

Third, the Report attempts to show that the Acting Regional Counsel did not have complete information about the new owner. Region 5 nonconcurs. It is undisputed that none of the violations were attributable to the new owner, who at great expense invested the necessary funds to timely and appropriately correct the violations. The Report significantly distorts the record of the new owner. These distortions call into question the even-handed, neutral review of information that should be the goal of OIG reports. This conclusion is incorrect.

Finally, Region 5 set out all of the reasons for its actions in a May 23, 2007 justification memo, which incorporated by reference the April 27, 2007 settlement approval memo. The Region agrees that it would have been more clear to restate the conclusions of the April 27, 2007 memo into a single justification memo, and will do so.

1. The Request for Information was Justified and Fully Appropriate.

The Report finds that the decision to reduce the civil penalty was "unjustified." Report at 2. Region 5 nonconcurs, and supports the decision of the Acting Regional Counsel to seek more information prior to potentially bankrupting a company. The Report skirts the threshold issue of determining whether the request for more information was justified, by jumping to the ultimate issue of the penalty reduction. This takes the decision out of time and context. As shown, OIG's findings are unfounded, and are inconsistent with the stated goals of EPA's penalty policy. The reasons for the Acting Regional Counsel's actions are set out adequately at page three of the Report, but the Report omits the key facts upon which the decisions were based.1

As noted in the Report, the ORC case team submitted a "Recommendation for Settlement in Minnesota Metal Finishing, Inc." on April 23, 2007. That memo, submitted with the settlement for approval, comes to two important conclusions, both absent from the Report: (1) depending on the outcome of certain important information, the owner of the company is on the verge of bankruptcy, unable to pay any penalty and (2) the government's sole litigation financial litigation expert could not support any penalty higher than $80,000 and if cross-examined, might be forced to conclude that MMF cannot pay any penalty.

Thus, on April 23, 2007, less than one month before the hearing in this matter, the litigation team unequivocally concluded:

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[1]Region 5 submitted extensive exhibits and attachments to its comments on prior drafts of this Report. Many of these documents contain information such as investigative reports and financial data that are inappropriate for publication, and will not be submitted herewith.

> Even based on incomplete information with assumptions favoring the argument for a high penalty, [the government's only financial litigation expert], **cannot support more than $80,000 payable over two years**.
>
> * * *
>
> [the government's expert] might be forced to testify that, based on the information available to him, **MMF cannot pay any penalty**. We would not be able to argue that more evidence is necessary for MMF to sustain its burden of proof, because MMF has clearly met its burden by providing the financial statements, tax returns, notes payable to the previous owner, and the DKG lease.
>
> (Emphasis added).

The financial analysis itself concluded that there were some crucial assumptions being made about a lease term and "if we learn that the lease was renewed on the same terms, then [the new owner] is **probably facing personal bankruptcy**." (Emphasis added). It also states that the "amount of money going to [the new owner] is at best barely enough to finance his purchase of MMF, allow for payment of taxes on MMF's profits, and support himself, his wife and two teenage sons" on a "small salary."

On the basis of this joint recommendation from staff and both managers that the known facts did not justify a penalty in excess of $80,000, the Acting Regional Counsel sought more information upon which to evaluate the proposed $110,000 penalty. As it stood, the government's witness could not support a penalty of higher than $80,000, and if certain key facts that were still unknown favored the Respondent, Respondent might well have zero ability to pay. The request for more information was justified and appropriate, and as shown below, the ultimate penalty reduction was consequently justified and appropriate.

For unknown reasons, the Report attempts to diminish the impact of the clear and explicit conclusions of the April 23 memo by labeling the memo a "worst case" analysis. The "worst case" claim is nowhere found in the memo – and is contradicted by the memo itself. Further, the Report concludes that the analysis was "never intended to establish MMF's ability to pay," a statement that is belied by the second sentence of the memo explaining its purpose, which states, "[a]s explained below, this recommendation is based on ability to pay" and then reviews the ability to pay information in detail in each subsequent subheads (see, e.g., subhead 1: "the Original Ability to Pay Analysis Was Based on Incomplete Information; subhead 2: the Second Ability to Pay Analysis Yields a Smaller Amount Available for Penalties"; subhead 3: New Information Reveals that the Rental Payments Mostly Go to an Unrelated Third Party."). The Report implies that Regional decisionmakers cannot review memos summarizing ability to pay information in justification of a settlement. Region 5 disagrees. Regional decisionmakers were entitled to rely upon the ability to pay review summarized in the memo in deciding whether to seek additional information.

Perhaps most troubling is that the Report would require the Region to cast a blind eye to information that a penalty higher than $80,000 was unsupportable. Indeed, the Report is apparently mandating that the Acting Regional Counsel should have ignored the only financial information before him showing that the penalty proposed would have been beyond the ability to pay of the Respondent. The information that the Report would have the Acting Regional Counsel disregard was based on the following investigations:

1. The First Ability to Pay Analysis.

2. The Second Ability to Pay Analysis.

3. The report of EPA's Civil Investigator, including a comprehensive asset search for MMF and the new owner, to investigate whether assets were not disclosed to EPA.

4. Attorneys' Settlement Memo.

It is beyond dispute that the Acting Regional Counsel's decision to obtain more information was justified, rested on solid information, and was proper.

It was also consistent with EPA penalty policy. EPA procedures permit enforcement personnel, at their discretion, to adjust the amount of the proposed penalty downward where the violator or information from other sources convincingly demonstrates that application of additional adjustment factors is warranted by facts. Indeed, the 2003 RCRA Civil Penalty Policy (RCRA Penalty Policy) notes that agency decisionmakers may take into account "Other Unique Factors," and states:

"This Policy allows an adjustment for factors which may arise on a case-by-case basis."

Policy at 40. The 2003 penalty policy is based on and consistent with the Agency's 1984 general policy on civil penalties, which established three goals of penalties:

1. Deterrence
2. Fair and equitable treatment of the regulated community; and
3. Swift resolution of environmental problems.

RCRA Penalty Policy at 6. Given the penalty policy allows for downward adjustment when information from the violator or other sources is warranted, and that fair and equitable treatment of the regulated community is a requirement of the policy, the OIG's conclusion that the Acting Regional Counsel must ignore evidence that the penalty was in excess of Respondent's ability to pay is wholly without merit. Region 5 strongly disagrees with the OIG that the Acting Regional Counsel was barred from requesting additional information.

2. After the May 14, 2007 Order of Termination, Settling the Case Rather than Proceeding to Hearing or Delaying Further was Appropriate, and Should Not be Second-Guessed by OIG.

The Report concludes settlement of the matter was not urgent after the Administrative Law Judge (ALJ) terminated the proceedings on May 14. Region 5 nonconcurs. Here, the OIG is supplanting its own judgment of litigation risk for that of the Office of Regional Counsel, with no basis.

A week before the hearing, on May 14, 2007, the presiding judge issued an Order unexpectedly. Rather than grant EPA's motion to postpone the hearing, the Order denied the motion — and terminated the proceeding. The Order was unprecedented in ORC's experience. The termination underscored the need to resolve the matter as fast as possible. At this point, Respondent could have decided not to settle at all — leaving EPA without remedy except for a motion for reconsideration of the termination. The outcome of such a motion is speculative. The ALJ could have denied it, leaving EPA in a difficult situation. Or the ALJ could have granted it, and reset a hearing — perhaps in the next day or two. If a hearing were set, the litigation team of three attorneys and a number of program witnesses would have had to mobilize quickly, necessitating a large expenditure of scarce taxpayer resources (and scarcer time). The conclusion that it would be best to avoid this situation is doubtless correct. The Report errs in finding otherwise.

The Report is able to predict what no one else could: What will Respondent do? Will Respondent offer substantially less? Will Respondent engage in strategic bargaining behavior? What would happen if Respondent revoked their offer, but EPA then attempted to sign it anyway (after EPA had made a counteroffer?). Was the offer still effective? What would the ALJ have done? Would she have set a new trial? Imminently? Next month? Next year? What would have happened at the hearing? Would the EPA have obtained more at the hearing than the $85,000 it settled for? or less? Would the expenditure of resources been justified by the result? Would ORC attorneys been better deployed on the many pending matters before the Region with a settlement rather than hearing?

Region 5 suggests that OIG is significantly overreaching if it purports to know even the probabilities of these answers, let alone to predict outcomes definitively. It is notable that the Report does not consider such relevant questions, avoiding the issue by apparently concluding that in OIG's judgment, Region 5 should not have considered risk, costs and benefits, or resources.

An alternative implicit in the Report is that the Acting Regional Counsel should have delayed the settlement for an unspecified longer period to make the decision, even though the uncontradicted record is clear that no new evidence aside from a single tax return would be forthcoming and there was mounting time pressure to settle. It cannot be concluded that the Acting Regional Counsel should have at this point launched an extensive accounting/financial analysis. This is especially true because the settlement proposed by the Acting Regional Counsel of $85,000 recovered economic benefit, and was in no way inconsistent with any penalty policy. It was prudent to accept the settlement rather than wait further.

In addition, the CAFO itself in Paragraph 9 required the Respondent to pay the first installment of the penalty amount due by a date certain — June 4, 2007. Any delay beyond that date would have required the entire 3-year payment schedule to be renegotiated. Again, it was

better to obtain the payment on June 4 rather than re-open negotiations. The imminent June 4 date contributed to the urgency, and made filing the CAFO a high priority.

The Report cites an email from an ORC Branch Chief to opposing counsel as its only "proof" that EPA could have signed Respondent's original offer if Respondent revoked in response to EPA's counteroffer. The Report fails to distinguish between an assessment of litigation risk and external communications to counsel. It should come as no surprise to anyone familiar with litigation that the two often are not the same – especially when the parties are engaged in bargaining. The Branch Chief who wrote the email agrees that the Report is wrong to conclude on the basis of his letter that EPA could have signed the earlier, superceded settlement agreement. The finding is wholly without basis.2

Finally, the Report suggests that Region 5 could have offered time payments rather than a penalty reduction. First, Region 5 did offer and incorporate time payments. Second, extended time payments over a number of years are generally disfavored, as they require monitoring resources and are subject to the continuing viability of the company (a matter that was in doubt here). Recovery of penalties from a bankrupt entity is at best uncertain, difficult, and time consuming. Especially when viewed against the April 23 memo's assessment of MMF's financial condition, the Report's preference for further extending time payments to a marginal company is inappropriate.

3. Sufficient Information Regarding the New Owner

The Report finds that "Regional Counsel's characterization of MMF's owner was based on incomplete and inaccurate knowledge." Region 5 nonconcurs with this finding. The Report states the Acting Regional Counsel (1) believed that the current MMF owner was eager to fix the company's environmental violations and, (2) the violations occurred prior to the current president's ownership, and despite existing violations, the president bought the company and invested considerable money to correct existing RCRA violations. Oddly, the Report does not show that these facts are untrue. Rather, the Report incorrectly disparages the new owner's compliance activities, while avoiding the central proposition at issue: the violations were not attributable to the new owner, who at great expense invested the necessary funds to timely and appropriately correct the violations. The uncontradicted evidence is as follows.

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[2]The Report seems to conclude that if the Respondent just prior to the hearing agreed to settle for $110,000, the Acting Regional Counsel was barred from taking account of the April 23, 2007 memo. The Report ignores that EPA's demand in the complaint was **$300,000**, and that the hearing would cost Respondent tens of thousands of dollars more in time and attorney's fees. At an imminent hearing with an uncertain result, Respondent was faced with losing his company, which had been financed in part with personal debt, even if the company prevailed on many counts – or accepting the government's offer. It is unsurprising that a company facing those choices opted to settle. To use this higher settlement amount to call into question the Acting Regional Counsel's review shows a misunderstanding of litigation and negotiation. It is improper, and Region 5 rejects the Report's apparent suggestion that regional decisionmakers are bound to disregard the consequences of their actions.

As the Acting Regional Counsel was informed, the new owner fixed every compliance issue after he bought the facility. The April 23 memo accurately states:

> There are no compliance issues, since Respondent has implemented a floor repair and management plan to correct problems from the deteriorated flooring (which was the basis of the main count in the Complaint), and has also re-built its waste system to ensure that all hazardous wastewater (which was formerly discharged onto the floor) now flows within hard piping directly to the treatment system.

The April 23 memo makes clear MMF's "cashflow and assets are insufficient to secure credit." The new owner took on lease payments for the business signed by himself and his wife. The new owner "takes a small salary" to support himself and two teenage sons. Against this backdrop, and without EPA action, the new owner invested in the business to cure the environmental problems that arose while the prior owner ran the business.

The record before the Acting Regional Counsel indicated that the new owner had no connection to the violations. The Report attempts to draw an inference from the fact that the new owner was an employee of MMF prior to purchasing the company, and had been paid in part in stock. The conclusion that the new owner was responsible for the violations finds no basis in the penalty assessment worksheets. The record is to the contrary. The Penalty Computation Worksheet refutes the Report's speculation as to the new owner's involvement in the violations. The worksheet is a fifty six page single-space comprehensive evaluation of every act of violative conduct, with the names of each employee responsible where appropriate. See, e.g., Count I, Failure to Provide Hazardous Waste Training, extent of deviation: Major (listing the prior owner's name (President and Emergency Coordinator) and others, but not the new owner's). It also details the gravity associated with each act. This exhaustive document connects no gravity to the new owner. The only basis for the penalty here was gravity; the violations resulted in no economic benefit. Thus, there can be no showing that the new owner was associated with the violations, nor that he benefitted from them in any way.

The Report disregards the new owner's successful efforts to remedy every violation after his purchase of MMF (as well as the subsequent outstanding environmental record at the facility). This is consequential, because EPA procedures permit enforcement personnel, at their discretion, to adjust the amount of the proposed penalty downward where the violator or information from other sources convincingly demonstrates that application of additional adjustment factors is warranted by facts of the case. As noted, the penalty in this matter was based 100 percent upon gravity. It is undisputed that (1) all of the violations were attributable to the former owner, and (2) the new owner, on credit, took responsibility for repairing existing condition of the facility. The Report errs in implying that regional decisionmakers should not have taken these facts into account, especially with regard to a gravity-based penalty.

The Report attempts to show that the "clean up" was not complete as of October 2007. This statement is emblematic of the selective omissions in the Report. The October 2007 inspection resulted in no violations whatsoever – a stark contrast to the former owner's

operations. The remaining “clean up” noted in the Report is the continued implementation of corrective action already submitted and approved.3 The overwhelming majority of the original penalty resulted from Count III (failure to maintain and operate a facility to minimize possibility of fire, explosion, or any unplanned sudden or non-sudden release). This main violation characterizes the former owner’s operation of the facility, and should be contrasted to the October 2007 inspector’s report, which highly praises the new owner’s operations and improvements.

To dismiss the changes from the former owner to the present owner as the Report does as merely “some improvement,” Report at 6, is a gross misrepresentation, and calls into question the neutral fact-finding of the Report. One need only contrast the October 2007 Report with the description in Count III above to realize the Report has drastically minimized the improvements made by the new owner.

In sum, the Acting Regional Counsel’s information concerning the new owner was not only “sufficient” but also correct. The Report’s conjecture that the new owner could be in some unstated way responsible for the violations lacks any proof. The Report’s recitation of progress made at the facility under the new owner evinces a propensity to distort the facts. The finding is incorrect.

4. The Proposed Penalty Documentation Could Be Improved in this Matter.

The Report notes that the 2003 RCRA Civil Penalty Policy requires documentation and justification for any adjustments to the penalty. The Report finds the incorporation by reference in the May 23, 2007 justification memo of the April 23, 2007 memo inadequate. The April 23 memo contained the basis of the penalty reduction and its reference in the May 23 memo explains the adjustment to the final penalty. However, the Region agrees that combining the justification into a single document would have been clearer, and will provide appropriate documentation consistent with the Report’s Recommendation.

Region 5 did in fact attempt to provide the proper documentation. It is unfortunate that the Report recounts none of this history, even though it was provided in its entirety to the OIG. In fact, the Report only quotes from a WPTD Branch Chief memo, while describing none of the events that preceded or followed it. It is puzzling and unfortunate that the Report opted not to reflect the Region’s efforts in this regard. Quoting solely the WPTD Branch Chief here is a selective recitation. The Report should have noted the emails that followed the memo, which gave every opportunity to the author of the memo to address any concerns he had.

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[3]It should be noted that the continued corrective action obligations arise from violations of the former owner, and undermine the Report’s conclusion that penalty reduction was not justified. It is puzzling why OIG would prefer to take funds away from ongoing corrective action to pay a very small amount more towards a penalty that already recovers economic benefit and is above EPA’s bottom line.

5. Comments on Recommendations

The Report makes three recommendations. Region 5 responds to each below:

1. Documentation. The Report recommends that the Regional Administrator direct ORC and LCD "to document in the case file their rationale for reducing the amount of MMF's penalty." As noted above, Region agrees the rationale could have been consolidated into a single document, and made more clear.

Planned Completion Date: Consolidated documentation placed in file by September 30, 2008.

2. Documentation Concerning "all future penalty decisions." The Report recommends that the Regional Administrator direct ORC and LCD "to properly determine and document all future penalty decisions." Region 5 disagrees that the penalty decision was improperly "determined," and declines to give this instruction. There is no question that the penalty decision comports with all applicable penalty policies, and Region 5 has nonconcurred on the findings that underpin this recommendation. As to the documentation of the "all future penalty decisions," the instruction is unnecessary. As the Report recognizes in the "Notable Achievements" section of the Report, ORC for more than a year has mandated the review of all CAFOs. There have been no coordination problems with LCD and ORC throughout the time period at issue. The specific conditions that form the basis of the recommendation are no longer present, and the factual findings of the Report otherwise do not support the instruction.

3. Hiring. The Report recommends that ORC, "follow through on hiring staff that can provide the enforcement and legal staff with the financial analysis expertise necessary to properly analyze violators' financial health, and instruct staff to clearly define the difference between an ability-to-pay memorandum and a bottom line settlement figure." Region 5 will continue with its hiring plans, consistent with the Recommendation. ORC has already hired a new attorney who will handle a range of activities, including fiscal law, grants, and some financial transactions. Region 5 will also hire a Civil Investigator — the only Region in the country to do so — and will publish the solicitation on USAJOBS in September 2008. The report also calls for ORC to instruct staff to "clearly define the difference between an ability-to-pay memorandum and a bottom line settlement figure." As noted above, settlement memoranda often contain summary ability to pay information, and it is not improper for regional decisionmakers to rely upon such summary information in evaluating settlements. Region 5 disagrees that this instruction is necessary or appropriate.

Planned Completion Date:

A. Hiring Civil Investigator: Solicitation published on USAJOBS by September 15, 2008, and Civil Investigator hired by December 31, 2008.

CONCLUSION

For the reasons stated herein, EPA Region 5 nonconcurs in each of the Report's first three findings. These findings should have been withdrawn. Region 5 agrees, with comments, with the last finding ("Documentation"). Region 5 will implement the recommendations according to the schedule set out above.

EPA Region 5 appreciates this opportunity to provide comments.

Appendix B

Timeline of Significant Events Since 2005

Date	Event
	2005
January 5	MMF provided EPA its 2001 to 2004 federal tax returns so that EPA could assess MMF's ability to pay a civil penalty for violations under RCRA.
February 1	WPTD requested that MMF provide its corporate financial statements. WPTD stated that EPA would not consider an ability-to-pay claim without the company's corporate financial statements.
March 25	WPTD acknowledged receipt of 2001-2003 financial statements. In addition, WPTD requested a copy of MMF's current owner's stock purchase from the company's prior owners and the names and titles of its current owners and executives.
July 27	WPTD's financial expert evaluated MMF's ability to pay and concluded it could pay a $300,000 civil penalty.
August 26	Region 5 filed a complaint against MMF that proposed it pay a $300,000 civil penalty for violations of RCRA.
	2006
February 17	ORC financial expert evaluated MMF's ability to pay. Based on MMF's 2001-2003 tax returns and 2001-2004 unaudited financial statements, the expert determined MMF was healthy and profitable in 2004 and could afford to pay a $300,000 penalty.
March 23	Region 5 filed an amended complaint and continued to propose a $300,000 civil penalty.
May 16	MMF offered to settle the case for $15,000.
May 31	ORC proposed that MMF perform a Supplemental Environmental Project and pay a $75,000 penalty.
September 1	Region 5 filed a second, amended complaint that continued to propose a $300,000 civil penalty.
	2007
February 26	MMF offered to pay an $80,000 civil penalty payable over 4 years.
April 18	ORC staff discussed whether it should take MMF's $80,000 offer or counter with an offer up to $150,000 payable over 2 to 3 years. In addition, ORC staff noted that the financial expert would be hard-pressed to support a civil penalty of more than $50,000 per year for 2 years, or a total of $100,000.
April 19	The financial expert prepared a second ability-to-pay analysis and informed ORC staff that MMF continued to be a healthy and profitable firm. The financial expert also stated MMF could pay a penalty between $80,000 and $110,000 based on its available cash flow. ORC Branch Chief wrote his staff that ORC had a choice between bottom lines of $80,000 over 2 years or $100,000 over 3 years.

Date	Event
April 23	ORC staff wrote its bottom line settlement recommendation to their Section and Branch Chiefs stating that MMF could pay at least $80,000 over a 3-year period. ORC Branch Chief informed the WPTD Enforcement and Compliance Branch Chief that EPA intended to offer MMF a settlement of $150,000 over 3 years. He believed that MMF would seriously entertain this offer. In addition, he noted that the only real outstanding issue in the case was the appropriate amount of the penalty, which depended on MMF's ability to pay.
April 24	ORC Branch Chief and WPTD Enforcement and Compliance Branch Chief agreed to offer MMF $150,000 if it settled by April 30, or $165,000 if it settled by May 7. ORC Branch Chief informed WPTD Enforcement and Compliance Branch Chief that MMF made a final offer to pay a $110,000 civil penalty, payable over 3 years, to resolve the case without resorting to a hearing. In addition, the ORC Branch Chief stated that ORC recommended EPA accept the offer because it was above the $80,000 bottom line amount that was recommended on April 23.
April 26	MMF's president signed the settlement agreement for $110,000, plus interest, payable over a 3-year period.
April 27	ORC staff filed a motion to postpone the hearing before EPA's ALJ. Motion stated that EPA and MMF had agreed to the settlement terms without resorting to a hearing; MMF signed the agreement on April 26; and EPA would sign, date, and file it by May 11, 2007.
May 9	Regional Counsel met with his staff, and requested that they reconsider the penalty amount with the possibility of reducing the $110,000 penalty to $80,000. ORC staff requested that MMF provide its 2006 corporate tax return, 2006 financial statement, and copy of its office space lease.
May 10	MMF's attorney informed ORC staff that MMF's tax return would be prepared by the following Monday (May 12) and MMF did not intend to prepare a financial report because it would take several weeks to prepare.
May 14	The ALJ terminated and closed the case because MMF had waived its right to a hearing by signing the settlement document. MMF provided its 2006 tax return. After reviewing the 2006 tax return, the financial expert concluded that his opinion had not materially changed from his April 19, 2007, analysis.
May 15	Regional Counsel asked his Branch Chief if there was any new information concerning receipt of MMF's tax returns and lease.
May 16	Regional Counsel met with WPTD Director to discuss MMF settlement. ORC Section Chief wrote his staff that a revised settlement document had been prepared. The settlement document was consistent with the Regional Counsel's order to settle the case for $85,000. ORC's staff and its Section and Branch Chiefs recommended that the Regional Counsel make no adjustment to the $110,000 penalty that MMF had already accepted.
May 17	ORC Branch Chief informed MMF's attorney that following discussions between EPA Region 5 management a revised settlement document was prepared for MMF's signature. He also stated that if the settlement document was not signed by May 21 the offer may be withdrawn and ORC would likely forward the earlier version that MMF signed for final approval.

Date	Event
May 18	MMF's president signed the settlement document for $85,000.
May 21	ORC Branch Chief informed his staff that the Regional Counsel and WPTD Director agreed to the $85,000 settlement.
May 22	Regional Counsel concurred with revised settlement amount.
May 23	ORC's Branch Chief informed WPTD Director that the settlement document had been negotiated to resolve alleged violations under RCRA, and MMF had agreed to pay an $85,000 penalty over a 3-year period. In addition, the ORC Branch Chief stated that MMF had provided additional information on May 14, 2007, that persuaded the decision-makers that an $85,000 settlement figure was appropriate.
May 30	WPTD's Enforcement and Compliance Assurance Branch Chief wrote to ORC staff, WPTD Director, and the Regional Counsel that the documents presented to him did not include the penalty calculation worksheet and support that were required by the RCRA Civil Penalty Policy. In response, an ORC Branch Chief wrote WPTD's Chief Enforcement and Compliance Assurance Branch Chief that a penalty justification memorandum was typically prepared by the WPTD staff, and Counsel's office would assist if necessary. WPTD's Enforcement and Compliance Branch Chief informed the WPTD Director that he had not been given the opportunity to assess the additional information MMF had provided. The Branch Chief withdrew from signing the settlement document as the EPA complainant.
May 31	WPTD Director signed the settlement document and issued it as a final order. The settlement document was filed with the Regional Hearing Clerk and became effective that day. MMF immediately paid the civil penalty's first installment.

Appendix C

Distribution

Office of the Administrator
Assistant Administrator for Enforcement and Compliance Assurance
Assistant Administrator for Solid Waste and Emergency Response
Regional Administrator, Region 5
Regional Counsel, Region 5
Office of Administrative Law Judges
Office of General Counsel
Agency Follow-up Official (the CFO)
Agency Follow-up Coordinator
Associate Administrator for Congressional and Intergovernmental Relations
Associate Administrator for Public Affairs
Director for Land and Chemicals Division, Region 5
Director for Public Affairs, Region 5
Audit Follow-up Coordinator, Office of Enforcement and Compliance Assurance
Audit Follow-up Coordinator, Region 5
Deputy Inspector General