

**IN RE M.A. BRUDER & SONS, INC.
D/B/A M.A.B. PAINTS, INC.**

RCRA (3008) Appeal No. 01-04

FINAL DECISION

Decided July 10, 2002

Syllabus

U.S. EPA, Region V (the "Region") appeals an Initial Decision in which the Administrative Law Judge ("ALJ") assessed a civil penalty of \$8,950 against the Respondent M.A. Bruder & Sons, Inc. ("Bruder"), for violating the Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended, 42 U.S.C. §§ 6901-6992k, and its implementing regulations. The only issue raised on appeal involves the civil penalty assessed in the Initial Decision. The Region requests that the Environmental Appeals Board (the "Board") modify the Initial Decision in this matter, and that this Board assess a penalty of \$64,900, the amount proposed in the complaint.

The Region filed a complaint against Bruder for allegedly violating section 3005(a) of RCRA and its implementing regulations by accumulating hazardous waste without a permit. Specifically, the Region alleged that Bruder failed to timely install air emission control equipment required by subpart CC, 40 C.F.R. § 265.1082(a), thereby losing an exemption available to generators permitting them to store hazardous wastes for up to 90 days. Having lost this exemption, Bruder became subject to the requirement that it either have a RCRA permit or interim status. Since Bruder did not have a RCRA permit or interim status, it was operating its facility illegally.

Bruder has not disputed that it violated RCRA. Rather, the parties disagree on the proper characterization of Bruder's RCRA violation for purposes of assessing an appropriate penalty. The Region proposed a \$64,900 penalty, using the RCRA Civil Penalty Policy (October 1990) ("Penalty Policy"), by treating Bruder as a treatment, storage, or disposal facility that illegally stored hazardous waste without a RCRA permit or interim status. Bruder argued that this characterization of the violation did not accurately reflect the true nature of the underlying violation — failure of a generator to timely install air emission control equipment on its hazardous waste accumulation tank — and resulted in an inappropriately high penalty.

The ALJ chose not to apply the Penalty Policy, finding that, while the Region's application of the Penalty Policy was "technically accurate," it was "myopic" and resulted in an unduly harsh penalty given the circumstances in this matter. The ALJ, having chosen not to apply the Penalty Policy, determined a penalty relying directly on the RCRA statutory criteria without the aid of the Penalty Policy.

Held: While there is clearly no legal obligation to follow an Agency penalty policy, there are good reasons to apply a penalty policy whenever possible. Such policies assure that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner. Therefore, in reviewing an ALJ's penalty assessment in circumstances where the ALJ has chosen not to apply the policy at all — rather than, for example, applying the policy differently than advocated by the complainant — the Board will closely scrutinize the ALJ's reasons for choosing not to apply the policy to determine if they are compelling. If they are, the Board will defer to that determination, as it has done on numerous occasions. But if they are not, the Board will not grant deference to that determination, and will perform its own penalty analysis *de novo*, consonant with the authority vested in it by 40 C.F.R. § 22.30(f).

As applied to this case, the ALJ's decision to depart from the Penalty Policy flowed directly from his mistaken belief that the Region's analysis under the Penalty Policy was correct, a premise the Board rejects. Having rejected this fundamental premise of the ALJ's reasoning, the Board finds that his decision does not warrant its deference, and the Board chooses to perform its own penalty assessment in this matter. Using the Penalty Policy, the Board assesses a civil penalty of \$17,510.22 against Bruder for its RCRA violation.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich:

I. INTRODUCTION

The matter before the Environmental Appeals Board (the "Board") involves the penalty assessment for a violation of the Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended, 42 U.S.C. §§ 6901-6992k, and its implementing regulations. Specifically, the Administrative Law Judge ("ALJ") assessed a civil penalty under section 3008(a) of RCRA, 42 U.S.C. § 6928(a), in the amount of \$8,950 against M.A. Bruder & Sons, Inc. (hereinafter "Bruder" or "Respondent") for illegally operating a treatment, storage, or disposal facility ("TSDF" or "TSD facility") without interim status or a RCRA permit.¹ On December 17, 2001, U.S. EPA, Region V (the "Region") filed its notice of appeal with the Board. The only issues raised in the Region's appeal involve the civil penalty assessed in the Initial Decision.

In the Initial Decision, the ALJ reviewed the Region's use of the RCRA Civil Penalty Policy (October 1990) ("Penalty Policy"), as well as Bruder's argu-

¹ As discussed in greater detail below, this violation occurred because Bruder, which stored hazardous waste at its facility, lost its eligibility for an exemption permitting generators to store hazardous wastes for up to 90 days when it failed to timely install the requisite air emission control equipment on a hazardous waste storage tank.

ments regarding the application of the Penalty Policy to the violation. The ALJ, for reasons more fully discussed later in this decision, disagreed with the Region's proposed penalty of \$64,900. Instead the ALJ, after finding that the Region's application of the applicable penalty policy was "technically accurate," disregarded the Penalty Policy and used the statutory factors (seriousness of the violation and good faith efforts of the Respondent to comply with the applicable requirements) to assess a civil penalty of \$8,950 against Bruder.

In its appeal, the Region requests that the Board "modify or set aside the penalty recommended in the Initial Decision and recalculate the penalty as proposed in the complaint." Brief of the Complainant-Appellant at 4 (Dec. 17, 2001) (hereinafter "Region's Appeal Brief"). The Region attacks the ALJ's penalty assessment on several grounds: 1) The ALJ's deviation from the Penalty Policy was not warranted under the circumstances; 2) The ALJ's application of the statutory factors to the penalty was unreasonable; 3) The ALJ failed to appropriately assess the evidence; 4) The ALJ failed to clearly relate the RCRA penalty factors to the penalty assessment; and 5) The ALJ's penalty assessment failed to provide sufficient deterrence.

In response to the Region's appeal, Bruder requests that this Board affirm the ALJ's Initial Decision. Bruder supports its request with two primary arguments: 1) The ALJ's deviation from the RCRA Penalty Policy was proper because he "amply considered [the Region's] use of that policy" and he provided an explanation for his decision to depart from the Penalty Policy; and 2) The ALJ's penalty assessment was "well-grounded" in RCRA's penalty assessment criteria.

We begin our examination of this matter by reviewing the factual and procedural history of this case. We then examine the ALJ's penalty assessment in the Initial Decision. From there, we review the legal framework pursuant to which all administrative penalties must be assessed. Thereafter, we analyze the Region's penalty analysis and the ALJ's penalty assessment, ultimately declining to give the ALJ's penalty determination deference, and determining a penalty in accordance with our view of the proper application of the Penalty Policy.

More specifically, as discussed below, we find that the Region's application of the Penalty Policy was erroneous. Accordingly, the ALJ was mistaken when he found the Region's application of the Penalty Policy to be "technically accurate." Because he felt that this "technically accurate" application led to an unreasonable result, the ALJ chose not to apply the Penalty Policy. Since the ALJ's decision not to apply the Penalty Policy was premised on the Region's erroneous application of the Penalty Policy, which the ALJ mistakenly believed to be accurate, the Board chooses not to adopt the ALJ's penalty analysis, but rather to determine a penalty *de novo*, as provided for in the applicable regulations. 40 C.F.R. § 22.30(f).

II. FACTUAL AND PROCEDURAL HISTORY

A. Liability

Bruder at all times relevant to this matter owned and operated a paint manufacturing facility, M.A.B. Paints Inc., in Terre Haute, Indiana.² During its manufacturing process at this facility, Bruder generated used solvents including xylene, ethylbenzene, toluene, mineral spirits and naphtha. Initial Decision (“Init. Dec.”) at 2. These used solvents are defined as hazardous wastes under Indiana’s Administrative Code, 329 IAC 3.1-13.^{3, 4} Bruder stored these and other wastes in an accumulation tank at the facility.

The Region and the Indiana Department of Environmental Management (“IDEM”) inspected Bruder’s facility on June 3, 1998. As a result of this inspection and follow-up information requests,⁵ the Region filed a complaint against Bruder for allegedly violating section 3005(a) of RCRA and its implementing regulations by accumulating hazardous waste without a permit. Specifically, the Region alleged that Bruder failed to install air emission control equipment required

² According to the Record in this matter, Bruder closed its Terre Haute facility in October of 1999. Hearing Transcript (“Tr.”) at 33 (Aug. 25, 2000).

³ Pursuant to section 3006 of RCRA, 42 U.S.C. § 6926, the Administrator of U.S. EPA may authorize a state to administer the RCRA hazardous waste program in lieu of the federal program. The Administrator of U.S. EPA granted Indiana final authorization to administer certain RCRA requirements, including Hazardous and Solid Waste Amendments (“HSWA”). 53 Fed. Reg. 128 (Jan. 5, 1988); 54 Fed. Reg. 29,557 (July 13, 1989); 56 Fed. Reg. 33,717 (July 23, 1991); 56 Fed. Reg. 33,866 (July 24, 1991); 56 Fed. Reg. 35,831 (July 29, 1991); 56 Fed. Reg. 36,010 (July 30, 1991); 61 Fed. Reg. 43,018 (Aug. 20, 1996); 61 Fed. Reg. 43,009 (Aug. 20, 1996). For purposes of this case, Indiana’s regulations are the operative regulations for those aspects of RCRA for which the state program is authorized. RCRA § 3008(a)(2), 42 U.S.C. § 6928(a)(2), authorizes EPA to enforce the federally authorized portions of Indiana’s program.

⁴ According to the Region, “[t]he waste solvents accumulated by Respondent in the accumulation tank were described on waste manifests throughout the period from December 6, 1996 through at least October 23, 1998, as hazardous wastes with waste codes D001 (signifying a hazardous waste for the characteristic of ignitability within the meaning of 329 IAC 3.1 — 6-1 [40 C.F.R. §§ 261.20 and 261.21]), and waste codes F003 and F005 (signifying listed hazardous wastes under 329 IAC 3.1-6-1 [40 C.F.R. §§ 261.30 and 261.31]).” Region’s Motion for Accelerated Decision ¶ 12, at 5. The classification of the used solvents as hazardous waste is undisputed.

⁵ See Joint Exhibits (“Jt. Exs.”) 4 & 6 (Information Requests); Complainant’s Ex. (“C. Ex.”) 1 (Inspection Report).

by subpart CC, 40 C.F.R. § 265.1082(a),⁶ on or before December 6, 1996.⁷ According to the Region, this failure meant that Bruder lost the exemption available to generators permitting storage of hazardous wastes for up to 90 days (“90-day generator exemption”).⁸ Having lost this exemption, Bruder became subject to the requirement that it either have a RCRA permit or interim status. Since Bruder did not have a RCRA permit or interim status,⁹ it was operating its facility illegally.

The Region filed a Motion for Accelerated Decision with the ALJ, requesting that he grant accelerated decision on liability since there were “no genuine issues of material fact regarding Respondent’s liability for the violation alleged in the Complaint.” Motion for Accelerated Decision at 17 (Jan. 30, 2000). In its response to the Region’s Motion for Accelerated Decision, Bruder admitted liability in this matter, but disputed the Region’s proposed civil penalty. The ALJ granted the Region’s Motion for Accelerated Decision on August 2, 2000. Bruder has not appealed the ALJ’s decision to grant the Region’s Motion for Accelerated Decision on liability. A hearing on the issue of the appropriate penalty was then held on August 25, 2000. The ALJ issued his initial decision in this matter on October 25, 2001. *In re M.A. Bruder & Sons, Inc.*, RCRA 5-99-005 (Oct. 25, 2001) (“Initial Decision”).

⁶ In 1984, Congress added RCRA § 3004(n), 40 U.S.C. § 6924(n), through the HSWA. Section 3004(n) requires U.S. EPA to promulgate the Organic Air Emissions Standards for Tanks, Surface Impoundments, and Containers. The standards that EPA eventually promulgated became effective in all states on December 6, 1996. 59 Fed. Reg. 62,896, 62,921 (Dec. 6, 1994); 61 Fed. Reg. 59,932 (Nov. 25, 1996). At all times relevant to this matter, Indiana was not authorized to operate a state hazardous waste management program implementing the subpart CC regulations or the broader Organic Air Emissions Standards for Tanks, Surface Impoundments, and Containers. *See* Region’s Motion for Accelerated Decision Exhibit P (RCRA State Authorization Status Report).

⁷ According to the Complaint, the effective date of this requirement could have been extended to December 8, 1997, if Bruder had prepared an implementation schedule for installation and operation of all control equipment necessary to comply with 40 C.F.R. part 265, subpart CC, and entered the implementation schedule in a permanent readily available file at the facility no later than December 6, 1996. *See* 40 C.F.R. § 265.1082(a)(2). Bruder did not satisfy this alternative provision in the regulations.

⁸ Under RCRA and its implementing regulations, a generator of hazardous waste is allowed to temporarily accumulate hazardous wastes on-site for 90 days or less without a RCRA permit or interim status, provided the generator meets certain requirements. 329 IAC 3.1-7-1 [40 C.F.R. § 262.34(a)].

⁹ Under section 3005(e) of RCRA, 42 U.S.C. § 6925(e), interim status allows TSD facilities to operate in certain circumstances pending the receipt of a permit. Facilities with interim status are regulated under 40 C.F.R. part 265; however, since the Indiana program has been federally authorized, interim status facilities in Indiana are regulated under Indiana’s regulations at 329 IAC 3.1-10. Bruder does not argue that it qualifies for treatment as an interim status facility.

B. *Penalty Arguments at Hearing*

In assessing a civil penalty under RCRA, the Act provides that:

Any penalty assessed in the order shall not exceed \$25,000¹⁰ per day of noncompliance for each violation of a requirement of this subchapter. In assessing such a penalty the Administrator [or her delegatee] shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3). In determining its proposed penalty, the Region looked to the Penalty Policy¹¹ as an analytical model for determining an appropriate penalty. The Region explained how it derived the proposed penalty amount using the Penalty Policy, a guideline designed to

ensure that RCRA civil penalties are assessed in a fair and consistent manner; that penalties are appropriate for the gravity of the violation committed; that economic incentives for noncompliance with RCRA requirements are eliminated; that penalties are sufficient to deter persons from committing RCRA violations; and that compliance is expeditiously achieved and maintained.

Penalty Policy at 5. The Penalty Policy takes into account the statutory factors of seriousness of the violation and any good faith efforts to comply with the applicable requirements. Under the Penalty Policy, the Region first must determine a

¹⁰ Pursuant to the regulations implementing the Debt Collection Improvement Act of 1996, the maximum daily penalty amount allowed under section 3008(a)(3) of RCRA has increased to \$27,500 for violations occurring on or after January 31, 1997. 40 C.F.R. § 19.4.

¹¹ EPA intended the Penalty Policy to guide Agency personnel responsible for calculating appropriate penalties for RCRA violations, as well as “judicial officers presiding over administrative proceedings at which proper penalty amounts for violations redressable under RCRA Sections 3008(a) and (g) are at issue.” Penalty Policy at 12; *see* 40 C.F.R. § 22.27(b).

gravity-based penalty for the violations based on the Penalty Policy’s matrix¹² by examining two factors: potential for harm, and extent of deviation from a statutory or regulatory requirement. Then, if appropriate, an additional amount is assessed for the number of days of violation. The total of the gravity-based penalty and the multi-day component is then adjusted to allow for other case specific factors. Lastly, the Region determines what, if any, amount should be added to the gravity-based penalty for the economic benefit that Respondent derived from noncompliance.

In this matter, the Region concluded that Bruder’s violation had only a “minor” potential for harm under the Penalty Policy’s first factor in calculating a gravity-based penalty. The Penalty Policy suggests that the potential for harm determination should be based on risk of exposure as well as harm to the RCRA statutory or regulatory program. *See* Penalty Policy at 13. The Region considered the type of wastes in the tank, the “very low emissions” generated at the tank annually, and the quick dispersion of any emissions into the air when it determined that Bruder’s violation posed only a minor risk to human health and the environment. Tr. at 80-83. Regarding the harm to the RCRA program (the second component of the potential for harm factor), the Region’s witness, Duncan Campbell, explained that while “[t]he agency viewed the Respondent’s failure to have a valid RCRA permit as being a serious violation,” in this case there were mitigating factors that the Region felt lessened the harm to the RCRA program. Tr. at 83-84.

Next, the Region analyzed the second factor used to determine a gravity-based penalty under the Penalty Policy — the extent of deviation from the statutory or regulatory requirement. The Region concluded that the violation’s extent of deviation from the requirement was “major.” When asked how the Region determined the extent of deviation for this violation was major, Duncan Campbell, the Region’s Environmental Protection Specialist assigned to this matter stated:

¹² The gravity-based matrix uses potential for harm and extent of deviation from the requirements as the two axes. The matrix has nine cells, and each cell contains a penalty range, as set forth below.

		Extent of Deviation from Requirement		
		MAJOR	MODERATE	MINOR
Potential for harm	MAJOR	\$25,000 to 20,000	\$19,999 to 15,000	\$14,999 to 11,000
	MODERATE	\$10,999 to 8,000	\$7,999 to 5,000	\$4,999 to 3,000
	MINOR	\$2,999 to 1,500	\$1,499 to 500	\$499 to 100

Penalty Policy at 19.

[B]y the Respondent's failure to comply with all the conditional exclusions provided to it under [40 C.F.R. §] 262.34 A, B and C[,] [i]t had failed to meet the specific exclusion found in 40 C.F.R. [§] 270.1 which is the permitting Chapter. * * * Given the fact that the Respondent did not comply with all of the specific exclusions enumerated in [40 C.F.R. §] 262.34 A, B and C, there was only one conclusion and that is that this facility was operating without a valid permit or interim status in this instance.^{13]}

Tr. at 86-87. The Region's "minor/major" determination corresponded to the \$2,999 to \$1,500 matrix cell. *See Supra* note 12. The Region determined that \$2,250 — the midpoint in the cell — was the appropriate number within the cell. Jt. Ex. 3. The Region added an additional amount to the gravity-based penalty to account for the duration of the violation. Here, the Region proposed an assessment of \$350 per day for 179 days. The Region consulted the Penalty Policy's Multi-Day Matrix of Minimum Daily Penalties¹⁴ to arrive at the \$350 figure. Penalty Policy at 24.

Lastly, after increasing the penalty by 10% to account for inflation,¹⁵ the Region considered the adjustment factors identified in the Penalty Policy and de-

¹³ Apparently, the Region assumed that violation of an exemption to the TSD facility requirements leads inevitably to treatment for penalty purposes as an unpermitted TSD facility and a "major" extent of violation — an assumption with respect to which, as explained below, we have a different view.

¹⁴ Similar to the previous matrix, this matrix for the multi-day component of the penalty uses potential for harm and the extent of deviation from the regulations as its two axes. Each cell contains either a penalty range, or in the case of the "minor/minor" cell, a dollar value. The dollar figure selected from the appropriate cell is then multiplied by the number of days of violation.

		Extent of Deviation		
		MAJOR	MODERATE	MINOR
Potential for harm	MAJOR	\$5,000 to 1,000	\$4,000 to 750	\$3,000 to 550
	MODERATE	\$2,200 to 400	\$1,600 to 250	\$1,000 to 150
	MINOR	\$600 to 100	\$300 to 100	\$100

Penalty Policy at 24.

¹⁵ In accordance with the Debt Collection Improvement Act of 1996, U.S. EPA promulgated 40 C.F.R. part 19, Adjustment of Civil Penalties for Inflation, which increases maximum penalty amounts by 10%. U.S. EPA also issued a memorandum revising its environmental penalty policies to take into account the effects of inflation. *See* Jt. Ex. 2 (Memorandum on Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule (May 9, 1997)); *see supra* note 10.

creased the proposed penalty by 10%. The Region explained that this 10% reduction was a “good faith adjustment” reflecting the fact that Bruder, while failing to install the proper air emission control equipment for the accumulation tank prior to the effective date of the subpart CC rule, had in fact purchased the equipment before that date. Tr. at 104. The Region stated at hearing that it did not seek a penalty amount for economic benefit of noncompliance since it had determined that Bruder’s economic benefit was insignificant in this matter. Tr. at 110. Accordingly, the Region proposed a \$64,900 penalty assessment against Bruder.¹⁶

In response to the Region’s proposed penalty, Bruder argued at hearing that the Region’s application of the Penalty Policy in this case was rigid and inflexible. Tr. at 39. While Bruder agreed with the Region that its violation created only a minor potential for harm and that Bruder had not gained any economic benefit from its violation, Bruder argued that in determining extent of deviation, the Region should have focused on the underlying failure — the failure to install the air emission control equipment (pressure relief valve) on the tank — instead of focusing, as the Region did, on the resulting violation — operating without a permit. Bruder asserts that because of the Region’s determination that Bruder’s violation was a major deviation, the proposed penalty was “grossly disproportionate to the nature of MAB’s [Bruder’s] actual violation.” Bruder’s Response Brief at 4.

C. ALJ’s Penalty Assessment

In the present case, the ALJ considered the Region’s penalty analysis under the Penalty Policy. Although he rejected the Region’s proposed penalty as too harsh, the ALJ found that the Region applied the Penalty Policy correctly. Init. Dec. at 20. He then set out two reasons why he disagreed with the Region’s proposed penalty of \$64,900. First, the ALJ explained that in his view, the Region’s proposed penalty “loses sight of the fact that, but for the failure of [Bruder to timely install] * * * the valve, MAB [Bruder] would have continued to be exempt from the permit requirements entirely.” *Id.* The ALJ explained that, even if the Region’s minor/major gravity designation was correct, the Region’s adoption of the midpoint range within the minor/major cell of the gravity matrix did not accurately reflect the status of Bruder’s violation in comparison to other cases where respondents have failed to obtain a RCRA permit. *Id.* Second, the ALJ found that the Region’s minor/major gravity designation resulted in the Region’s assessment of a multi-day component in the proposed penalty, which he did not believe appropriately reflected the “case specific facts” in this matter. *Id.* at 21. The ALJ concluded that the Penalty Policy was “wanting,” because he found that even though the Region’s application was correct, the Region’s proposed penalty

¹⁶ The Region applied both the 10% increase for inflation and the 10% decrease for good faith to the gravity-based penalty figure of \$64,900. Thus, they effectively cancelled one another.

was myopic. Therefore, he departed from the Penalty Policy.¹⁷

After explaining why he did not agree with the Region's use of the Penalty Policy, the ALJ turned to the statutory criteria of seriousness and good faith to assess a penalty in this matter. *Id.* at 20. From here, the ALJ determined that the seriousness of the violation was "manifestly minimal" and that Bruder's good faith required a reduction in the penalty. The ALJ cited Bruder's responses to the Region's information requests as evidence of its "good faith," as well as Bruder's "overall good faith." *Id.* at 22. He assessed a civil penalty of \$8,950 against Bruder — \$50 per day for each of the 179 days of violation alleged in the complaint.¹⁸ *Id.* at 22.

D. Arguments on Appeal

On appeal, the Region contends that the ALJ abused his discretion or committed clear error when he departed from the relevant Penalty Policy in this instance. The Region argues chiefly that the Region's proposed penalty was appropriate for this case. Alternatively, the Region argues that the ALJ's reasons for deviating from the penalty sought by the Region did not warrant the complete rejection of the Penalty Policy. "Even if one agreed with the Presiding Officer's point of view, this would provide a sufficient basis for reclassifying the gravity of the violation under the RCRA Penalty Policy, rather than completely deviating from the [sic] it[.]" Region's Appeal Brief at 23.

The Region, furthermore, takes issue with the ALJ's penalty assessment, arguing that the ALJ did not reasonably apply the statutory criteria when arriving at a penalty. Here, the Region discusses what it identifies as "the central disagreement between the parties." *Id.* at 25. The Region attacks the ALJ's framing of the violation for penalty purposes. In this case, the ALJ granted the Region's motion for accelerated decision on liability finding Bruder liable for the illegal storage of

¹⁷ The ALJ explains his departure from the Penalty Policy in this way:

Departure from the penalty policy is fully warranted in this case. The Court realizes that EPA's evaluation of the extent of deviation, deemed "major" in this instance, is technically accurate, because MAB had, in a formal sense, become a TSDf [treatment, storage, or disposal facility]. * * * However, this analysis is myopic, as it loses sight of the fact that, but for the failure of [Bruder to timely install] * * * the valve, MAB would have continued to be exempt from the permit requirements entirely.

Init. Dec. at 20.

¹⁸ As the Region points out in its appeal, although the ALJ criticizes the Region's use of a multi-day component in the penalty, the ALJ's own penalty uses a multi-day component as well, albeit at a much reduced level.

hazardous waste without a permit, but when determining a penalty, the ALJ framed the violation as a failure to install the requisite pressure relief valve on the tank in a timely manner and found that the “seriousness” of this violation was significantly less than the Region suggested in its proposed penalty calculation. The Region argues that this application of the statutory criterion for seriousness was unreasonable. The ALJ also considered the minimal amount of effort it would have taken Bruder to install the pressure relief valve, and thereby to comply with the regulations, in determining the “seriousness” of the violation. This, too, the Region attacks as an unreasonable application of the statutory criterion. *Id.* at 29-31.

Along similar lines, the Region asserts the ALJ’s application of the statutory criterion of “good faith efforts to comply” was unreasonable. The Region is particularly troubled by the ALJ’s consideration of Bruder’s response to two U.S. EPA information requests in allowing for penalty mitigation. The Region forcefully argues that complying with legal obligations that are not related to the legal obligation forming the basis of the violation should not lead to penalty mitigation. *Id.* at 33. Furthermore, the Region argues that the ALJ erred when he mitigated the penalty further because Bruder did install the tank pressure relief valve after the Region had informed Bruder of the violation. *Id.*

In response to the Region’s Appeal Brief, Bruder argues that the Board should affirm the ALJ’s Initial Decision in this matter. Bruder asserts that the ALJ has not committed clear error or abused his discretion since after considering and rejecting the proposed penalty, the ALJ “assessed a penalty squarely based upon RCRA’s twin penalty assessment criteria * * *.” Appellee’s Brief in Opposition to the Complainant-Appellant’s Notice of Appeal at 4 (Jan. 7, 2002) (“Bruder’s Response Brief”). Bruder cites the well-established principle that a penalty policy lacks the force of law and is, therefore, not binding, “not having been subject to the rulemaking procedures of the Administrative Procedure Act.” Bruder’s Response Brief at 5 (citing *In re City of Marshall*, 10 E.A.D. 173, 189 n.29 (EAB 2001)). Bruder then goes on to cite several Board cases that give deference to penalty assessments made by ALJs. *Id.* at 6. Responding to the Region’s argument that the ALJ committed error when he did not use the Penalty Policy, Bruder asserts that the ALJ did consider “EPA’s use of the penalty policy” and gave a “clear reason for deviating from EPA’s use of its penalty policy.” Bruder contends:

Although the Judge could have done so, the Presiding Officer’s job is not then to correct EPA’s use of the Penalty Policy. Rather, having articulated a solid reason why EPA’s myopia led to a poorly implemented penalty assessment, the Judge was free to calculate the penalty in any manner that appropriately account[ed] for RCRA’s

statutory penalty considerations. Judge Moran did just that.

Id. at 8.

III. DISCUSSION

A. Statutory and Regulatory Framework

As discussed above, RCRA provides that the seriousness of the violation and any good faith efforts to comply should be taken into account when assessing a civil penalty. RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3). As noted previously, the Region used the Penalty Policy, which takes into account these statutory factors, in formulating the penalty sought in its compliant.

The regulations that govern a presiding officer's assessment of a civil penalty provide:

Amount of civil penalty. If the Presiding Officer determines that a violation has occurred and the complainant seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision specific reasons for the increase or decrease.^[19]

40 C.F.R. § 22.27(b). The Board has explained that this regulatory requirement does not necessitate the use of a penalty policy in determining a particular penalty amount, but rather a "Presiding Officer, having considered any applicable civil penalty guidelines issued by the Agency, is nonetheless free not to apply them to the case at hand." *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 758 (EAB

¹⁹ Both the Region and the ALJ considered the Penalty Policy as a "civil penalty guideline" to be considered under this section. Bruder has not disputed this, arguing instead that the ALJ "[a]mplify [c]onsidered" the Region's use of the Penalty Policy before choosing to depart from it. Bruder's Response Brief at 4.

1997); e.g., *In re Allegheny Power Serv. Corp.*, 9 E.A.D. 636, 655-56 (EAB 2001), *aff'd*, No. 6:01-cv-241 (S.D. W. Va. Apr. 5, 2002). The penalty policies do not bind either the ALJ or the Board since these policies, not having been subjected to the rulemaking procedures of the Administrative Procedure Act, lack the force of law. *See, e.g., In re City of Marshall*, 10 E.A.D. 173, 189 n.29; *In re B & R Oil Co.*, 8 E.A.D. 39, 63 (EAB 1998); *Wausau*, 6 E.A.D. at 759. Moreover, while an ALJ must *consider* the applicable penalty policy, he or she has the “discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant.” *In re DIC Americas, Inc.*, 6 E.A.D. 184, 189 (EAB 1995) (emphasis in original); *Wausau*, 6 E.A.D. at 759 (ALJ is free to deviate from the penalty policy in a particular case); *In re Rybond, Inc.*, 6 E.A.D. 614, 639 (EAB 1996) (“Under the circumstances of a given violation, reduction of a penalty assessment may be appropriate even if the penalty has been properly calculated in accordance with [the appropriate] Penalty Policy.”).

As previously noted, although an ALJ is not required to use an applicable penalty policy, the Agency designs penalty policies to be used as valuable tools for assessing penalties. Specifically, the Agency developed the RCRA Penalty Policy to

ensure that RCRA civil penalties are assessed in a fair and consistent manner; that penalties are appropriate for the gravity of the violation committed; that economic incentives for noncompliance with RCRA requirements are eliminated; that penalties are sufficient to deter persons from committing RCRA violations; and that compliance is expeditiously achieved and maintained.

Penalty Policy at 3. Furthermore, we have in past cases held that penalty policies serve to facilitate the application of statutory penalty criteria, and that ALJs and the Board may utilize applicable penalty policies in determining civil penalty amounts. *See, e.g., In re Chempace Corp.*, 9 E.A.D. 119 (EAB 2000); *In re Mobil Oil Corp.*, 5 E.A.D. 490, 515 (EAB 1994).

While the Board clearly has authority to review a penalty determination *de novo*,²⁰ the Board has stated that we will generally not substitute our judgment for that of an ALJ absent a showing that the ALJ committed clear error or abused his or her discretion in assessing a penalty. *In re Chempace, Corp.*, 9 E.A.D. 119, 131 (EAB 2000); *In re Britton Constr. Co.*, 8 E.A.D. 261, 293 (EAB 1999) (citing *In re Predex Corp.*, 7 E.A.D. 591, 597 (EAB 1998)). However, the Board has the

²⁰ Pursuant to 40 C.F.R. § 22.30(f), the Board generally takes *de novo* review of an ALJ’s initial decision. *In re Bil-Dry Corp.*, 9 E.A.D. 575, 588 (EAB 2001).

authority to “assess a penalty that is higher or lower than the amount recommended to be assessed in the decision” and will exercise its authority to do so when appropriate. *See* 40 C.F.R. § 22.30(f); *Allegheny Power*, 9 E.A.D. at 656; *In re Catalina Yachts, Inc.*, 8 E.A.D. 199 (EAB 1999), *aff’d*, No. CV 99-07357 GHK (C.D. Cal. Feb. 18, 2000); *In re Rybond*, 6 E.A.D 614, 639 (EAB 1996); *In re Everwood Treatment Co.*, 6 EAD 589, 601 (EAB 1996), *aff’d*, No. 96-1159-RV-M (S.D. Ala. Jan. 21, 1998). Indeed, although we are inclined to grant some degree of deference to an ALJ’s penalty assessment even where he or she departs from the applicable penalty policy, the Board reserves the right to closely scrutinize the ALJ’s rationale for his or her penalty assessment. *See In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994) (“[W]hen a penalty deviates substantially from the Agency’s penalty guidelines, closer scrutiny of the Presiding Officer’s rationale may be warranted.”)

B. *The Region’s Application of the Penalty Policy*

As discussed above, the underlying regulatory violation in this matter consists of the failure of a generator to timely install the proper air emission control equipment. This violation, in turn, required that Bruder, no longer exempt under its prior status as a generator, operate its facility with RCRA interim status, or a RCRA permit. Bruder did not have interim status or a RCRA permit. Therefore, the ALJ found Bruder was operating its facility illegally.

In reviewing the Region’s penalty analysis, we conclude it is flawed because its characterization of the violation for penalty purposes does not reflect the narrowness of the infraction involved in this matter. When the Region asserts that Bruder’s extent of deviation was major because of its “illegal storage of hazardous waste without a permit for nearly two years,” the Region does not take into account the particular circumstances of this case. Here, as the ALJ points out, “but for the failure of the [timely] installation of the valve, MAB [Bruder] would have continued to be exempt from the permit requirements entirely”. *Init. Dec.* at 20. Indeed, the Region acknowledges that Bruder is not a “real” TSD facility, but rather a generator that temporarily lost its eligibility for the generator exemption. *Region’s Appeal Brief* at 29 n.25.

Although in some cases it may be perfectly appropriate to frame a penalty analysis in terms of the failure of a respondent to obtain interim status or a permit when dealing with a generator’s loss of its exemption status, the facts of each case must be reviewed to ensure that the reality of the violation is reflected. In the instant case, Bruder failed to timely install air emission control equipment on an accumulation tank thereby losing its eligibility for the 90-day generator exemption. We find no suggestion in the record that Bruder stored hazardous waste for longer than 90 days or otherwise ran afoul of the requirements of the exemption. Moreover, the Region concedes that the likelihood of exposure and the seriousness of any potential exposure from the tank emissions was low. *Tr.* at 80-83.

Given the very limited nature of Bruder's noncompliance with the generator regulations and the minimal potential environmental impact, the Region's framing of the penalty analysis in terms of a failure to obtain a permit rather than a failure to install a pressure relief valve, the effect of which was to greatly increase the penalty, is unreasonable.

By treating the violation for penalty purposes as if Bruder were a traditional TSD facility that had illegally stored hazardous waste without a permit for nearly two years, the Region concluded that the extent of deviation was major. The Region's determination reflects case law which generally holds that when a TSD facility fails to obtain a permit, the extent of deviation under the Penalty Policy is major. *See In re Harmon Elec., Inc.*, 7 E.A.D. 1 (1997), *rev'd on other grounds*, 19 F. Supp 2d 988 (W.D. Mo. Aug. 25, 1998), *aff'd*, 191 F.3d 894 (8th Cir. Sept. 16, 1999); *In re Everwood*, 6 E.A.D. 589 (EAB 1996); *In re Ashland Chem. Co.*, 3 E.A.D. 1 (CJO 1989); *In re Zalcon Inc.*, RCRA V W-92-R-9 (June 30, 1998); *In re Bloomfield Foundry, Inc.*, RCRA VII 88 H 0017 (July 14, 1989); *In re A.Y. McDonald*, 2 E.A.D. 402 (CJO 1987). But, as noted earlier, the Region concedes that Bruder was not in the Region's view "really" a TSD facility, and so these cases are inapposite. When the case is more properly viewed as one involving a generator that failed to comply in only one limited respect with the requirements necessary to qualify for the generator exemption, the Region's application of the Penalty Policy fails to reflect the true seriousness of the violation.²¹

C. *The ALJ's Decision Not to Apply the Penalty Policy*

The ALJ found that the Penalty Policy did not render an appropriate result, and therefore he departed from the Penalty Policy. The ALJ's rationale for departing from the Penalty Policy was premised on his determination that the Region's application of the Penalty Policy was technically correct because Bruder "had in a formal sense become a TSDF," *Init. Dec.* at 20, but that it produced an unreasonable result. Since the ALJ disagreed with the proposed penalty produced by the Region's use of the Penalty Policy, the ALJ concluded that the Penalty Policy itself was inappropriate to use in this matter, and instead directly used the statutory factors to determine a civil penalty. *Id.* at 21.

We reject Bruder's argument that our assessing a penalty different from the penalty assessed by the ALJ creates a new standard. The regulations grant the Board *de novo* review of penalty determinations. 40 C.F.R. § 22.30(f).

²¹ There is nothing in the Penalty Policy itself that treats a generator in these circumstances, or for that matter a TSD facility operating without a permit, as necessarily "major" in terms of the extent of deviation prong of the penalty assessment.

While, as discussed previously, there is clearly no legal obligation to follow an Agency penalty policy, we think there are good reasons to apply a penalty policy whenever possible. Such policies assure that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner. Therefore, in reviewing an ALJ's penalty assessment in circumstances where the ALJ has chosen not to apply the policy at all — rather than, for example, applying the policy differently than advocated by the complainant — we will closely scrutinize the ALJ's reasons for choosing not to apply the policy to determine if they are compelling. If they are, we will defer to that determination, as we have done on numerous occasions. *See, e.g., In re City of Marshall*, 10 E.A.D. 173 (EAB 2001); *In re B & R Oil Co.*, 8 E.A.D. 39 (EAB 1998); *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120 (EAB 1994). But if they are not, we will not grant deference to that determination, and will perform our penalty analysis *de novo*, consonant with the authority vested in us by 40 C.F.R. § 22.30(f).²²

In this instance, we do not find the ALJ's rationale for departing from the Penalty Policy to be compelling and, as such, find that it does not in this case warrant our deference. The ALJ's decision to depart from the Penalty Policy flowed directly from his mistaken belief that the Region's analysis under the Penalty Policy was correct, a premise we reject. Since we reject this fundamental premise of the ALJ's reasoning, we find that his decision does not warrant our deference under the standard discussed above, and we choose to perform our own penalty assessment in this matter.

D. Penalty Assessment

While we agree with the ALJ that the Region's proposed penalty produces an unduly harsh result, we believe that the Penalty Policy can be applied in a way that would ensure an appropriate penalty, and choose to use it in determining the penalty we assess.

Using the Penalty Policy, we first determine, as did the parties in this matter, that Bruder's violation had only a minor potential for harm — the first factor used to determine the gravity of a violation. *See Supra* Part II.B.

The second factor used in the Penalty Policy for determining the gravity of a violation — the extent of deviation from a statutory or regulatory requirement — depends upon how the violation is characterized for purposes of the penalty assessment. The fact that the ALJ granted the Region's motion for accelerated decision, which found that Bruder was illegally storing hazardous waste without a

²² The regulations expressly give the Board this authority. 40 C.F.R. § 22.30(f) (conferring authority on the Board to, *inter alia*, "assess a penalty that is higher or lower than the amount recommended to be assessed in the decision or order being reviewed").

permit, does not mean the extent of deviation from the statutory and regulatory requirement must be major under the Penalty Policy. Region's Appeal Brief at 24-32. While characterizing Bruder as a TSD facility operating without a permit or interim status may have been an acceptable way to plead the case,²³ even the Region recognizes that "liability and the penalty that is appropriate for the violation do not necessarily constitute the same issues." *Id.* at 28. Further, the Region agrees that Bruder's "history of regulation as a generator and the fact that the regulatory agencies involved knew about Respondent-Appellee's waste generation activities are pertinent factors in determining an appropriate penalty in this case." Region's Appeal Brief at 29. The Region, in its appeal brief, states that it has never considered Bruder to be a TSD facility, but rather it recognizes that Bruder has been regulated by the State of Indiana as a hazardous waste generator. Region's Appeal Brief at 29 n.25. Under the facts of this case, we find it is more appropriate to consider the underlying reason for the permit violation — the failure of a hazardous waste generator to timely install the appropriate air emission control equipment — when we determine the extent of deviation in this matter.

After reviewing the record, we find this violation to be a minor deviation²⁴ from the statutory and regulatory requirements that require a hazardous waste generator, in order to maintain its 90-day generator exemption, to timely install air emission control equipment (pressure relief valve) under subpart CC of the RCRA regulations. While we do believe that the regulatory requirements under subpart CC are important, we find that a designation of "minor" is the appropriate determination in this matter since the failure to timely install a pressure relief valve alone does not significantly deviate from the regulatory provisions allowing Bruder to claim an exemption as a generator.²⁵ In this regard, we note that there is no asser-

²³ We make no findings regarding the way the Complaint in this matter is pled as to liability, since the question of liability and the manner in which the Region pled its case are not issues on appeal in this case.

²⁴ The Penalty Policy describes the different categories for extent of deviation as follows:

MAJOR: the violator deviates from requirements of the regulation or statute to such an extent that most (or important aspects) of the requirements are not met resulting in substantial noncompliance.

MODERATE: the violator significantly deviates from the requirements of the regulation or statute but some of the requirements are implemented as intended.

MINOR: the violator deviates somewhat from the regulatory or statutory requirements but most (or all important aspects) of the requirements are met.

Penalty Policy at 17.

²⁵ We make this determination on the specific facts of this case, reflecting the very limited nature of Bruder's noncompliance with the generator regulations.

tion in the record that Bruder was not meeting the other requirements of the exemption. Accordingly, we find the facts of this particular case suggest a “minor” extent of deviation determination.

Accordingly, we look to the Penalty Policy’s “minor/minor” cell in its matrix for the gravity-based component of the penalty. Penalty Policy at 19. The minor/minor cell in the matrix suggests a penalty range from \$100 to \$499. *See supra* note 12. We will select the mid-point in the cell’s range — \$300.

The Penalty Policy then gives us the option of including a multi-day component in the gravity-based penalty when appropriate. The Penalty Policy provides guidance as to when such an assessment might be appropriate. *See* Penalty Policy at 19-25. Depending upon the gravity-based designations for the violation (e.g., “major/major,” “major/moderate,” or “minor/minor”), multi-day penalties may be mandatory, presumed, or discretionary. Penalty Policy at 23. According to the Penalty Policy, multi-day penalties are discretionary for a “minor/minor” gravity-based penalty. *Id.* In this case, we find that the violation’s significance directly relates to its duration. Apparently, Bruder had purchased the air emission control equipment sometime before the regulatory deadline for installing or the RCRA inspection, but only installed it on or about October 23, 1998, after the Region notified Bruder of the violation. *See* Jt. Ex. 10 at 2; Answer ¶ 46. We assess, as both the Region and the ALJ did, a multi-day penalty for day 2 through 180 of violation.²⁶ Following the Penalty Policy’s multi-day matrix of minimum daily penalties, we assess \$100 per day of the violation. *See supra* note 14. Thus, we add \$17,900 to the \$300 gravity-based penalty to arrive at a base penalty of \$18,200.

The Penalty Policy then guides us to calculate the economic benefit of non-compliance. However, in this particular instance, the Region did not include an economic benefit component in the proposed penalty because the Region found that any economic gain was less than \$2,500. Region’s Post-Hearing Brief at 39. Thus we do not include an economic benefit figure in the penalty assessment. Additionally, consistent with the intent of the Debt Collection Improvement Act of 1996, we have increased the portion of the gravity-based penalty that occurred on or after January 31, 1997, by ten percent, to \$19,455.80.²⁷

²⁶ While the Region alleged that Bruder had failed to install the pressure relief valve for approximately 685 days, the Region elected only to seek a multi-day component for 179 days of violation. Init. Dec. at 11 n.15.

²⁷ *See supra* note 15. The May 9, 1997 Memorandum provides a detailed formula to use when calculating the appropriate increase when some, but not all, of the days of violation occurred after the effective date of the new rule. Jt. Ex. 2 at 3-4. According to the May 9, 1997 Memorandum (Jt. Ex. 2), the portion of the penalty assessed for the violation occurring on or after January 31, 1997 must be increased by 10%. *Id.* at 4. Pursuant to the Memorandum, we determined that of the 180 days of

Continued

The only remaining factors left to consider using the Penalty Policy are the adjustment factors. Penalty Policy at 30-40. Those factors include: good faith efforts to comply, degree of willfulness, history of noncompliance, ability to pay, environmental projects, and other unique factors. We will adjust the revised gravity-based penalty to reflect a ten percent decrease for Bruder's good faith efforts to comply, as did the Region. Region's Post-Hearing Brief at 38; Tr. at 104. Accordingly, we assess a total civil penalty of \$17,510.22 against Bruder.

IV. CONCLUSION

For the foregoing reasons, we reverse the ALJ's penalty assessment in this matter. We assess a total civil penalty of \$17,510.22 against Bruder. Bruder shall pay the full amount of the civil penalty within thirty (30) days of the date of service of this order, unless another time frame is mutually agreed upon by the parties. Payment shall be made by forwarding a cashier's check, or certified check payable to the Treasurer, United States of America, to the following address:

First National Bank of Chicago
U.S. EPA, Region V
(Regional Hearing Clerk)
P.O. Box 70753
Chicago, Illinois 60673

So ordered.

(continued)

violation charged to Bruder, 69% of the days of violation (or 125 days) occurred on or after January 31, 1997. Then, following the Memorandum's approach, we multiplied the post-effective date percentage by 0.10 and added 1. This formula provided us with the gravity adjustment factor $([.10 \times .69] + 1)$ or 1.069. Next, we multiplied this factor (1.069) by our original gravity-based penalty (\$18,200). This resulted in a revised gravity-based penalty of \$19,455.80. *Id.*