



**Everwood Treatment Co. v. United States EPA**

United States District Court for the Southern District of Alabama, Southern Division

January 21, 1998, Decided ; January 21, 1998, Filed

CIVIL ACTION NO. 96-1159-RV-M

**Reporter**

1998 U.S. Dist. LEXIS 927 \*; 1998 WL 1674543

EVERWOOD TREATMENT CO., INC. and  
CARY W. THIGPEN, Petitioners, v. UNITED  
STATES ENVIRONMENTAL PROTECTION  
AGENCY, Respondent.

**Disposition:** [\*1] Respondent's Motion for  
Summary Judgment GRANTED. FINAL  
JUDGMENT entered in favor of the respondent  
and against both petitioners on all claims.

**Core Terms**

petitioners', willfulness, regulations,  
Recommendation, magistrate judge, issues,  
contaminated, selective prosecution, court finds,  
waived, summary judgment, disposal, dirt,  
substantial evidence, requirements, immediate  
response, initial decision, hazardous waste, civil  
penalty, provisions, spill, irrebuttable presumption,  
environmental impact, standardless, proceedings,  
burying, site, statement of objection, penalty  
enhancement, regulatory program

**Case Summary****Procedural Posture**

Respondent Environmental Protection Agency  
(EPA) filed a motion for summary judgment in  
petitioner corporation's agency appeal. The  
corporation filed a statement of objections to the  
report and recommendation of a magistrate judge,  
claiming that the EPA unconstitutionally  
prosecuted the corporation in a selective manner,  
and that a finding that the corporation's conduct  
was willful was not supported by substantial

evidence.

**Overview**

A pipe at the corporation's plant burst and  
discharged the wood preservative CCA onto the  
ground. The corporation removed the soil and  
placed it in a polyethylene lined pit; this violation  
was discovered in an inspection by Environmental  
Protection Agency (EPA) seven months after the  
spill occurred. In granting the EPA's motion for  
summary judgment, the court held that the  
corporation had not made out a prima facie case of  
selective prosecution. The court held that despite  
evidence of the EPA's use of such measures, the  
corporation had not adduced any evidence that the  
EPA did not generally prosecute others for this type  
of violation. The court also noted a complete lack  
of evidence that the prosecution was based on a  
constitutionally impermissible ground. The court  
also held that the finding by the Environmental  
Appeals Board that the corporation willfully  
committed the disposal violation, in overruling its  
administrative law judge, was supported by  
substantial evidence and warranted the enhanced  
penalty imposed on the corporation.

**Outcome**

The court overruled the corporation's objections to  
the magistrate's report and recommendations and  
granted the motion for summary judgment of the  
Environmental Protection Agency.

**LexisNexis® Headnotes**

Civil Procedure > ... > Summary  
Judgment > Entitlement as Matter of  
Law > Appropriateness

Civil Procedure > ... > Discovery > Methods of  
Discovery > General Overview

Civil Procedure > Judgments > Summary  
Judgment > General Overview

Civil Procedure > Judgments > Summary  
Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary  
Judgment > Motions for Summary  
Judgment > General Overview

Civil Procedure > ... > Summary  
Judgment > Entitlement as Matter of  
Law > General Overview

Civil Procedure > ... > Summary  
Judgment > Entitlement as Matter of  
Law > Genuine Disputes

Civil Procedure > ... > Summary  
Judgment > Entitlement as Matter of  
Law > Materiality of Facts

Civil Procedure > ... > Summary  
Judgment > Supporting Materials > General  
Overview

Civil Procedure > ... > Summary  
Judgment > Supporting Materials > Discovery  
Materials

### **HNI Entitlement as Matter of Law, Appropriateness**

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P.*

56(c). All evidence must be viewed in the light most favorable to the nonmoving party. In ruling on a motion for summary judgment, the function of the court is not to weigh the evidence and determine the truth of the matter but to determine whether there is an issue for trial.

Civil Procedure > Judicial  
Officers > Judges > General Overview

Governments > Courts > Judges

Civil Procedure > Judicial  
Officers > Magistrates > Pretrial Referrals

Civil Procedure > Judicial  
Officers > Magistrates > Standards of Review

Civil Procedure > Judicial  
Officers > Magistrates > Trial by Appeal &  
Consent

Civil Procedure > Appeals > Standards of  
Review > De Novo Review

### **HN2 Judicial Officers, Judges**

*Fed. R. Civ. P. 72(b)* requires the district judge to whom the case is assigned to make a de novo determination of those portions of the a report and recommendation of a magistrate to which timely objection is made. *Fed. R. Civ. P. 72(b)* advisory committee's notes. Under the de novo standard, a court reviews the record in light of its own independent judgment without giving special weight to the prior decision. In the context of a district court's review of a report and recommendation of a magistrate the de novo standard requires the district judge to base his conclusions on an independent review of the record rather than the magistrate judge's findings.

Administrative Law > Judicial  
Review > Reviewability > Factual  
Determinations

Civil Procedure > Appeals > Standards of Review > General Overview

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Agency Rulemaking > Informal Rulemaking

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Governments > Federal Government > Claims By & Against

### **HN3[↓] Reviewability, Factual Determinations**

A district court's review of such a formal agency proceeding is governed by the Administrative Procedure Act, 5 U.S.C.S. §§ 701-706, which provides, in relevant part, that a reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be unsupported by substantial evidence. 5 U.S.C.S. § 706(2)(E). The substantial evidence standard is a narrow standard of review. Substantial evidence is something more than a scintilla of evidence, but something less than the weight of the evidence; the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Alternately stated, substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Defenses > Selective Prosecution

### **HN4[↓] Freedom of Religion, Free Exercise of Religion**

To prevail on a selective prosecution defense, a defendant must prove that others are generally not prosecuted for the same conduct and that the decision to prosecute the defendant was based upon impermissible grounds such as race, religion, or the exercise of constitutional rights.

Administrative Law > Judicial Review > Standards of Review > General Overview

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

### **HN5[↓] Judicial Review, Standards of Review**

A reviewing court should not, absent exceptional circumstances, overrule an administrative agency decision unless that administrative body erred against objections presented to it.

Administrative Law > Judicial Review > Reviewability > Factual Determinations

Labor & Employment Law > Collective Bargaining & Labor Relations > Judicial Review

Administrative Law > Judicial Review > Standards of Review > General

Overview

Administrative Law > Judicial  
Review > Standards of Review > Substantial  
Evidence

**HN6** [↓] **Reviewability, Factual Determinations**

In reviewing a finding of willfulness by the Environmental Appeals Board, the court must determine whether that finding was supported by substantial evidence in the record of the case. Where an administrative agency has disagreed with an administrative law judge (ALJ) on questions of fact and matters of credibility, the court may examine the evidence more critically in determining whether there is substantial evidence to support the agency's decision. Under this standard, however, the court is not required to choose between the ALJ's and the agency's determinations. Rather the court merely requires that the agency's choice in adopting two fairly conflicting views be supported by articulate, cogent, and reliable analysis.

Civil Procedure > ... > Standards of  
Review > Substantial Evidence > General  
Overview

Civil Procedure > Trials > Jury  
Trials > Province of Court & Jury

**HN7** [↓] **Standards of Review, Substantial  
Evidence**

The question of whether an action was willful is a finding of fact.

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**Judges:** Richard W. Vollmer, Jr., UNITED STATES DISTRICT JUDGE.

**Opinion by:** Richard W. Vollmer, Jr.

**Opinion**

**MEMORANDUM OPINION AND ORDER**

On September 26, 1997, Magistrate Judge Bert W. Milling, Jr. entered a Report and Recommendation (Doc. [\*2] 27), pursuant to 28 U.S.C. § 636(b)(1), wherein he recommended that this court grant summary judgment in favor of the respondent United States Environmental Protection Agency ("EPA") in this agency appeal. Now before the court are petitioners' "Statement of Objection to Magistrate Judge's Recommendation" (Doc. 30) and their supporting brief (Doc. 31). Also before the court is the respondent's brief in opposition to the petitioner's objections (Doc. 32).

**I. Background**

The circumstances which eventually gave rise to this appeal were set into motion when a pipe burst at petitioner Everwood Treatment Company's

("Everwood") Irvington, Alabama wood treatment plant.<sup>1</sup> At the time the pipe burst, it contained a chemical compound solution known as CCA, which consists of chromic acid, cupric oxide, and arsenic pentoxide. The hazardous waste produced by the CCA solution is classified under the EPA waste codes as D004 for arsenic and D007 for chromium. The break in the pipe caused approximately fifty gallons of the CCA solution to spill onto the concrete and soil ground at the Everwood plant.

[\*3] The events subsequent to this spill and leading to the agency appeal in this matter have already been set forth by Magistrate Judge Milling in his Report and Recommendation. This court will not revisit this factual background, but will instead provide the following citation of Magistrate Judge Milling's Report and Recommendation as a background to this case:

One morning in June 1990 at the Everwood facility, a PVC pipe connecting two tanks broke and approximately fifty gallons of the CCA solution spilled onto a concrete slab and the ground (*see* Doc. 13, pp. xiv-xv, PP 12-13). After conferring with Thigpen by telephone, several Everwood employees took shovels and diked around the edge of the area where the spill occurred; the contaminated dirt, less than four cubic yards in volume, was moved onto the concrete slab with a backhoe and treated with lime (*see* Doc. 13, p. xvi, PP 18, 20, 21, 24). Petitioner had no drums for storing the contaminated dirt at the time of the spill; delivery of the drums generally took two to three weeks (*see* Doc. 13, p. xvii, PP 25, 26).

Everwood employees dug a hole, six feet in diameter and four feet deep, on the southwest corner of their [\*4] property, and lined it with a doubled layer of six mil polyethylene; lime was added to the contaminated dirt which was

then transported from the concrete pad, in a single trip on the back of a truck (*see* Doc. 13, pp. xvii-xviii, PP 27-28, 30-31). The dirt was placed in the hole and covered with polyethylene; a steel door, weighing approximately seven thousand pounds, was placed on top of the dirt and polyethylene (*see* Doc. 13, p. xviii, PP 32-33). Dirt and stone from the excavated site was placed on top of the door (*see* Doc. 13, p. xviii, P 35). No further action was taken with regard to the contaminated dirt (*see* Doc. 13, p. xviii, P 36).

On August 23, 1990, a former Everwood employee (who wished to remain anonymous) called the Alabama Department of Environmental Management ("ADEM") and told them that Everwood had buried contaminated dirt from a CCA spill on its property (*see* Doc. 13, p. xxiii, P 58). Approximately one month later, two ADEM employees went to the Everwood facility and observed several things which factually corroborated the anonymous caller's tip (*see* Doc. 13, p. xxiv-xxv, PP 62, 64-65). Following the site inspection, ADEM requested EPA's assistance [\*5] in conducting a sampling investigation (*see* Doc. 13, p. xxviii, P 74).

On February 13, 1991, employees from both ADEM and EPA went to the Everwood plant (*see* Doc. 13, p. xxviii, PP 75-76). The site of the contaminated dirt was excavated with the use of a backhoe; after the steel door was removed, a yellow-green leachate was observed bubbling up and pooling outside the liner (*see* Doc. 13, p. xxix-xxx, PP 81, 86). Soil samples taken from the contaminated dirt proved to be toxic for arsenic and chromium (*see* Doc. 13, p. xxxiv, P 108).

ADEM representatives concluded that Everwood had created a landfill in burying the contaminated soil and recommended, in an August 1991 order, that Everwood be penalized for violations of . . . RCRA and the Alabama

<sup>1</sup>Cary W. Thigpen is also a petitioner in this action. Mr. Thigpen was the president of Everwood during all times relevant to this action.

Hazardous Wastes Management and Minimization Act (*see* Doc. 13, pp. xxxiv-xxxv, PP 109, 113; *see* Doc. 19, p. 8). The proposed order became final in January 1992 and was appealed by Everwood to the Alabama Environmental Commission (*see* Doc. 13, p. xxxvi, P 118). In mid-June 1992, the EPA "over-filed" the ADEM proceeding, filing its own complaint; in response, ADEM revoked its final order (*see* Doc. 13, pp. xl-xli, [\*6] PP 135-36).

During the period of September 7 - 15, 1993, a hearing was held before a Presiding Officer ("PO") who issued a decision on July 7, 1995 (Doc. 20, Exhibit 2, pp. 4, 82). The PO held that Everwood, in burying the contaminated soil, had disposed of hazardous waste, operated a disposal facility, and violated land disposal restriction regulations (Doc. 20, Exhibit 2, p. 45, PP 5-6). The PO further held that \$ 59,700 was an appropriate penalty (Doc. 20, Exhibit 2, p. 45, P 8).

The EPA appealed the PO's decision to the Environmental Appeals Board ("EAB"); Everwood did not appeal the PO's decision (Doc. 20, Exhibit 1, p. 3). The EAB, in its decision of September 27, 1996, held that the PO had erred in several respects, reversing the decision and assessing a penalty of \$ 273,750 (Doc. 20, Exhibit 1, p. 31).

Petitioner filed an action in this Court on November 22, 1996, petitioning for review of the EAB decision (Doc. 1). Subsequently, Everwood filed a Statement of Issues and Fact and a brief, arguing that it has not violated the law and has been improperly penalized (Doc. 13). The EPA filed a Motion for Summary Judgment, complete with brief, proposed findings of fact and conclusions [\*7] of law, and a response to Petitioner's statement of issues and facts (Docs. 18-20). Petitioner responded to the Motion (Doc. 21) and Respondent EPA replied to that response (Doc. 24).

(Mag.'s Rep. & Recom., Doc. 27 at 2-5).

In his Report and Recommendation, Magistrate Judge Milling identified the seven issues set forth by the petitioners in their appeal of the EAB's decision. These issues were, as follows:

- 1) Is the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) dispositive of Petitioner's alleged liability for RCRA violations?
- 2) Does EPA's failure to define its regulatory terms render its actions unenforceable?
- 3) Are the regulatory provisions of RCRA ARARs [applicable] to a private party non cost recovery CERCLA response . . . ?
- 4) Must EPA prove an environmental impact as a condition to assessing a major penalty?
- 5) Is EPA's Penalty Policy unenforceable by virtue of its subjective and standardless application?
- 6) Is EPA barred by principles of estoppel and res judicata from prosecuting causes of action which were or could have been alleged in the previously dismissed state proceeding?
- and 7) Did EPA violate petitioner's constitutional [\*8] rights to substantive due process and equal protection by its arbitrary and capricious interpretation of its regulations, by its legally unjustified prosecution of Petitioners, and by its arbitrary, capricious and punitive assessment of the penalty under its standardless Civil Penalty Policy?

(Mag.'s Rep. & Recom., Doc. 27 at 5-6). After identifying the petitioners' issues, Magistrate Judge Milling went on to find that all but one of those issues had been waived because the petitioners had either failed to raise those issues before the presiding officer ("ALJ") in this case, or failed to appeal from the ALJ's initial findings.

The single issue which the magistrate judge found had not been waived was whether the EPA was required to prove environmental impact as a condition to assessing a major penalty. The court found that this issue related to the penalty assessed by the EAB, and therefore could not have been waived because the issue did not arise until after the EAB's decision.

After concluding that there had been no waiver of this one issue, Magistrate Judge Milling addressed whether proof of environmental impact was necessary to assess a major penalty. On this point, the [\*9] magistrate judge determined that no finding as to environmental impact was necessary in this case because the EAB had found that a major penalty was justified on other grounds. The magistrate judge made this determination based on the language of the EPA's RCRA Civil Penalty Policy which provides two *alternate* grounds to justify a major penalty. The first ground is the risk of harm, which the petitioners claimed required a finding of environmental impact. The second ground is whether "the actions have or may have a substantial adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program." (RCRA Civil Penalty Policy, Doc. 20, Ex. 3 at 15). The EAB specifically mentioned the second ground in making its finding of a major penalty,<sup>2</sup> a fact which Magistrate Judge Milling found persuasive in rejecting petitioners' argument as to environmental impact: "Everwood's claim that the EPA must prove an environmental impact is irrelevant in light of the fact that the EAB found it to have committed a major violation in undermining the goals and purposes of the RCRA program." (Mag.'s Rep. & Recom., Doc. 27 at 11).

[\*10] In his Report and Recommendation in this case, Magistrate Judge Milling recommended that this court grant summary judgment in favor of the respondent, EPA. The petitioners now object to the findings of the magistrate judge.

<sup>2</sup>In rendering its decision as to whether the petitioners' permitting violation was major, the EAB stated that "such violations go to the heart of the RCRA program. Thus, based on our analysis of the statutory criteria (in particular the 'seriousness of the violation') as well as the penalty policy, and to deter any future unpermitted disposal, we conclude that the failure to obtain a permit prior to disposing of the hazardous waste . . . must be considered a major violation." (EAB's Decision, Doc. 20, Ex. 1 at 21). In discussing the land disposal violation, the EAB found that "as with the permitting violation, the complete failure to comply with these requirements presents a major potential for harm in that it 'undermines the statutory or regulatory purposes or procedures for implementing the RCRA program.'" (*Id.* at 24).

## II. Jurisdiction

This matter comes before the court on appeal from a federal administrative agency's imposition of a statutory civil penalty. Accordingly, this court has jurisdiction over this action pursuant to *28 U.S.C. §§ 1331 & 1355 (1994)*.

## III. Venue

Venue is appropriate in this judicial district pursuant to *28 U.S.C. § 1391(b)*.

## IV. Standard of Review

This matter comes before the court on a magistrate judge's Report and Recommendation on a dispositive motion.<sup>3</sup> Petitioners have filed timely objections to the report.

[\*11] To address petitioners' objections properly, this court must conduct a *de novo* review of the contested portions of the Report and Recommendation. See *Fed. R. Civ. P. 72(b)*

<sup>3</sup>The dispositive motion in this case is the respondent's Motion for Summary Judgment. *HNI* [↑] Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. See also *Adickes v. S. H. Kress, Inc.*, 398 U.S. 144, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). All evidence must be viewed in the light most favorable to the nonmoving party. *Alphin v. Sears, Roebuck & Co.*, 940 F.2d 1497, 1500 (11th Cir. 1991); *Langston v. ACT*, 890 F.2d 380, 383 (11th Cir. 1989). In ruling on a motion for summary judgment, the function of the court is not to "weigh the evidence and determine the truth of the matter but to determine whether there is an issue for trial." *Anderson v. Liberty Lobby*, 477 U.S. 242, 242-43, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

Because factual findings have already been made in the earlier administrative proceedings in this case, this court's review on summary judgment will not take its usual form. Although the standard for considering summary judgment will be relevant to the court's decision, that standard will be greatly supplemented by the administrative law standards that are necessary to the court's review of the contested Environmental Appeals Board decision.

advisory committee's notes ("HN2[↑] the rule requires the district judge to whom the case is assigned to make a de novo determination of those portions of the report to which timely objection is made"). Under the *de novo* standard, a court reviews the record "in light of its own independent judgment without giving special weight to the prior decision." United States v. Brian N., 900 F.2d 218, 220 (10th Cir. 1990). In the context of a district court's review of a Report and Recommendation, the *de novo* standard requires the district judge to base his conclusions on an independent review of the record rather than the magistrate judge's findings. See Stokes v. Singletary, 952 F.2d 1567, 1576 (11th Cir. 1992) (faulting a district judge for failing to conduct a proper *de novo* review of a magistrate judge's findings).

Complicating the court's review in this case is the fact that this is an appeal from a federal administrative agency proceeding. HN3[↑] A district court's review of such a formal agency proceeding [\*12] is governed by the Administrative Procedure Act, 5 U.S.C. §§ 701-706, which provides, in relevant part, that "[a] reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be . . . unsupported by substantial evidence[.]" 5 U.S.C. § 706(2)(E). See Bechtel Constr. Co. v. Secretary of Labor, 50 F.3d 926, 933 (11th Cir. 1995) (utilizing the substantial evidence standard to review an adjudicative decision in an administrative appeal); see also Kelly Kunsch, Standard of Review (State and Federal): a Primer, 18 Seattle U. L. Rev. 11, 42 (1994) ("Under the federal APA, the 'substantial evidence' standard applies to review of formal, record-producing agency actions but not to informal rulemaking."). The substantial evidence standard is a narrow standard of review. See McHenry v. Bond, 668 F.2d 1185, 1190 (11th Cir. 1982). As the Eleventh Circuit has described the standard, substantial evidence "is something more than a scintilla of evidence, but something less than the weight of the evidence; the 'possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative

agency's findings from being [\*13] supported by substantial evidence." Id. (quoting Consolo v. Federal Maritime Comm., 383 U.S. 607, 620, 16 L. Ed. 2d 131, 86 S. Ct. 1018 (1966)). Alternately stated, substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971).

## V. Issues

In their "Statement of Objections to Magistrate Judge's Recommendation," the petitioners assert that the magistrate judge erred in finding that they had waived many of the issues raised in their agency appeal to this court. Specifically, petitioners argue that the magistrate judge failed to consider the following issues in his Report and Recommendation: (1) that the petitioners had raised their claim to the EAB that the "EPA violated [their] constitutional rights to substantive due process and equal protection by its arbitrary and capricious interpretations of its regulations and by its arbitrary, capricious and punitive assessment of the penalty under a standardless RCRA Penalty Policy[.]"<sup>4</sup> (2) that petitioners did argue to the EAB that "EPA's RCRA Civil Penalty Policy is unenforceable by [\*14] virtue of its subjective and standardless application and failure to define its regulatory terms" and thereby provide a fair warning to the regulated community<sup>5</sup>; (3) that the EAB erred in finding that petitioners' conduct constituted a willful violation of RCRA provisions and in assessing an enhanced penalty based on that finding of willful conduct; (4) that the petitioners presented to the EAB their argument that "the EPA has established an irrebuttable presumption that a violation of the RCRA permitting regulations, per se, creates a major potential for harm to the

<sup>4</sup> Pets.' Stmt. of Objections, Doc. 30 at 3.

<sup>5</sup> Id.



regulatory program[;]"<sup>6</sup> and (5) that the EAB erred in reversing the ALJ's finding that the petitioners acted in good faith.

## VI. Discussion

The court has thoroughly reviewed the issues raised in the petitioners' statement of objections and has compared those issues with the arguments of the EPA and the findings of the magistrate judge. After conducting [\*15] this review, the court finds that some of the arguments raised in the petitioners' objections require further consideration. Accordingly, the court will address each of the petitioners' objections in the following discussion.

A. "EPA violated Petitioners' constitutional rights to substantive due process and equal protection by its arbitrary and capricious interpretations of its regulations and by its arbitrary, capricious and punitive assessment of the penalty under a standardless RCRA Penalty Policy."

The three constitutional arguments asserted by the petitioners in their Statement of Issues (Doc. 13) include: (1) that the EPA's interpretation of its permitting regulations and Penalty Policy creates an impermissible, irrebuttable presumption; (2) that the EPA has violated the petitioners' equal protection rights by subjecting them to selective prosecution and enforcement; and (3) that various RCRA regulations are unconstitutionally vague. Insofar as the first and third of these arguments are addressed elsewhere in the petitioners' objections and in this Order, the court will address only petitioners' arguments on selective prosecution at this time.<sup>7</sup>

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<sup>6</sup> *Id.* at 4-5.

<sup>7</sup> The court does not consider the EPA's argument on waiver of this issue because the proceedings prior to this appeal were before an adjudicative arm of the same agency which was allegedly biased against the petitioners. Because the very nature of petitioners' selective prosecution claim is one of impermissible agency motive, this court finds that it must give full consideration to the selective prosecution issue at this time.

[\*16] In their selective prosecution claim, petitioners argue that they were singled out for conduct that was regularly conducted by the EPA in agency-conducted on site CERCLA removal actions. (See Pets.' Stmt. of Issues, Doc. 13 at 43). Specifically, petitioners assert that EPA officials admitted that, on a number of occasions, they had not obtained RCRA permits when they temporarily used polyethylene lined excavations to store hazardous wastes during CERCLA removal actions.

After reviewing the petitioners' arguments on this point, the court concludes that the petitioners have failed to make out a prima facie case of selective prosecution. For petitioners' *HN4* [↑] to prevail on their selective prosecution defense, they must prove: "(1) that others are generally not prosecuted for the same conduct; [and] (2) the decision to prosecute this defendant was based upon impermissible grounds such as race, religion or the exercise of constitutional rights." *Rybachek v. United States*, 1993 U.S. App. LEXIS 26404, at \*1, No. 91-35160, 1993 WL 385454, at \*4 (9th Cir. Sept. 29, 1993) (addressing a Bivens action brought, in part, to remedy selective prosecution by the EPA). Although the petitioners have pointed to some evidence which [\*17] indicates that the EPA has used polyethylene lined excavations to store hazardous waste, the petitioners have done nothing else to satisfy the first prong of the selective prosecution standard. Indeed, petitioners have pointed to no evidence which would tend to prove that "others are generally not prosecuted for the same conduct[.]" *Id.* Furthermore, the petitioners have produced nothing which would show that the EPA's decision to prosecute in this case "was based upon impermissible grounds such as race, religion or the exercise of constitutional rights." *Id.* Accordingly, the court finds that the petitioners have not generated sufficient proof of selective prosecution to raise a genuine issue of material fact. See *United States v. Production Plated Plastics, Inc.*, 742 F. Supp. 956, 962 (W.D. Mich. 1990) (finding "no proof of selective prosecution other than defendants' mere allegations and arguments in

their brief which are not sufficient to raise an issue of material fact").

B. "EPA's RCRA Civil Penalty Policy is unenforceable by virtue of its subjective and standardless application and failure to define its regulatory terms" and thereby provide a fair warning to [\*18] the regulated community.<sup>8</sup>

The specific regulatory term to which petitioners appear to object is "immediate response."<sup>9</sup> After reviewing petitioners' argument regarding the alleged subjective and standardless nature of that term, and then tracing that argument back through the proceedings in this case, the court concludes that this issue was waived by the petitioners when they failed to appeal the decision of the ALJ. Issues identical to those raised here were asserted to, and rejected by, the ALJ when he made his initial finding of a permitting violation. In speaking to the same issues of vagueness and notice that are now raised in the petitioners' brief to this court, the ALJ found:

That "immediate response" is sufficiently definite [\*19] when measured by common understanding and practices that Respondents may fairly be held to be on notice that initiating or continuing treatment or containment activities after a reasonable opportunity to secure drums or other containers in which to store the contaminated materials had elapsed subjected them to RCRA requirements including obtaining a permit.

(Initial Decision in In the Matter of Everwood Treatment Co., et al., Docket No. RCRA-IV-92-115-R (hereinafter "Initial Decision"), Doc. 20, Ex.

<sup>8</sup>In their brief in support of their Statement of Objections, petitioners have clarified their objection on this issue by restating it as: "No penalty can result where the EPA failed to define regulations giving rise to violation." (Pets.' Br. in Support, Doc. 31 at 7).

<sup>9</sup>Other claims of vague regulatory terms were asserted at earlier stages of this action; however, in their objections to this court, petitioners have asserted arguments on only the term "immediate response." Accordingly, this court will limit its review to petitioners' arguments on the term "immediate response."

2 at 66). Because petitioners failed to appeal after the ALJ ruled against them on this issue, the court finds that petitioners' arguments relating to notice and the term "immediate response" have been waived. See Alabama ex rel. Siegelman v. EPA, 911 F.2d 499, 505 (11th Cir. 1990) (stating that HNS[↑] a reviewing court should not, absent exceptional circumstances, overrule an administrative agency decision "unless that administrative body erred against objections presented to it").

[\*20] C. The EAB erred in finding that petitioners' conduct constituted a willful violation of RCRA provisions and in assessing an enhanced penalty based on that finding of willful conduct.

In their statement of objections, petitioners assert that the magistrate judge never addressed their argument that the EAB erred when it found that the petitioners' conduct constituted a willful violation of RCRA meriting an enhanced penalty. After reviewing the Report and Recommendation in this case, the court must agree with the petitioners that the issue of willfulness was not fully considered. Accordingly, the court will address petitioners' arguments on willfulness at this time.

The first question which the court must address on the willfulness issue is whether the petitioners waived their arguments on this point by failing to raise them at an earlier stage in the proceedings. In deciding this issue, the court notes that the ALJ did not find any willfulness on the part of the petitioners in the Initial Decision. Accordingly, petitioners did not waive their right to oppose an enhanced penalty for willfulness when they did not appeal the ALJ's decision.

The first finding of willfulness was [\*21] made by the EAB in its September 29, 1996 Final Order. (Doc. 20, Ex. 1). The petitioners had contested the EPA's arguments to the EAB on the issue of willfulness prior to the EAB's ruling on the matter. Additionally, the petitioners have noted their opposition to the EAB's finding of willfulness in

documents submitted to the magistrate judge on summary judgment, and to this court in opposition to the Report and Recommendation. Because the petitioners have consistently asserted their opposition to the EAB's finding of willfulness, the court finds no waiver on the greater issue of willfulness. The court, however, does find that two of the petitioner's bases for objecting to the willfulness finding cannot be asserted at this stage of the proceeding because those arguments were waived when the petitioners failed to appeal the ALJ's findings.

In their "Brief in Support of Petitioners' Statement of Objection to Magistrate Judge's Recommendation," the petitioners present numerous arguments in opposition to the EAB's finding of willfulness. Because these arguments overlap at certain points, the court has distilled the petitioners contentions into the following four legal positions: (1) there [\*22] was no RCRA violation at all in this case because the petitioners were entitled to CERCLA permit waivers; (2) even if there was a RCRA violation, the violation was not willful because the petitioners acted in reliance on the permit waiver regulations; (3) there was no violation at all in this case because the petitioners were engaged in an "immediate response;" and (4) there can be no willful violation where, in a case like this, the petitioners attempted to comply with the relevant EPA regulations.

The court notes that the first and third arguments listed above attack the basic finding of a RCRA violation and, thus, cannot be raised at this stage in the proceedings because the petitioners never appealed the ALJ's original ruling. Accordingly, petitioners' assertions regarding their entitlement to CERCLA permit waivers <sup>10</sup> [\*23] and conducting

<sup>10</sup>The ALJ specifically addressed and rejected the petitioners' argument regarding CERCLA permit waivers. (See Initial Decision, Doc. 20, Ex. 2 at 46-55). In his decision, the ALJ concluded that "even if Everwood's actions in response to the spill were removal actions under CERCLA, RCRA, and corresponding provisions of the Alabama Hazardous Waste Management and Minimization Act and regulations thereunder are requirements applicable to Everwood

an "immediate response" <sup>11</sup> are found to be waived.

Additionally, the court concludes that it must reject petitioners' argument regarding alleged reliance on the permit waiver regulations. Not only was this argument not raised in the earlier proceedings in this case, but the petitioners have failed to point the court to any section of the record where proof of reliance might be found.

Petitioners' fourth argument is their strongest objection to the EAB's finding of willfulness. In that argument, petitioners' assert that their "compliance with RCRA regulations for some regulatorily undefined period of time cannot be said to be a willful [\*24] violation justifying an upward adjustment of the penalty by the EAB." (Pets.' Br. in Supp., Doc. 31 at 12). Although petitioners do not elaborate on this argument, the court finds that it can safely construe the petitioners' argument as a challenge to the EAB's basis for reversing the ALJ on the issue of willfulness.

In the Initial Decision in this case, the ALJ denied the EPA's claim for a twenty-five (25) percent enhanced penalty for willful conduct. <sup>12</sup> This claim for a twenty-five percent upward adjustment was revisited by the EAB in its review of the ALJ's decision. In its consideration of the issue, the EAB

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under the circumstances presented here." (*Id.* at 55). This conclusion provided a partial basis for the ALJ's ultimate finding of a violation and, therefore, petitioners' failure to appeal that conclusion waives their right to raise arguments on the CERCLA waiver issue at this time.

<sup>11</sup> In rejecting the petitioners' argument that they complied with the "immediate response" exception under RCRA, the ALJ found "it [to be] clear that the 'storage' claimed by Everwood continued long after a reasonable time for obtaining [proper waste storage] drums had elapsed." (*Id.* at 65). Although this finding was crucial to the ALJ's assessment of a violation, the petitioners did not appeal. Accordingly, the court finds that the petitioners may not revive this claim at this stage in the proceedings.

<sup>12</sup> In denying the EPA's claim for an enhanced willfulness penalty, the ALJ stated: "It is concluded that the 25 percent upward adjustment calculated by Complainant, because Mr. Thigpen did not immediately manifest the contaminated material off site to a licensed TSD facility has no proper basis." (Initial Decision, Doc. 20, Ex. 2 at 79).

found that "Everwood's actions in burying the contaminated soil were willful and therefore justify an upward adjustment in the gravity based penalty." (EAB's Decision, Doc. 20, Ex. 2 at 29). As grounds for this finding, the EAB stated:

In particular, the record indicates that despite his awareness of the applicable regulations as well as the toxicity of the CCA solution, Thigpen ordered and actually assisted in burying the contaminated soil. Further, the burial site in this case was located in a corner of the facility under or near a parking lot and was not marked [\*25] in any way. In fact, during the February 13, 1991 inspection not even Thigpen could recall the exact location of the pit, except that it was in the southwest corner of the facility. Moreover, despite Thigpen's assistance, it took inspectors two hours to locate the steel door [that had been placed over the burial site]. These facts cast serious doubt on Everwood's assertion that it intended the burial only as a temporary storage measure pending acquisition of drums and/or completion of a planned new wood treatment facility. On the contrary, under the totality of the circumstances, we believe it is more likely that Everwood buried the wastes in a location where they would never be discovered -- which might well still be the case had the burial not been reported by a former employee. This conduct is consistent with being aware of the applicable regulations and choosing to avoid them. Thus, based on our review of the record, we agree with the region that Everwood's actions in burying hazardous waste in a pit at its facility without obtaining a permit and without complying with applicable land disposal requirements were willful and therefore warrant an upward adjustment of the gravity-based [\*26] penalty.

(Id. at 29-30).

HN6 [↑] In reviewing the EAB's finding of willfulness, the court must determine whether that

finding was supported by substantial evidence in the record of the case. See N.L.R.B. v. Datapoint Corp., 642 F.2d 123, 126 (5th Cir 1981) (noting, in a review of an N.L.R.B. decision, that the court "must defer to the Board if there is substantial evidence in the record to support its factual findings"). Where, as in this case, an administrative agency has disagreed with an ALJ on questions of fact and matters of credibility, "the court may examine the evidence more critically in determining whether there is substantial evidence to support the [agency's] [\*27] decision." Bechtel Constr., 50 F.3d at 933. Under this standard, however, the court is "not required to choose between the ALJ's and [agency's] determinations. Rather we merely require that the [agency's] choice in adopting two fairly conflicting views, 'be supported by articulate, cogent, and reliable analysis.'" Id. (quoting Northport Health Serv., Inc. v. N.L.R.B., 961 F.2d 1547, 1553-54 (11th Cir. 1992). Cf. 2 Kenneth Culp Davis and Richard J. Pierce, Jr., Administrative Law Treatise 178 (3rd Ed. 1994) ("If an agency and an ALJ disagree with respect to a finding of fact, it is the agency's finding that is due deference on judicial review.").

After reviewing the EAB's decision in this case, the court concludes that the EAB's finding of willfulness<sup>13</sup> is supported by substantial evidence in the record of this case. In making this finding, the court is persuaded by petitioners' failure to report the spill or to remove the contaminated waste in the seven months prior to the administrative inspection that uncovered the violations. Furthermore, the court finds that the EAB's decision to reverse the ALJ on the issue of willfulness was "supported by articulate, [\*28] cogent, and reliable analysis." Bechtel Constr., 50 F.3d at 933. Specifically, the court notes the lengthy discussion provided by the EAB in its

<sup>13</sup> HN7 [↑] The question of whether an action was willful is a finding of fact. See, e.g., Stanfield v. Answering Serv. Inc., 867 F.2d 1290, 1296 (11th Cir. 1989) (stating, in an age discrimination case, that "a finding of willfulness turns on the issue of intent or motivation and is a question of fact").

reversal of the ALJ's findings on good faith and willfulness. (See EAB's Decision, Doc. 20, Ex. 1 at 25-31). The court has reviewed the EAB's discussion on this issue and found it to be both well-reasoned and well-supported. Because the EAB had a sufficient basis for its finding of willfulness, this court will not further question the twenty-five percent enhanced penalty that was assessed in this case.

D. "The EPA has established an irrebuttable presumption that a violation of the RCRA permitting regulations, per se, creates a major potential for harm to the [\*29] regulatory program."

After a full review of the record in this case, the court rejects petitioners' claim that the EPA has established an impermissible, irrebuttable presumption that "a violation of the RCRA permitting regulations, per se, creates a major potential for harm to the regulatory program." (Pets.' Stmt. of Objections, Doc. 30 at 4-5). Specifically, the court finds that it does not need to reach the petitioners' claims of an irrebuttable presumption in this case because the petitioners have mischaracterized the EAB's finding of a major permitting violation.<sup>14</sup>

In their arguments on this point, petitioners have characterized the EAB's finding of a major violation as a baseless conclusion which merely asserts that: "(a) there was a permitting violation by Everwood; (b) permitting violations [\*30] pose a major potential for harm to our program; therefore, (c) Everwood created a major potential for harm to our program." (Pets.' Br. in Support, Doc. 31 at 17). Petitioners contend that they were subjected to an irrebuttable presumption of guilt, when, after being found guilty of a permitting violation, the EAB required no additional proof to find them also guilty of a *major* permitting violation. In making this

<sup>14</sup>The court also notes that the petitioners have failed to point the court to any legal authority in making their lengthy argument regarding the alleged irrebuttable presumption of a major permitting violation.

argument, however, the petitioners have neglected to consider the EAB's complete basis for its finding of a major violation. Specifically, the petitioners have failed to mention the EAB's consideration of the seriousness of the violation, the need for deterrence, and other facts of the case<sup>15</sup>:

Based on our analysis of the statutory criteria (in particular, the "seriousness of the violation") as well as the penalty policy, and to deter any future unpermitted disposal, we conclude that the failure to obtain a permit prior to disposing of hazardous waste under the facts of this case must be considered a violation of major significance.

(EAB's Decision, Doc. 20, Ex. 1 at 21). Because the EAB's finding of a major permitting violation was based on a number [\*31] of legitimate factors, the court rejects the petitioners' assertion that the EAB's finding was an untenable "syllogistic fallacy." (Pets.' Br. in Support, Doc. 31 at 17). Furthermore, the court finds that the EAB's assessment of a major permitting violation was

<sup>15</sup>One of "the facts of this case" which spoke directly to the issue of harm to the regulatory program can be found in the testimony of Shannon Maher, the EPA's Chief of RCRA enforcement for Alabama and Mississippi:

Q Now, can you please explain what harm to the RCRA regulatory program means? . . .

A To reiterate, the integrity of the RCRA program is maintained through its regulations and statutory requirements. The manner in which these regulations are carried out are through a permit at treatment, storage and disposal facilities. If a facility does not operate without a permit, in essence they are rendering the provisions of RCRA useless.

Q Do you mean if they do operate with a permit?

A Excuse me. If they do operate without a permit, then they render the provisions of RCRA useless. There is no oversight. There is no insurance that they are properly managing their waste.

Q And can you explain how there is harm to the regulatory program in this case with these violations?

A None of the provisions, none of the RCRA requirements were even partially met. There was no permit, there was no groundwater monitoring system. There was no financial assurance, et cetera. The provisions were useless.

(Maher Test. before ALJ, Doc. 24, Ex. 18 at 1241-42).

supported by substantial evidence, and, therefore, was not in error.

[\*32] E. The EAB erred in reversing the ALJ's finding that the petitioners acted in good faith.

Petitioners' argument on the question of good faith raises the same issues as were discussed earlier regarding the EAB's finding of a willful violation. In the initial decision in this case, the ALJ found that the petitioners' penalty should be reduced because no consideration had been previously given to petitioners' "good faith attempts to comply with applicable requirements." (Initial Decision, Doc. 20, Ex. 2 at 79-80). As the EAB properly indicated in its later opinion, the ALJ "did not, however, articulate precisely what actions he believed demonstrated Everwood's good faith efforts to comply with the relevant regulations[.]" (EAB's Decision, Doc. 20, Ex. 1 at 25). Indeed, this court notes that the ALJ's finding of good faith consisted of little more than a naked conclusion which was supported by neither evidentiary citation nor meaningful discussion. By contrast, the EAB's reversal of the ALJ's good faith finding was supported by the citation of substantial evidence, as well as, articulate discussion and cogent analysis. See *Bechtel Constr., 50 F.3d at 933*. Accordingly, this [\*33] court will not disturb the EAB's findings on this matter.

## VII. Conclusion

Based on the foregoing, and those portions of the Report and Recommendation that are undisturbed by this Order, <sup>16</sup> the court finds that the EAB's decision in this case was not in error. Accordingly, respondent's Motion for Summary Judgment is due to be, and hereby is, **GRANTED**.

DONE this the 21 day of January, 1998.

<sup>16</sup>The court **ADOPTS** those portions of the magistrate judge's Report and Recommendation that are not inconsistent with this Order.

Richard W. Vollmer, Jr.

**UNITED STATES DISTRICT JUDGE**

## JUDGMENT

**FINAL JUDGMENT** is hereby entered in favor of the respondent and against both petitioners on all claims presented in this action. Thus, it is **ORDERED, ADJUDGED AND DECREED** that respondent shall have and recover from the petitioners the sum of **TWO HUNDRED AND NINETY TWO THOUSAND ONE HUNDRED AND ELEVEN DOLLARS AND NO CENTS (\$ 292,110.00)** in civil penalties and interest in the following [\*34] amounts:

\$ 273,750.00 in civil penalties

\$ 18,360.00 in prejudgment interest <sup>1</sup>

**TOTAL: \$ 292,110.00.**

Costs shall be taxed against the petitioners.

DONE this the 21 day of January, 1998.

Richard W. Vollmer, Jr.

**UNITED STATES DISTRICT JUDGE**

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<sup>1</sup>This interest award is based on a six (6) percent annual rate calculated from December 3, 1996 to January 20, 1998. The authority for this award is found at *31 U.S.C. § 3717 (1994)* and *40 C.F.R. § 13.11 (1996)*.