



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY BEFORE THE ADMINISTRATOR

U.S. ENVIRONMENTAL PROTECTION AGENCY-REG.11 2013 JUN 21 P 3:03 REGIONAL HEARING CLERK

In the Matter of: )
Andrew B. Chase, a/k/a Andy Chase, )
Chase Services, Inc., Chase Convenience )
Stores, Inc., and Chase Commercial )
Land Development, Inc., )
Respondents. )

Docket No. RCRA-02-2011-7503

Dated: June 20, 2013

INITIAL DECISION

I. Procedural Background

This proceeding was initiated on April 7, 2011 by the Director of the Division of Enforcement and Compliance Assistance of the United States Environmental Protection Agency, Region 2 ("Complainant" or "EPA") filing a Complaint, Compliance Order and Notice of Opportunity for Hearing against the Respondents. The Complaint, filed pursuant to Section 9006 of the Solid Waste Disposal Act, as amended (the "Act" or "SWDA"), 42 U.S.C. § 6991, charges Respondents, as owners and/or operators of underground storage tanks ("USTs") at six retail gasoline stations, with 21 counts of violating regulatory requirements for UST release detection, prevention and correction. These regulatory requirements, codified at 40 C.F.R. Part 280, were promulgated by the Environmental Protection Agency pursuant to Section 9003(a) of the Act. In the Complaint, Complainant proposed a total penalty of \$232,838.63 for the alleged violations.

Respondents submitted an Answer to the Complaint, denying the alleged violations and disputing the amount of the penalty. After several extensions of time were granted, the parties filed prehearing exchanges and stipulations. In their prehearing exchange, Respondents asserted, inter alia, financial hardship and inability to pay the penalty, but did not submit any proposed exhibits except for documentation of leak detector testing. A hearing was scheduled and later, upon motion, rescheduled to commence on July 17, 2012 in Plattsburgh, New York. The parties submitted Joint Stipulations on March 22, 2012 ("Stips").

Complainant filed a motion for accelerated decision as to Respondents' liability for Counts 1 through 19 and 21 of the Complaint, and Respondents filed an opposition to the motion. By Order on Complainant's Motion for Partial Accelerated Decision, dated June 21, 2012, ("June 21 Order"), the motion was granted and Respondents were found liable for the

violations alleged in Counts 1 through 16, 18, 19 and 21, but the motion was denied as to Count 17.

Upon motion filed by Complainant to compel production of financial records, to which Respondents failed to respond, an Order dated May 11, 2012 was issued, ordering Respondents to serve the requested documents on Complainant. Subsequently, Complainant filed a motion to preclude Respondents from producing documents relevant to financial hardship or inability to pay the penalty, on grounds that Respondents failed to submit the documents. Respondents filed a response to the motion, but did not submit the requested financial documents. By Order dated June 28, 2012 ("June 28 Order"), the motion was granted, precluding Respondents from presenting any evidence or information as to inability to pay or financial hardship.

On July 10, 2012, the parties submitted a Joint Motion to Cancel Hearing and for the Court to Issue an Initial Decision Based on the Written Record. In the motion, the parties stated that they knowingly and willingly relinquished and waived their right to an oral hearing, and they moved to cancel the oral hearing, requesting a decision on the written record as to any penalty for each of the violations found in the June 21 Order. The motion was made upon seven conditions agreed by the parties, including a briefing schedule for submission of papers, that the June 28 Order remain fully in effect, that documents in the prehearing exchange may be incorporated by reference in the papers submitted, and that declarations, affidavits, and statements of fact and exhibits in support thereof may be submitted if the declarant or affiant was identified in the prehearing exchange or if leave to submit such statement is granted by the undersigned. The parties also agreed to the condition that Complainant does not seek to obtain a judgment on liability or a penalty assessment on Counts 17 and 20 of the Complaint. An Order issued on July 13, 2012 ("July 13 Order") granted the motion, accepted and incorporated the seven conditions in the motion, cancelled the hearing, and set a briefing schedule.

By letter dated July 20, 2012, Complainant informed Respondents and the undersigned that the proposed penalty in the Complaint, \$232,838.63, was "not properly tabulated" and thus calculated in error, and that the total proposed penalty should have read \$276,078.63. Because Complainant does not seek assessment of penalties for Counts 17 and 20, the proposed penalties for those counts subtracted from the corrected proposed penalty yields a total proposed penalty of \$265,211.63, Complainant states, which is the penalty it now seeks in this proceeding.

Complainant submitted a Memorandum of Law, dated August 9, 2012 ("EPA's Brief"), in support of ordering the injunctive relief and penalties Complainant seeks for the violations found in the June 21 Order. Enclosed with EPA's Brief is a Declaration of Paul M. Sacker, dated August 9, 2012 ("Sacker Decl.") and Exhibit A attached thereto. Respondents filed a Response Brief dated August 29, 2012 ("Respondents' Brief" or "Resp. Brief") with no enclosures. The Respondents' Brief included a request to reconsider the ruling in the June 28 Order precluding introduction of financial hardship information. On September 24, 2012, Complainant submitted a Memorandum in Reply to the Respondents' Brief ("Reply Brief"), with an enclosed Declaration of Gail B. Coad, dated September 21, 2012 ("Coad Declaration"). On September 28,

2012, Complainant filed a Motion to Supplement its Reply Brief to revise a paragraph in the Coad Declaration, with an enclosed Supplemental Declaration of Gail B. Coad, dated September 28, 2012 (“Supp. Coad Decl.”).

On October 18, 2012, the due date for any response to the Motion to Supplement, the record closed. The substantive issues remaining for decision in this proceeding are the amount of any penalty to assess for the violations alleged in Counts 1 through 16, 18, 19 and 21 of the Complaint. The pending procedural issues are addressed below.

## **II. Complainant’s Motion to Supplement Reply Brief**

Complainant moved to supplement its Reply Brief to correct and clarify Paragraph 11 of the Coad Declaration, which paragraph provides information as to sales of properties owned by Respondents. The Supplemental Declaration of Gail B. Coad includes a revised Paragraph 11 and a statement that her edits to Paragraph 11 do not affect in any way her conclusion in the Coad Declaration.

Respondents did not file any response to the Motion to Supplement within the time period provided in the applicable procedural rules, 40 C.F.R. part 22. 40 C.F.R. §§ 22.16(b), 22.7(c) (a response to a motion must be filed within 15 days after service of the motion, plus five additional days where the motion is not served by overnight mail). Respondents have not objected to Complainant’s motion to supplement its Reply Brief, and no prejudice would result from granting the motion. Accordingly, Complainant Motion to Supplement Reply Brief is **GRANTED**.

## **III. Motion to Reconsider**

### **A. Parties’ Arguments**

Respondents’ Brief includes a request to reconsider the ruling in the June 28 Order restricting the introduction of information as to financial hardship. Respondents request that they be allowed to submit such evidence, arguing that their “financial condition is an unalterable fact” and that a penalty beyond their means to pay will only force them into bankruptcy. Resp. Brief at 2. Pointing out that the violations occurred between 2006 and 2009 and that the Complaint was not filed until April 2011, Respondents assert that at the time of the Complaint, the companies owning and operating the stations had run into financial hardship. They assert further that all but one of the stations were sold, that Respondents no longer have any interest in those stations, and that “any net proceeds received from the sale were relatively minimal, and none of the named corporations are in operation.” *Id.* at 1. Respondents argue that “[n]one of the Respondent corporations have any financial ability to pay any amount of fine,” that imposing the penalties after many of the stations have been sold “poses incredible financial hardship upon Andrew

Chase individually,” and that he “does not have the capacity to pay the fines.” *Id* at 2. They argue further that a penalty that “recognizes the Respondents’ financial condition better insures that EPA will be paid.” *Id.* at 2. They refer to tax returns which they allege were submitted to EPA in March 2012, and assert that on June 14, 2012, a copy of the Individual Ability to Pay Claim was forwarded to EPA. *Id.*

In response, EPA submits that it would be inappropriate to reconsider the ruling in the June 28 Order for several reasons. First, the July 13 Order accepted the conditions listed in the Joint Motion to Cancel Hearing, which included the condition that the June 28 Order shall remain fully operative. Second, Respondents never sought interlocutory appeal or reconsideration of the June 28 Order before filing their Brief, and in any event, they maintain the right to request appellate review after the initial decision herein. Third, Respondents had ample warning from this Tribunal of their burden of proof on the issue of inability to pay or financial hardship, and of the consequences of failing to submit to EPA financial documents requested, and nevertheless they disregarded such notice and failed to submit financial documents in their Prehearing Exchange, to supplement their Prehearing Exchange, or to submit to EPA the financial documents requested. Reply Brief at 19-25.

Furthermore, EPA asserts that Respondents failed to meet their burden on proof on a claim of inability to pay the penalty or financial hardship, and that Respondents failed to provide documentation in support of such a claim despite ample opportunity to do so. EPA points out that Respondents did not quantify the amount they received from sale of the stations or what the money was used for, and did not provide any declaration or affidavit of Mr. Chase or anyone else with responsibility for his financial affairs. Therefore, EPA argues, Respondents’ unsupported and unverifiable assertions should be disregarded. Reply Brief at 5-6. Narrating in detail EPA counsel’s requests in June through August 2012 for financial information from Respondents, EPA asserts that they have not provided the documentation it sought, and that the documents Respondents had submitted earlier do not provide sufficient information to support a conclusion that they would be unable to pay the proposed penalty or would suffer financial hardship. *Id.* at 7-12.

In support, EPA provides the Declaration of Gail B. Coad, a consultant with Industrial Economics, Incorporated, who provides financial analysis services, and who assessed the financial capability of Respondents. She stated in her Declaration, as amended by her Supplemental Declaration, that Respondents sold four gas station properties in 2009 and 2011, that gross sales proceeds from the sales totaled over \$5.79 million, and that Respondents sold an additional fifth gasoline station operation in 2009. She stated further that Mr. Chase’s company Belmont LM continues to operate a station and convenience store in Lyon Mountain, New York, with a market value of \$165,000. She also stated that on June 1, 2012, Mr. Chase offered his home for sale for \$1.99 million including furniture and vehicles, and that in March 2011, he incorporated a new ATM servicing business. She opined that, based on publicly available information, Mr. Chase appears to be able to pay the proposed penalty. She stated further that the tax returns and other financial data that Respondents provided were incomplete and did not

include all supporting schedules, and that the documentation was inconsistent internally and was inconsistent with public documents. Furthermore, she stated that the documents did not describe Respondents' current situation. She opined that, based on her many years of experience evaluating financial situations of individuals and companies, she does not have a sufficient basis to conclude that the proposed penalty of approximately \$263,000 should be reduced for ability to pay concerns. Coad Decl.

## B. Discussion and Conclusion on Motion to Reconsider

The applicable procedural rules, 40 C.F.R. Part 22 ("Rules of Practice"), refer only to reconsideration of a final order, and do not refer to motions to reconsider an interlocutory order. If such a motion is to be entertained nonetheless, then federal case law may provide guidance. The power to reconsider an interlocutory order is committed to the discretion of the court, and the law of the case doctrine may guide that discretion. *American Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4<sup>th</sup> Cir. 2003). The doctrine does not limit the court's discretion and its application varies depending on the context. *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 148-49 (2<sup>nd</sup> Cir. 1999). However, "in deciding a motion to reconsider, the court must not reevaluate the basis upon which it made a prior ruling if the moving party is simply 'rearguing' a prior claim." *Brainware, Inc. v. Scan-Optics, Ltd.*, Civ. No. 3:11cv755, 2012 U.S. Dist. LEXIS 1166009 (E.D. Va., Aug. 16, 2012).

The June 28 Order included a detailed discussion of the facts and rationale supporting the ruling therein precluding Respondents from presenting any evidence or information as to inability to pay or financial hardship. As stated in the June 28 Order, Respondents failed to provide any documentation as to inability to pay in response to the Order dated May 11, 2012, despite being clearly warned of the consequences of failure to do so and of their burden of proof to show inability to pay. In response to Complainant's motion to preclude Respondents from introducing evidence as to financial hardship, the Respondents finally submitted some financial documents, but as discussed in the June 28 Order, they were insufficient. The Respondents do not assert that there are any errors of fact or law in the ruling, and do not assert that there were any changes in relevant law or factual circumstances since the ruling. Respondents simply reiterate arguments made in their response to the motion to preclude, namely that they had run into financial hardship and that the penalty would pose "incredible" financial hardship on Mr. Chase, and plead for reconsideration based upon vague statements of their counsel that a penalty beyond their means would force them into bankruptcy, and that net proceeds from property sales were relatively minimal. These statements are not evidence and thus carry no evidentiary weight. *Gans v. Gray*, 612 F. Supp. 608, 619 (E.D. Pa. 1985)(mere statements made in counsel's briefs are not evidence for purposes of supporting or opposing motion for summary judgment); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1358 (4<sup>th</sup> Cir. 1995)(counsel's statements are not evidence). The time for Respondents to submit financial information in this proceeding has long passed. Their argument that a smaller penalty "better insures that EPA will be paid" completely misses the purposes for which penalties are imposed, which purposes are discussed below with

respect to the Penalty Policy.

Moreover, even if the documents attached to Respondents' response to EPA's motion to preclude were considered, they are not sufficient to establish that the Respondents are unable to pay the proposed penalty, for the reasons stated in the Coad Declaration, which I find to be persuasive. Additionally, an inference could be drawn from Respondents' failure to submit complete documentation at the appropriate times in this proceeding, that the information requested by EPA but not submitted would be adverse to Respondents' claim of inability to pay. 40 C.F.R. § 22.19(g).

Accordingly, Respondents' request to reconsider the ruling in the June 28 Order is **DENIED**.

#### **IV. Statutory and Regulatory Provisions Governing Penalty Assessment**

Section 9003 of the Act, 42 U.S.C. § 6991b, authorizes the Environmental Protection Agency ("Agency") to promulgate release detection, prevention, and correction regulations applicable to all owners and operators of USTs as necessary to protect human health and the environment. A UST is defined in Section 9001 of the Act as "any one or combination of tanks (including underground pipes connected thereto) which is used to contain an accumulation of regulated substances," that is, petroleum or hazardous substances defined in 42 U.S.C. § 9601(14). 42 U.S.C. §§ 6991(7), 6991(14). Section 9006 of the Act authorizes the Agency, if it determines that any person is in violation of any requirement of the Act, to issue a compliance order, and any owner or operator of a UST who fails to comply with any requirement or standard promulgated under Section 9003 of the Act "shall be subject to a civil penalty not to exceed \$10,000 for each tank for each day of violation." 42 U.S.C. §§ 6991e(a) and 6991e(d)(2). According to Section 9006(c) and (e) of the Act, the penalty assessed must be determined as "reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements," the "compliance history of an owner or operator in accordance with [the provisions of the Act governing USTs or a program approved thereunder]," and "[a]ny other factor the Administrator considers appropriate." 42 U.S.C. § 6991e(c) and (e).

Under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, the Agency promulgated regulations that, as applied to penalties under Section 9006 of the SWDA, increase the maximum penalty to \$11,000 for violations occurring between January 30, 1997 and January 12, 2009, and increase the maximum penalty to \$16,000 for violations occurring thereafter. 40 C.F.R. § 19.4.

Under the Rules of Practice, EPA has the burdens of presentation and persuasion that the relief sought is appropriate, and following EPA's prima facie case, Respondents have the burden of presenting "any response or evidence with respect to the appropriate relief." 40 C.F.R. § 22.24. The Rules of Practice provide that the Administrative Law Judge ("ALJ") "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” and “shall consider any civil penalty guidelines issued under the Act.” 40 C.F.R. § 22.27(b).

## **V. Penalty Policy**

The Agency issued the “U.S. EPA Penalty Guidance for Violations of UST Requirements,” dated November 14, 1990 (“Penalty Policy”), and on April 6, 2010, the Agency issued a guidance document entitled “Revision to Adjusted Penalty Policy Matrices Issued on November 16, 2009” (“Revised Matrices Guidance”) which adjusted the penalty matrices in the Penalty Policy to account for the increased penalties under the Federal Civil Penalties Inflation Adjustment Act and 40 C.F.R. § 19.4.

The Penalty Policy states (at section 1.3) that penalty assessment methodology is intended to encourage timely resolution of environmental problems, support fair and equitable treatment of the regulated community, and deter potential violators from future violations. Deterrence is achieved by removing any significant economic benefit the violator may have gained from noncompliance (the “economic benefit component”), and by charging an additional amount (the “gravity-based component”) to penalize the violator for not obeying the law.

The economic benefit component consists of avoided costs, which are the expenditures which should have but were not incurred by the violator, and delayed costs, which are the expenditures which were deferred by the violation. It is calculated with the Agency’s software program called “BEN.”

The gravity-based component is calculated in four steps. The first step is to determine a value from a matrix, which is based on two criteria forming the axes of the matrix: (1) the extent of deviation from the requirement, and (2) the probability of actual or potential harm to human health or the environment and/or the adverse effect on the regulatory program. The levels assigned under each criterion are major, moderate and minor. Appendix A of the Penalty Policy lists selected types of UST violations and provides a guide for assessing the levels of extent of deviation and potential for harm. Penalty values for violations occurring after March 15, 2004 are provided in the Revised Matrices Guidance.

The second step is to apply violator-specific adjustments to the matrix value. Four such adjustment factors are listed in the Penalty Policy: (1) degree of cooperation/noncooperation, (2) degree of willfulness or negligence, (3) history of noncompliance, and (4) other unique factors.

The first factor includes consideration of the violator’s good faith efforts in response to enforcement actions. The matrix value may be reduced by as much as 25 percent if the violator goes beyond what is minimally required to comply with requirements closely related to the initial harm; no reduction is made for merely coming into compliance. The matrix value may be

increased as much as 50 percent for lack of cooperation with enforcement officials.

Consideration of the second adjustment factor, which may increase or reduce the matrix value by up to the same percentages, includes how much control the violator had over events constituting the violation, the foreseeability of such events, whether the violator made good faith efforts to comply and/or took reasonable precautions against such events, and whether the violator knew or should have known of hazards associated with the conduct. The Penalty Policy provides that if the violator knew of the legal requirement violated, the penalty may be adjusted upward; lack of knowledge does not support a decrease in the penalty.

As to the third adjustment factor, history of noncompliance, the matrix value may be increased by up to 50 percent for violations of any environmental regulation, unless the current violation was “caused by factors entirely out of control of the violator.”

As a final adjustment, the matrix value may be increased up to 50 percent or decreased up to 25 percent for the fourth factor, “other unique factors,” to account for unanticipated factors that arise in a particular case.

After making any violator-specific adjustments, the third step is to apply an Environmental Sensitivity Multiplier (“ESM”), which takes into account adverse environmental effects the violation may have had considering the sensitivity of the local area to potential damage posed by a release. Factors considered are the amount of petroleum potentially released, toxicity of petroleum, and potential hazards from a potential release, such as explosion, geologic site features, and likelihood of contaminating a river, drinking wells or wetlands, proximity to schools, and ecological or aesthetic value. The ESM is 1.0 for low value, 1.5 for moderate ESM, and 2.0 for a high ESM.

The fourth and final step is to apply a Days of Noncompliance Multiplier (“DNM”), by which the adjusted matrix value multiplied by the environmental sensitivity multiplier are then multiplied. This factor takes into account the number of days of noncompliance, and is assigned a value of 1 for violations lasting up to 90 days, 1.5 for the next 90 days, 2.0 for days 181 through 270, and 2.5 for days 271 through 365; beyond that time for each 6 month period the value increases by 0.5.

## **VI. Parties’ Briefs and Evidence**

Complainant seeks the assessment of the penalties it proposes for the violations of Counts 1 through 16, 18, 19 and 21 of the Complaint. In addition, Complainant seeks an order directing and enjoining Mr. Chase, to the extent he continues to own and operate USTs at Station I as identified in the Complaint, to comply with all applicable requirements set forth in 40 C.F.R. Part 280, including 40 C.F.R. §§ 280.41(b)(1)(ii), 280.41(b)(1)(i), 280.44(a), and 280.20(c)(1)(ii) as incorporated into 40 C.F.R. Section 280.21. In support, Complainant submits its Brief and the Declaration of Paul M. Sacker.

Complainant points out the purposes of the UST regulations:

These final standards for UST systems are designed to reduce the number of releases of petroleum and hazardous substances, increase the ability to quickly detect and minimize the contamination of soil and ground water by such releases, and ensure adequate cleanup of contamination. To do this, the standards in some way must affect every phase of the life cycle of a storage tank system: Selection of the tank system, installation, operation and maintenance; closure and disposal, and cleanup of the site in cases of product release.

53 Fed. Reg. 37082, 37096 (Sept. 23, 1988).

Complainant asserts that the proposed penalties were developed in accordance with the Penalty Policy. Complainant also asserts that the totality of the circumstances, where Respondents owned and operated 19 USTs at six service stations, Mr. Chase was involved in the UST business for many years, and there were long periods of noncompliance with many regulatory requirements even after EPA gave express notice of regulatory noncompliance, underscores the need and importance for the assessment of the proposed penalties. Complainant points out Mr. Sacker's conclusion in his Declaration that the violations were serious, and the fact that the record does not show evidence of actual harm from any of the violations is not relevant because it is the potential for harm that is important, and proof of actual harm need not be proven to assess a substantial penalty. EPA's Brief at 43 (citing *V-1 Oil Company*, 8 E.A.D. 729, 755 (EAB 2000)). Complainant urges that the circumstances of Respondents' violations "call for penalties with 'teeth,' penalties that 'sting.'" EPA's Brief at 43. EPA argues that it is well established that a penalty should deter violations not just by the defendant but against others who might commit similar violations. *Id.* at 44 (citing *inter alia United States v. T & S Brass and Bronze Works, Inc.*, 681 F. Supp. 314, 322 (D. S.C. 1988), *aff'd in part, vacated in part*, 865 F.2d 1261 (4<sup>th</sup> Cir. 1988)). Complainant argues that deterrence is of particular importance in the context of USTs given the large number of them throughout the country, pointing out that the Agency, when promulgating the UST regulatory requirements in Part 280, acknowledged that there were over 2 million UST systems estimated to be located at over 700,000 facilities nationwide. *Id.* (citing 53 Fed. Reg. 37082, 37083, 37095 (Sept. 23, 1988)). Complainant also points out that releases from the piping associated with USTs "occur twice as often as tank releases." and therefore release detection "is an essential backup measure to prevention." 53 Fed. Reg. 37082, 37088, 37142 (Sept. 23, 1988). *Id.* at 33.

Accompanying EPA's Brief is the Declaration of Paul M. Sacker, dated August 9, 2012, with the Penalty Policy attached as Exhibit A. Mr. Sacker was identified as a witness in Complainant's Prehearing Exchange Statement. He asserts in his Declaration that he is an environmental engineer at EPA who inspected two of the gasoline stations at issue, reviewed inspection reports and other documentation relevant to this case, and calculated the proposed penalties. In his Declaration, Mr. Sacker refers to specific documents in EPA's Prehearing Exchange and thereby incorporates them by reference into EPA's papers in support of the relief

requested, and thus offered them into the written record of this case. The Sacker Declaration, along with the other evidence offered into the record by Complainant, is addressed in more detail with respect to each count of violation below.

In their Brief, Respondents assert that five of the six service stations at issue were sold prior to the date the Complaint was served, and that none of the corporate Respondents are in operation. As noted above, Respondents point out that the violations occurred between 2006 and 2009 but that the Complaint was not filed until April 2011. Respondents argue that the penalties “do not appear to be in any way related to any actual harm due to any leak or contamination” and that “[i]t is undisputed that no such leak or contamination has occurred as a result of the violations.” Resp. Brief at 2. Finally, Respondents observe that the Penalty Policy allows for adjustments to be made to the proposed penalty, including up to 80 percent of the gravity-based component. Respondents simply urge that an 80 percent reduction of the proposed gravity-based penalty should be implemented in this case.

In its Reply Brief, Complainant notes an implicit laches defense in Respondents’ Brief and the lack of any facts to show actual prejudice as a result of any delay in filing the Complaint. Complainant asserts that in any event, laches is irrelevant to the penalty determination, citing, *inter alia*, *United States v. Summerlin*, 310 U.S. 414, 416 (1940) (“It is well settled that the United States is not . . . subject to the defense on laches in enforcing its rights”). In response to the assertion of no actual harm resulting from the violations, Complainant points out rulings of the Environmental Appeals Board (“EAB”) and federal courts that EPA need not provide proof of actual harm to assess a substantial penalty, and that a violation may be serious based on its potential for harm, regardless of whether actual harm occurred. Reply Brief at 17, citing, *inter alia*, *V-1 Oil Company*, 8 E.A.D. 729, 755 (EAB 2000); *Ram, Inc.*, RCRA (9006) Appeal No, 08-01 & 08-02, 2009 WL 2050079 \* 14 (EAB 2009); *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 344 (E.D. Va. 1997), *aff’d in part, rev’d on other grounds*, 191 F.3d 516 (4<sup>th</sup> Cir. 1999), *cert. denied*, 531 U.S. 813 (2000).

## **VII. Discussion and Conclusions as to Respondents’ Arguments**

Respondents’ request for an 80 percent reduction of the penalty is apparently based on the Penalty Policy’s provision of an 80 percent reduction in the context of settlement, where the respondent demonstrated that it is unable to pay the penalty or that it will preclude it from achieving compliance. Not only have Respondents failed to make such a demonstration, but this provision is not for determination of a penalty by the administrative law judge. There is no other provision in the Penalty Policy for reducing the penalty by 80 percent; violator-specific adjustments allow only for a maximum 25 % decrease for each of three adjustments, and such adjustments are discussed below with respect to each count of violation. Respondents did not submit any affidavit, declaration, or exhibit to offer into evidence, and except for the reference to the Penalty Policy, did not incorporate by reference in their Brief any document in the prehearing exchange. Therefore, there is no basis for an 80 percent reduction of the penalty.

