

IN RE U. S. ARMY, FORT WAINWRIGHT CENTRAL HEATING AND POWER PLANT

CAA Appeal No. 02-04

REMAND ORDER ON INTERLOCUTORY APPEAL

Decided June 5, 2003

Syllabus

This is an interlocutory appeal by the United States Department of the Army, Alaska Garrison (“Alaska Garrison”) from an order, dated April 30, 2002, issued by Chief Administrative Law Judge Susan Biro (“ALJ”). In her decision (the “Penalty Criteria Decision”), the ALJ held that U.S. EPA Region 10 is entitled to judgment as a matter of law that the Clean Air Act (“CAA”) Section 113(e) penalty assessment factors of “economic benefit of noncompliance” and “size of the business” apply to Alaska Garrison and may be taken into account in adjusting the penalties for Alaska Garrison’s violations. The ALJ rejected Alaska Garrison’s argument that these penalty criteria do not apply to Federal entities.

Alaska Garrison requests that the Board reverse the ALJ and rule in Alaska Garrison’s favor as a matter of law. Alaska Garrison argues that (a) the plain meaning and legislative history of CAA section 113(e)(1) precludes application of these factors to Federal facilities, (b) application of these factors to Federal facilities violates section 118 of the CAA by discriminating against Federal facilities, (c) application of the economic benefit factor conflicts with Federal fiscal law applicable to federal facilities like Alaska Garrison, and (d) application of these factors to Alaska Garrison is inconsistent with prior EPA guidance and policy statements.

The ALJ’s determination in an earlier accelerated decision that Alaska Garrison is liable for violating the Clean Air Act is not at issue in this interlocutory appeal. Alaska Garrison also has not challenged EPA’s authority to assess a civil administrative penalty against it, just one that is based on the application of the challenged penalty assessment factors.

Held: The Board upholds the ALJ’s conclusion that, as a matter of law, the “economic benefit” and “size of the business” penalty factors of CAA section 113(e)(1), 42 U.S.C. § 7413(e)(1), are appropriately considered and may be applied on remand. A penalty-phase evidentiary hearing is necessary to fully develop the record of all relevant facts and circumstances bearing upon an appropriate penalty for the violations found by the ALJ.

In essence, Alaska Garrison seeks to bypass the normal, fact-specific penalty analysis with respect to these two statutory penalty assessment factors by arguing that there are no circumstances in which the ALJ could, in a proper exercise of discretion, adjust the penalty, either up or down, on account of those factors. The Board finds Alaska Garrison’s arguments to be unpersuasive, and the Board expresses concern that premature elimination

of one or more of the penalty assessment factors may work mischief in this or a subsequent case. The penalty assessment factors as a whole, including size of business and economic benefit, provide sufficient latitude for the ALJ to assess an appropriate penalty taking into account all relevant circumstances, including Alaska Garrison's important mission.

Because this appeal seeks review only of questions of law largely in the abstract, it is not possible for the Board to speak definitively to the implications of its legal conclusions for the facts and circumstances of this case. The Board notes that nothing in its decision should be taken to suggest that the issues Alaska Garrison raises are unimportant, nor underestimate the potential complexity of determining economic benefit when a Federal entity is subject to the Federal budgetary process and Federal appropriations laws. In addition, the Board's decision leaves undisturbed the ALJ's conclusion favorable to Alaska Garrison that fiscal law precludes Alaska Garrison from both borrowing funds and earning income on investments. By this conclusion, the ALJ rejected the Region's proposed rationale for the majority of the Region's initially proposed penalty of \$16 million. Thus, the Region's proposed penalty amount cannot be viewed as necessarily indicative of what the ALJ may determine is appropriate after considering all of the evidence introduced at trial on remand in light of the statutory penalty assessment factors.

The Board's decision on Alaska Garrison's specific arguments is summarized as follows:

Statutory Text and Legislative History. The Board rejects Alaska Garrison's argument that Congress did not intend "size of the business" and "economic benefit" to be applied to Federal facilities. The Board concludes that a legal determination at this stage of this proceeding holding that certain statutory factors do not apply to Federal facilities would have the same practical effect as a conclusion that the ALJ may not consider those factors. This result would violate the plain meaning of the statutory text, CAA section 113(e), and the "unambiguous intent" of Congress evidenced in the legislative history that the Agency's section 113 enforcement authority applies to Federal facilities. The plain meaning of paragraph (e)(1) of section 113, read collectively with paragraph (d)(1) of section 113 and with CAA section 302(e), expressly authorizes EPA to issue administrative penalty assessments against Federal agencies as "persons" under the statute and mandates that EPA consider the identified penalty factors in determining the amount of "any" such penalty. Where Congress intended to exempt Federal facilities from the enforcement powers of section 113, Congress expressly stated so in the text of the statute. *See* CAA § 113(c)(5)(A), (E), 42 U.S.C. § 7413(c)(5)(A), (E) (exempting government entities from certain criminal penalties).

Fiscal Law. The Board also concludes that Alaska Garrison has failed to show that fiscal law applicable to Federal agencies and, in particular, to major military construction projects, precludes application of the economic benefit penalty factor. Applicable fiscal law prohibits Federal agencies from spending funds without appropriation of money from Congress, and it restricts the authority of a military department to undertake a major military construction project that costs more than \$1.5 million without specific authorization from Congress. Alaska Garrison has not demonstrated any error in the ALJ's conclusion that Alaska Garrison had authority to construct continuous opacity monitors ("COMs") and continuous emissions monitors ("CEMs") costing less than \$1.5 million using its operations and maintenance appropriations. Alaska Garrison also has shown no error in the ALJ's conclusion that "there is a clear economic benefit from avoided costs of *operating and maintaining* the COMS and CEMS during the years Respondent deferred their purchase and installation." Thus, Alaska Garrison has failed to show that, as a matter of law, fiscal law precludes application of the economic benefit penalty factor in this case.

However, the Board also holds that the ALJ erred in concluding that Alaska Garrison could have begun the more substantial project involving the construction of an emissions control baghouse for the Facility (the “Baghouse”) in the earliest year that Alaska Garrison had a lump sum appropriation large enough to fund the project. Alaska Garrison appears to be correct in arguing that 10 U.S.C. §§ 114(a)(6), 2802 and 2805 prohibit Alaska Garrison from redirecting lump sum appropriations to a construction project costing more than \$1.5 million that has not received specific authorization from Congress. Nonetheless, there are other potential avenues by which economic benefit might logically be taken into consideration notwithstanding the presence of limits on the use of appropriated funds. The Board concludes that consideration of alleged delay in requesting funding for the Baghouse and factual issues regarding potential alternative methods of achieving compliance require remand and an evidentiary hearing as appropriate to fully develop the relevant facts.

Section 118 of the CAA. The Board rejects Alaska Garrison’s argument that application of the “economic benefit” and “size of business” criteria to Alaska Garrison violates, as a matter of law, the requirements of section 118 of the CAA, which provides that Federal facilities “shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity.” CAA § 118(a), 42 U.S.C. § 7418(a).

Alaska Garrison’s arguments regarding section 118, as stated in its Appellate Brief, focus solely on the penalty the *Region* proposed and not on the reasoning the *ALJ* employed. The ALJ rejected the portion of the *Region*’s proposed penalty that would calculate economic benefit based on an imputed rate of interest or cost of borrowing. Alaska Garrison’s arguments directed at this portion of the *Region*’s proposed penalty are thus moot in light of the ALJ’s decision. Moreover, nothing in the statute, legislative history, or Agency guidance suggests that section 118 prohibits the application of these two penalty factors to Federal facilities. Where Congress intended to allow Federal facilities relief from section 118, Congress specifically granted the President the authority for issuing limited scope exemptions. *See* CAA § 118(b) (allowing certain exemptions if the President determines that it is in the paramount interest of the United States). Accordingly, section 118 does not preclude, as a matter of law, the application to Alaska Garrison of penalty factors that are routinely applied to non-Federal entities.

Agency Guidance. Finally, the Board concludes that existing statements of Agency policy or guidance do not preclude application of the challenged factors to Alaska Garrison as a matter of law. Under applicable regulations, the ALJ is not required to follow Agency penalty policies, and, therefore, those policies do not limit the ALJ’s discretion to assess a penalty that is otherwise in accordance with the statutory factors. Moreover, the Agency policy and guidance statements at issue do not support Alaska Garrison’s argument that the Agency has limited the scope of these penalty factors.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Kathie A. Stein.

Opinion of the Board by Judge Stein:

This is an interlocutory appeal by the United States Department of the Army, Alaska Garrison (“Alaska Garrison”) from an order, dated April 30, 2002, issued by Chief Administrative Law Judge Susan Biro (“ALJ”), titled “Accelerated

Decision as to Application of Economic Benefit of Noncompliance and Size of Business Penalty Factors” (the “Penalty Criteria Decision”).

In the Penalty Criteria Decision, the ALJ held that U.S. EPA Region 10 (the “Region”) “is entitled to judgment as a matter of law that [Clean Air Act] Section 113(e) penalty assessment criteria of ‘economic benefit of noncompliance’ and ‘size of the business’ apply to [Alaska Garrison] and may be taken into account in adjusting the penalties for [Alaska Garrison’s] violations.” Penalty Criteria Decision at 44. In reaching this conclusion, the ALJ rejected Alaska Garrison’s argument, made in opposition to the Region’s motion for an accelerated decision on liability,¹ that, as a matter of law, these civil penalty assessment criteria of the Clean Air Act (“CAA”) should not be applied against Federal entities like Alaska Garrison.

By this interlocutory appeal, Alaska Garrison requests that we reverse the ALJ and rule in Alaska Garrison’s favor, in advance of an evidentiary hearing on the penalty phase of the case, that these penalty factors do not apply here.² For the following reasons, we uphold the ALJ’s conclusion that, as a matter of law, these penalty factors are appropriately considered and may be applied in the penalty phase of an administrative action against a Federal facility like Alaska Garrison.

I. INTRODUCTION

Alaska Garrison asks this Board to determine, prior to any evidentiary hearing on the issues, that the CAA and other legal authority preclude an administrative law judge, as a matter of law, from making *any* adjustment in the penalty on account of “size of the business” or “economic benefit of noncompliance” in the context of a Federal facility case like the matter at hand. As discussed fully below, we rule against Alaska Garrison on the central legal issues it raises.

Because this appeal seeks review only of questions of law largely in the abstract, it is not possible for us to speak definitively to the implications of our legal conclusions for the facts and circumstances of this case. Indeed, as discussed below, those implications can be fully gauged only after an evidentiary hearing to

¹ On January 8, 2001, the complainant, the Region, filed a Motion for Accelerated Decision seeking judgment as to Alaska Garrison’s liability for the violations alleged in the Region’s complaint and as to questions of law raised in eleven affirmative defenses set forth in Alaska Garrison’s answer. On February 8, 2001, Alaska Garrison filed an opposition to the Region’s Motion for Accelerated Decision.

² By requesting a legal ruling in its favor before the ALJ and now on appeal, Alaska Garrison in effect requests that we grant it accelerated decision. As explained below, we conclude that an accelerated decision in Alaska Garrison’s favor is not appropriate and, therefore, its request is denied.

establish the predicate facts to which the points of law decided here can be applied.

Accordingly, nothing herein should be taken to suggest that the issues Alaska Garrison raises are unimportant, nor do we underestimate the potential complexity of determining economic benefit when a Federal entity is subject to the Federal budgetary process and Federal appropriations laws. Moreover, we are mindful of the important national security aspects of Alaska Garrison's mission, and that as this decision is being written our nation has only recently concluded a war with Iraq. We expect that on remand the ALJ will take these considerations into account.³ As the Region stated at oral argument in response to questions from the Board, considerations of national security may legitimately form part of a determination of a proper penalty in this case under the penalty factors of "impact of the penalty on the business" and "other factors as justice may require." See CAA § 113(e), 42 U.S.C. § 7413; Transcript of Oral Argument Before the Environmental Appeals Board, at 49-52 (Nov. 21, 2002) (hereinafter, "Tr. at ___"). In our view, a remand to the ALJ will permit development of a complete factual record and determination of an appropriate penalty fully informed by that record and the statutory penalty criteria.

Our decision leaves undisturbed a significant conclusion favorable to Alaska Garrison, namely that the Region cannot rely on an imputed interest rate as evidence that Alaska Garrison obtained an economic benefit. Specifically, the ALJ held that fiscal law precludes Alaska Garrison from both borrowing funds and earning income on investments, thereby precluding Alaska Garrison from obtaining this type of economic benefit from delayed compliance. By this conclusion, which the Region has now apparently conceded,⁴ the ALJ rejected the Region's proposed rationale for the majority of the Region's initially proposed penalty of \$16 million.⁵ Thus, the Region's proposed penalty amount cannot be viewed as necessarily indicative of what the ALJ may determine is appropriate after considering all of the evidence in light of the statutory factors.

³ We are concerned that issues uniquely affecting the national security mission of the military departments in the present context be given proper attention. Nevertheless, a premature elimination of one or more of the statutory penalty factors may unduly constrain the penalty analysis and, thereby, affect this or a subsequent case in unintended ways. We believe such matters should be accommodated by considering and balancing all of the statutory penalty criteria when all relevant facts have been shown by evidence introduced, developed, and explained at the penalty-phase hearing.

⁴ Tr. at 54.

⁵ The ALJ noted that it is difficult to determine exactly how much of the Region's proposed \$16 million penalty is based on alleged economic benefit since the Region's proposed penalty analysis lead to an initial penalty of \$27,020,049 (which included \$12,152,853 on account of "economic benefit of noncompliance" and an additional substantial increase on account of "size of the business"), which the Region reduced to \$16 million in order to recognize that this is the first case of this magnitude against a Federal facility. Penalty Criteria Decision at 1 n.2.

Before proceeding with our analysis, it is important to observe that several issues are not within the scope of this appeal. First, we have not been asked at this juncture to rule on the ALJ's conclusion that Alaska Garrison violated⁶ section 113(a) of the CAA by failing to comply both with its permit (the "Permit") to operate⁷ the central heating and electric power generation plant at Fort Wainwright, Alaska (the "Facility") and with the requirements of the Alaska State Implementation Plan ("SIP").⁸ This being said, we note that Alaska Garrison has acknowledged in its appeal that the Region "raises legitimate concerns over the historical inability of the [Facility] to meet applicable air quality standards" and that Alaska Garrison "must correct these deficiencies as expeditiously as the law allows." Appellant's Appellate Brief at 3 n.2.

Second, because Alaska Garrison has not raised the issue, we do not have before us the question whether section 113(d) of the CAA authorizes the Agency to assess civil administrative penalties of up to \$25,000 per day of violation⁹ against Federal entities like Alaska Garrison for violations of section 113(a).¹⁰ Indeed, Alaska Garrison acknowledges that imposition of a civil administrative

⁶ In an earlier accelerated decision, the ALJ found that, among other things, Alaska Garrison has been in violation of its Permit since at least 1994. *See* Order on Complainant's Motion for Accelerated Decision (ALJ, July 3, 2001). The Region also argues that its evidence pertaining to the amount of penalty to be assessed will show violations dating back to 1991. *See* Appellee's Response Brief at 1 (citing Complainant's Memorandum of Points and Authorities in Support of Motion for Accelerated Decision at 28-34).

⁷ On April 30, 1993, the Alaska Department of the Environment issued a permit authorizing Alaska Garrison to operate the Facility.

⁸ The CAA contemplates that states may exercise primary responsibility for creating plans to maintain and improve the nation's air quality consistent with the requirements of the CAA. States are required to develop state implementation plans, or SIPs, that provide a means for attainment of the National Ambient Air Quality Standards ("NAAQS") in nonattainment areas or for the prevention of significant deterioration in areas that are already in attainment or unclassifiable. CAA § 110, 42 U.S.C. § 7410. Each state's SIP must set forth a permitting program that is at least as stringent as the requirements of the CAA. CAA § 110(a), 42 U.S.C. § 7410(a). EPA is charged with reviewing each state's proposed SIP and determining whether the SIP complies with the CAA. EPA is also authorized to enforce the requirements of a state's SIP. CAA § 113(a), 42 U.S.C. § 7413(a). EPA approved the State of Alaska's SIP, effective on June 25, 1991. *See* 56 Fed. Reg. 19,284 (Apr. 26, 1991).

⁹ Section 113(d)(1) of the Clean Air Act, 42 U.S.C. § 7413(d)(1), authorizes the Administrator to assess administrative civil penalties of "up to \$25,000, per day of violation" against violators of the Act. The Debt Collection Improvement Act of 1996 ("DCIA"), 31 U.S.C. § 3701, requires EPA to adjust the maximum civil penalties on a periodic basis to incorporate inflation. On June 27, 1997, EPA promulgated the Adjustment of Civil Monetary Penalties for Inflation Rule, 40 C.F.R. §§ 19 *et seq.*, as mandated by the DCIA. The rule sets the maximum allowable administrative penalty per day of violation of the CAA at \$27,500 and a maximum total penalty of \$220,000. 40 C.F.R. § 19.4.

¹⁰ *See* Office of Legal Counsel, U.S. Dep't of Justice, Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act (July 16, 1997) (determining that EPA has authority to administratively assess penalties against Federal facilities under CAA § 113(d)).

penalty against it for its violations is appropriate. Alaska Garrison states that it “recognizes EPA’s interest in ‘sending a message’ that the historical performance of the [Facility] has been unacceptable,” Appellant’s Appellate Brief at 3 n. 2, and that under “the Clean Air Act, we are subject to a penalty based on the gravity of the violation,” Tr. at 7.

In reaching our interlocutory decision to uphold the central features of the ALJ’s legal ruling and remand the case to the ALJ for further proceedings, we are influenced by several preliminary considerations. By seeking a legal determination prior to the penalty-phase evidentiary hearing, Alaska Garrison in effect argues that it would be an abuse of discretion, viewing the evidence in the record in the light most favorable to the Region,¹¹ for the ALJ to make *any* adjustment in the penalty on account of “size of the business” or “economic benefit of noncompliance.” Because Alaska Garrison has asked us to decide this question before the Region has introduced and explained any of its penalty evidence, the ALJ has not had the opportunity to consider all of the relevant facts, and there is no record before us that would reveal the weight, if any, that the ALJ might assign to “size of the business” or “economic benefit of noncompliance” in this case.

Similarly, because she has not yet determined an appropriate penalty, the ALJ has not balanced the competing considerations that may be required by applying all of the statutory penalty factors set forth in section 113(e) to the facts of this case. Section 113(e)(1) of the CAA provides as follows:

In determining the amount of any civil penalty to be assessed under this section * * * the Administrator or the court, as appropriate, *shall take into consideration* (in addition to such other factors as justice may require) *the size of the business*, the economic impact of the penalty on the business, the violator’s full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same viola-

¹¹ The standards governing accelerated decision under 40 C.F.R. § 22.20(a) are analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *See, e.g., In re CWM Chem. Servs., Inc.*, 6 E.A.D. 1 (EAB 1995). Alaska Garrison is not entitled to judgment on accelerated decision where the evidence in the record may support a reasonable inference in favor of the Region. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1985) (applying the summary judgment standard under the Federal Rules of Civil Procedure). The D.C. Circuit Court of Appeals has recently held that a party is entitled to accelerated decision under section 22.20(a) only if that party “presents ‘evidence so strong and persuasive that no reasonable [fact finder] is free to disregard it.’” *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002) (quoting *In re BWX Techs., Inc.*, 9 E.A.D. 61, 76 (EAB 2000)).

tion, *the economic benefit of noncompliance*, and the seriousness of the violation.

CAA § 113(e)(1), 42 U.S.C. § 7413(e)(1) (emphasis added).¹²

Determination of an appropriate penalty is normally a fact-specific analysis that requires the ALJ to consider the factors listed in the statute as well as “such other factors as justice may require.” CAA § 113(e)(1), 42 U.S.C. § 7413(e)(1).¹³ As one court has explained when applying similar penalty factors under the Clean Water Act:¹⁴

“It must be understood * * * that despite the directional aid and guidance that the six enumerated factors in § 1319(d) provide, the calculation of a final penalty may often be imprecise and approximate at best. Indeed, the accuracy of the final calculations, and the figure of penalty that they produce, is as dependent, or even more so, upon the provision of complete and accurate evidence, as introduced, developed, and explained at trial, as it is upon a good evaluation of this information by the court.”

U.S. v. Mun. Auth. of Union Township, 150 F.3d 259, 264 (3d Cir. 1998)¹⁵ (quoting *United States v. Sheyenne Tooling & Mfg. Co.*, 952 F.Supp. 1420, 1422-23 (D.N.D.1996)). In addition, the U.S. Supreme Court has noted that, in assessing civil penalties, “highly discretionary calculations that take into account multiple

¹² In addition, the Agency’s Part 22 rules provide:

If the Presiding Officer determines that a violation has occurred and the complaint 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.

40 C.F.R. § 22.27(b).

¹³ Moreover, we have held that where a statute permits, “the Administrator or her delegate may exercise discretion by looking to the [statutory] factors listed in * * * other sections as guidance in specific cases.” *In re Woodcrest, Inc.*, 7 E.A.D. 757, 774 n.11 (EAB 1998), *aff’d*, 114 F. Supp. 2d (N.D. Ind. 1999).

¹⁴ The Clean Water Act and the Clean Air Act are *in pari materia*, *United States v. Anthony Dell’Aquila Enters. & Subs.*, 150 F.3d 329, 338 n.9 (3d Cir. 1998); *United States v. Stauffer Chem. Co.*, 684 F.2d 1174 (6th Cir. 1982), *aff’d*, 464 U.S. 165 (1984), and courts often rely upon interpretations of the Clean Water Act to assist with an analysis under the Clean Air Act. *See, e.g., United States v. Midwest Suspension and Brake*, 824 F. Supp. 713, 733 (E.D. Mich. 1993).

¹⁵ The Third Circuit held in *Municipal Authority of Union Township* that profit derived from delayed or avoided capital expenditure is not the only method for calculating economic benefit penalties. 150 F.3d at 264.

factors are necessary.” *Tull v. United States*, 481 U.S. 412, 426-27 (1987) (regarding civil penalties under the Clean Water Act). Likewise, we have held that the Region’s burden of proof relates to the appropriateness of the penalty as a whole taking all of the factors into account. *In re New Waterbury, Ltd.*, 5 E.A.D. 524, 538 (EAB 1994).

The difficulty of Alaska Garrison’s predicate legal argument at this stage of this case is highlighted by Alaska Garrison’s admission at oral argument that the statute requires the ALJ to “consider” all of the statutory factors. Tr. at 8. This concession is unavoidable, as we explain in part III.A below, since the plain meaning of the statute clearly requires the ALJ to “consider” all of the listed factors whenever the Agency assesses a penalty under section 113.

At oral argument, Alaska Garrison’s counsel sought to distinguish between the statutorily required consideration of all penalty factors and Alaska Garrison’s argument on appeal that, as a matter of law, the “economic benefit” and “size of business” factors do not “apply” to Alaska Garrison. Alaska Garrison’s counsel stated as follows:

In terms of the ‘shall consider’ language, our position is that the statute requires consideration of any or all of those factors, if applicable. And our argument is, as a matter of law, economic benefit and size of business do not apply [to Alaska Garrison].

Tr. at 11. Thus, although Alaska Garrison admits that the ALJ must “consider” all of the penalty factors, nevertheless, Alaska Garrison seeks to bypass the normal, fact-specific analysis with respect to two of the penalty factors by arguing, in essence, that there are no circumstances in which the ALJ could, in a proper exercise of discretion, adjust the penalty, either up or down, on account of those factors. We find Alaska Garrison’s argument unpersuasive and are furthermore concerned that premature elimination of one or more of these statutory factors may work mischief in this or a subsequent case.

The following paragraphs briefly summarize our decision on the four principal issues raised in this appeal:

Statutory Text and Legislative History. As explained more fully below in part III.A, we reject Alaska Garrison’s argument that Congress did not intend “size of the business” and “economic benefit” to be applied to Federal facilities. We conclude that a legal determination at this stage of this proceeding holding that certain statutory factors do not apply to Federal facilities would have the same practical effect as a conclusion that the ALJ may not consider those factors. This result would violate the plain meaning of the statutory text, CAA § 113(e), and the “unambiguous intent” of Congress evidenced in the legislative history that

the Agency's section 113 enforcement authority, *applies* to Federal facilities. We also conclude that Congress' use of the word "business" in the statute with respect to the size criterion was not intended to limit the application of that factor to only for-profit, private entities. Where Congress intended to exempt Federal facilities from the enforcement powers of section 113, Congress expressly stated so in the text of the statute. *See* CAA § 113(c)(5)(A), (E), 42 U.S.C. § 7413(c)(5)(A), (E) (exempting government entities from certain criminal penalties).

In addition, the legislative history shows Congress used the terms "business" and "violation" interchangeably, and the plain meaning of "business" based on its dictionary definition includes, among other things, "mission" or "field of endeavor." Alaska Garrison admits that it has a mission, indeed an important one. Likewise, the brief reference in the legislative history to business "competitors" with respect to the economic benefit criterion does not demonstrate Congressional intent to limit the scope of that criterion since this reference is found in the same legislative history discussion where "business" and "violation" are used interchangeably.

Fiscal Law. We also conclude, as explained in part III.B, that Alaska Garrison has failed to show that consideration of fiscal law applicable to Federal agencies and, in particular, constraints on major military construction projects of more than \$1.5 million ("MILCON"), preclude application in this case of the economic benefit penalty factor.¹⁶ Briefly, applicable fiscal law prohibits Federal agencies from spending funds without appropriation of money from Congress, and it restricts the authority of a military department to undertake a major military construction project that costs more than \$1.5 million without specific authorization from Congress. Here, with respect to the purchase, installation, and certification of continuous opacity monitors ("COMs") and continuous emissions monitors ("CEMs"), which cost less than \$1.5 million, Alaska Garrison has not demonstrated any error in the ALJ's conclusion that Alaska Garrison had authority to construct the COMs and CEMs using its operations and maintenance ("O & M") appropriations. *See* Penalty Criteria Decision at 24.¹⁷ Alaska Garrison also has shown no error, at this juncture, in the ALJ's conclusion that "there is a clear economic benefit from avoided costs of *operating and maintaining* the COMS and CEMS during the years Respondent deferred their purchase and installation." *Id.* at 23.¹⁸ Because Alaska Garrison has failed to demonstrate error in these con-

¹⁶ As noted above and as discussed in part III.B.1 below, the ALJ rejected a portion of the Region's proposed rationale for a substantial portion of its proposed economic benefit penalty.

¹⁷ Holding that Alaska Garrison "has not shown any prohibition on its ability to choose between spending O & M funds on compliance or on other activities."

¹⁸ The ALJ has not yet determined what adjustment, if any, should be made to the penalty on account of such economic benefit, and accordingly we express no opinion on this subject.

clusions, Alaska Garrison has failed to show that, as a matter of law, fiscal law precludes application of the economic benefit penalty factor in this case.

However, we also conclude, for the reasons explained in part III.B, that the ALJ erred in concluding that Alaska Garrison could have begun the more substantial MILCON project involving the construction of an emissions control baghouse for the Facility (the “Baghouse”) in the earliest year that Alaska Garrison had a lump sum MILCON appropriation large enough to fund the project. Alaska Garrison appears to be correct in arguing that 10 U.S.C. §§ 114(a)(6), 2802 and 2805 prohibit Alaska Garrison from redirecting lump sum appropriations to a construction project that has not received specific authorization from Congress. However, at this time, the record is not sufficiently developed to determine whether such fiscal law constraints caused, at all relevant times, the continued failure to construct the Baghouse. The record is insufficient to determine whether Alaska Garrison could have, and should have, requested authorization and funding at an earlier time; or whether other methods of compliance were available. Accordingly, notwithstanding the ALJ’s analytical error, we uphold the ALJ’s ultimate determination that Alaska Garrison has failed to show that, as a matter of law, fiscal law precludes application of the economic benefit criterion in this case.

Section 118 of the CAA. In part III.C, we reject Alaska Garrison’s argument that application of the “economic benefit” and “size of business” criteria to Alaska Garrison violates, as a matter of law, the requirements of section 118 of the CAA, which provides that Federal facilities “shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity.” CAA § 118(a), 42 U.S.C. § 7418(a).

As discussed below, Alaska Garrison’s arguments regarding section 118, as stated in its Appellate Brief, focus solely on the penalty the *Region* proposed and not on the reasoning the *ALJ* employed. The ALJ rejected the portion of the *Region*’s proposed penalty that would calculate economic benefit based on an imputed rate of interest or cost of borrowing. Alaska Garrison’s arguments on appeal regarding section 118 focus on this portion of the *Region*’s proposed penalty and are, thus, moot in light of the ALJ’s decision. Moreover, nothing in the statute, legislative history, or Agency guidance suggests that section 118 prohibits the application of these two penalty factors to Federal facilities. To the contrary, section 118 subjects Federal facilities, such as Alaska Garrison, to “all” Federal requirements, “administrative authority,” and “process and sanctions” respecting air pollution in the same manner, and to the same extent as any non-Federal entity. CAA § 118(a), 42 U.S.C. § 7418(a). Where Congress intended to allow Federal facilities relief from this requirement, Congress specifically granted the President the authority for issuing limited scope exemptions. *See* CAA § 118(b), 42 U.S.C.

§ 7418(b) (allowing certain exemptions if the President determines that it is in the paramount interest of the United States).

Accordingly, this section does not preclude, as a matter of law, the application to Alaska Garrison of penalty factors that are routinely applied to non-Federal entities. Indeed, Alaska Garrison's request for a determination prior to the penalty-phase hearing that certain factors do not apply to it appears to be an effort to obtain treatment that is different in manner and extent from the typical application of CAA process and sanctions to non-governmental entities.

Agency Guidance. Finally, as explained below in part III.D, we conclude that existing statements of Agency policy or guidance do not preclude application of the challenged factors to Alaska Garrison as a matter of law. Under applicable regulations, the ALJ is not required to follow Agency penalty policies, and, therefore, those policies do not limit the ALJ's discretion to assess a penalty that is otherwise in accordance with the statutory factors. In addition, the ALJ properly concluded that Agency guidance has not limited "economic benefit" to only profit-making activities and that Agency guidance allows the ALJ to look to avoided costs as a measure of economic benefit. Moreover, as discussed below, the Board's own decisions have recognized at least three different types of economic benefit that may flow from a failure to invest in compliance, including avoided costs. The ALJ also properly concluded that existing Agency guidance does not preclude application of the size of business criterion to Federal facilities.

In remanding the case to the ALJ for further proceedings consistent with this opinion, we anticipate that many of the issues Alaska Garrison has raised about the challenges of considering economic benefit and size of the business in the context of a Federal entity will be addressed on remand. Indeed, the ALJ noted that significant unresolved factual issues require an evidentiary hearing in this case. Of these unresolved issues, we note that it remains to be determined whether the Region will be able to introduce sufficient evidence to approximate economic benefit. Moreover, the Region readily agreed at oral argument that the ALJ may properly consider the national security mission of Alaska Garrison in connection with the "size of the business" penalty factor and the related factor of "impact of the penalty on the business." In so doing, the Region conceded that the ALJ has the discretion to determine "that no penalty [is] appropriate, or certainly one lower than the \$16 million figure that has been thrown out." Tr. at 50. Further, issues also must be resolved regarding the application of the size criterion, including consideration of different attributes of size that are or are not relevant to a penalty adjustment in this case (e.g., what resources were available to avoid the violations).

Under the circumstances of this case, we conclude that the case must be remanded to the ALJ to undertake a penalty-phase evidentiary hearing that will fully develop the record of all relevant facts and circumstances. The statutory fac-

tors as a whole, including size of the business and economic benefit, provide sufficient latitude for the ALJ to assess an appropriate penalty taking into account all relevant circumstances, and Alaska Garrison has not justified why we should prematurely eliminate one or more of those factors from the analysis.

II. BACKGROUND

The U.S. Department of the Army owns and operates the Facility under the command of Alaska Garrison. In 1994 and 1997, the Region and the Alaska Department of Environmental Conservation conducted inspections at the Facility. Based on those inspections, the Region filed a nine count complaint against Alaska Garrison alleging violations of Alaska Garrison's Permit to operate the Facility, the Alaska SIP, and section 113(a) of the CAA, 42 U.S.C. § 7413(a). The Region alleged the following violations in the complaint:

Count 1: Alaska Garrison failed to install, maintain, and operate required continuous opacity monitors at the Fort Wainwright Central Heating and Power Plant from May 1, 1994, through August 8, 1998;

Count 2: Alaska Garrison failed to install, maintain, and operate continuous emission monitors from at least May 1994, through November 10, 1999;

Count 3: Alaska Garrison failed to install, maintain, and operate emissions control devices that provide optimum control of air contaminant emissions during all operating periods on its six coal-fired boilers from at least January 4, 1994 to present;

Count 4: Alaska Garrison failed to test the continuous opacity monitors for compliance with certain regulatory procedures and submit a timely Comparison Report;

Count 5: Alaska Garrison failed to test the continuous emission monitors for compliance with certain regulatory procedures and submit a timely Comparison Report;

Count 6: Alaska Garrison failed to monitor quarterly the flue gas opacity from each exhaust stack from at least January 6, 1994, through August 8, 1998;

Count 7: Alaska Garrison failed to monitor quarterly the carbon monoxide and oxygen concentrations from each exhaust stack from at least January 6, 1994, through November 10, 1999;

Count 8: Alaska Garrison has failed to control fugitive dust from material piles, roadways, coal and ash handling, and transport systems since at least June 23, 1997; and

Count 9: Alaska Garrison failed to comply with the 20% opacity standard on almost a daily basis at the Facility.

On February 3, 2000, Alaska Garrison filed an answer to the Region's complaint ("Answer"). As part of its answer, Alaska Garrison asserted, as its Sixth Affirmative Defense, that the Region "lacks the authority under the Act to recover any civil penalty purporting to recoup an alleged economic benefit or based upon a 'size of business' factor." Answer at 7, ¶ 71. On January 8, 2001, the Region filed a motion for accelerated decision seeking a determination that Alaska Garrison is liable for the violations alleged in the complaint. In that motion, the Region requested accelerated decision on Alaska Garrison's Sixth Affirmative Defense and argued, among other things, that this purported affirmative defense is not a bar to finding Alaska Garrison liable for the alleged violations. Alaska Garrison filed an opposition to the Region's motion and therein requested that the ALJ "rule as a matter of law that: * * * (ii) Complainant is not entitled to recover economic benefit penalties, nor that component of 'size of violator' penalties dependent upon Complainant's economic benefit calculations * * * ." Respondent's Opposition to Complainant's Motion for Accelerated Decision at 106 (Feb. 9, 2001).¹⁹ The Region filed a reply to Alaska Garrison's opposition, in which the Region argued, among other things, that Alaska Garrison's "arguments with respect to these factors go only to the appropriate amount of penalty to be assessed for these factors." Complainant's Reply to Respondent's Opposition to Complainant's Motion for Accelerated Decision at 9 (Mar. 6, 2001).²⁰ On July 3, 2001, the ALJ issued her decision finding Alaska Garrison liable for eight of the nine counts alleged in the complaint. *See* Order on Complainant's Motion for Accelerated Decision and other Motions at 1-2 (ALJ, July 3, 2001) (hereinafter, the "ALJ's Liability Determination").²¹ The ALJ, however, expressly reserved judg-

¹⁹ As noted in footnote 2 above, by requesting a legal ruling in its favor before the ALJ and now on appeal, Alaska Garrison in effect requests that we grant it accelerated decision. A formal motion for accelerated decision is not necessarily required; however, there must be adequate notice and an opportunity for genuine issues of material fact to be raised. *See* 10A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. 3d § 2720 (3d ed.). In the present case, the ALJ identified a number of factual issues that require an evidentiary hearing. *See, e.g., infra* part III.B.3.

²⁰ The Region stated further that "[t]he question before the Presiding Officer at this stage of the proceeding is whether *any portion* of the proposed penalty may be based on the costs avoided or delayed by Respondent in failing to comply with the CAA." Complainant's Reply to Respondent's Opposition to Complainant's Motion for Accelerated Decision at 10 (Mar. 6, 2001) (emphasis added).

²¹ The ALJ granted the Region's motion for accelerated decision as to liability on all counts, except count 8. ALJ's Liability Determination at 22.

ment on Alaska Garrison’s arguments regarding the “economic benefit” and “size of business” penalty factors.

Later, on April 30, 2002, the ALJ issued her Penalty Criteria Decision on the legal questions of whether the penalty factors of “economic benefit of non-compliance” and “size of business” must be considered and may be applied in determining the appropriate penalty to be imposed on a Federal facility, such as Alaska Garrison. The ALJ concluded that these penalty factors must be considered and may be applied. By this interlocutory appeal, Alaska Garrison seeks reversal of the ALJ’s conclusion that these penalty factors may be applied in this case.

III. DISCUSSION

In her Penalty Criteria Decision, the ALJ concluded that “‘economic benefit of noncompliance’ applies in determining the appropriate penalty to be imposed on Respondent, a Federal facility, for its violations of the Clean Air Act, and that adjustment of a penalty on account of that factor is not precluded by concepts of economic benefit, fiscal law [or] CAA Section 118 * * * .” Penalty Criteria Decision at 35.²² The ALJ reached a similar conclusion regarding “size of business.” *Id.* at 44. In its interlocutory appeal, Alaska Garrison states that it has “vigorously disputed the legal applicability of the disputed penalty criteria to Federal facilities,” Appellant’s Appellate Brief at 4, and Alaska Garrison requests that we reverse the ALJ’s conclusion by ruling that size of the business and economic benefit do not apply as a matter of law to “Federal facilities such as Appellant.” *Id.* at 56-58.

Alaska Garrison argues that application of these penalty factors in this case is precluded as a matter of law by: (1) the statutory text and legislative history of CAA section 113(e)(1); (2) fiscal law constraints governing Alaska Garrison’s appropriations process and limitations on its authority to engage in construction activity; (3) CAA section 118; and (4) EPA’s guidance and policy statements. We will discuss each of these four arguments below.

A. Statutory Text and Legislative History of Section 113(e)(1)

Section 113(e)(1) of the CAA requires that “[i]n determining the amount of any civil penalty to be assessed under this section * * * the Administrator * * * shall take into consideration * * * the size of the business * * * [and] the eco-

²² The ALJ also considered and rejected Alaska Garrison’s arguments regarding “the balance of power between the legislative and executive branches [and] due process.” Penalty Criteria Decision at 35. Alaska Garrison has not raised these arguments in this interlocutory appeal.

conomic benefit of noncompliance * * * .” CAA § 113(e)(1), 42 U.S.C. § 7413(e)(1) (emphasis added). The ALJ concluded that the plain language of the statute is “clear” that these penalty factors must be “taken into consideration” in assessing civil administrative penalties against respondents in CAA enforcement actions, including Federal facilities. We find this conclusion unassailable.

When interpreting the language of a statute, the starting point is always the language of the statute itself. “If the statute is clear and unambiguous, that is the end of the matter, for the court * * * must give effect to the unambiguously expressed intent of Congress.” *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990). In addition, “[t]he plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.” *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (internal quotation marks and brackets omitted).

A statute is ambiguous if it is “capable of being understood in two or more possible senses or ways.” *Chickasaw Nation v. United States*, 534 U.S. 84, 90 (2001) (internal quotations omitted). As the Supreme Court has emphasized, “[t]he meaning - or ambiguity - of certain words or phrases may only become evident when placed in context.” *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Thus, “[i]t is a ‘fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.’” *Id.* (quoting *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809 (1989)). “In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.” *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

In the present case, the plain meaning of paragraph (e)(1) of CAA section 113, read collectively with paragraph (d)(1) of section 113 and with CAA section 302(e), expressly authorizes EPA to issue administrative penalty assessments against Federal agencies as “persons” under the statute and mandates that EPA consider the identified penalty factors in determining the amount of any such penalty. The complaint in this case seeks to collect civil administrative penalties from Alaska Garrison under the authority granted the Agency by section 113(d)(1) of the CAA. That section authorizes the Agency to issue against any “person” an administrative order assessing a civil administrative penalty for violation of, among other things, the applicable implementation plan or permit. CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1).²³ The term “person” is defined by section 302(e) as including “any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.” CAA § 302(e), 42 U.S.C.

²³ The Region’s complaint in this case alleges violations of both the Alaska state implementation plan and Alaska Garrison’s permit to operate the Facility.

§ 7602(e) (emphasis added). Finally, section 113(e)(1), by its terms, expressly requires the EPA to consider the enumerated penalty factors “[i]n determining the amount of *any* penalty to be assessed under” section 113. CAA § 113(e)(1), 42 U.S.C. § 7413(e)(1) (emphasis added).

The statute, thus, specifically includes Federal entities within the scope of section 113 and provides no blanket exemption for Federal facilities from the provisions of section 113(e). The statute does, however, provide a specific and narrow exemption preventing the application of certain *criminal* penalties to Federal facilities and other governmental entities. *See* CAA § 113(c)(5)(A), (E), 42 U.S.C. § 7413(c)(5)(A), (E).²⁴ This demonstrates that where Congress intended to exempt Federal facilities from section 113 enforcement, it stated this intent in clear language.²⁵

We find the meaning of this statutory language unambiguous in its requirement that the statutory penalty factors must be considered in assessing any civil administrative penalty against any person, including Federal agencies. *Darby v. Cisneros*, 509 U.S. 137, 147 (1993) (“Recourse to the legislative history of § 10(c) [of the Administrative Procedure Act] is unnecessary in light of the plain meaning of the statutory text.”). Nevertheless, if there were any ambiguity, that ambiguity would be dispelled by the legislative history of the CAA, which is fully consistent with and supports our conclusion.²⁶ Most significantly, when Congress amended section 302(e) in 1977, and again when it added the administrative penalty authority to the Agency’s existing section 113 enforcement authorities in 1990,²⁷ Con-

²⁴ This exemption from certain *criminal* penalties set forth in section 113(c)(5)(A), (E) was added to the CAA in 1990 at the same time that Congress moved and expanded the list of *civil* penalty factors set forth in section 113(e)(1). This legislative history is described in greater detail below.

²⁵ In addition, as discussed below in part III.C, where Congress intended to exempt Federal facilities from the obligation to comply with CAA requirements, Congress used clear statutory language to grant the President authority for narrow scope, short term exemptions. *See* CAA § 118(b), 42 U.S.C. § 7418.

²⁶ Where the meaning of the statutory text is clear, the Supreme Court nevertheless has on occasion noted legislative history that echos or reinforces the text’s plain meaning, even though resort to such history is unnecessary. *See, e.g., Dunn v. Commodity Futures Trading Comm.*, 519 U.S. 465, 474 (1997); *Darby v. Cisneros*, 509 U.S. 137, 147 (1993); *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (noting sparse legislative history). The Circuit Courts of Appeals, likewise, frequently note legislative history consistent with the plain meaning of statutory text. *See, e.g., Broselow v. Fisher*, 319 F.3d 605, 611 (3rd Cir. 2003); *Liesegang v. Sec’y of Veteran’s Affairs*, 312 F.3d 1368, 1374 (Fed. Cir. 2002); *Microsoft Corp. v. Comm’r of Internal Revenue*, 311 F.3d 1178, 1186 (9th Cir. 2002); *Demette v. Falcon Drilling Co.*, 280 F.3d 492, 502 (5th Cir. 2002); *United States v. Weaver*, 275 F.3d 1320, 1331 (11th Cir. 2001); *Rosmer v. Pfizer, Inc.*, 263 F.3d 110, 121 (4th Cir. 2001); *United States v. Reynoso*, 239 F.3d 143, 148 (2d Cir. 2000).

²⁷ Prior to the 1990 amendments, EPA did not have authority to enforce the CAA by administratively assessing penalties. *See* Chafee-Baucus Statement of Senate Managers, S. 1630, The Clean
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gress made clear its “unambiguous” intention to subject Federal violators to the panoply of section 113 enforcement authorities. We review the legislative history in some detail in the following paragraphs, as it is relevant to some of the issues in this case.

The Agency’s section 113 enforcement authority originated with the CAA Amendments of 1970, Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1686-87. As with the current version of section 113, the 1970 version authorized Federal enforcement against “persons.” However, at that time the definition of “person” did not include agencies of the Federal government. In 1977, Congress amended the definition of “person” to include “any agency, department, or instrumentality of the United States.” CAA Amendments of 1977, Pub. L. No. 95-95, § 301(b), 91 Stat. 685, 770. The House and Senate Conference Committee adopted this amendment language from the House bill. *See* H.R. Conf. Rep. No. 95-564, at 137, 172 (1977); H.R. 6161, 95th Cong. § 113(d) (1st Sess. 1977). The committee report accompanying the House bill expressly stated that the specific purpose of the additional language was to express the “unambiguous intent” that section 113 enforcement is authorized against Federal agencies:

Finally, in defining the term “person” for the purpose of section 113 of the act to include Federal agencies, departments, instrumentalities, officers, agents, or employees, the committee is expressing its *unambiguous intent* that the *enforcement authorities of section 113* may be used to insure compliance and/or to impose sanctions against any Federal violator of the act.

H.R. Rep. No. 95-294, at 200 (1977) (“House Report”) (emphasis added). Thus, Congress, by adopting the House bill’s language, indicated in 1977 its unambiguous intent to authorize EPA to use its section 113 enforcement authorities against Federal agencies.²⁸

The House Report explains further that, by the 1977 amendments, Congress expressed its “intent to overturn” the U.S. Supreme Court’s decision in *Hancock v. Train*, 426 U.S. 167 (1976), in which the Court held that the 1970 amendments to

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Air Act Amendments of 1990, *reprinted in* A Legislative History of the Clean Air Act Amendments of 1990, Vol. 1 at 937 (1993) (noting that the House-Senate conference agreement includes “the new authority for EPA to issue administrative penalty orders in response to violations.”).

²⁸ The Supreme Court has noted that “[i]n surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill, which ‘represent[t] the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.’” *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)).

the CAA had not evidenced a sufficiently manifest intent that Federal facilities be subject to state permitting requirements. House Report at 199.²⁹ In the context of the present case, it is worth noting that the House Report sharply criticized Federal facilities' failure to comply with the obligations that were originally imposed by the 1970 CAA amendments. House Report at 198-99 ("Instead of playing the leadership role envisioned by Public Law 91-604, many Federal agencies and facilities have been laggard or have obstinately refused to obtain required permits, to submit required reports, to conduct required monitoring, permit on-site inspections, and even to meet compliance schedules and emission limits."). Thus, the amendments Congress made in 1977 were intended to finally foreclose arguments made by Federal entities that the section 113 enforcement authorities were not intended to apply to Federal entities. *Id.* at 200.

Subsequently, in 1990, Congress amended the Agency's enforcement authority under section 113 to include the authority to assess civil administrative penalties of up to \$25,000 per day for violations of, among other things, state implementation plans and permits. CAA Amendments of 1990, Pub. L. No. 101-549, § 701, 104 Stat. 2399, 2677-79 (adding the administrative penalty authority under section 113(d)). At the same time, Congress amended section 113 to expand the list of factors the courts and the Agency must consider in determining the amount of civil penalties to be assessed under section 113 and moved this list of factors to section 113(e). *Id.* at 2679 (adding section 113(e)).³⁰

²⁹ The House Report explains that, by the enactment of section 118 of the CAA in 1970, Congress "declared the clear and unequivocal policy of the United States that facilities, real and personal property, owned by the U.S. Government were to comply with all substantive and procedural requirements of Federal, State, interstate or local law intended to control air pollution." House Report at 197. As noted in the text, the Supreme Court, however, in *Hancock v. Train* concluded that the 1970 version of section 118 was not sufficiently clear that Federal facilities must comply with state procedures. The Supreme Court dismissed, as moot, the state's request in *Hancock* that EPA be required to use its section 113 enforcement authority to coerce Federal facility compliance with state procedures.

³⁰ Prior to 1990, the Agency was authorized to bring judicial enforcement actions under section 113(b), which required the courts to consider the penalty assessment criteria that were set forth in section 113(b)(5). At that time, section 113(b)(5) provided in relevant part as follows: "In determining the amount of any civil penalty to be assessed under this section, the courts shall take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." Congress deleted the list of factors previously set forth in section 113(b)(5) and expanded this list when it created the new section 113(e) in 1990 and directed that "the Administrator or the court, as appropriate, shall take into consideration" the enumerated factors. CAA § 113(e), 42 U.S.C. § 7413(e) (emphasis added). Section 113(e)(1) presently provides in relevant part as follows:

In determining the amount of any penalty to be assessed under this section or section 7604(a) of this title, the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and
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Nothing in the text or legislative history of the 1990 Amendments expresses any change in Congress' unambiguous intention, as stated in the 1977 Amendments, that EPA's section 113 enforcement authority applies to Federal entities.³¹ Indeed, the Justice Department's Office of Legal Counsel ("OLC") reached this conclusion when, in 1997, the OLC rejected an objection by the Department of Defense to EPA's proposed application of its civil administrative penalty authority under section 113(d) against Federal entities. *See* Office of Legal Counsel, U.S. Dep't of Justice, Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act (July 16, 1997) (concluding that EPA has authority under section 113(d) to administratively assess penalties against Federal facilities).

The logic of this OLC opinion addressing the authority to administratively assess penalties against Federal facilities under paragraph (d)(1) of section 113 applies with equal force to the requirement to consider the penalty factors set forth in paragraph (e)(1) of section 113 when determining the amount of penalties assessed under paragraph (d)(1).³² By its terms, paragraph (e)(1) applies to "any" penalties assessed under section 113, which necessarily includes the civil administrative penalty authority under paragraph (d)(1). Because EPA may use its civil administrative penalty authority under paragraph (d)(1) against Federal facilities as "persons," the natural and plain meaning of "any" penalty in paragraph (e)(1) necessarily means that paragraph (e)(1) also applies to Federal facilities. In this regard, we note that the list of factors in paragraph (e)(1) was rewritten and expanded in 1990 at the same time that Congress added the civil administrative penalty authority under paragraph (d)(1). In addition, at the same time, Congress also

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good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

Id.

³¹ The one exception to the application of section 113 to Federal entities is section 113(c)(5), which as previously noted exempts governmental entities from certain criminal penalties. *See* 42 U.S.C. § 7413(c)(5).

³² Alaska Garrison argues that, as part of the dispute resolution processes before the OLC, EPA failed to list the economic benefit factor as one that is "clearly relevant" to Federal facilities and that this fact should be viewed as "tantamount to an acknowledgment that economic benefit is indeed irrelevant in calculating appropriate penalties against Federal facilities." Appellant's Appellate Brief at 22. We disagree. As a matter of logic, EPA's failure to list economic benefit as among the issues "clearly relevant" to the question under consideration by the OLC cannot be interpreted as an admission by EPA that economic benefit has no relevance to the question in this case or may not be taken into account in any fashion. Moreover, by holding that the section 113 enforcement authorities may be used against Federal facilities, the OLC opinion did not endorse the Department of Defense's argument that parts of section 113 are not relevant to Federal facilities.

established the narrow exemption preventing the application of certain *criminal* penalties to Federal facilities and other governmental entities under section 113(c)(5)(A), (E), thereby demonstrating that Congress knew how to provide an exemption to section 113 where it wanted one. Thus, in 1990, Congress could have, but did not, limit the consideration and application of the section 113(e)(1) civil penalty factors in the Federal facilities context.

Thus, we conclude that the plain meaning of the statutory text, and the clear, “unambiguous” intention of Congress, is that the ALJ must “take into consideration” “size of the business” and “economic benefit” penalty factors when she determines the amount of penalty to assess for Alaska Garrison’s violations of the Alaska state implementation plan and Alaska Garrison’s state-issued permit.

Alaska Garrison does not dispute the conclusion that the ALJ must “consider” all of the statutory factors. Tr. at 8. However, at oral argument, Alaska Garrison’s counsel sought to distinguish between “consideration” of all penalty factors and Alaska Garrison’s argument that, as a matter of law, two of those factors do not “apply” to Alaska Garrison:

In terms of the ‘shall consider’ language, our position is that the statute requires consideration of any or all of those factors, if applicable. And our argument is, as a matter of law, economic benefit and size of business do not apply [to Alaska Garrison].

Tr. at 11. When presented at this early stage of the penalty analysis, this distinction between “consideration” and “application” is elusive. Alaska Garrison’s attempted finesse of the words “does not apply as a matter of law” would have the same practical effect as a ruling that the Agency cannot consider these factors in Federal facility cases. Such a conclusion would contravene the unqualified and unambiguous intent underlying the 1977 amendments to the CAA that “the enforcement authorities of section 113 may be used to ensure compliance and/or impose sanctions against any Federal violator of the act,” House Report at 200, and the explicit directive in section 113(e)(1) that the civil penalty enforcement sanctions imposed under section 113 by the Agency and the courts reflect consideration of the factors identified in section 113(e)(1).

Although we find Alaska Garrison’s proffered distinction between “consideration” and “not applicable as a matter of law” is highly suspect at this stage of this proceeding, we nevertheless consider in the following parts of this decision Alaska Garrison’s specific arguments as to why the economic benefit and size of the business penalty factors may not be applied to a Federal facility such as Alaska Garrison. While we ultimately find Alaska Garrison’s arguments unavailing at this stage of this proceeding, we also note throughout the following discussion that many of the arguments Alaska Garrison raises in this appeal may be

appropriate for consideration when the ALJ applies the penalty factors after hearing the evidence in this case.

Alaska Garrison first argues that under its view of the plain meaning of the statutory text, the economic benefit and size of the business criteria do not apply to Federal facilities as a matter of law. It contends that Congress had a more narrow view of the statutory words “economic benefit of noncompliance” than the ALJ used. Appellant’s Appellate Brief at 8-10. According to Alaska Garrison, Congress intended economic benefit penalties “to level the playing field among competing businesses by removing the financial gain or competitive advantage that a business could gain by delaying the costs of environmental compliance.” *Id.* at 12. To support this contention, Alaska Garrison refers to a statement that the Senate Managers made after the joint House-Senate conference committee approved the 1990 CAA amendments. In that statement, the Senate Managers explained, among other things, that “[v]iolators should not be able to obtain an economic benefit vis-à-vis their competitors as a result of their noncompliance with environmental laws.” *Id.* (quoting Chafee-Baucus Statement of Senate Managers, S. 1630, The CAA Amendments of 1990, reprinted in *A Legislative History of the Clean Air Act Amendments of 1990*, Vol. 1 at 942 (1993) (emphasis added by Alaska Garrison)).

Alaska Garrison also argues that Congress’ use of “business” in the statutory text with respect to the size criterion, and its use of “violation” for other penalty criteria, signifies that Congress “authorized EPA to adjust a civil penalty based on ‘size’ only in cases where a ‘business’ is the violator.” *Id.* at 48. For these reasons, Alaska Garrison argues, Congress intended that these two penalty factors do not “apply” to a Federal entity such as Alaska Garrison, which according to Alaska Garrison does not have traditional business competitors.

Alaska Garrison’s argument, however, must fail. First, Alaska Garrison has not shown any error in the ALJ’s conclusion that neither the statutory text nor the legislative history support Alaska Garrison’s argument that Congress intended the “economic benefit” criterion not to apply to Federal facilities as a matter of law. Alaska Garrison correctly notes that the legislative history of the 1990 amendments shows that the Senate Managers emphasized the importance of the “economic benefit” criterion in competitive contexts. However, this emphasis on one context does not preclude the application of that criterion in other contexts. The ALJ held that “there is no indication in the CAA that ‘economic benefit of non-compliance’ is limited to private business or other entities which are in a competitive market, and that the factor is wholly inapplicable to Federal entities.” Penalty Criteria Decision at 18. In this regard, we observe that, while arguing that Congress intended a more narrow meaning, Alaska Garrison nonetheless admitted at oral argument that there is an economic dimension to its decision making. *See Tr.*

at 39-40³³ (“Certainly, this Respondent, the Department of the Army, [and] all federal agencies factor cost considerations and economic factors into their decision-making associated with discharging their mission functions.”). The ALJ further concluded that “[t]he brief statement in the legislative history of section 113(e) in the 1990 CAA amendments * * * does not suggest that Congress intended to limit the application of economic benefit to those entities which have competitors.” Penalty Criteria Decision at 18 n.11.³⁴

Alaska Garrison has not articulated in this appeal any basis within the statutory text or legislative history on which we can find that the ALJ erred in these conclusions. Congress had the opportunity in the amendments of 1990 to narrow the Agency’s broad enforcement authority against Federal entities that it so clearly enunciated in 1977.³⁵ It did not do so, except with regard to a narrow exclusion from certain criminal penalties set forth in section 113(c)(5)(A),(E). To the contrary, the 1990 amendments evidence an intent to strengthen the Agency’s enforcement authority.³⁶ As noted above, Alaska Garrison’s argument runs counter to the “unambiguous intent” of the 1977 amendments that the Agency’s section 113 enforcement authority applies to Federal entities.³⁷

Second, the same legislative history Alaska Garrison cites as allegedly demonstrating Congress’ distinction between “business” entities and other “violators”

³³ See also Tr. at 22-23, 28-30.

³⁴ Moreover, the evidence may well show that Alaska Garrison has “competitors.” For example, the evidence may show that the Facility’s production of heat and electricity is in competition with comparable energy services that could have been provided by the private sector. See Penalty Criteria Decision at 27.

³⁵ Alaska Garrison argues that the Region “cannot point to any applicable policy or expression of Congressional intent that supports its attempted application of the size of business criterion to Appellant and other Federal facilities.” Appellant’s Appellate Brief at 47. Alaska Garrison’s mistake in this argument is that Congress stated its “unambiguous intent” in 1977 that the section 113 enforcement authority may be used without limitation against Federal facilities, and the 1990 amendments did not change that intent.

³⁶ See Chafee-Baucus Statement of Senate Managers, S. 1630, The CAA Amendments of 1990, reprinted in *A Legislative History of the Clean Air Act Amendments of 1990*, Vol. 1 at 936 (1993) (discussing the increased scope of authority and stating that “[i]t is particularly noteworthy that these provisions change current law in a fashion that will prove tougher on polluters than does the current arrangement.”).

³⁷ Moreover, the Agency has recovered economic benefit penalties from government and non-profit entities such as states, municipalities, and hospitals, consistent with the notion that economic benefit are applicable to such entities. See, e.g., *United States v. Beaumont*, 786 F. Supp. 634 (E.D. Tex. 1992) (applying economic benefit under the Clean Water Act); *In re City of Salisbury*, Docket No. CWA-III-219 (ALJ, Feb. 8, 2000) (applying economic benefit under the Clean Water Act); *In re Kalamazoo Reg’l Psychiatric Hosp., Mich. Dep’t of Mental Health*, Docket No. CAA-020-92 (ALJ, May 25, 1995).

that do not have traditional economic competitors, in fact, shows that Congress did not draw a distinction between the terms “business” and “violator.” The full text of the Senate Managers’ comments on the penalty factors set forth in section 113(e)(1) is as follows:

This section requires the [EPA] Administrator and the courts to consider a number of factors when arriving at an appropriate penalty, including, in particular, the economic benefit gained as a result of the violation. Violators should not be able to obtain an economic benefit vis-à-vis their competitors as a result of their noncompliance with environmental laws. The determination of economic benefit or other factors will not require an elaborate or burdensome evidentiary showing. Reasonable approximations of economic benefit will suffice. Other objective factors customarily taken into account in assessing penalties, such as the history of violations, good faith efforts to comply, and economic impact on the violator, also may be taken into account in arriving at an appropriate penalty.

Chafee-Baucus Statement of Senate Managers, S. 1630, The CAA Amendments of 1990, *reprinted in* A Legislative History of the Clean Air Act Amendments of 1990, Vol. 1 at 942 (1993). Significantly, the Senate Managers used the phrase “economic impact on the *violator*” in the last sentence of this explanation to describe a statutory text that uses the phrase “economic impact of the penalty on the *business*.” *Compare id. with* CAA § 113(e)(1), 42 U.S.C. § 7413(e)(1). This legislative history shows that Congress used the words “violator” and “business” interchangeably, thereby demonstrating that Congress did not draw the sharp distinction that Alaska Garrison now postulates.

The absence of any clear distinction between “violator” and “business” in the legislative history is consistent with, and supports, the plain meaning of “business” as evidenced by the dictionary definition upon which the ALJ relies. In particular, Judge Biro noted that the dictionary definition of “business” includes “role, function * * * an immediate task or objective; mission * * * a particular field of endeavor.” Penalty Criteria Decision at 42-43 (alteration in original) (quoting Webster’s Ninth New Collegiate Dictionary at 190 (1990)). This definition applies to Alaska Garrison; indeed, Alaska Garrison readily admits that it has a “mission,” and it cannot deny that it has a role, function, and field of endeavor. *See* Appellant’s Appellate Brief at 6, 20, 30 (discussing Alaska Garrison’s

“mission”).³⁸

Rather than argue that it does not fall within this dictionary definition of “business,” Alaska Garrison instead seeks to apply an artificially narrowed definition focused solely on for-profit enterprises. Such a narrow definition is inconsistent with Congress’ own lack of distinction in its use of “business” and “violator” as shown in the legislative history discussed above. Further, where Congress intended governmental entities to be exempt from certain types of penalties, it stated so with clear language in the text of the statute. *See* CAA § 113(c)(5)(A), (E) (subjecting “organizations” to certain criminal penalties and defining organization to mean “a legal entity, other than a government”). Accordingly, we reject Alaska Garrison’s narrow focus on for-profit entities.

The ALJ also based her decision that “size of the business” applies to Alaska Garrison on her conclusion that Congress used that particular phrase in this statute to remain consistent with the language of a number of other environmental statutes. The ALJ stated that “[t]he very fact that this phrase is used in numerous other statutes, and has an established line of case law interpreting it, suggests a rationale why Congress would choose *not* to alter it when it amended Section 113 in 1990 * * *.” Penalty Criteria Decision at 39.³⁹ Alaska Garrison has not explained any error in this additional reason for concluding that Congress intended the “size of business” penalty factor to apply in cases such as this one and, accordingly, we find these reasons persuasive as well.

For the foregoing reasons, we conclude that the plain meaning and legislative history of section 113, read together with section 302(e), compels the conclusion that all of the penalty factors set forth in section 113(e)(1) must be considered, and may be applied, in assessing administrative penalties against a Federal facility, such as Alaska Garrison. We therefore reject Alaska Garrison’s effort to carve out for itself, and similarly situated Federal facilities, a blanket exemption

³⁸ Moreover, the ALJ noted that the Department of Defense does not always seek to draw such sharp distinctions between itself and private, for-profit companies — it characterizes itself on its Internet web site as “America’s oldest, largest, busiest and most successful company.” Penalty Criteria Decision at 36.

³⁹ The ALJ also observed that failure to consider the size of business of Federal facilities would result in all such facilities being inappropriately treated either the same as the largest private businesses or the same as the smallest private businesses, depending upon whether the penalty calculation adjusts downward from the maximum penalty or upward from a minimal penalty. *Id.* at 43. In part III.D.1 below, we note that the federal courts have recognized that the penalty analysis under the statutory factors may begin with a maximum penalty and mitigate downwards or, alternatively, begin with a gravity-based penalty and adjust upwards. Thus, without an opportunity for adjustment on account of size, the initial starting point in the analysis dictates whether a Federal facility would be treated the same as a small or large private entity. It makes little sense that all Federal facilities, irrespective of size, would be treated as either the smallest or largest private violator.

from the applicability of these penalty factors based on an unduly restrictive reading of the statutory text of section 113(e)(1).

B. *Fiscal Law Restrictions on Alaska Garrison's Spending*

Alaska Garrison argues that the ALJ erred by concluding that fiscal law does not preclude application of the “economic benefit” penalty factor in this case.⁴⁰ Alaska Garrison contends that fiscal law prevented it from spending money to install the equipment that would have enabled it to comply with its Permit and the Alaska SIP. Specifically, Alaska Garrison notes that “Federal agencies are subject to the panoply of Federal laws that prescribe the process agencies must follow to request, obtain, and expend Federal funds.” Appellant’s Appellate Brief at 32. Alaska Garrison argues that 10 U.S.C. §§ 114(a)(6), 2802 and 2805 prohibit it from undertaking a major military construction, or MILCON, project costing more than \$1.5 million without both authorization and sufficient appropriations from Congress. *Id.* at 42. Alaska Garrison argues that the constraints imposed by fiscal law “conflict” with application of the economic benefit penalty factor. *Id.* at 30.

It is undisputed that the violations the ALJ found could have been avoided had Alaska Garrison timely spent funds to install certain emissions control and monitoring equipment at the Facility. Counts one and two state violations for the failure to install, maintain, and operate the COMs and CEMs; count three states a violation for the failure to install, maintain, and operate emissions control devices, such as the Baghouse that Alaska Garrison is now planning to construct; counts four and five state violations for failure to test the COMs and CEMs; counts six and seven state violations for failure to monitor quarterly the flue gas opacity and concentrations of carbon monoxide and oxygen, for which the COMs and CEMs were required; and count nine states daily violations of the opacity standard, which could have been remedied by the Baghouse.

The ALJ concluded that Alaska Garrison failed to show that fiscal law prevented it from achieving compliance earlier by spending appropriated funds to

⁴⁰ Alaska Garrison does not directly argue that fiscal law precludes application of the “size of business” criterion. However, Alaska Garrison does contend that the size of business criterion is premised on an assumption that does not apply to Alaska Garrison. In particular, Alaska Garrison argues that the size criterion “assumes that corporations with large financial assets are in a better position to draw upon those assets to pay fines” and to comply earlier and more effectively. Appellant’s Appellate Brief at 49. Alaska Garrison argues that this assumption does not apply to it since it is barred by law from selling its assets to raise money to pay fines or to fund compliance. Although Alaska Garrison is correct that it cannot sell assets to raise funds for either compliance or to pay penalties, nevertheless this does not preclude application of the size criterion. As discussed in part III.D below, the size criterion take into account other differences in resources available for compliance, such as technical expertise. These other considerations may be applicable to Alaska Garrison.

install the COMs, CEMs, and Baghouse. The ALJ gave three reasons for her conclusion. First, the ALJ held that, as a matter of law, Alaska Garrison had authority to spend appropriated funds to install the COMs, CEMs, and Baghouse and that the Region had identified evidence showing that Alaska Garrison obtained an economic benefit from delay in installing that equipment. Penalty Criteria Decision at 23-27. In particular, with respect to the Baghouse, the ALJ held that Alaska Garrison had authority to spend on the construction of the Baghouse any MILCON funds for which there was no statement in the text of the appropriations legislation limiting the use of those funds to a particular project. *Id.* at 26. Second, she concluded that an evidentiary hearing is required to determine whether Alaska Garrison could have achieved compliance earlier by purchasing electricity and heat from a private vendor, rather than operating the Facility in violation of its Permit and the Alaska SIP. *Id.* at 27. Third, the ALJ concluded that there is a disputed issue of fact as to whether Alaska Garrison could have achieved compliance sooner by initiating earlier the process for funding the Baghouse. *Id.* at 26 n. 17.

Alaska Garrison presents two arguments on appeal in support of its contention that the ALJ erred. First, Alaska Garrison argues that fiscal law caused Alaska Garrison's delay in achieving compliance. Specifically, Alaska Garrison argues that "the issue concerns Appellee's legal authority to demand penalty payments during a period of compliance delay rendered necessary by Federal law — i.e., for the time period commencing when Appellant initiated the Federally-mandated project funding process, and continuing through the period during which Appellant diligently (and successfully) pursued that funding process and conducted the Federally-mandated construction contracting process." Appellant's Appellate Brief at 32-33. In essence, by arguing that the "period of compliance delay" was "rendered necessary" by fiscal law, Alaska Garrison contends that fiscal law caused its delay in compliance and that, since it allegedly could not avoid this delay, the ALJ should not consider any economic benefit that accrued to it during that period. Second, Alaska Garrison argues that the ALJ erred in concluding that Alaska Garrison had legal authority to spend on the construction of the Baghouse any MILCON funds for which there was no statement in the text of the appropriations legislation limiting the use of the MILCON funds to a particular project. *Id.* at 41-46. In essence, this second issue raised by Alaska Garrison on appeal is a subpart of Alaska Garrison's more general argument that compliance delay was rendered necessary, or caused, by fiscal law.

Before considering Alaska Garrison's arguments on appeal, it is important to note that the ALJ held that, although fiscal law does not bar the application of the economic benefit penalty factor in this case, fiscal law nevertheless must be taken into account and may influence the nature and proof of economic benefit in this case. This aspect of the ALJ's analysis is explained more fully in part III.B.1 of this decision below. Then, in parts III.B.2 and III.B.3, we explain why Alaska Garrison's arguments on appeal do not require reversal of the ALJ's conclusion that fiscal law does not bar the application of the economic benefit penalty factor

in this case, although we explain that the ALJ erred in one respect. In part III.B.2, we examine the fiscal law restrictions on Alaska Garrison's use of appropriated funds for construction of the Baghouse, as well as construction of the COMs and CEMs. As explained below, we conclude that fiscal law did not prevent Alaska Garrison from earlier construction of the COMs and CEMs (and therefore fiscal law does not bar proof of economic benefit from delayed construction of the COMs and CEMs). However, we also conclude in part III.B.2 that the ALJ erred in her analysis regarding whether fiscal law constrained Alaska Garrison's use of appropriated funds for earlier construction of the Baghouse. In part III.B.3, we explain that our reversal of the ALJ's conclusions on this issue does not lead to the conclusion, at this stage of this case, that the ALJ may not adjust a penalty upward on account of economic benefit from delayed construction of the Baghouse. Specifically, we explain that the ALJ identified two other potential avenues by which economic benefit might logically be taken into consideration notwithstanding the presence of limits on the use of appropriated funds.

*1. ALJ's Conclusion that Fiscal Law Must Be Taken into Account
When Applying the Economic Benefit Criteria in this Case*

Although the ALJ rejected Alaska Garrison's argument that fiscal law prevents outright the application of the economic benefit penalty factor, she nevertheless also held that the fiscal restrictions imposed on Alaska Garrison are not to be ignored. To the contrary, she concluded that she must take those restrictions into account in applying the statutory penalty factors. In particular, the ALJ stated that "Respondent's arguments that it is unable to save or invest funds, that it cannot realize any interest or financial return on its appropriated funds, and that for purposes of penalty assessment, any economic benefit must accrue to the named respondent rather than generally to the Federal Government, United States Treasury, or Congress, are well taken." Penalty Criteria Decision at 17. By this ruling, the ALJ rejected the underpinnings for a significant portion of the Region's proposed penalty.

The penalty the Region initially proposed included an upward adjustment for "economic benefit" resulting from Alaska Garrison's violations of its Permit and the Alaska SIP. That proposed upward adjustment included an amount that allegedly would represent either an interest rate earned, or a cost of borrowing avoided, during the period of Alaska Garrison's delay in expending funds to install the COMs, CEMs and Baghouse.

This approach to calculating economic benefit penalties is consistent with the Agency's guidance for private companies and other not-for-profit entities. See U.S. EPA, A Framework for Statute Specific Approaches to Penalty Assessment: Implementing EPA's Policy on Civil Penalties (General Enforcement Policy #GM-22) at 7-9 (Feb. 16, 1984); U.S. EPA, BEN User's Manual at I-3 (Jan. 1985); U.S. EPA, Clean Air Act Stationary Source Civil Penalty Policy at 4-5

(Oct. 25, 1991). As the ALJ noted, Agency guidance recommends that the economic benefit component of the penalty include a “standard discount rate which reflects the violator’s ‘time value of money.’” Penalty Criteria Decision at 21 (citing BEN User’s Manual at I-3, 3-14 (Sept. 1999); BEN User’s Manual at A-3 (Rev. Dec. 1993, Aug. 1997)). The ALJ observed that a memorandum issued in 1999 by Steven Herman, then Assistant Administrator for EPA’s Office of Enforcement and Compliance Assurance (the “1999 Herman Memo”),⁴¹ recommends that for Federal entities, the penalty analysis should use the Federal Treasury note interest rate as the Federal government’s cost of capital. *Id.* The Region’s proposed penalty relies on the 1999 Herman Memo’s guidance that economic benefit for Federal facilities should include alleged benefit from avoided borrowing costs.

The ALJ’s ruling, however, effectively rejects the portion of the Region’s proposed penalty intended to recover the “cost of capital” that would be imputed to Alaska Garrison under the Region’s analysis. *Id.* at 23 (concluding that Alaska Garrison “could not have borrowed funds and therefore could not have avoided any costs of borrowing additional funds by delaying installation of the equipment.”). The Region has not appealed this portion of the ALJ’s decision — indeed, at oral argument, the Region stated it is not challenging this determination. Tr. at 54.

In light of the above, it is clear that the ALJ’s application of the statutory penalty factors in this case will take into account restrictions fiscal law imposed upon Alaska Garrison that may have affected the nature of any economic benefit Alaska Garrison obtained as a result of its noncompliance. As we have noted, a substantial portion of the Region’s proposed \$16 million penalty appears to have been based on an imputed cost of borrowing. However, it is also significant that the ALJ’s ruling does not preclude the submission of other evidence both to prove that Alaska Garrison obtained an economic benefit from its delayed compliance and to reasonably approximate the amount of any such benefit.

In essence, the ALJ distinguished analytically between, on the one hand, precluding application of “economic benefit” to a Federal facility as a matter of law, and, on the other hand, determining the relevance of certain evidence to whether the named respondent obtained a particular alleged economic benefit. In other words, the ALJ concluded that evidence concerning the *Federal government’s* cost of borrowing is not relevant to whether *Alaska Garrison* obtained an economic benefit from the delayed compliance, but the ALJ rejected Alaska Garrison’s argument that fiscal law precludes any application of economic benefit.

⁴¹ The 1999 Herman Memo is titled “Guidance on Calculating the Economic Benefit of Non-compliance by Federal Agencies.” Assistant Administrator Herman had also issued an earlier memorandum dated October 9, 1998 and titled “Guidance on Implementation of EPA’s Penalty/Compliance Order Authority Against Federal Agencies Under the Clean Air Act” (the “1998 Herman Memo”).

In particular, the ALJ held that Alaska Garrison has obtained some forms of economic benefit from its delayed compliance. She noted that Alaska Garrison had conceded that “increased budgetary flexibility ‘might be, at least theoretically, a source of economic gain.’” Penalty Criteria Decision at 19 (quoting October 4, 2001 Oral Argument Transcript at 16 (transcript of argument before the ALJ)). In this regard, the ALJ observed that Federal courts have recognized that “the term ‘economic benefit’ can include non-monetary benefits, and benefits which cannot be invested in any profit-making activities.” *Id.* (citing *Holdeen v. United States*, 297 F.2d 886, 890 (2d Cir. 1962); *O’Daniel v. United States*, 6 F.3d 321, 325 (5th Cir. 1993); *California Dental Ass’n v. FTC*, 526 U.S. 756, 767 (1999); *McCann v. United States*, 696 F.2d 1386 (Fed. Cir. 1983); *United States v. Bridell*, 180 F. Supp. 268, 274 (N.D. Ill. 1960)). The ALJ also noted that “Congress has explicitly referenced economic benefits to Fort Wainwright” in connection with upgrades to electric transmission service between military installations in Alaska. *Id.* (citing Department of Defense Appropriations Bill, S. Rep. No. 408, 102nd Congress (Sept. 17, 1992)). Notably, Alaska Garrison does not argue in this interlocutory appeal that it did not obtain benefits of this kind. *See* Tr. at 39-40⁴² (“Certainly, this Respondent, the Department of the Army, [and] all federal agencies factor cost considerations and economic factors into their decision-making associated with discharging their mission functions.”).⁴³

The economic benefits associated with “budgetary flexibility” and other budget-related benefits are precisely the kinds of economic considerations that Congress recognized in 1977 as motivating Federal facilities to delay compliance. Specifically, in the House Report accompanying the text added in 1977 to express Congress’ unambiguous intent that section 113 applies to Federal facilities, the Committee observed as follows:

Regrettably, many facility operators and, in turn, their agency supervisors * * * have feared that the funds for

⁴² *See also* Tr. at 22-23, 28-30.

⁴³ Although Alaska Garrison admits that these economic considerations are part of its decision making process, it argues that these economic considerations fall outside Congress’ intended meaning of economic benefit. As discussed above in part III.A, we have rejected Alaska Garrison’s argument that the plain meaning of the statutory text requires the narrow interpretation proffered by Alaska Garrison. The more pertinent questions, as we note in this part, are whether the Region can introduce evidence that will show that Alaska Garrison obtained an economic benefit and whether the Region’s evidence can reasonably approximate at least a portion of any such economic benefit. *See In re B.J. Carney Indus., Inc.* 7 E.A.D. 171, 219 (EAB 1997) (“Given the importance of recovering economic benefit, where at least part of the economic benefit can be approximated, courts have routinely opted to recover the partial benefit rather than ignore it merely because the entire benefit cannot be approximated.”), *appeal dismissed as untimely sub nom. B.J. Carney Indus., Inc. v. United States Environmental Protection Agency*, 192 F.3d 917 (9th Cir. 1999), *dismissal as untimely vacated and dismissed as moot due to settlement*, 200 F.3d 1222 (9th Cir. 2000).

the proposed projects (to abate pollution) would be taken from elsewhere in their operating budgets and have recognized that related increases in operating and manpower budgets necessitated by new equipment would not be given special consideration by OMB. Consequently, some have chosen not to initiate plans and budget requests, thereby aborting the whole strategy.

House Report at 200 (quoting Shaw, *The Procedures to Ensure Federal Facilities Compliance with Environmental Quality Standards*, Report for the Committee on Compliance and Enforcement Proceedings, Administrative Conference of the United States, at 6 (Apr. 30, 1975)).

From the foregoing, it should be clear that Federal facilities may obtain some form of economic benefit from delayed compliance. The more pertinent questions are whether these economic benefits are provable and can be approximated and what adjustment, if any, should be made to the penalty assessment on account of such economic benefits. At oral argument, the Region acknowledged that “[t]he burden will be on [the Region] at the penalty phase to put [on] a reasonable approximation of the benefit that accrued to the Alaska Garrison * * * .” Tr. at 57.⁴⁴

Alaska Garrison, however, contends in this appeal that the restrictions fiscal law impose bar the application of the economic benefit criterion in its entirety, rather than, as held by the ALJ, influence the nature and proof of economic benefit. We now turn to Alaska Garrison’s two arguments raised on appeal as allegedly showing that fiscal law precludes application of the economic benefit factor to Alaska Garrison. Those two arguments are, first, that fiscal law caused Alaska Garrison’s delayed compliance and, second, that the ALJ erred by concluding that Alaska Garrison had authority to spend any unrestricted MILCON funds on the Baghouse.

2. Whether Fiscal Law Prevented Alaska Garrison from Spending Appropriated Funds to Achieve Compliance Earlier

The ALJ held that fiscal law did not prevent Alaska Garrison from spending appropriated funds earlier to install the COMs, CEMs, and Baghouse. Penalty Criteria Decision at 22-27. In analyzing this issue, the ALJ distinguished the fiscal law restrictions applicable the COMs and CEMs from the fiscal law restrictions applicable to the Baghouse.

⁴⁴ The Region bears the burden of proving the appropriateness of a penalty taking all of the factors into account, but not a separate burden on each of the statutory factors. *In re New Waterbury, Ltd.*, 5 E.A.D. 524, 538 (EAB 1994).

The ALJ observed that the installation, testing, maintaining, and operating of the COMs and CEMs were funded from Alaska Garrison's operations and maintenance ("O & M") appropriations. She concluded that fiscal law did not preclude Alaska Garrison from spending O & M appropriations on earlier installation of the COMs and CEMs. *Id.* at 24. Specifically, she held that Alaska Garrison "has not shown any prohibition on its ability to choose between spending O & M funds on compliance or on other activities." *Id.*⁴⁵ Nevertheless, the ALJ noted that delay in the purchase, installation and certification of the COMs and CEMs did not result in avoidance of costs. Although there was delay, the cost of installing the COMs and CEMs was in fact incurred and Alaska Garrison cannot be deemed to have avoided costs of borrowing⁴⁶ during that delay. *Id.* at 23. However, she also held that "there is a clear economic benefit from avoided costs of *operating and maintaining* the COMs and CEMs during the years Respondent deferred their purchase and installation." *Id.* (emphasis added). Thus, the ALJ held that fiscal law did not prevent Alaska Garrison from installing the COMs and CEMs at an earlier time to comply with the requirements of its Permit and the Alaska SIP, and she concluded that Alaska Garrison may have obtained an economic benefit from its non-compliance to the extent that it avoided the costs of operating and maintaining the COMs and CEMs during the period before that equipment was installed.

Alaska Garrison's arguments on appeal do not show any error in these conclusions. Indeed, Alaska Garrison does not even mention the COMs and CEMs violations in its appellate brief, other than in a single reference in its summary of the case background. *See* Appellant's Appellate Brief at 3. This absence is noteworthy in that it would appear to represent a concession by Alaska Garrison that fiscal law did not preclude it from earlier compliance with the COMs and CEMs requirements and that Alaska Garrison may have obtained an economic benefit as a result of its delayed compliance. This, on its own, is sufficient for us to conclude that Alaska Garrison has failed to show that the ALJ erred in holding that fiscal law does not preclude application of the economic benefit penalty criterion to

⁴⁵ The analysis here of O & M funds potentially available to spend on the COMs and CEMs must be distinguished from the Region's proposal to recapture economic benefit for O & M funds that would have been used to operate the Baghouse after construction. That latter portion of the penalty based on O & M funds is more appropriately analyzed along with constraints on construction of the Baghouse discussed below.

⁴⁶ As noted above in part III.B.1, the ALJ held that fiscal law prevents Alaska Garrison from both borrowing funds and earning interest on funds that are not spent. *See* Penalty Criteria Decision at 21. Thus, the ALJ held that where a cost is ultimately incurred, albeit after a delay, the Region cannot rely upon evidence of an imputed cost of borrowing to quantify Alaska Garrison's benefit from the delay.

Alaska Garrison in this case.⁴⁷

With respect to the Baghouse, the ALJ recognized that this substantially larger project “qualifies and must be funded as a military construction (‘MILCON’) project” and is therefore subject to different restrictions than those applicable to O & M funds. Penalty Criteria Decision at 24. Nevertheless, the ALJ concluded that restrictions on use of MILCON funds apply only when the restrictions are stated in the text of the funding legislation. *Id.* at 26. Specifically, the ALJ concluded that “[w]here Congress authorizes appropriations for military construction projects at a particular installation in a lump sum without naming or describing a particular project, the installation is not legally bound to spend the funds on a particular project.” *Id.* at 25.⁴⁸

Alaska Garrison directly challenges this conclusion in its appeal and requests that we reverse the ALJ’s decision on this point. In particular, Alaska Garrison states that, unlike other expenses, a military department may undertake a construction project costing more than \$1.5 million only if it can be shown that Congress authorized the department to undertake the project. Appellant’s Appellate Brief at 42, citing 10 U.S.C. §§ 114(a)(6), 2802, 2805.⁴⁹ In its response to Alaska Garrison’s appeal, the Region does not seriously attempt to refute Alaska Garrison’s argument on this point, or even contend that Alaska Garrison has somehow misconstrued the cited statutes. *See* Region’s Brief at 15-19; *see also* Tr. at 55-56.

⁴⁷ We note, however, that we do not have before us the amount of any adjustment in the penalty that the ALJ may attribute to this economic benefit. Our ruling today looks only to the predicate legal question of whether the ALJ may apply the “economic benefit” criterion as part of her analysis, and, therefore, our comments and analysis should not be viewed as constraining in any respect the ALJ’s proper exercise of her discretion in applying this factor along with the other statutory factors to arrive at an appropriate penalty after considering all of the evidence introduced, developed, and explained at trial.

⁴⁸ The ALJ noted that such unrestricted funding may have been available to Alaska Garrison in earlier years for use in constructing the Baghouse. Further, the ALJ concluded that “even assuming *arguendo* that Respondent could not have requested any earlier the MILCON appropriation for constructing the Baghouse, Respondent nevertheless may have realized an economic benefit from avoided costs of operating and maintaining the baghouse.” *Id.* at 26.

⁴⁹ Section 114(a) provides that “No funds may be appropriated for any fiscal year to or for the use of any armed force or obligated or expended for * * * (6) military construction * * * unless funds therefor have been specifically authorized by law.” 10 U.S.C. § 114(a). Section 2802 provides that “The Secretary of Defense and the Secretaries of the military departments may carry out such military construction projects as are authorized by law.” *Id.* § 2802. Section 2805 authorizes minor construction projects under \$1.5 million that are not otherwise authorized by law. *Id.* § 2805. Alaska Garrison states that where Congress provides an appropriation, without an authorization for a specific project in the funding legislation, Alaska Garrison must rely upon the legislative history, including Congressional conference and committee reports, to find the requisite Congressional intent for the project. Appellant’s Appellate Brief at 42.

Upon review, we conclude that the ALJ erred on this issue. We are persuaded that the mere absence of any restriction in the text of the legislation appropriating MILCON funds is not sufficient to establish that Alaska Garrison was authorized to spend such funds to install the Baghouse. Central to the ALJ's analysis on this issue is the notion that "a fundamental principle of appropriations law is that where 'Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency.'" *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (quoting *In re LTV Aerospace Corp.*, 55 Comp. Gen. 307, 318 (1975)). From this proposition of law, the ALJ extrapolated that, in the present case, Alaska Garrison had authority to commence the Baghouse project in any year in which it had a lump-sum MILCON appropriation large enough to cover the project.

The ALJ's error, however, is that an agency's discretion to spend a lump-sum appropriation is limited by its duty to comply with other laws that restrict its authority. *See, e.g., TVA v. Hill*, 437 U.S. 153 (1978) (spending of appropriations on dam construction must comply with Endangered Species Act, unless legislative text expresses a contrary intent). Here, Alaska Garrison explains that it is prohibited by law from undertaking a major "military construction project" — that is, one costing more than \$1.5 million — without specific authority for that project. Appellant's Appellate Brief at 43 ("the Secretary of a military department may lawfully carry out a construction project with an approved cost greater than \$1.5 million only if the department has separate authorization to undertake the project."). Alaska Garrison explains that "a military department may legally commit the government to fund a major construction project only if Congress has provided both an authorization for the project * * * and a separate appropriation * * *." *Id.* at 43-44. Alaska Garrison explains further that "should the Army fund a major construction project without Congressional authorization, it would violate Federal law, specifically 10 U.S.C. §§ 2802, 2805." *Id.* at 45. These statements are consistent with the Office of Comptroller General's explanation of military construction law. *See* Gary L. Kepplinger, Associate General Counsel, Comptroller General, to Michael B. Donley, Assistant Secretary of the Air Force, Financial Management and Comptroller, 1991 WL 315260 (Dec. 24, 1991);⁵⁰ *see also*

⁵⁰ Associate General Counsel Kepplinger explained as follows:

A "military construction project" must be specifically authorized by law in order to be carried out by a secretary of a military department. 10 U.S.C. § 2802. Once a military construction project is authorized, it must be funded from an appropriation available to pay for the cost of the project. 41 U.S.C. § 12; 63 Comp. Gen. 422 (1984).

Army Regulation 415-15 ch. 1, sec. III (“Every [Army Military Command] * * * MILCON construction undertaking must be specifically authorized and funded in MILCON legislation or performed under special authority * * * .”); *id.* ch. 4-7 (“Authorization is required to use funds.”). Accordingly, we reverse the ALJ and hold that a lump-sum appropriation, without more, was not sufficient to authorize Alaska Garrison to construct the Baghouse project.

The Region has not identified any authorization for the Baghouse project prior to the authorization Congress granted through the fiscal year 2000 authorization legislation.⁵¹ The Region, however, argues that there is inherent flexibility in the military construction funding process and that Alaska Garrison could have used this flexibility to obtain funding to construct the Baghouse. Region’s Response at 15. The Region identifies four sources of flexibility that allegedly bear on the issue at hand:⁵² 1) the Army’s “Reprogramming Directive,”⁵³ which provides guidance on requests for “realignment of appropriated funds in order to fund higher priority items,” *id.* at 16; 2) statutory authority under 10 U.S.C. § 2803⁵⁴ for the “Secretary concerned” to undertake emergency construction of up to \$30 million in order to protect human health and the environment, *id.* at 17; 3) Army regulations — Energy Conservation Investment Program — designed to achieve Department of Defense directed conservation goals, *id.* at 18; and 4) Army Regulations — Environmental Compliance Achievement Program (“ECAP”) — which authorizes projects to correct deficiencies identified in Notices of Violation, *id.* at 18-19.

Based on our review, however, none of those authorities serve to enlarge Alaska Garrison’s authority to spend appropriated funds on the Baghouse. The Region’s only reference to authority⁵⁵ for Alaska Garrison to undertake a con-

⁵¹ On October 5, 1999, Congress enacted the Fiscal Year 2000 DoD Authorization Act, Pub. L. No. 106-65, authorizing \$15.5 million for the Baghouse construction.

⁵² The Region also proffers a fifth source of “flexibility” that does not bear upon the question whether Alaska Garrison had authority to construct the Baghouse project. Instead, this fifth source of flexibility relates to alternative methods of compliance: possible purchase of utility services from local, municipal, or regional authorities. Region’s Response at 19. Such authority may bear upon the factual issues discussed in part III.B.3, below.

⁵³ See <http://www.asafm.army.mil/budget/di/ard/ard.pdf> (rev. July 1, 2000).

⁵⁴ Section 2803(a) of 10 U.S.C. authorizes the “Secretary concerned” to spend up to \$30 million for military construction “not otherwise authorized by law” if the Secretary “determines (1) that the project is vital to the national security or to the protection of health, safety, or the quality of the environment, and (2) that the requirement for the project is so urgent that deferral of the project for inclusion in the next Military Construction Authorization Act would be inconsistent with national security or the protection of health, safety, or environmental quality, as the case may be.”

⁵⁵ Neither the Army Environmental Compliance Achievement Program, nor the Energy Conservation Investment Program, appear to encompass legislative authority for a major military construction project.

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struction project the size of the Baghouse project is 10 U.S.C. § 2803. However, the statute and the Army's regulations and guidance speak to authority of the Secretary of the Army acting only with approval from Congress. In particular, the statute confers the emergency construction authority on the Secretary of the Army, and we have been unable to locate any delegation of this authority that could be exercised by the local command, such as Alaska Garrison. To the contrary, the Army's guidance on reprogramming of appropriations requires the local command to initiate the process by requesting a reprogramming, but also requires approval from both Congress and the Army Headquarters.

Reprogramming of MILCON appropriations in order to fund a construction project under 10 U.S.C. § 2803 may not be undertaken without a formal reprogramming request submitted for approval by Congress. *See* Reprogramming Directive, ch. 4.3(a)(4). To initiate this process, the Major Army Command must submit an emergency construction request to the Department of Army Headquarters, which in turn submits the request, after review and approval, to the Army Secretariat. *See* Army Regulation 415-15, ch. 5-19(b). Ultimate approval of the project is contingent on, among other things, written approval from the House and Senate Appropriations Committees. *Id.* Thus, by their terms, the statute, regulations and guidance do not appear to confer authority on the individual commands, such as Alaska Garrison, to exercise, on their own, any of the identified authority to undertake a construction project of the size of the Baghouse.⁵⁶ Accordingly, we hold that the Region has not demonstrated that Alaska Garrison had both the authority and the appropriations for the Baghouse project.

Our decision to reverse the ALJ on this issue, however, does not lead to a reversal of the ALJ's conclusion that fiscal law does not preclude application of the economic benefit penalty factor in this case. As noted above, fiscal law did not prevent Alaska Garrison from installing the COMs and CEMs earlier. In addition, as discussed in the following part of this decision, disputed questions of fact remain as to two other material issues bearing upon whether fiscal law caused Alaska Garrison's violations.

(continued)

tion project. *See* Army Regulation 415-15, ch. 1-6(4), ch. 1-10. Although these regulations do not appear to relate to the requisite legislative authority for Alaska Garrison to undertake a major military construction project, nevertheless these regulations may bear upon whether Alaska Garrison took advantage of all means to accelerate the approval process for obtaining authority through any special category of construction projects, such as the ECAP. Army Regulation 415-15, ch. 1-10. Such issues are discussed in part III.B.3, below.

⁵⁶ Nevertheless, the referenced statutes, regulations, or guidance may confer discretionary authority that Alaska Garrison could have requested be used to achieve earlier compliance through reprogramming and construction of the Baghouse. Accordingly, the opportunity to request such authority may be considered in connection with the similar issue of whether Alaska Garrison could have begun the process for requesting appropriations earlier. That issue is discussed in part III.B.3 below.

3. *Issues of Fact*

Although we hold that fiscal law governing major military construction placed limits on Alaska Garrison's authority to use appropriated funds for the Baghouse, this conclusion does not warrant agreeing with Alaska Garrison, at this stage of this case, that the ALJ may not adjust a penalty upward on account of economic benefit from delayed construction of the Baghouse. There are other potential avenues by which economic benefit might logically be taken into consideration notwithstanding the presence of limits on the use of appropriated funds. The ALJ's Penalty Criteria Decision, as discussed below, identifies at least two that would allow for consideration of economic benefit and, therefore, as a matter of law, preclude a ruling in Alaska Garrison's favor at this stage of this case.

First, the ALJ expressly left open the possibility that Alaska Garrison could have avoided violating its Permit and the Alaska SIP by requesting MILCON funding for the Baghouse earlier. Penalty Criteria Decision at 26. The ALJ stated that this is a disputed issue of fact. *Id.* at 26 n. 17.⁵⁷ On this issue, the Region argues that "the Army has never sufficiently explained why it could not have initiated the funding process sooner or obtained alternative sources of funding." Region's Response at 20. The Region states that evidence in the record shows that the Army was aware of violations since at least 1991. *Id.* Significantly, Alaska Garrison's Appellate Brief does not argue that the ALJ erred in concluding that an evidentiary hearing is required to resolve this disputed question of fact. Accordingly, we remand this issue for further proceedings and an evidentiary hearing as appropriate.⁵⁸

Second, the ALJ also noted that Alaska Garrison may not have been limited to construction of the Baghouse as its only method for achieving compliance. Penalty Criteria Decision at 27. She observed that some evidence brought to her attention as part of the accelerated decision briefing suggests that Alaska Garrison could have purchased electricity and heat from private vendors, rather than running its own plant in violation of its Permit and the Alaska SIP. The ALJ observed that the economic benefit component of the penalty could consider the difference between the cost of such alternative sources and the potentially lower cost to Alaska Garrison of running its own non-compliant plant. *Id.* at 27 (citing *In re A.Y. McDonald Indus., Inc.*, 1 E.A.D. 402, 424 (CJO 1987), as an example of

⁵⁷ The ALJ also noted that delays involving the appropriations process may be relevant to calculating the amount of any economic benefit component of the penalty, but reserved this issue for further consideration after an evidentiary hearing. Penalty Criteria Decision at 26.

⁵⁸ Issues concerning whether Alaska Garrison could have requested discretionary authority for reprogramming of appropriated MILCON funds, *see* notes 52 and 56 above, may also be considered along with this issue of whether Alaska Garrison could have requested appropriations for the Baghouse earlier.

economic benefit calculated on cost savings from operating out of compliance as compared to the higher cost of purchasing the services from another entity).

On this issue, Alaska Garrison does not raise a significant challenge on appeal. Alaska Garrison merely states “Appellee may now assert that Appellant could have avoided the penalty by shutting down the [Facility]. This matter is not before the EAB since, to the best of Appellant’s knowledge, Appellee has never suggested such extraordinary relief and has never sought an injunction to halt facility operation.” Alaska Garrison’s Brief at 37 n.39. In point of fact, however, there is nothing “extraordinary” about the ALJ’s observation that evidence brought to her attention at this stage of the proceeding is sufficient to raise a bar to the relief requested by Alaska Garrison, especially where that evidence may support a finding of economic benefit consistent with a prior final Agency decision, *A.Y. McDonald*. Although we express no opinion as to whether the reasoning in *A.Y. McDonald* would ultimately be dispositive in this case, there is no question that the ALJ did not err in holding that the evidence that came to her attention — evidence, which if properly introduced, developed, and explained, has the potential to be sufficient to approximate part of any economic benefit obtained by Alaska Garrison — is sufficient to raise a factual question for trial. As we have noted, “[g]iven the importance of recovering economic benefit, where at least part of the economic benefit can be approximated, courts have routinely opted to recover the partial benefit rather than ignore it merely because the entire benefit cannot be approximated.” *In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 219 (EAB 1997), *appeal dismissed as untimely*, *B.J. Carney Indus., Inc. v. United States Environmental Protection Agency*, 192 F.3d 917 (9th Cir. 1999), *dismissal as untimely vacated and dismissed as moot due to settlement*, 200 F.3d 1222 (9th Cir. 2000).

Moreover, Alaska Garrison’s argument also must fail because whether or not an injunctive remedy may have been available to the Region when it first became aware of the violations is not relevant to the question of appropriate administrative penalties for Alaska Garrison’s violations of its Permit and the Alaska SIP. Simply stated, it is not the Region’s duty to seek an injunction compelling Alaska Garrison to comply with the CAA. Rather, it is Alaska Garrison’s duty to comply with the terms of its Permit and the Alaska SIP; and, when Alaska Garrison has not done so, the Region is authorized to seek penalties from Alaska Garrison. In determining the amount of such penalties, the ALJ is required to consider any economic benefit obtained by Alaska Garrison. CAA § 113(e)(1). It would be inappropriate to foreclose a method of estimating economic benefit that may be supported by evidence when properly introduced, developed and explained at trial, particularly when that method initially appears consistent with a prior final Agency decision, *A.Y. McDonald*, 1 E.A.D. at 402. Accordingly, we remand this issue for further proceedings and an evidentiary hearing as appropriate.

In sum, therefore, we conclude that these two considerations — alleged delay in requesting MILCON funding and factual issues regarding potential alternative methods of achieving compliance — require remand and an evidentiary hearing as appropriate to fully develop the relevant facts. Accordingly, while we reverse the ALJ’s conclusions regarding Alaska Garrison’s authority to spend MILCON funds that were not restricted by the text of the appropriations legislation, nevertheless, we sustain the ALJ’s conclusion that Alaska Garrison has not shown that, as a matter of law, fiscal law bars application of the “economic benefit” penalty factor to Alaska Garrison in this case.

C. Whether Application of the “Economic Benefit” and “Size of Business” Penalty Factors in this Case Violates Section 118(a) of the CAA

The ALJ concluded that assessing economic benefit penalties as outlined in her Penalty Criteria Decision is consistent with section 118(a) of the CAA, which provides that Federal facilities shall be “subject to * * * all Federal * * * process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity.” Specifically, she stated as follows:

It may not be possible to calculate penalties for economic benefit in precisely the same manner for Federal facilities as for private business. The portion of economic benefit representing the cost of debt or financial return on alternative investment does not apply to an individual Federal facility such as Respondent. Nevertheless, assessment of the remaining portion of economic benefit, representing avoided capital and/or annual costs, subjects Federal facilities to at least a portion of the economic benefit sanctions in the same manner as, and to the same extent as, a nongovernmental entity. To completely omit the assessment of an economic benefit penalty against a Federal facility merely because a portion of EPA’s economic benefit methodology does not apply is illogical and contrary to Section 118(a) of the CAA.

Penalty Criteria Decision at 29.

Alaska Garrison argues that the ALJ’s analysis of section 118 “deprives” the phrase “‘in the same manner, and to the same extent’ of all substantive meaning and provides EPA carte blanche to apply the economic benefit criterion against Appellant in a discriminatory fashion.” Appellant’s Appellate Brief at 26. More specifically, Alaska Garrison argues first that section 118 expresses a “prohibition against discriminatory treatment of Federal facilities” and that the Region’s proposed economic benefit penalty, which is based in part on an imputed cost of

capital to Alaska Garrison for the period of delayed compliance, discriminates against Alaska Garrison by seeking to remove a “nonexistent gain.” *Id.* at 26, 28 n.26. Alaska Garrison contends that the Region’s effort to recover “nonexistent gain” is grounded on an alleged redefinition of economic benefit as “cost savings” when applied to Federal entities in contrast to the allegedly traditional meaning as “alternative investment” when applied to non-federal entities. *Id.* at 27-28. Alaska Garrison argues further that any “cost savings” was realized by Congress or the Treasury Department, not by Alaska Garrison. *Id.*⁵⁹

Upon review, we uphold the ALJ’s conclusion that Alaska Garrison has not shown that application of the economic benefit and size of business penalty criteria in this case violates section 118 of the CAA as a matter of law. We first note that Alaska Garrison’s specific arguments regarding alleged “nonexistent gain” and “cost savings” are entirely directed at the economic benefit penalty proposed by the *Region* and not at the reasoning employed by the *ALJ*. In particular, Alaska Garrison’s arguments in its Appellate Brief focus on the Region’s proposed calculation of economic gain using an imputed rate of return or cost of capital, which Alaska Garrison refers to as “nonexistent gain” to a Federal facility. Appellant’s Appellate Brief at 28 n. 26.

These arguments, however, wholly fail to recognize that the ALJ concluded, as discussed in part III.B.1 above, that cost of debt or financial return cannot be assessed against Alaska Garrison. Since the ALJ has rejected imputing to Alaska Garrison a cost of debt or financial return that Alaska Garrison is prohibited by statute from either incurring or earning, the ALJ’s analysis recognizes that any

⁵⁹ Alaska Garrison also argues that the Agency’s Federal facilities policy allowing economic benefit penalties to be offset by supplemental environmental projects shows that the Agency is treating the public and private sectors differently with respect to economic benefit penalties. Appellant’s Appellate Brief at 28-29. The Region, however, correctly notes that this argument is based on a misreading of the referenced guidance. Region’s Brief at 13. Specifically, the 1999 Herman Memo relied on by Alaska Garrison only states that supplemental environmental projects may be used in a settlement “in lieu of part of a monetary penalty.” 1999 Herman Memo, attach. at 8 (answer to last question). This dovetails with, and does not modify, the Agency’s policy for supplemental environmental projects, which allows the use of such projects in lieu of only a portion of the monetary penalty. Final EPA Supplemental Environmental Projects Policy, 63 Fed. Reg. 24,796, pt. E (May 5, 1998). Thus, there appears to be no difference in the recommended treatment of federal and non-federal entities under this policy. We also reject Alaska Garrison’s argument that, under the Agency’s Federal facilities policy, there are no analogous equitable adjustments afforded to Federal facilities similar to the ones granted other entities, such as “ability to pay,” which recognizes “countervailing public interests.” Appellant’s Appellate Brief at 29-30. As we noted in the introduction, the Region has acknowledged that national security concerns and the important national security aspects of Alaska Garrison’s mission may be taken into account under a variety of penalty factors, Tr. at 49-50, and, as noted in part III.B.1 above, the ALJ has stated that constraints of the federal budgetary process and fiscal law will be taken into account in her determination of an appropriate penalty when applying the statutory factors in this case. In addition, in part III.D.3 below, we note that equitable adjustments may be made under the size of business factor.

economic benefit penalty cannot be based on such alleged “nonexistent gain.” Thus, the ALJ’s determination moots Alaska Garrison’s arguments.

More generally, it is worth noting that Alaska Garrison argues both that it cannot be subject to different standards than are applicable to private entities *and* that it would be discriminatory for it to be treated the same as private entities. Compare Appellant’s Appellate Brief at 27 *with id.* at 30. Both our decisions and those of the Federal courts have recognized that the evidence used to demonstrate economic benefit may vary depending upon the circumstance of the case. See, e.g., *In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 208-09 (EAB 1997) (identifying three different types of economic benefit that may flow from a failure to invest in compliance), *appeal dismissed as untimely B.J. Carney Indus., Inc. v. United States Environmental Protection Agency*, 192 F.3d 917 (9th Cir. 1999), *dismissal as untimely vacated and dismissed as moot due to settlement*, 200 F.3d 1222 (9th Cir. 2000); see also *United States v. Mun. Auth. of Union Township*, 150 F.3d 259, 264 (3rd Cir. 1998) (holding that profit derived from delayed or avoided capital expenditure is not the only method for calculating economic benefit). Whether the respondent is a private, for-profit violator, or a Federal entity like Alaska Garrison, the principal question is the same in both cases — whether the proffered evidence shows that the named respondent obtained an economic benefit from the violations. Although the nature and proof of economic benefit may differ from case to case, such differences do not constitute discriminatory treatment.

Moreover, as we explain more fully below in part III.D.2, the ALJ’s analysis applies the general standards of longstanding Agency guidance while at the same time recognizes the unique characteristics of Alaska Garrison as a Federal entity. For the purposes of the present discussion, it is sufficient to note that Alaska Garrison has not shown that the ALJ’s approach of looking at any economic benefit Alaska Garrison obtained from avoidance of costs, including the costs of operating and maintaining the COMs and CEMs, but not at imputed cost of debt or financial return on alternative investment, discriminates against Alaska Garrison, or otherwise fails under section 118(a). As such, Alaska Garrison has failed to show any fundamental flaw in the ALJ’s analysis.

In reviewing Alaska Garrison’s arguments, we also note that Congress’ stated reason for amending section 118 in 1977 to include the language Alaska Garrison referenced was not to protect Federal entities from discriminatory treatment as argued by Alaska Garrison, but instead was to eliminate the more favorable treatment historically enjoyed by Federal entities. As discussed above in part III.A, the House Report accompanying the text that Congress enacted in 1977 explained that the amendment of section 118 was necessary because, “many Federal agencies and facilities have been laggard or have obstinately refused to obtain

required permits, to submit required reports, to conduct required monitoring, permit on-site inspections, and even to meet compliance schedules and emission limits.” House Report at 199.⁶⁰

The House Report also explained that Congress viewed the earlier 1970 amendments as stating Congress’ “intent that State and local requirements not be deemed invalid because they contradicted orders of * * * the Secretary of Army or Navy; rather, any action of these or other Federal agencies refusing [or] failing to comply with State or local requirements was to be deemed invalid as a violation of section 118 of the act.” *Id.* at 198. Thus, it is clear that Congress’ overriding concern in amending section 118 in 1977 was not to enact a protection of Federal facilities from discriminatory treatment as argued by Alaska Garrison, but instead was to eliminate the more favorable treatment that Federal facilities had historically enjoyed.

This purpose underlying section 118 is borne out by the plain meaning of the statutory text, which subjects Federal facilities, such as Alaska Garrison, to “all” Federal requirements, “administrative authority,” and “process and sanctions” respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. Where Congress intended to allow Federal facilities relief from this requirement, Congress specifically granted the President the authority for issuing limited scope exemptions. *See* CAA § 118(b) (allowing exemption if the President determines that it is in the paramount interest of the United States). This statute cannot be read to preclude, as a matter of law, the application to Alaska Garrison of penalty factors that are routinely applied to non-governmental entities. Indeed, it would appear that Alaska Garrison’s request for a determination prior to the penalty-phase hearing that certain factors do not apply to it is an effort to obtain treatment that is different in manner and extent than the typical application of CAA process and sanctions to non-governmental entities.

For the foregoing reasons, we conclude that section 118 of the CAA does not bar application of the “size of business” and “economic benefit” penalty factors to Federal facilities like Alaska Garrison.⁶¹ In the following part III.D, we con-

⁶⁰ Notably, Alaska Garrison’s violations found by the ALJ in this case include failure to conduct required monitoring and failure to meet emissions limits of its Permit and the Alaska SIP.

⁶¹ Alaska Garrison argues that, to comply with section 118, application of the economic benefit and size of business penalty factors must “recognize the inherent distinctions between private entities and Federal agencies” and in so doing, that application cannot “mechanically treat Federal facilities just like any other member of the regulated community.” Appellant’s Appellate Brief at 27. Alaska Garrison also contends that section 118 prohibits EPA from subjecting “Federal facilities to different standards than private sector entities.” *Id.* at 26. Alaska Garrison, however, does not articulate why it believes that the ALJ’s analysis failed to both (a) apply the same standards to Alaska Garrison as

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sider Alaska Garrison's argument that the ALJ has disregarded the Agency's traditional interpretation of "size of business" and has redefined "economic benefit" inconsistent with Agency policy.

D. Agency Guidance and Policy Statements

Alaska Garrison argues that EPA policy and guidance have limited the application of economic benefit and size of business penalties and that the ALJ's conclusion that those factors may be applied in this case goes beyond those limits. In particular, Alaska Garrison argues: (1) that application of economic benefit penalties to a Federal facility departs from prior practice, Appellant's Appellate Brief at 16-24, 50-52; (2) that the ALJ redefined "the nature of economic benefit beyond anything heretofore recognized in EPA policy and practice," *id.* at 10; and (3) that the ALJ's decision "disregards EPA's traditional interpretation and application of the [size of the business] criterion," *id.* at 46. Alaska Garrison also contends that application of these penalty factors to Alaska Garrison cannot be justified based on a deterrence rationale under the alleged circumstances of this case. *Id.* at 23.

In support of its argument that Agency policy and guidance have historically restricted⁶² the application of the economic benefit and size of business penalty factors, Alaska Garrison cites to the Agency's 1984 general policy on civil penalties, the more recent Clean Air Act Stationary Source Penalty Policy, and guidance for the Agency's BEN computer model for calculating economic benefit penalties. *See* Appellant's Appellate Brief at 13-16 (citing EPA Policy on Civil Penalties: EPA General Enforcement Policy #GM-21, 22 (Feb. 16, 1984) ("General Penalty Policy"); Clean Air Act Stationary Source Civil Penalty Policy (Oct. 25, 1991) ("Stationary Source Penalty Policy"); and the 1996 BEN Manual). Alaska Garrison's central arguments are: (1) that Agency policy and guidance have interpreted the "economic benefit of noncompliance" penalty factor to recover only illegal profits or financial gain obtained by a private for-profit entity that has business competitors, Appellant's Appellate Brief at 13-16; and (2) that

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would be applied to a non-federal entity and (b) recognize inherent distinctions between private entities and Federal agencies. Our reasons for this conclusion are set forth in part III.D, below.

⁶² Alaska Garrison also states that it understood EPA policy and guidance on the "economic benefit" and "size of the business" penalty factors to allegedly "echo Congress' intent to address the effects of noncompliance on competition among businesses in the private sector." Appellant's Appellate Brief at 13. In part III.A above, we have already rejected Alaska Garrison's effort to characterize the statutory text and legislative history as expressing an intent to limit the application of the "economic benefit" and "size of business" penalty factors to private, for-profit entities. Thus, we begin our discussion of EPA policy and guidance from the premise that any limit on the application of these two penalty factors found in Agency guidance does not "echo" a limitation found in the statute, but instead would reflect an effort to constrain the authority granted by the statute.

Agency policy and guidance have interpreted the “size of business” criterion to be used to increase the penalty for corporations with large financial assets available for payment of penalties, *id.* at 49. These arguments, however, fall short.

Upon review, we conclude, as explained more fully in part III.D.1 below, that the role accorded to penalty policies and guidance under applicable regulations and the prior decisions of this Board run counter to Alaska Garrison’s argument that those policies and guidance limit the applicability of the penalty factors. In addition, in part III.D.2, we also explain that the ALJ’s approach does not redefine “economic benefit” as argued by Alaska Garrison, but instead is based on the longstanding analytical framework set forth in the Agency’s guidance and policy statements. In part III.D.3, we conclude that the Agency’s guidance for the size of business criterion does not limit that factor to enhancement of the penalty for corporations with large assets available for payment of penalties. We also conclude that a number of considerations identified in Agency guidance relating to the size of the violator may well apply to Alaska Garrison and, therefore, preclude a conclusion that the size criterion is not applicable as a matter of law.⁶³

1. *The Role of Agency Guidance and Policy*

At this juncture, some general observations regarding the penalty assessment process are necessary to place the issue before us within the proper context. First, the Agency’s Consolidated Rules of Practice, found in 40 C.F.R. part 22, contain a number of requirements governing the ALJ’s penalty assessment, including a requirement that the ALJ determine the amount of the penalty based on the evidence and in accordance with the statutory penalty factors. Specifically, the rules provide:

If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presid-

⁶³ Alaska Garrison also argues that “Deterrence, the prime rationale for application of the economic benefit criterion, has no place in a situation where the decision-maker EPA seeks to motivate has taken all permissible legal steps to seek and obtain Congressional funds needed to get into compliance.” Appellant’s Appellate Brief at 23. This argument must fail. As the Agency has explained in its General Penalty Policy, “[t]he first goal of penalty assessment is to deter people from violating the law. Specifically, the penalty should persuade the violator to take precautions against falling into non-compliance *again* (specific deterrence) and *dissuade others* from violating the law (general deterrence).” General Penalty Policy at 2 (emphasis added). In short, the rationale for capturing all economic benefit obtained by Alaska Garrison is to provide Alaska Garrison, and other operators of Federal facilities, the proper incentives to comply with environmental laws, not just in the present context, but future ones as well, and to achieve compliance even before EPA finds a violation through an inspection. Thus, Alaska Garrison is mistaken in arguing that deterrence has been achieved in this case simply because it now is taking all permissible legal steps to correct the present violations. A penalty in this case may also serve to deter violations in future contexts by this and other Federal entities.

ing 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 the specific reasons for the increase or decrease.

40 C.F.R. § 22.27(b).

The General Penalty Policy, the Stationary Source Penalty Policy, and the 1996 BEN Manual cited by Alaska Garrison are a few of the Agency policy documents that provide guidance on methods for translating statutory penalty factors into numerical terms. The Part 22 regulations and the Board's decisions, however, make clear that the ALJ has significant discretion to assess a penalty other than that calculated pursuant to a particular penalty policy. *See* 40 C.F.R. § 22.27(b); *In re Allegheny Power Serv. Corp. & Choice Insulation, Inc.*, 9 E.A.D. 636 (EAB 2001), *appeal docketed*, No. 6:01-CV-241 (S.D. W. Va. Mar. 16, 2001); *In re Employers Ins. of Wausau.*, 6 E.A.D. 735, 758 (EAB 1997).

The ALJ's decision must contain a reasoned analysis of the basis for the penalty assessment, but the ALJ is free to depart from the penalty policy so long as she adequately explains her rationale. *See In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 535 (EAB 1998). We have explained that "the Presiding Officer's penalty assessment decision is ultimately constrained only by the statutory penalty criteria and by any statutory cap limiting the size of the assessable penalty, by the Agency's regulatory requirement (40 C.F.R. § 22.27(b)) to provide 'specific reasons' for rejecting the complainant's penalty proposal, and by the general Administrative Procedure Act requirement that a sanction be rationally related to the offense committed (i.e., that the choice of sanction not be an 'abuse of discretion' or otherwise arbitrary and capricious)." *Employers Ins. of Wausau*, 6 E.A.D. at 758-59.⁶⁴

⁶⁴ In addition, on appeal, the Board has the authority to increase or decrease a penalty assessment in an initial decision, *see* 40 C.F.R. § 22.30(f), and has exercised this authority in appropriate circumstances. *See, e.g., In re City of Marshall*, 10 E.A.D. 173, 180 (EAB 2001); *In re Rybond, Inc.*, 6 E.A.D. 614, 639 (EAB 1996). In the present case, however, we do not have the ALJ's penalty assessment before us for review at this stage of the case.

Moreover, the General Penalty Policy and the Stationary Source Penalty Policy explain that their purpose is to guide Agency enforcement personnel in calculating the penalty to be proposed in administrative complaints and in settlement negotiations. *See* General Penalty Policy at 4-5; Stationary Source Penalty Policy at 1-2 (“This policy will ensure the penalty plead in the complaint is never lower than any revised penalty calculated later based on more detailed information.”). The Stationary Source Penalty Policy also expressly states that “[t]he procedures set out in this document are intended solely for the guidance of government personnel. They are not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the United States.” Stationary Source Penalty Policy at 4.⁶⁵

The Agency’s guidance documents Alaska Garrison cites recommend a method for calculating the total penalty; first, by establishing a preliminary deterrence penalty taking into account economic benefit, among other things, and, then, by adjusting the preliminary deterrence amount up or down in consideration of additional factors. This approach, however, is not the only rational method of considering and applying the statutory penalty criteria. Indeed, a Federal Court has noted that courts generally start with the presumption “that the maximum penalty should be imposed.” *United States v. B & W Inv. Properties*, 38 F.3d 362, 368 (7th Cir. 1994); *United States v. Midwest Suspension and Brake*, 824 F. Supp. 713, 735 (E.D. Mich. 1993). Another Court observed that “[c]ourts can achieve an equitable mitigation (if any is warranted in a particular case) either by starting at the maximum penalty and mitigating it downward based upon the factors in § 7413(e)(1), or simply relying upon those factors to arrive at an appropriate amount without starting at the maximum. The statute only requires that the fine be consistent with a consideration of each of the factors the court is obligated to evaluate.” *United States v. Anthony Dell’Aquila, Enters. & Subs.*, 150 F.3d 329,

⁶⁵ Alaska Garrison also requests that we direct that the Agency undertake a rulemaking as the procedural vehicle for determining whether the “economic benefit” and “size of the business” penalty factors apply to Federal facilities, rather than allowing the Region to rely on an enforcement case as a vehicle for answering these questions. Appellant’s Appellate Brief at 53-56. In so arguing, Alaska Garrison nevertheless acknowledges that the Supreme Court has twice held that the choice between rulemaking and administrative adjudication “lies primarily within the informed discretion of the administrative agency.” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974); *see also Sec. & Exch. Comm’n v. Chenery*, 332 U.S. 194 (1947). In the present case, we see no compelling reason to constrain the Region’s prerogative to bring this penalty proceeding, particularly in light of the fact that, as adjudicated by the ALJ, Alaska Garrison committed a number of infractions of the law. Our decision not to accede to Alaska Garrison’s request is also influenced by the fact that the Agency has chosen, almost uniformly, to formulate and implement Agency policy for statutory penalty factors under this and other statutes by issuing guidance directed at the penalty to be proposed in the complaint, thus allowing for flexibility, rather than by promulgating rules that would bind the ALJs’ determination of appropriate penalties.

339 (3rd Cir. 1998).⁶⁶ Thus, at this stage of this proceeding where the ALJ has not yet made her determination of an appropriate penalty, we cannot assume that the ALJ will apply economic benefit and size of business as grounds for increasing an initial gravity-based penalty as recommended by Agency guidance, since the downward mitigation approach is also a rational method of applying the statutory penalty factors and, in any event, the ALJ is not required to follow Agency guidance.

From this discussion, it should be clear that our review must focus on the ALJ's analysis, not on the penalty the Region recommended, nor on the penalty that would be derived under Agency guidance, except to the extent that the ALJ has chosen to follow the Region's recommendation or Agency guidance, or failed to adequately explain her reasons for rejecting those approaches. Moreover, it also should be clear that subsumed within the ALJ's authority to assess a penalty different than one calculated under Agency guidance is the notion that Agency guidance does not limit the ALJ's authority to assess a penalty that is otherwise in accordance with the statutory factors.

Thus, we reject Alaska Garrison's argument that Agency penalty policies and guidance have limited the circumstances in which the size of business and economic benefit penalty criteria may be applied. Although this conclusion regarding the proper role of Agency penalty policies is sufficient to dismiss Alaska Garrison's arguments on appeal, nevertheless, in the next parts of this decision, we also explain that Alaska Garrison's specific arguments are not supported by the policies themselves.

2. *Alaska Garrison's Argument that the ALJ Redefined Economic Benefit*

As noted above, Alaska Garrison argues that the ALJ's approach redefined "the nature of economic benefit beyond anything heretofore recognized in EPA policy and practice." Appellant's Appellate Brief at 10. It argues that Agency pol-

⁶⁶ Under the similar penalty factors set forth in the Clean Water Act, the courts are split on which methodology to use in assessing an appropriate civil penalty. Some courts use the "top-down" method of penalty calculation, in which the court begins the penalty calculation at the statutory maximum, and adjusts downward considering the statutory factors. *See, e.g., United States v. Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir. 1990); *Hawaii's Thousand Friends v. Honolulu*, 821 F. Supp. 1368, 1395 (D. Haw. 1993); *Atlantic States Legal Found., Inc. v. Universal Tool & Stamping Co.*, 786 F. Supp. 743, 746 (N.D. Ind. 1992); *United States v. Roll Coaster, Inc.*, 21 Env'tl. L. Rep. 21073 (N.D. Ind. 1991). Other courts use the "bottom-up" method of penalty calculation, in which the court begins the penalty calculation with an initial gravity-based penalty, and adjusts upward or downward considering the statutory factors. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Env'tl. Serv., Inc.*, 956 F. Supp. 588, 603 (D.S.C. 1997); *United States v. Mun. Auth. of Union Township*, 929 F. Supp. 800, 806 (M.D. Pa. 1996); *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield*, 611 F. Supp. 1542, 1557 (E.D. Va. 1985).

icy and guidance have limited economic benefit penalties to the recovery only of illegal profits or financial gain obtained by a violator that has business competitors. *Id.* at 13-16. In particular, Alaska Garrison argues that the General Penalty Policy states that the purpose of the economic benefit component of the penalty is to place “the violator in the same position as he would have been in if compliance had been achieved on time.” *Id.* at 13 (quoting General Penalty Policy at 3). Alaska Garrison also notes that the Stationary Source Penalty Policy states that the penalty shall “capture the actual economic benefit of noncompliance” by targeting the recovery of “illegal profits.” *Id.* at 14 (citing the Stationary Source Civil Penalty Policy).⁶⁷

Alaska Garrison also argues that Agency policy has changed in recent years and that the new policy fails to recognize fundamental distinctions between Federal agencies and private entities. *Id.* at 17. Alaska Garrison identifies two instances that allegedly illustrate its contention that the Agency has recently changed its policies. First, Alaska Garrison contrasts comments made to Congress in 1987 by F. Henry Habicht II, then assistant Attorney General, Land and Natural Resources Division of the Department of Justice, with the Yellow Book: Guide to Environmental Enforcement and Compliance at Federal Facilities, U.S. EPA Office of Enforcement and Compliance Assurance (Feb. 1999) (the “Yellow Book”). Second, as also allegedly showing a change in Agency policy, Alaska Garrison points to the 1999 Herman Memo, which instructed Division Directors and Regional Counsel to calculate economic benefit penalties for Federal facilities using the Treasury Bill rate as the Federal government’s cost of capital or discount rate.

These arguments, however, must fail. First, as discussed above in part III.D.1, applicable regulations and the prior decisions of this Board make clear that Agency penalty policies and guidance do not limit the ALJ’s discretion to assess a penalty that is otherwise in accordance with the statutory penalty factors. Second, although Alaska Garrison correctly notes that elimination of illegal or improperly obtained profit has been an important objective of EPA policy on economic benefit penalties, Alaska Garrison is not correct that Agency policy has limited economic benefit penalties only to the recovery of such profits. To the

⁶⁷ For the BEN computer model, Alaska Garrison refers to statements in the Federal Register notices regarding the BEN model:

A cornerstone of the EPA’s civil penalty program is recapture of the economic benefit that a violator may have *gained* from illegal activity, *whenever EPA can effectively measure that gain*. Recapture helps *level the economic playing field, preventing violators from obtaining an unfair financial advantage over their competitors who timely made the necessary investment in environmental compliance*.

Appellant’s Appellate Brief at 14 (emphasis added by Alaska Garrison) (quoting 1996 BEN Notice and 1999 BEN Notice).

contrary, we find that the ALJ followed the general principles of longstanding Agency guidance and policy in holding that economic benefit may be measured, in part, by the costs that were avoided by the violator's noncompliance.

The ALJ concluded that Agency guidance recommends a two-part analysis that looks first at costs that were avoided and, second, at an imputed benefit that the violator would have obtained from investing delayed and avoided costs. *See* Penalty Criteria Decision at 21-22 ("first, the cost estimates for avoided capital and/or annual costs, adjusted for inflation and tax deductibility; and second, the expected return on the avoided costs, based on the discount rate."). In essence, the ALJ explained that Agency guidance first estimates what the violator would have been required to spend in each year in order to comply and then, for the expenses that the violator did not incur, Agency guidance recommends estimating additional benefit derived from either the profit that the violator would have obtained from investing those funds or the cost it avoided by not borrowing funds to cover those expenses.

In considering how these principles may be applied in this case, the ALJ held that the Region cannot prove that Alaska Garrison obtained an economic benefit by evidence that would show an imputed rate of return or cost of capital because Alaska Garrison, as a Federal agency, is precluded by fiscal law both from investing funds to earn a profit and from borrowing funds. *See* Penalty Criteria Decision at 23. The ALJ also held that, although the Region may not prove economic benefit by reference to an imputed interest rate, Alaska Garrison failed to show that fiscal law, or other differences between Federal facilities and private entities, preclude proof of economic benefit by reference to actual costs of compliance that Alaska Garrison had avoided. *Id.* at 23-27. An example of this type of avoided cost is the expense of operating and maintaining the COMs and CEMs during the period of Alaska Garrison's delayed installation of that monitoring equipment. *Id.* at 23.

We find no error in these conclusions. Specifically, each of the guidance documents Alaska Garrison cites as allegedly showing that the EPA has historically applied a narrow view of the meaning of economic benefit, in fact, identify many different types of economic benefit that might be obtained in a particular case. These include the two types identified by the ALJ, namely, "first, the cost estimates for avoided capital and/or annual costs, adjusted for inflation and tax deductibility; and second, the expected return on the avoided costs, based on the discount rate." Penalty Criteria Decision at 21-22. The ALJ held that the second of these two types of economic benefit — a rate of return or discount rate — does not apply to Federal facilities that are prohibited by law from investing or borrowing funds. In each of the relevant penalty policies, particular emphasis is placed on identifying, as an early step in the analysis, all costs that were avoided by delayed compliance, including operating and maintenance expenses. For example, the General Penalty Policy, which was issued in 1984, notes that economic benefit

can be derived from delayed costs and “costs that are avoided completely.” General Penalty Policy at 6-7.

The General Penalty Policy provides a number of examples of costs that might be avoided completely, including “cost savings for operation and maintenance of equipment that the violator failed to install.” *Id.* at 9. It states that “[s]ince these costs will never be incurred, the estimate is the expense avoided until the date compliance is achieved * * * .” *Id.* The General Penalty Policy expressly distinguishes these types of economic benefit from what it refers to as “benefit from competitive advantage.” *Id.* at 10-11. In this latter context the General Penalty Policy discusses recovery of net profits obtained from improper transactions.⁶⁸ In addition, the General Penalty Policy recommends estimating economic benefit from the time value of money by imputing to the violator a rate of return or avoided cost of borrowing obtained from the avoided and delayed costs. *Id.* at 7-8.⁶⁹ Thus, this guidance does not look solely to imputed or actual profit or financial gain, as suggested by Alaska Garrison. Instead, these examples from the General Penalty Policy support the ALJ’s determination that it has been a longstanding Agency policy to calculate economic benefit, in part, by reference to costs that the violator avoided by its noncompliance; and to separately look at any economic benefit based on (a) net profits from competitive advantage and (b) benefit from an imputed rate of return or avoided cost of borrowing.⁷⁰

Similar references to calculation of costs that were avoided as a separate category of economic benefit from profit obtained through competitive advantage and imputed rate of return or cost of borrowing are found in the Stationary Source Penalty Policy and the various BEN guidance documents. *See, e.g.*, Stationary Source Penalty Policy at 5 (discussing violations that enable the violator to “avoid

⁶⁸ The policy states that “removing the savings which accrue from noncompliance will usually be sufficient to remove the competitive advantage * * * . But there are some situations in which noncompliance allows the violator to provide goods or services which are not available elsewhere or are more attractive to the consumer. * * * To adequately remove the economic incentive for such violations, it is helpful to estimate the net profits made from the improper transaction (i.e., those transactions that would not have occurred if the party had complied).” General Penalty Policy at 10. Thus, under the policy, economic benefit penalties based on an estimation of actual profits is only one potential application of the economic benefit criterion.

⁶⁹ Under the ALJ’s analysis, an imputed rate of return or imputed cost of borrowing may not be used as a measure of economic benefit in this case. Penalty Criteria Decision at 23. She also held that evidence may be introduced showing the capital, and operating and maintenance costs that were avoided by the delayed compliance. *Id.*

⁷⁰ Our purpose here is not to fully characterize the myriad ways to calculate economic benefit under the Agency’s penalty policies, but instead we simply note that the ALJ’s distinction between economic benefit from avoided costs, on the one hand, and economic benefit from an imputed rate of return on investment, imputed cost of borrowing, or actual profit from competitive advantage, on the other hand, is consistent with the Agency policy cited by Alaska Garrison.

permanently certain costs associated with compliance”). In addition, the decisions of this Board have recognized at least three different types of economic benefit that may flow from a failure to invest in compliance, including avoided costs. *See, e.g., In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 208-09 (EAB 1997). We therefore reject Alaska Garrison’s argument that the ALJ allegedly redefined “the nature of economic benefit beyond anything heretofore recognized in EPA policy and practice.”

We also reject Alaska Garrison’s argument that the Agency changed its policy in such a way as to deny fundamental distinctions between Federal agencies and private entities. As noted above, Alaska Garrison points to two documents that allegedly show a change in Agency policy. First, Alaska Garrison points to a 1987 statement to Congress made by F. Henry Habicht, II (then Assistant Attorney General with the Department of Justice) as allegedly evidencing the Agency’s early recognition that there are differences between Federal agencies and private entities. Mr. Habicht stated as follows:

For Federal facilities, strict compliance with all substantive requirements is our goal, just as it is for private facilities. However, important constitutional, statutory, and public policy considerations all dictate that the *means* employed to achieve this goal will in certain respects be different from the procedures used in securing private compliance - although they are clearly comparable. This is because Federal facilities are *not* the same as private facilities.

Appellant’s Appellate Brief at 17 (quoting Statement of F. Henry Habicht II, Assistant Attorney General Land and Natural Resources Division, before the Subcommittee on Oversight and Investigations Committee on Energy and Commerce, House of Representatives, at 3 (Apr. 28, 1987)) (hereinafter, “Habicht 1987 Statement”) (emphasis in Mr. Habicht’s original). Alaska Garrison argues that, although EPA originally included Mr. Habicht’s statement in its Federal facilities enforcement policy, EPA subsequently changed its policy to treat Federal facilities “just like” private industry. *Id.* at 17.

We conclude, however, that there is no conflict between Mr. Habicht’s statement and the Agency’s subsequent Federal facilities enforcement policy. In particular, the statement by Mr. Habicht, quoted by Alaska Garrison, states that Federal facilities must be treated similarly to private entities in that Federal facilities are expected to strictly comply with environmental laws, but that the means or procedures used to obtain compliance must recognize differences between Federal facilities and private entities. Mr. Habicht was speaking to the concern that disputes within the Executive Branch be resolved by administrative dispute resolution methods that do not displace the President’s control over the Executive

Branch. *See, e.g.*, Habicht 1987 Statement at 5 (“Most importantly, federal agencies report to the President, who is accountable under the Constitution for their missions and actions. At times, agency missions, which Congress set forth by statute, can conflict and the resolution of those conflicts by the President is one way in which these agencies differ from private facilities.”).

This same distinction between the obligation to strictly comply with environmental laws and the enforcement procedures used to secure compliance is carried forward into the new Federal facilities enforcement policy, even though Alaska Garrison seeks to characterize the new policy as “starkly contrast[ing]” with the prior policy. Appellant’s Appellate Brief at 21. The new policy states “Federal agencies, just like private parties, are required to comply with all environmental requirements.” Yellow Book at XV (Feb. 1999). The Yellow Book goes on to state that “EPA’s enforcement response for Federal agencies is different from its enforcement against non-Federal parties in that it is purely administrative and, therefore, does not involve civil judicial action or assessment of civil judicial penalties.” *Id.* at V-2. This is the same distinction between compliance and enforcement procedures Mr. Habicht identified in his 1987 statement quoted above. Thus, we reject Alaska Garrison’s argument that recent policy statements by the Agency show a change in Agency policy and fail to recognize the distinctions between Federal agencies and private entities that were recognized by Mr. Habicht’s statement in 1987.⁷¹

As noted above, Alaska Garrison also argued that, by including an imputed cost of borrowing for the delay in achieving compliance, the Region’s proposed penalty was based on a change in Agency policy set forth in the 1999 Herman Memo. We do not need to address this argument, however, because it has been rendered moot by the ALJ’s Penalty Criteria Decision. The ALJ specifically held that Alaska Garrison “cannot save or earn interest on its allocation of annually appropriated O & M funds” and that Alaska Garrison “cannot borrow to obtain O & M funds.” Penalty Criteria Decision at 23. The Region is not challenging this determination. Tr. at 54.⁷² As we stated in part III.D.1 above, our review is of the

⁷¹ Mr. Habicht’s statement was made prior to the Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505, which among other things amended the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k, to clarify EPA’s authority to issue administrative orders, including the assessment of administrative penalties against other Federal agencies. Thus, to the extent that portions of Mr. Habicht’s statement concerned specific provisions of RCRA that were changed by the 1992 amendment, EPA’s current Federal enforcement policy presumably reflects the amended statutory text. This change in the law, which rendered parts of Mr. Habicht’s statement outdated, may well explain why Mr. Habicht’s statement is no longer used as an attachment to the Agency’s Federal enforcement policy set forth in the Yellow Book.

⁷² Accordingly, even if Alaska Garrison were correct that the 1999 Herman Memo represents a shift in Agency policy on the question of imputing interest to a Federal agency, the ALJ has rejected
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ALJ's decision and, therefore, our focus must be on her analysis, not on the penalty proposed by the Region or on one that would be calculated under Agency guidance or policy statements.

Thus, in short, Alaska Garrison has failed to demonstrate (1) that the ALJ "redefined" economic benefit, (2) that Agency guidance and policy limits the application of economic benefit penalties to recovery of illegal profit, and (3) that the ALJ erred by allegedly adhering to a major policy shift that purportedly fails to recognize distinctions between Alaska Garrison and private entities. To the contrary, we find that the ALJ's analysis, although not limited by Agency guidance, nevertheless is consistent with long-standing Agency guidance on assessing "economic benefit" penalties and that the ALJ's analysis recognizes distinctions between Alaska Garrison and private businesses.

3. *Alaska Garrison's Argument that Agency Guidance Limits "Size of the Business" as Applying to Corporations with Large Assets*

The ALJ concluded that Agency policy and guidance have not limited the application of size of the business to private corporations with large assets and that this criterion may be applied to Alaska Garrison in this case. The ALJ explained that the Agency's Stationary Source Penalty Policy does not expressly state that "size of the business" penalties recommended by that policy applies to Federal facilities, nor does it expressly state that such penalties do not apply. Penalty Criteria Decision at 39-42. She also observed that the 1998 Herman Memo recommended that size of the Federal entity be taken into account when considering the appropriate penalty against Federal facilities under the CAA. *Id.* at 41.

The ALJ also observed that size of the business penalties have been assessed against government entities in other contexts, such as under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y. *Id.* at 42. She concluded as follows:

While this does not support a finding that a penalty must be increased for "size of the business," it suggests that EPA did not as a matter of policy limit the application of "size of the business" to private business entities, in the FIFRA context. Moreover, it suggests that "size of the business" should not be simply ignored in assessing penalties against governmental entities.

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this approach in her Penalty Criteria Decision, and, therefore, Alaska Garrison cannot claim that it is prejudiced by any such change.

Id. She concluded that “[i]nstead of simply disregarding ‘size of the business’ with respect to Federal facilities, there are policy questions that must be addressed in the particular circumstances of the case * * *. These questions, being related to disputed factual issues, are appropriate to consider at a hearing, and cannot be decided herein.” *Id.* at 43.

Alaska Garrison argues that the ALJ’s decision “disregards EPA’s traditional interpretation and application of the [size of the business] criterion.” Appellant’s Appellate Brief at 46. It argues that Agency policy and guidance have interpreted the size of the business criterion to be used to increase the penalty for corporations with large financial assets available for payment of penalties. *Id.* at 49. It states that “the thrust of the concept is to mete out extra punishment based on a presumption that business entities with greater assets could have complied earlier or more effectively.” *Id.* Alaska Garrison argues that this is inappropriate for Federal facilities because, unlike private industry, the assets of a Federal facility “are not available to the installation to sell or mortgage to raise money for compliance or to pay fines.” *Id.* at 50.⁷³

These arguments by Alaska Garrison, however, do not show that the ALJ erred in concluding that “size of the business” may be applied to Alaska Garrison in this case. As we held above in part III.D.1, Agency policy and guidance do not limit the authority of the ALJ to assess a penalty that is different than one calculated pursuant to the relevant policy or guidance so long as the ALJ adequately explains her rationale. In addition, Alaska Garrison’s argument that it should not be treated the same as a for-profit corporation that has large assets available to achieve compliance does not by itself show that the Agency’s policy limited the application of the size of the business factor. Instead, by these arguments, Alaska Garrison merely reiterates the type of factual issues that the ALJ concluded must be taken into account in applying the factor and that require an evidentiary hearing. *See* Penalty Criteria Decision at 43.

⁷³ Alaska Garrison also argues that Agency penalty policies have “impermissibly changed the statutory criterion to ‘size of violator,’” rather than “size of the business.” Appellant’s Appellate Brief at 47-48 (citing the General Penalty Policy and the Stationary Source Penalty Policy). We reject this argument. As noted above, Congress used the terms “violator” and “business” interchangeably. Moreover, the General Penalty Policy, which is a guide for all environmental statutes, was drafted many years before the criteria “size of the business” was added to section 113 of the CAA. The Stationary Source Penalty Policy does not reflect an effort to change the statutory meaning, but instead merely follows the guidance of the General Penalty Policy. In any event, any penalty the ALJ ultimately assesses must be consistent with the statutory penalty factors. *See, e.g., In re New Waterbury, Ltd.*, 5 E.A.D. 524, 538 (EAB 1994) (stating that the burden of proof relates to the appropriateness of the penalty as a whole taking all of the statutory factors into account); *see also United States v. Anthony Dell’Aquila, Enters. & Subs.*, 150 F.3d 329, 339 (3d Cir. 1998) (“The statute only requires that the fine be consistent with a consideration of each of the factors the court is obliged to evaluate.”).

Moreover, Alaska Garrison has not addressed the ALJ's observation that not making some adjustment in the amount of the penalty based on the size of the Federal facility would, in effect, be irrational. She stated: "the effect of not applying the 'size of the business' criterion at all to a Federal facility would be to equate all Federal entities with either the largest commercial business or with the smallest businesses depending on the particular penalty assessment methodology utilized [i.e., adjusting down from a maximum penalty, or adjusting up from a gravity-based penalty], which effect would be arbitrary and unreasonable." *Id.* at 43. In the present case, we do not have before us the amount of any penalty adjustment that the ALJ may attribute to this factor and, therefore, we do not know whether a ruling rejecting any adjustment on account of size would result in Alaska Garrison being treated similar to the largest or smallest businesses. Thus, a legal ruling at this stage of the case could produce a result contrary to the general direction of Alaska Garrison's argument, and might work mischief in subsequent cases. For example, if the ALJ were to begin her penalty analysis with the statutory maximum penalty and then mitigate downward based on the statutory factors, elimination of "size of business" would prevent Alaska Garrison from arguing that a downward adjustment on account of this factor is appropriate.⁷⁴

We are also mindful that size of an entity may bear upon a number of considerations that should be taken into account in determining an appropriate penalty. Those considerations can include both the capacity of the entity to identify environmental problems before they occur⁷⁵ as well as the capacity to marshal resources to invest in control devices.⁷⁶ Size may bear upon other considerations as well. While Alaska Garrison's arguments regarding its inability to sell assets bear upon its capacity to marshal resources to invest in control devices,⁷⁷ those

⁷⁴ Section 113(e)(1) also requires that the Agency consider "the economic impact of the penalty on the business." CAA § 113(e)(1), 42 U.S.C. § 7413(e)(1). If we were to accept Alaska Garrison's argument that the word "business" in the statute bars application of the size criterion to Federal facilities, we would also need to rule that this "impact of the penalty" factor would not apply as well. However, since we have rejected this argument, it should be clear that the ALJ must consider and may apply the "economic impact" factor in this case as well.

⁷⁵ The ALJ noted that part of the debate in Congress discussing the penalty criteria of Section 113(e)(1) in the 1990 CAA Amendments included concern that "small businesses would be overwhelmed, without technical or scientific experts on staff, by the new CAA requirements being imposed by the Amendments." Penalty Criteria Decision at 44 n.28 (citing 136 Cong. Rec. 2762, 2765 (daily ed., Mar. 20, 1990)). She observed that "[t]his concern does not appear to apply to Federal facilities." Penalty Criteria Decision at 44.

⁷⁶ See Tr. at 76-77 (Region stated that, under the size criterion, the ALJ could consider among other things who is operating the Facility, who ensures compliance, who prioritizes funding, and who approves funding).

⁷⁷ These arguments may also bear upon the penalty factor of "the economic impact of the penalty on the business." CAA § 113(e)(1), 42 U.S.C. § 7413(e)(1). Thus, we reject Alaska Garrison's

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arguments do not address all of the potential considerations addressed by the size criterion. Therefore, a ruling at this stage would be premature, although Alaska Garrison has raised significant issues showing that the size criterion should not be treated as a one-dimensional factor.⁷⁸

IV. CONCLUSION

For the foregoing reasons, we uphold the ALJ's decision that she must consider and may apply the "economic benefit of noncompliance" and "size of the business" penalty factors in the present case. Nevertheless, we reverse the ALJ's conclusion that Alaska Garrison had authority to begin construction of the Baghouse project in the earliest year that Alaska Garrison had a lump sum MIL-CON appropriation large enough to fund the project. We remand this matter to the ALJ for further proceedings consistent with this decision.

In issuing this decision, we resolve only the predicate legal question whether the ALJ erred in rejecting Alaska Garrison's argument that, as a matter of law, the "economic benefit" and "size of business" penalty factors do not apply to Alaska Garrison. Except as expressly stated, our discussion of the predicate legal question should not be viewed as a mandate constraining the ALJ's review of facts, issues, or penalty factors that properly bear upon her determination of an appropriate penalty in this case, and our discussion should not be viewed as commenting on the weight to be accorded Alaska Garrison's arguments in assessing an appropriate penalty taking all relevant factors into account.

More specifically, as noted earlier, in prior cases we have explained that "the Presiding Officer's penalty assessment decision is ultimately constrained only by the statutory penalty criteria and by any statutory cap limiting the size of the assessable penalty, by the Agency's regulatory requirement (40 C.F.R. § 22.27(b)) to provide 'specific reasons' for rejecting the complainant's penalty proposal, and by the general Administrative Procedure Act requirement that a sanction be rationally related to the offense committed (i.e., that the choice of

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argument that the Region's "silence on the 'inability to pay' factor constitutes an unfounded presumption that this is *not* a consideration when dealing with a Federal agency." Appellant's Appellate Brief at 52.

⁷⁸ Because these issues have not been fully developed through the introduction and explanation of relevant evidence at trial, we express no opinion regarding the appropriateness, in the context of this case, of the Stationary Source Penalty Policy's approach to calculating a penalty taking into account the violator's size. We also do not express an opinion at this juncture regarding what attributes of size, including whether the attributes of affiliated entities, should properly be considered in this case.

sanction not be an 'abuse of discretion' or otherwise arbitrary and capricious)." *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 758-59 (EAB 1997).

Our resolution of this interlocutory appeal looks only to the first of these constraints on the ALJ's penalty assessment decision, i.e., what statutory penalty criteria may be applied in this case as a matter of law. We do not have before us, and therefore do not address, the other constraints, namely the regulatory requirement that the ALJ provide 'specific reasons' if she rejects the complainant's proposed penalty and the Administrative Procedure Act requirement that the sanction she imposes after consideration of the evidence introduced and explained at the penalty-phase hearing not be an abuse of discretion or otherwise arbitrary and capricious. Many of the arguments that we reject as not establishing a legal bar to an application of the economic benefit and size of the business penalty factors may, nevertheless, properly influence the analysis accorded different types of evidence when those factors are considered and applied in this case.

So ordered.