IN RE RAM, INC.

RCRA (9006) Appeal Nos. 08-01 & 08-02

FINAL DECISION AND ORDER

Decided July 10, 2009

Syllabus

Ram, Inc. ("Ram"), the owner or operator of several gasoline and convenience store facilities in Oklahoma, and U.S. Environmental Protection Agency ("EPA" or "Agency"), Region 6 ("Region") both appeal an Initial Decision issued by Administrative Law Judge Spencer T. Nissen ("ALJ") finding Ram liable for violations of Oklahoma's Underground Storage Tank ("UST") regulations. The Region, which is authorized to commence federal enforcement actions in states such as Oklahoma where EPA has approved a state UST program, asserted that Ram violated the Oklahoma UST program requirements for spill prevention, release detection monitoring, cathodic protection, leak detector testing, and inventory control at five Ram-owned or operated facilities. Prior to an evidentiary hearing before the ALJ, the Region withdrew a number of charges. At the evidentiary hearing, Ram stipulated to liability on each count the Region did not withdraw. Following the evidentiary hearing, the ALJ rejected the $175,062.75 penalty the Region, using the *Penalty Guidance for Violations of UST Regulations* ("UST Penalty Policy"), proposed for the remaining counts. The ALJ, also using the UST Penalty Policy, assessed a total penalty of $49,312 in his Initial Decision.

Ram's appeal raises four issues for the Environmental Appeals Board's ("Board" or "EAB") consideration: (1) whether the ALJ erred in applying federal penalties and relying on the federal UST Penalty Policy, rather than the Oklahoma penalty policy; (2) whether Ram is liable for Count 1; (3) whether the ALJ should have further reduced the penalty for Count 1 from $2,213.94 to $0; and (4) whether the Region engaged in selective prosecution against Ram.

In its appeal, the Agency challenges the ALJ's decision to reduce the penalty for Counts 3, 14, 15, and 16, raising two issues. First, as to all four of these counts, the Agency maintains that the ALJ erred by finding that, under the UST Penalty Policy, the potential for harm arising from Ram's violations was minor. Second, the Agency contends the ALJ erred by reducing the "days of noncompliance multiplier" for the violation in Count 15, despite Ram's stipulation to the number of days it was in violation. The ALJ's penalty assessment for these four counts together totaled $7,147.12. The Agency asks the Board to reinstate the $43,847 penalty the Region initially proposed for these counts.

Held: The Board denies Ram's appeal, grants the Agency's appeal, and affirms the Initial Decision in all other respects. The Board rejects the ALJ's penalty assessment for Counts 3, 14, 15, and 16, and fashions its own assessment against Ram in the amount of $43,847.12 for those counts. Specifically, the Board concludes the following:

Ram's Appeal

(1) The Board affirms the ALJ's decision to be guided by the federal UST penalty policy rather than the Oklahoma penalty policy. Although there may be a disparity between the federal penalty assessment and the likely state penalty when the Agency conducts an UST enforcement action in an approved state and relies on federal sanctions, federal inspection authorities, and federal procedures instead of the state authorized analogs, the Agency explicitly sanctioned such an approach when it approved and codified the Oklahoma UST program.

(2) The Board upholds the ALJ's liability finding for Count 1. Ram's stipulations at the evidentiary hearing, including a stipulation of liability for Count 1, are binding judicial admissions. Because Ram does not identify any special circumstances that would warrant consideration of the stipulation of liability for Count 1 as non-binding, the Board declines any implied request to allow Ram to withdraw its stipulation on appeal.

(3) The Board also upholds the ALJ's penalty assessment for Count 1. His determination that the deviation from requirements was moderate and the potential for harm was minor at an UST that lacked spill prevention devices on one side and that did not receive product deliveries is affirmed. One half of the UST did have spill prevention devices, rendering the deviation from requirements as moderate. The lack of product deliveries or any spills in general to the side of the UST lacking spill prevention devices does not result in a further reduced or no penalty.

(4) The Board affirms the ALJ's finding that the Region did not engage in selective prosecution against Ram. The Region adequately explained its rationale for inspecting the Ram-owned or operated facilities. Ram failed to establish that it was singled out while other similarly situated violators were left untouched or that the Region chose to inspect and fine Ram due to bad faith based on race, religion, or the desire to prevent the exercise of constitutional rights.

EPA's Appeal

(1) The Board rejects the ALJ's characterization of the potential for harm from Ram's failure to meet release detection requirements for the two USTs temporarily taken out of service in Counts 3 and 14 as minor. Although the ALJ found that the volumes of product remaining in the tanks were not a major fraction of the tanks' total capacities, these volumes were not small and had the potential to increase as it was Ram's practice to use one of the tanks to hold excess product from overloaded delivery trucks. Failure to regularly ensure that release detection equipment functions properly unquestionably threatens the UST regulatory scheme and program because without release detection, a release of product may go unnoticed for a lengthy period of time. The Agency also has previously recognized the vast impact a small-volume gasoline spill can have on a nearby drinking water supply. The Board thus holds that the potential for harm for Counts 3 and 14 is major.

(2) The Board also rejects the ALJ's determination that Ram's failure to operate corrosion protection systems for USTs during temporary closure (Count 15) and failure to test the cathodic protection systems of those USTs (Count 16) had a minor potential for harm. The ALJ's findings for Count 15 – corrosion could occur without an operating corrosion protection system, leading to a future leak if product is placed in the tank after the temporarily closed UST is returned to service – and for Count 16 – failure to regularly test corrosion protection systems while an UST is in use may cause a malfunctioning cathodic pro-

tection system to escape notice, corrosion within an UST system, and the subsequent release of product into the environment – support a finding of moderate potential for harm. Compliance with a regulation after being cited for its violation does not warrant a downward adjustment to a gravity-based penalty, and the appropriate characterization of the potential for harm is moderate without further adjustment to the matrix value.

(3) The Board rejects the ALJ's determination of number of days of noncompliance for Count 15. Because the count alleged the period of violation, and because Ram did not provide grounds on which to be released from its stipulation, Ram's stipulation of the period of violation as stated in the count is binding, and the Region need not provide independent proof of its basis for the days of noncompliance.

(4) The proposed penalty of $43,847.12 for Counts 3, 14, 15, and 16 is properly calculated under the UST Penalty Policy, is supported by the evidence, and is appropriate based on the facts and circumstances of the case. The Board assesses a total penalty of $86,012.

Before Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast.

Opinion of the Board by Judge Stein:

Both the U.S. Environmental Protection Agency ("EPA" or "Agency") Region 6 ("Region"), and Ram, Inc. ("Ram") appeal an Initial Decision in which Administrative Law Judge Spencer T. Nissen ("ALJ") found Ram liable for violating the Oklahoma underground storage tank ("UST") regulations promulgated in the state's administrative code. Okla. Admin. Code § 165:25. The Region based its twenty-count Complaint, Compliance Order, and Notice of Opportunity for Hearing ("Complaint") on alleged violations the Region observed during a joint inspection it and the Oklahoma Corporation Commission ("OCC") conducted on February 16 and 17, 2005, of five Ram-owned or operated gasoline and convenience store facilities in Oklahoma.[1]

The Region's Complaint generally asserted that Ram violated the Oklahoma UST program requirements for spill prevention, release detection monitoring, cathodic protection, leak detector testing, and inventory control at the Ram-owned or operated facilities. Prior to an evidentiary hearing before the ALJ, the Region withdrew a number of charges. Ram stipulated to liability on each count the Region did not withdraw. Following the evidentiary hearing, the ALJ rejected the $175,062.75 penalty the Region proposed for the remaining counts and instead assessed a total penalty of $49,312 in his Initial Decision.

[1] The Region conducted the joint inspection under the Agency's oversight role of Oklahoma's enforcement of its UST regulations. *See* 40 C.F.R. § 282.86(b).

Ram's appeal raises four issues for the Environmental Appeals Board's ("Board" or "EAB") consideration: (1) whether the ALJ erred in applying federal penalties and the federal UST penalty policy, rather than the OCC penalty policy; (2) whether Ram is liable for Count 1; (3) whether the ALJ should have further reduced the penalty for Count 1 from $2,213.94 to $0; and (4) whether the Region engaged in selective prosecution against Ram. Ram's Notice of Appeal & Brief in Support of Appeal (Aug. 15, 2008) ("Ram Br.") at 2-4.

In its appeal, the Agency challenges the ALJ's decision to reduce the penalty for Counts 3, 14, 15, and 16, raising two issues. Complainant's Appellate Brief (Aug. 13, 2008) ("EPA Br.") at 1. The ALJ's penalty assessment for these four counts together totaled $7,147.12. The Agency asks the Board to reinstate the $43,847 penalty the Region initially proposed for these counts.[2] *Id.* The Agency challenges the ALJ's application of the federal UST penalty policy. *Id.* (citing Office of Solid Waste & Emergency Response, U.S. EPA, Directive No. 9610.12, *Penalty Guidance for Violations of UST Regulations* (Nov. 14, 1990) ("UST Penalty Policy")). First, as to all four of these counts, the Agency maintains that the ALJ erred by finding that, under the UST Penalty Policy, the potential for harm arising from Ram's violations was "minor." *Id.* Second, as to Count 15, the Agency contends the ALJ erred by reducing the "days of noncompliance multiplier," despite Ram's stipulation to the number of days it was in violation. *Id.*

For the reasons set forth below, the Board denies Ram's appeal and grants the Agency's appeal. In particular, the Board overturns the ALJ's civil penalty assessment as to Counts 3, 14, 15, and 16; reviews the penalty de novo; and assesses a civil penalty totaling $86,012.12. The Board affirms the Initial Decision in all other respects.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

Subtitle I of the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901-6992k, imposes a comprehensive regulatory program for USTs. RCRA §§ 9001-9010, 42 U.S.C. §§ 6991-6991i. RCRA directs the Agency to promulgate release detection, prevention, and correction regulations for USTs, to achieve the Congressional goal of protecting human health and the environment. RCRA § 9003, 42 U.S.C. § 6991b. Under the UST program owners of UST systems must: (1) implement spill and overfill control procedures;

[2] The sum of the Region's proposed penalties for Counts 3, 14, 15, and 16 was $43,847.11. Compl. attach. A, at 45, 55-57 (penalty calculations for Counts 3, 14, 15, and 16). The penalty assessment that the Agency requests the Board to reinstate appears rounded down to the nearest dollar.

(2) provide corrosion protection; (3) monitor tanks and underground piping for releases; (4) maintain records of release detection systems; (5) report accidental releases; (6) take corrective action in response to any such releases; and (7) provide appropriate temporary and permanent closure of USTs to prevent future releases. RCRA §§ 9003(c)-(d), 42 U.S.C. §§ 6991b(c)-(d); 40 C.F.R. §§ 280.30-.230.

EPA may approve state UST programs such as Oklahoma's to operate in lieu of the federal UST program and grant the state "primary enforcement responsibility with respect to the requirements of its programs." RCRA § 9004(d)(2), 42 U.S.C. § 6991c(d)(2); *see also* Approved Oklahoma UST Program, 61 Fed. Reg. 1220, 1220 (Jan. 18, 1996) (codified at 40 C.F.R. § 282.86). EPA approved the Oklahoma UST program in 1992 and codified the approval in 1996. 61 Fed. Reg. at 1220; *see also* Final Approval of Oklahoma State UST Program, 57 Fed. Reg. 41,874 (Aug. 12, 1992). The Oklahoma regulations, Oklahoma Administrative Code title 165, chapter 25, were incorporated by reference in the federal regulations and are listed in 40 C.F.R. part 282, Appendix A. Significantly, the Agency may commence a federal enforcement action in a state where EPA has approved a state UST program consisting of that state's regulations. RCRA § 9006(a)(2), 42 U.S.C. § 6991e; *e.g.*, 40 C.F.R. § 282.86(b) (Oklahoma UST program noting EPA's authority). When EPA enforces state UST violations, it may seek a civil penalty of up to $11,000 per tank, per day of violation.[3] RCRA § 9006(d)(2)(B), 42 U.S.C. § 6991e(d)(2)(B).

B. *Factual and Procedural History*

In its twenty-count Complaint, the Region alleged that Ram violated Oklahoma UST regulations concerning spill prevention, release detection monitoring, cathodic protection, leak detection testing, and inventory control at five facilities. On May 9 through 11, 2006, the ALJ held an evidentiary hearing in McAlester, Oklahoma. At the opening of hearing, the Region withdrew the following six counts: 5, 6, 11, 13, 18, and 19. Init. Dec. at 2 (citing ALJ Hearing Transcript ("ALJ Tr.") at 14). Ram stipulated to liability on each of the remaining counts but argued that the Region's proposed penalty was so excessive that it violated substantive due process. *Id.* (citing ALJ Tr. at 56 ("We stipulate to liability in each and every case.")).

---

[3] EPA has increased the statutory maximum penalty by 10%, from $10,000 to $11,000, under regulations promulgated pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990) (codified at 28 U.S.C. § 2461 note), amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(s), 110 Stat. 1321, 1321-373 (1996). *See* 40 C.F.R. pt. 19 (EPA's inflation-adjusted maximum penalties); Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7121 (Feb. 13, 2004); Civil Monetary Penalty Inflation Adjustment Rule, 61 Fed. Reg. 69,360 (Dec. 31, 1996). These two penalty-related statutes direct EPA (and other federal agencies) to adjust maximum civil penalties on a periodic basis to reflect inflation.

In his penalty analysis, the ALJ found that the Region may follow the Agency's penalty guidance, rather than that of Oklahoma, for Ram's UST regulatory violations; however, the ALJ determined that the Region's proposed penalty nonetheless "overstate[d] the gravity of the violation[s] both from the standpoint of harm to the regulatory program and gravity of the misconduct." *Id.* ¶ 6, at 24 (citing UST Penalty Policy). For each of the fourteen counts that remained, the ALJ disagreed with how the Region assessed either the extent of deviation from the legal requirement or the potential for harm from the violation, or both. The ALJ assessed a total penalty of $49,312. *Id.* The Agency and Ram both appealed the Initial Decision to the Board, and both parties also responded to their opponent's appeals. *See* EPA Br.; Ram Br.; Complainant's Notice of Appeal (August 13, 2008); Respondent's Response to Complainant's Appellate Brief (Sept. 2, 2008) ("Ram Resp. Br."); Complainant's Brief in Opposition to Respondent's Appeal (Sept. 4, 2008) ("EPA Resp. Br.").

1. *Ram's Appeal*

In a four-page appeal,[4] Ram disparages the ALJ's decision. Based on a careful review of the appeal, the Board construes these arguments as follows.[5]

First, Ram states:

> The Court below failed to prevent EPA from applying its own penalties and policies, rather than the [OCC's] penalties and policies with respect to Ram. If OCC's program had been applied, $2000.00 would have been more likely the fine assessed, if any.

Ram Br. at 2. The Board construes this to challenge the ALJ's decision to apply the federal UST penalty policy and its associated federal penalties, rather than the OCC penalty policy and its associated penalties. As noted above, for federally-enforced state UST violations, EPA may seek civil penalties of up to $11,000

---

[4] Ram notes that it "adopts and makes a part of [its] [a]ppellate [b]rief" the ALJ's Initial Decision and the following documents filed before the ALJ: (1) Ram's Proposed Findings of Fact, Conclusion of Law and Brief in Support and (2) Ram's Memorandum in Reply to Complainant's Post Hearing Brief. Ram Br. at 2-3 n.1.

[5] For the most part, Ram asserts general and conclusory arguments about the Region's alleged overreaching without articulating how or why Ram's general arguments or excerpts from the ALJ's decision translate into a demonstration of a clear error on the ALJ's part. *See generally* Ram Br. The Board addresses in the text those arguments which appear to challenge the ALJ's decision by explaining the basis for the ALJ's alleged error. The Board rejects all other arguments because they fall short of Ram's burden to show clear error. *E.g., In re Mayes*, 12 E.A.D. 54, 95-96 (EAB 2005) (describing standard of Board's review of an ALJ's penalty assessment), *aff'd*, No. 3:05-CV-478 (E.D. Tenn. Jan. 4, 2008).

per tank, per day of violation. RCRA § 9006(d)(2)(B), 42 U.S.C. § 6991e(d)(2)(B). In comparison, for state enforcement of Oklahoma UST violations, OCC may seek "an administrative penalty not to exceed $10,000 for each day the violation continues." Okla. Admin. Code § 165:25-18-19. Thus, unlike the federal administrative penalty, the Oklahoma administrative penalty does not expressly focus on the number of tanks in violation of the UST program.

Second and third, Ram makes what the Board construes as potentially both a liability and a penalty argument with regard to Count 1. Specifically, Ram maintains that, for Count 1, the ALJ "reduced the fine to $2,213.94, which is still amazingly high, and should not be upheld, but should be reduced to zero." Ram Br. at 3. The Board thus considers this to challenge the ALJ's penalty assessment for that count and potentially his liability determination.

Finally, Ram argues that the Region engaged in selective prosecution. Ram bases its argument on its allegations that in fiscal year 2005, the Region only inspected Ram-owned or operated facilities in Oklahoma, and that the Region did not inspect other gas stations with which Ram was in direct competition.

2. *EPA's Appeal*

The Agency asks the Board to review the ALJ-assessed penalty for Counts 3, 14, 15, and 16, and it requests that the Board assess a $43,847 penalty for these counts. EPA Br. at 1. In Counts 3 and 14, the Region alleged that Ram failed to conduct release detection on two temporarily closed UST systems containing more than an inch of product, thereby violating Oklahoma Administrative Code section 165:25-3-62(b). Compl. at 7-8, 25-26. Although the Region had proposed that the ALJ assess a $4,500 penalty for each of these counts, the ALJ assessed only a $600 penalty for each count. Init. Dec. ¶¶ 30, 48 at 12, 20. In Count 15, the Region claimed that Ram failed to continue operating the cathodic protection systems on four temporarily closed USTs, in violation of Oklahoma Administrative Code section 165:25-3-62(a)(1). Compl. at 26-27. The ALJ rejected the proposed $16,500 penalty for Count 15 and assessed an $800 penalty instead. Init. Dec. ¶¶ 49-50, at 21. In Count 16, the Region asserted that Ram failed to regularly test the cathodic protection systems on four USTs, in violation of Oklahoma Administrative Code section 165:25-2-53(1). Compl. at 27-28. The Region proposed an $18,347.11 penalty for Count 16, which the ALJ reduced to $5,147.12. Init. Dec. ¶ 51, at 22. On appeal, the Agency seeks a total penalty of not less than $86,012,[6] and it asks the Board to affirm the Initial Decision in all other respects. EPA Br. at 6.

[6] The ALJ-assessed penalty ($49,312), less the portion of the penalty assessed for Counts 3, 14, 15, and 16 ($7,147), plus the penalty amount the Agency seeks to reinstate ($43,847) results in a total penalty of $86,012.

II. *ANALYSIS*

A. *Standard of Review*

In an enforcement proceeding, the Board reviews de novo an administrative law judge's factual findings and legal conclusions. 40 C.F.R. § 22.30(f) ("The [Board] shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed, and shall set forth in the final order the reasons for its actions."); *see also* Administrative Procedure Act, 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). In so doing, the Board typically grants deference to an ALJ's determinations regarding witness credibility and the factual findings based thereon because the Board recognizes that the ALJ had "the opportunity to observe the witnesses testify and to evaluate their credibility * * * ." *In re Echevarria*, 5 E.A.D. 626, 639 (EAB 1994). However, such deference does not translate into a blanket endorsement of the ALJ's findings, especially where the ALJ has committed a clear error of fact or law or where the Board finds an ALJ has relied inappropriately on facts or conclusions that are not adequately supported in the record. *E.g.*, *In re Everwood Treatment Co.*, 6 E.A.D. 589, 612 n.39 (EAB 1996), *aff'd*, No. 96-1159-RV-M (S.D. Ala. Jan. 21, 1998).

The regulations authorize the Board to assess a penalty, which may be "higher or lower than the amount recommended to be assessed in the [Initial D]ecision * * * or from the amount sought in the complaint." 40 C.F.R. § 22.30(f). However, when an ALJ's penalty assessment "'falls within the range of penalties provided in the penalty guidelines, the Board will generally not substitute its judgment for that of the [ALJ] absent a showing that the [ALJ] has committed an abuse of discretion or a clear error in assessing the penalty.'" *In re Rhee Bros.*, 13 E.A.D. 261, 268 (EAB 2007) (quoting *Chem. Lab Prods., Inc.*, 10 E.A.D. 711, 725 (EAB 2002)); *see also In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 536, 540-59 (EAB 1998) (finding clear error in ALJ's rejection of Agency-proposed upward increase for gravity component of penalty).

B. *Ram's Appeal*

1. *The ALJ Did Not Err in Applying the Federal UST Penalty Policy Rather than the Oklahoma Penalty Policy*

Ram states that "[t]he Court below failed to prevent EPA from applying its own penalties and policies, rather than the [OCC] penalties and policies with respect to Ram." Ram Br. at 2. Ram premises its argument solely on the assumption that a penalty calculated under the state policy would have been less than the actual penalty calculated under the federal policy.

EPA may assess penalties for failure to comply with "any requirement or standard of a State program approved pursuant to [42 U.S.C. §] 6991c[,]" which provides for state UST programs. RCRA § 9006(d)(2)(B), 42 U.S.C. § 6991e(d)(2)(B). EPA's final rule codifying the Oklahoma state UST program provides that for enforcement actions the Agency undertakes in "approved states," such as Oklahoma, "the Agency will rely on federal sanctions, federal inspection authorities, and federal procedures rather than the state authorized analogs to these provisions." Approved Oklahoma UST Program, 61 Fed. Reg. 1220, 1220 (Jan. 18, 1996). The Board has recognized that "penalties assessed by authorized states may be significantly lower than those assessed by the Agency." *In re Titan Wheel Corp. of Iowa*, 10 E.A.D. 526, 534 n.15 (EAB 2002), *aff'd*, 291 F. Supp. 2d 899 (S.D. Iowa 2003). In *Titan Wheel*, the Board stated that "even if [there were] disparities in penalties assessed by EPA and those assessed by the State of Missouri, such disparities are anticipated by [RCRA] and implementing regulations as a byproduct of a federalized system of administration." *Id.* The Board thus rejected such a disparity as grounds for decreasing the penalty, and on appeal, the U.S. District Court for the Southern District of Iowa affirmed that "the EPA may impose stiffer penalties than the penalties assessed by an authorized state." 291 F. Supp. 2d at 913.

In this case, the Region conducted an enforcement action in an "approved state[]" and "rel[ied] on federal sanctions, federal inspection authorities, and federal procedures rather than the state authorized analogs." 61 Fed. Reg. at 1220.[7] Although there may be a disparity between the federal penalty assessment and the likely state penalty, as in *Titan Wheel*, any such discrepancy would arise as a result of federal, rather than state, RCRA enforcement. This disparity does not persuade us that the ALJ clearly erred by applying the federal penalty policy. Indeed, the Agency explicitly sanctioned such an approach when it approved and codified the Oklahoma UST program. Accordingly, the Board affirms the ALJ's application of the UST Penalty Policy rather than the Oklahoma penalty policy.

2. *The ALJ Did Not Err in Finding Ram Liable for Count 1*

In general, Ram complains on appeal that "[t]he magnitude of th[e] fine is shocking" and "outrageous[.]" Ram Br. at 2-3. Ram specifically argues that the penalty for Count 1, which pertained to an alleged failure to install spill preven-

[7] To the extent that Ram's argument can be seen as a challenge to EPA's approval of the Oklahoma UST program, the Board rejects any such challenge, consistent with its practice of declining to review regulations in the context of an enforcement proceeding. *E.g.*, *In re Woodkiln Inc.*, 7 E.A.D. 254, 269 (EAB 1997) ("[T]he Board has refused to review final Agency regulations that are attacked because of their substantive content or alleged invalidity, both in the exercise of the Board's permit review authority and in the enforcement context."); *Echevarria*, 5 E.A.D. at 634 ("[C]hallenges to rulemaking are rarely entertained in an administrative enforcement proceeding." (quoting *In re Am. Ecological Recycle Research Corp.*, RCRA (3008) Appeal No. 83-3, at 5-6 (CJO July 18, 1985))).

tion devices for new tanks, "should not be upheld" because the ALJ "found there was no evidence of any truck deliveries at those two tanks." *Id.* at 3 (quoting Init. Dec. ¶ 22, at 7 ("[T]here is simply no evidence of any spill occurring at this station.")). With respect to this count, Ram states that "[the ALJ] reduced the fine [from $27,413.94] to $2,213.94, which is still amazingly high[] and * * * should be reduced to zero." *Id.*

Ram does not make clear in its brief the scope of its argument that the fine "should be reduced to zero." Ram also argues generally that "[i]n an effort to placate EPA, Ram agreed to stipulate to all of the remaining violations at the 3-day trial – they were largely only paperwork violations – if they were violations at all." *Id.* at 2. If by these statements Ram purports to contend that it is not liable for Count 1, the Board flatly rejects the contention. During its opening statement at the evidentiary hearing, Ram stipulated to liability for "the standing counts that [EPA had] not yet dropped * * * ." ALJ Tr. at 56; Init. Dec. ¶ 8, at 3. Ram stated, "We stipulate to liability in each and every case. * * * [W]e are liable." ALJ Tr. at 56; *see also* Init. Dec. ¶ 8, at 3 ("Ram has stipulated to liability for each and every count that has not been dropped by EPA, which includes * * * Count 1 * * * ."). Moreover, at no time during the hearing or before the ALJ did Ram seek release from its stipulation.

Stipulations are "judicial admission[s] binding on the parties making [them], absent special considerations." *Vallejos v. C.E. Glass Co.*, 583 F.2d 507, 510 (10th Cir. 1978); *see also Wheeler v. John Deere Co.*, 935 F.2d 1090, 1097 (10th Cir. 1991) (holding that a stipulation "cannot be disregarded or set aside at will" (quoting *Lyles v. Am. Hoist & Derrick Co.*, 614 F.2d 691, 694 (10th Cir. 1980))); *In re Euclid of Va., Inc.*, 13 E.A.D. 616, 657-58 (EAB 2008) (discussing judicial admissions), *appeal voluntarily dismissed*, No. 08-1088 (D.D.C. Oct. 22, 2008). Permitting parties to enter into stipulations allows tribunals "to dispense with proof over matters not in issue, thereby promoting judicial economy at the convenience of the parties." *United States v. McGregor*, 529 F.2d 928, 931 (9th Cir. 1976) (citing 9 J. Wigmore, Evidence §§ 2588-2597 (3d ed.1940)); *see also CDN Inc. v. Kapes*, 197 F.3d 1256, 1258 (9th Cir. 1999) (recognizing that "stipulations serve both judicial economy and the convenience of the parties").

Because of Ram's stipulations at the hearing, neither party presented evidence to support or defend the allegations regarding liability for Count 1. Ram's statements at the evidentiary hearing constitute binding judicial admissions, and therefore, the only issues for the ALJ to resolve were the penalty amounts. Ram does not identify any special circumstances that would warrant consideration of the stipulations as non-binding. Accordingly, the Board upholds Ram's stipulation of liability for Count 1 and declines any implied request to allow Ram to withdraw its stipulations on appeal. To allow Ram to reopen these issues on appeal would be patently unfair to the Region, which relied on Ram's admissions in its

trial presentation. It would also reward dilatory tactics and waste judicial resources.

3. *The ALJ Did Not Clearly Err or Commit an Abuse of Discretion in his Penalty Assessment for Count 1*

As noted above, Ram argues that the fine for Count 1, which the ALJ reduced considerably from the Region's request, nonetheless "should not be upheld [and] should be reduced to zero."[8] Ram Br. at 3. Based on a review of Ram's brief, the Board concludes that Ram essentially argues that there was no actual harm to the environment and that it did not deviate from the regulatory requirements.[9] The Board interprets this as a general challenge to the ALJ's finding that the potential for harm of the violations was minor and the deviation from the requirements was moderate.

A violation's "potential for harm" and "extent of deviation from requirements" are UST Penalty Policy criteria that the Region uses to identify a starting point for calculating the value of a penalty assessment's gravity-based component. The gravity-based component of a penalty assessment is one of the assessment's two main elements and reflects the seriousness of the violation.[10] UST Penalty

---

[8] Although Ram contends generally that the record shows this is a case of the Agency "issuing an economic death sentence," Ram Br. at 3, the record reflects otherwise. As the ALJ found, Ram withdrew its inability to pay argument prior to the pre-hearing exchange. Init. Dec. at 2 n.3.

[9] Ram states:

> EPA tried to fine Ram $27,413.94 for failing to install spill buckets on two tanks at a service station where those tanks could not be accessed by a fuel truck due to physical limitations. (The only reason for spill buckets is to catch spills from tank truck loading hoses.) [The ALJ] found there was no evidence of any truck deliveries at those two tanks and further that there is "simply no evidence of any spill occurring at this station."

Ram Br. at 3 (quoting Init. Dec. ¶ 22, at 7).

[10] The second element, an economic benefit component that captures the economic gain the violator may have received from noncompliance, is combined with the gravity-based component to arrive at a final penalty. UST Penalty Policy § 1.3. The Board's discussion of the economic benefit component is limited as it is not at issue in this case.

The Agency's penalty policies guide the ALJ and enforcement personnel "in determining an appropriate penalty assessment by describing a method for translating statutory penalty factors into numerical terms." *In re Lyon County Landfill*, 10 E.A.D. 416, 450 (EAB 2002), *aff'd*, No. Civ. 02-907 JNE/JGL (D. Minn. June 7, 2004), *aff'd*, 406 F.3d 981 (8th Cir. 2005). In particular, the policies "provide a framework that allows a presiding officer to apply his or her discretion to statutory penalty factors, thereby facilitating a uniform application of the factors." *In re Allegheny Power Serv. Corp.*, 9 E.A.D. 636, 655 (EAB 2001), *aff'd*, No. 6:01-cv-241 (S.D. W.Va. Apr. 5, 2002). Such guidance does

Continued

Policy § 3. The Region evaluates and categorizes for each violation the extent of deviation from the requirements and the potential for harm from the violation into one of three categories: "major," "moderate," and "minor." Using a grid on which the extent of deviation and the potential for harm form the axes, the Region then locates the point at which the assigned categories intersect to identify a base "matrix value," which may be further adjusted. *Id.* § 3.1.

With respect to whether the ALJ appropriately characterized the extent of deviation from the requirements, the Board first looks to the UST Penalty Policy, which describes the three categories of the extent of deviation as the following:

> Major – The violator deviates from the requirements of the regulation or statute to such an extent that there is substantial noncompliance. An example is installing a bare steel tank without cathodic protection.
>
> Moderate – The violator significantly deviates from the requirement of the regulation or statute, but to some extent has implemented the requirement as intended. An example is installing improperly constructed cathodic protection.
>
> Minor – The violator deviates slightly from the regulatory or statutory requirements, but most of the requirements are met. An example is failing to keep every maintenance record on properly constructed cathodic protection.

Id. § 3.1.1. The UST Penalty Policy also provides the following descriptions as guidance for categorizing a violation's potential for harm:

> Major – The violation causes or may cause a situation resulting in a substantial or continuing risk to human health and the environment and/or may have a substantial adverse effect on the regulatory program. Examples are: (1) improperly installing a fiberglass reinforced plastic

---

(continued)
not bind either the ALJ or the Board to assessing a particular penalty since these policies, not having been subjected to the rulemaking procedures of the Administrative Procedure Act, lack the force of law. *E.g.*, *id.* at 658-59; *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 758 (EAB 1997). "[A]lthough the ALJ must consider any civil penalty policies applicable to the matter, the ALJ has significant discretion to assess a penalty other than that calculated pursuant to the particular penalty policy." *Lyon County Landfill*, 10 E.A.D. at 450 (citing 40 C.F.R. § 22.27(b); *Allegheny Power*, 9 E.A.D. at 658-59; *Wausau*, 6 E.A.D. at 758). Similarly, on appeal, the Board is authorized to increase or decrease the penalty assessment in an initial decision in appropriate circumstances. 40 C.F.R. § 22.30(f).

> tank (because a catastrophic release may result); or (2) failing to provide adequate release detection by the specified phase-in date (because without release detection a release may go unnoticed for a lengthy period of time with detrimental consequences).
>
> Moderate – The violation causes or may cause a situation resulting in a significant risk to human health and the environment and/or may have a significant adverse effect on the regulatory program. An example would be installing a tank that fails to meet tank corrosion protection standards (because it could result in a release, although the use of release detection is expected to minimize the potential for continuing harm from the release).
>
> Minor – The violation causes or may cause a situation resulting in a relatively low risk to human health and the environment and/or may have a minor adverse effect on the regulatory program. An example would be failing to provide certification of UST installation (assuming that the installation was done correctly).

Id. § 3.1.2.

In this case, the ALJ found that the only fill ports used for delivering product to the USTs at issue were on the south side of the tanks, the only side that also had spill prevention devices. Init. Dec. ¶ 22, at 7. As to the north side of the tanks, the ALJ found that delivery of product would be impractical and that "there is no evidence that any delivery was ever made through the north ports." *Id.* The Region argued that the failure to have spill prevention devices on the north ports was a major deviation from the requirements and that the potential for harm was also major due to the possible cumulative effects of repeated spills while delivering product. *Id.*; *see also* ALJ Tr. at 94. The ALJ nonetheless concluded that the deviation from the requirements was moderate. Init. Dec. ¶ 22, at 7. As to the potential for harm due to this deviation, the ALJ considered the infrequency, or lack, of deliveries to the fill ports on the side of the USTs lacking spill prevention devices and rejected the Region's witness's testimony that a "spill after spill after spill scenario" could occur, finding that "there [wa]s simply no evidence of any spill occurring at this station." *Id.* Accordingly, the ALJ characterized the potential for harm for failing to have spill prevention devices on the north fill ports of the USTs as minor. *Id.* ¶ 22, at 7-8.

Ram argues that the general purpose of spill prevention devices is to catch product spilled from hoses during transfer from delivery trucks. Ram Br. at 3. According to Ram, one side of the USTs was inaccessible; therefore, Ram asserts

that it was not possible for spills to occur on that side, and spill prevention devices were not necessary. *Id.*

The Board remains unconvinced that it should further reduce or eliminate the ALJ's penalty assessment for Count 1. To the contrary, the ALJ fully factored Ram's concerns into his decision by reducing the Region's proposed penalty. Ram does not support its arguments that the lack of evidence of truck deliveries to the north fill ports or any spills in general should result in a further reduced or no penalty. Moreover, the Board observes that Ram partially complied with the requirements by installing the appropriate equipment on the side of the tanks that received shipments. The Board finds that the ALJ's penalty assessment is neither an abuse of discretion nor a clear error. Accordingly, the Board upholds the ALJ's characterization of the deviation from the requirements in Count 1 as moderate and the characterization of the potential for harm due to the violation as minor.

4. *The ALJ Did Not Err in Finding Ram Failed to Establish Selective Prosecution*

Finally, Ram alleges that the Region denied Ram substantive due process as evidenced by "the unjustifiable targeting of Ram, * * * the [assessment of] outrageous[ly] size[d] * * * fines, and * * * [a] pattern of EPA's inaccurate factual assertions." Ram Br. at 3. According to Ram, its facilities were the only ones the Region inspected in the state in 2005. *Id.* at 2. In further support of its selective prosecution argument, Ram asserts that there were no enforcement actions against any of the "Native American gasoline service stations" with which Ram is in "direct competition" and "there are no other UST penalties for other service stations * * * [that] are even one-tenth the size of those penalties issued to Ram." *Id.* at 4.

One who alleges selective prosecution or enforcement "faces a daunting burden in establishing that the Agency engaged in illegal selective enforcement, for courts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions." *In re B&R Oil Co.*, 8 E.A.D. 39, 51 (EAB 1998). Prosecutorial discretion also extends to decisions of when to commence enforcement actions, within the parameters of applicable statutes of limitations. *See, e.g., N.J. Dep't of Envtl. Prot. v. Gloucester Envtl. Mgmt. Servs., Inc.*, 668 F. Supp. 404, 407 (D.N.J. 1987) ("The EPA's decision as to the timing of an enforcement action is one within its discretion."). To prevail on a claim of selective prosecution, one must establish that "(1) the government 'singled out' a violator while other similarly situated violators were left untouched, and (2) the selection was in bad faith based on such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights." *B&R Oil*, 8 E.A.D. at 51 (citing *United States v. Smithfield Foods, Inc.*, 969 F. Supp. 975 (E.D. Va. 1997)), *aff'd in part, rev'd in part* 191 F.3d 516 (4th Cir. 1999), cert. denied 331 U.S. 813 (2000).

Ram does not establish that it was singled out "while other similarly situated violators were left untouched" or that the Region chose to inspect and fine Ram due to bad faith based on race, religion, or the desire to prevent the exercise of constitutional rights.[11] In fact, the ALJ found the Region based its inspections of multiple Ram facilities on the discovery of above and underground storage tank violations at two different Ram-owned or operated facilities within two months.[12] The Region's November 2004 inspection of a Ram-owned facility within a geographical area the Region had selected for its annual inspections resulted in its discovering three cathodic protection violations. Init. Dec. ¶ 10, at 4. The following month, OCC alerted the Region to a release of product from an aboveground storage tank at another Ram facility. *Id.* This triggered subsequent inspections at Ram-owned or operated facilities: "These violations raised concerns with [the] Region [] concerning compliance with UST regulations at other facilities owned or operated by Ram [and] lead to the EPA inspection of the Ram facilities on February 16 and 17, 2005."[13] *Id.* In light of these findings, Ram does not meet the threshold requirements for establishing selective prosecution, and the Board affirms the ALJ's decision to defer to the Region's exercise of its enforcement discretion.

C. *EPA's Appeal*

The Agency's appeal challenges the ALJ's penalty determinations for Counts 3, 14, 15, and 16. In particular, the Agency disputes the ALJ's characterization of the potential for harm for the violations in each count as "minor." The Agency further argues that the "days of noncompliance multiplier" ("DNM") for Count 15 should be based on Ram's stipulation that the violation lasted 1,279 days.

---

[11] Rather, Ram argues that the U.S. Constitution itself prohibits OCC "from enforcing UST rules against [tribally owned or operated gasoline service stations]" and that the ALJ's "failure to prevent Ram from being undercut in the marketplace by even-handed applications of the UST Rules and Regulations is * * * violative of Ram's Constitutional rights to fair trial and hearing." Ram Br. at 4. These statements alone do not establish that the Region chose to inspect and fine Ram due to bad faith based on race, religion, or the desire to prevent the exercise of constitutional rights.

[12] The ALJ found that due to limited resources, only "[o]ne set of inspections is allowed per year" and in 2004, the Region and OCC "conducted a joint inspection of the USTs in the Pittsburg County, [Oklahoma] geographical area." Init. Dec. ¶ 10, at 4.

[13] The ALJ also found that Ram-owned or operated facilities were not the only facilities that the Region inspected in the 2005 fiscal year. Init. Dec. at 26 (citing ALJ Tr. at 47).

1. *The ALJ Erred in Finding the Potential for Harm of the Violations in Counts 3 and 14 was "Minor"*

Counts 3 and 14 concern two USTs that Ram temporarily removed from service. The Region alleged, and Ram stipulated, that Ram violated Oklahoma Administrative Code section 165:25-3-62(a)(2)[14] by failing to meet release detection requirements for the USTs, which each contained "eight or nine inches of product." ALJ Tr. at 107, 116, 142, 222; Compl. at 7-9, 25-26. The Region's proposed penalty characterized the potential for harm as "major;" however, the ALJ rejected this characterization, reasoning that there was a "small amount of product remaining in the tank as opposed to it being full or some major fraction thereof." Init. Dec. ¶¶ 30, 48, at 12, 20. As a result, the ALJ characterized the potential for harm as "minor."

The Agency argues that the ALJ erred because he "based his reduction of the penalty for Counts 3 and 14 merely on what he determined to be a small amount of product remaining" in the USTs. EPA Br. at 6. The capacities of the two tanks were 12,000 gallons (Count 3) and 1,000 gallons (Count 14). Init. Dec. ¶¶ 28, 48, at 11, 20. The ALJ found that the 1,000-gallon tank contained approximately 60 to 70 gallons of product. *Id.* at 12 n.17 (citing ALJ Tr. at 600) (estimating 65 to 70 gallons); *see also id.* ¶ 31, at 13 (citing ALJ Tr. at 648) (estimating 60 to 65 gallons). The ALJ did not make a similar finding for the 12,000-gallon tank. He did note that in a tank of unspecified capacity, "eight inches of product would convert into 832 gallons." *Id.* at 12 n.17. The ALJ also found that Ram continued to use the 12,000-gallon tank as an "emergency" tank to hold product from overloaded delivery trucks. *Id.* ¶ 28, at 11.

The Agency relies on *In re Carroll Oil Co.*, 10 E.A.D. 635 (EAB 2002), to support its argument that the appropriate potential for harm category for Counts 3 and 14 is "major." EPA Br. at 7-8. In *Carroll Oil*, the Board found that an UST from which a respondent "pumped all the product * * * to as low a number as [it] possibly could" contained a "minimal amount" of gasoline, which "b[ore] inevitably on [an out-of-business gas station's] potential to pose substantial harm to the environment, at least during the period of temporary closure."[15] 10 E.A.D. at 670 & n.33. The Region had characterized the potential for harm to the environment

---

[14] Section 165:25-3-62(a)(2), now revoked, provided that the owner or operator of an UST that has been temporarily taken out of service is subject to release detection requirements unless the UST is "empty." Okla. Admin. Code §§ 165:25-3-62(a)(2), (b) (revoked July 1, 2006), *available at* 21 Okla. Reg. 2036 (June 15, 2004). Under the rule, an UST is "empty when all materials have been removed using commonly employed practices so that no more than 1 inch (1") of residue remains in the tank." *Id.* § 165:25-3-62(b) (revoked July 1, 2006).

[15] *Carroll Oil* concerned three USTs, one with a 8,000-gallon capacity and two with 6,000-gallon capacities. *Carroll Oil*, 10 E.A.D. at 640.

in that case as "major;" however, the Board rejected the Region's characterization and considered the potential for harm to be "moderate" based on the "minimal amount of gasoline" in the USTs at issue. *Id.* The Region had not ascertained a definite volume of gasoline remaining in the USTs. *Id.*

The Agency also argues that the ALJ disregarded the potential for the violations of the release detection requirements to have a substantial adverse effect on the regulatory program despite Ram's admissions that it used one of the tanks to hold excess product, failed to conduct release detection for all the tanks in Counts 3 and 14, and "reli[ed] on the unconfirmed actions of a third party" to justify non-compliance with Ram's regulatory obligations. EPA Br. at 8 ("[Ram's] conduct blatantly disregards the regulations."). The UST Penalty Policy includes within the framework of a major potential for harm situations where the violation may have a substantial adverse effect on the regulatory process. UST Penalty Policy § 3.1.2.

Ram does not rebut these allegations in any meaningful manner, merely stating that "not only was there no proven potential for harm to the environment, * * * [there was also] no [actual] harm to the environment." Ram Resp. Br. at 1. Ram states, "EPA never showed that there was one drop of gasoline from any of these five service stations which was spilled on the ground." *Id.*

When determining the potential for harm factor, "it is the *potential* in each situation that is important, not solely whether the harm has actually occurred." UST Penalty Policy § 3.1.2; *see In re V-1 Oil Co.*, 8 E.A.D. 729, 755 (EAB 2000) ("Proof of actual harm to the environment need not be proven to assess a substantial penalty."); *In re Everwood Treatment Co.*, 6 E.A.D. 589, 602-03 (EAB 1996) (violation raised potential that environmental damage, should it occur, would be substantial, and evidence of actual environmental damage is not required), *aff'd*, No. 96-1159-RV-M (S.D. Ala. Jan. 21, 1998). Accordingly, the Board rejects Ram's defense that the Region failed to demonstrate actual harm.

The UST Penalty Policy emphasizes the importance of release detection when evaluating the potential for harm: the example of a violation with "major" potential for harm provides that "without release detection a release may go unnoticed for a lengthy period of time with detrimental consequences[,]" and the example of a violation with a "moderate" potential for harm takes into account that the presence of release detection would "minimize the potential for continuing harm" from a potential release. UST Penalty Policy § 3.1.2; *see also Carroll Oil*, 10 E.A.D. at 657-58.

Failure to regularly ensure that release detection equipment functions properly unquestionably threatens the UST regulatory scheme and program. Indeed, Congress mandated release detection for tanks when it enacted the UST program, *see* RCRA § 9003(c)(1), 42 U.S.C. § 6991b(c)(1), and EPA emphasized in the

preamble to the regulations how important release detection is to preventing environmental harm. *See* UST Technical Requirements, 52 Fed. Reg. 12,662, 12,713 (proposed Apr. 17, 1987). "[T]he Agency concluded that release detection * * * will be needed in any regulatory approach to new tank systems[] * * * [and] that any regulatory approach should also provide for the * * * detection of future releases * * * of existing leak-prone UST systems." *Id.* at 12,672. Moreover, EPA observed that release detection can minimize releases should an UST owner or operator fall short of meeting other UST program requirements, such as corrosion standards. *See* UST Penalty Policy § 3.1.2 (suggesting that use of release detection is expected to minimize the potential for continuing harm from release from tank that fails to meet corrosion protection standards). The Board thus agrees that the ALJ clearly erred when he disregarded the substantial effect the violation had on the regulatory program.

Finally, at the hearing and on appeal, the Region proposed characterizing the potential for harm factor for Counts 3 and 14 as "major," with which the Board agrees. The amount of product remaining in Ram's USTs, 60-70 gallons in one tank and 832 gallons in another, appears to be considerably more than the "minimal amount" that remained after "pump[ing] all the product * * * to as low a number as * * * possibl[e]" in *Carroll Oil*, in which the Board found the proper categorization of the potential for harm was "moderate."[16] Additionally, the volume in Ram's larger tank had the potential to increase, despite the temporarily closed status of the tank, as it was Ram's practice to use that tank to hold excess product from overloaded delivery trucks. Although the volume of product admittedly remaining in the tanks could be considered a small fraction of the tanks' total capacities, the volume of product remaining in this case is anything but small and well exceeds the one inch of residue authorized to remain in a tank deemed "empty." The Agency has previously recognized the vast impact a small-volume gasoline spill can have on a nearby drinking water supply: "[I]t does not take much pollution to create a drinking water problem. For example, an unrestricted gasoline leak of one drop per second releases about 400 gallons per year. Even a few quarts of gasoline in the ground water can pollute a drinking water well." Office of Water, U.S. EPA, EPA 816-F-01-023, *Source Water Protection Practices Bulletin: Managing Underground Storage Tanks to Prevent Contamination of Drinking Water* 2 (July 2001); *see also* Office of Water, U.S. EPA, EPA 916-F-01-022, *Source Water Protection Practices Bulletin: Managing Above Ground Storage Tanks to Prevent Contamination of Drinking Water* 2 (July 2001) ("A spill of only one gallon of oil can contaminate a million gallons of water."). The UST Penalty Policy reflects the critical role that release detection require-

[16] The ALJ's and the Board's characterizations of the potential for harm in *Carroll Oil* was influenced by the Region's failure to quantify the amount of product remaining in that tank, in contrast to the case here where the Region provided and the ALJ made findings about the amount of product remaining in the tanks.

ments play in minimizing releases should they occur; violation of these requirements have a substantial effect on the UST regulatory program. Accordingly, the proper categorization of the potential for harm for the lack of release detection in the USTs in Counts 3 and 14 is "major."

2. *The ALJ Erred in Finding the Potential for Harm of the Violations in Counts 15 and 16 was "Minor"*

The ALJ categorized the potential for harm for Ram's failure to operate corrosion protection systems for USTs during temporary closure (Count 15) and failure to test the cathodic protection systems of those USTs (Count 16) as "minor." The ALJ observed that only one of the four USTs at issue in Counts 15 and 16 contained any product at the time of the inspection, and thus, at the time of the inspection, "the potential for harm was not as great because there was no product [in the three remaining tanks]." Init. Dec. ¶ 49, at 21. With respect to Count 15, the ALJ first found that "'a temporary closed tank assumes that sometime in the future, it's going to be placed or could be placed into operation' and the cathodic protection system 'has to be maintained because corrosion will occur.'" *Id.* ¶ 50, at 21 (quoting ALJ Tr. at 144-45). He then reasoned:

> If there is corrosion, a leak could occur in the future if product is placed in the tank. But if the tanks are removed and never used, no harm can occur from the failure to maintain a cathodic protection system on empty tanks. Therefore, in regard to these tanks, the potential for harm should be minor, if not nonexistent.

Id. The ALJ also found that, as to Count 16, "the tanks were eventually taken out." *Id.* ¶ 51, at 22.

The Agency argues that eventual removal of the USTs "is not a proper basis for penalty mitigation." EPA Br. at 10. EPA states that Ram's "conduct of removing the tanks, after the inspection and after the complaint was filed were [sic] not above and beyond what was necessary to comply with regulations that are closely related to the initial harm addressed." *Id.* (citing ALJ Tr. at 613). Ram's only response to this allegation is a general statement that there was not actual harm and that the Region failed to prove potential harm. Ram Resp. Br. at 1.

The Board reiterates that proof of actual harm to the environment is not required to assess a substantial penalty, *see* Part II.C.1, and that the actual or potential for harm factor is "[a]n assessment of the likelihood that the violation could (or did) result in harm to human health or the environment and/or has (or had) an adverse effect on the regulatory program." UST Penalty Policy § 3.1. Thus, the Region categorizes the potential for harm as "minor," "moderate," or "major" based on the type of violation that has occurred or is ongoing, without consideration of

actions taken subsequent to discovery of the violation. Moreover, a separate adjustment factor takes into account a violator's actions conducted in response to the Region's enforcement actions. Section 3.2.1 addresses a violator-specific adjustment for a violator's degree of cooperation or noncooperation and specifically provides, "Because compliance with the regulation is expected from the regulated community, no downward adjustment may be made if the good faith efforts to comply primarily consist of coming into compliance. That is, there should be no 'reward' for doing now what should have been done in the first place." *Id.* § 3.2.1 (emphasis omitted). This is consistent with the Board's interpretations of the penalty policies for other statutes. The Board previously stated in the context of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y, that "[p]ositive attitude and good faith attempts to comply with the law" are not eligible for a penalty reduction when the violator has, as here, decided to litigate the case rather than negotiate a settlement. *In re FRM Chem, Inc.*, 12 E.A.D. 739, 759 (EAB 2006) (declining to affirm ALJ's penalty reduction based on crediting violator with cooperation during two investigations).

The Board readily finds a moderate potential for harm due to the violations described in Counts 15 and 16. For Count 16, failing to regularly test corrosion protection systems while an UST is in use may cause a malfunctioning cathodic protection system to escape notice, corrosion within an UST system, and the subsequent release of product into the environment. The ALJ identified the potential for harm that could occur from the violation described in Count 15: corrosion could occur, and "[i]f there is corrosion, a leak could occur in the future if product is placed in the tank" after the temporarily closed UST is returned to service. Init. Dec. ¶ 50, at 21 (citing ALJ Tr. at 273). The UST Penalty Policy's description of a "moderate" potential for harm provides that "[t]he violation causes or may cause a situation resulting in a significant risk to human health and the environment and/or may have a significant adverse effect on the regulatory program." UST Penalty Policy § 3.1.2. "An example would be installing a tank that fails to meet tank corrosion protection standards (because it could result in a release, although the use of release detection is expected to minimize the potential for continuing harm from the release)." *Id.* Based on the UST Penalty Policy and the ALJ's findings, the violations described in Counts 15 and 16 both have a "moderate" potential for harm.

The ALJ clearly erred when he relied on the eventual removal of USTs to characterize the potential for harm in Counts 15 and 16 as "minor." The ALJ's findings support a "moderate" potential for harm, and because compliance with a regulation after being cited for its violation does not warrant a downward adjustment to a gravity-based penalty, the Board concludes the appropriate characterization of the potential for harm is "moderate," without further adjustment to the matrix value.

3. *The ALJ Erred by Reducing the Days of Noncompliance Multiplier for Count 15 Despite Ram's Stipulation to the Number of Days it was in Violation*

The Region argues that the ALJ impermissibly reduced the DNM from 5.5 to 1.0, contravening Ram's stipulation of liability for the count. EPA Br. at 12. The DNM is the final adjustment the Region makes to the gravity-based component of the penalty after determining the base matrix value, making any violator-specific adjustments, and multiplying the adjusted base matrix value by an "environmental sensitivity multiplier."[17] UST Penalty Policy §§ 3.3-.4. The DNM is a multiplier based on the number of days of noncompliance. *Id.* § 3.4. For 0 to 90 days of noncompliance, the DNM equals "1.0." *Id.* The DNM for noncompliance that is 91 through 180 days in duration is "1.5," and for noncompliance that lasts 181 through 270 days, the DNM increases to "2.0." *Id.* The Region assigns a DNM of "2.5" for noncompliance lasting 271 to 365 days. *Id.* After 365 days of noncompliance, the DNM increases by "0.5" for each additional six months or fraction thereof. *Id.*

In this case, the Region argues:

> Respondent stipulated to liability for each and every count that was not dropped by EPA at the Hearing. Count 15 as alleged in the Complaint included the allegation that the period of noncompliance began on the date the USTs were placed in temporary closure, which was August 17, 2001, and continued to February 16, 2005 (the earliest date compliance could have been achieved).

EPA Br. at 12 (citations omitted). Thus, according to the Region, "the 1,279 days of noncompliance for the Count 15 violations were not in issue." *Id.*

Notwithstanding the stipulation, in reducing the DNM from 5.5 to 1, the ALJ stated that the Region "did not provide an accurate basis for the days of noncompliance." Init. Dec. ¶ 50, at 21. He continued:

> During the direct examination, Complainant's counsel asked [its witness] if it "is the assumption there that [Ram] failed to operate the cathodic protection system * * * in August of [2001], when [Ram] took the tank out of service?" The [Region's witness] answered the question in the positive and went on to say that "we don't know when

[17] The environmental sensitivity multiplier is not at issue in this case.

> the cathodic protection system was shut off. But at the time of the inspection, it was not there."

Id. (citing ALJ Tr. at 147). The ALJ concluded that the Region's witness was "simply guessing that the cathodic protection system [was] not in operation since the tanks were last used." *Id.* The ALJ also refused to rely on Ram's lack of documentary evidence showing that the cathodic protection system was in fact in operation during the relevant time period, reasoning that lack of records was not the violation charged. *Id.* Accordingly, the ALJ found that the adduced testimony established only that "the cathodic protection systems were not in operation on the day of the inspection." *Id.*

Count 15 sets forth the alleged violation of Oklahoma Administrative Code section 165:25-3-62(a)(1) in five paragraphs. In particular, the final paragraph alleged that "[t]he period of violation is from the date the USTs were placed in temporary closure, which is August 17, 2001, to February 16, 2005 (the earliest date compliance could have been achieved.)." Compl. ¶ 105, at 27. In its answer, Ram did not admit to the allegations in paragraph 105. *See* Respondent's Answer to the Administrative Complaint (Oct. 11, 2005) ¶ 105, at 11. However, at the evidentiary hearing, counsel for Ram made the following statements: "We'll stipulate to liability in order to move this along"; "We stipulate to liability in each and every case"; and "Implicit in that is the standing counts that they have not yet dropped, we accept liability for them." ALJ Tr. at 56. Ram's oral stipulation did not state specific regulations that it had violated. It did, however, refer to liability for the remaining counts – including Count 15 – that the Region had not dropped. Because Count 15 alleged the period of violation, and because Ram has not provided grounds on which to be released from its stipulation,[18] Ram's stipulation of the period of violation as stated in Count 15 is binding, and the Region need not provide independent proof of its basis for the days of noncompliance. The ALJ thus clearly erred by ignoring the stipulation.

Even if the ALJ had not erred in ignoring Ram's stipulation, the Board is persuaded that a reasonable inference could also have been drawn based on the evidence in the record that the period of violation extended from August 17, 2001 to February 16, 2005.

In this case, although Count 15 does not allege a record keeping violation, Ram lacked records demonstrating recent cathodic protection system compliance. Init. Dec. ¶ 50, at 21. The Region also presented testimony that this lack of records began prior to the period of violation, when the tanks were in use. ALJ Tr. at 152. The Region's witness stated:

---

[18] *See* discussion of stipulations *supra* Part II.B.2.

> This particular facility had no records * * * showing that this system was ever tested; although, it had a cathodic protection system, we saw * * * evidence that it had one, there was no indication that it was ever tested [or] that it ever worked from day one, * * * even * * * before [it was put into] temporary closure.

Id. Ram did not present any evidence or argument either at the evidentiary hearing or during this appeal rebutting the Region's prima facie case regarding the period of violation. The Agency envisioned the record keeping requirements to be an important and essential part of the UST program, particularly in determining regulatory compliance. When promulgating the federal regulation upon which the Oklahoma regulation is based, the Agency stated that "recordkeeping is necessary to ensure compliance with the technical standards for * * * operation and maintenance of corrosion protection systems * * * *[T]he time frames for record retention were established to enable a demonstration of recent facility compliance status prior to an on-site visit.*" UST Technical Requirements, 53 Fed. Reg. 37,082, 37,141 (Sept. 23, 1988) (emphasis added).

The lack of records indicating successful testing of the cathodic protection system (along with testimony that Ram had never provided the Region with records that the system had *ever* been tested), and Ram's failure to rebut the Region's allegations create the reasonable inference that Ram failed to operate and maintain corrosion protection after taking the USTs described in Count 15 temporarily out of service.

The Board is persuaded that the ALJ clearly erred by ignoring Ram's stipulation and by finding that the Region failed to demonstrate that Ram violated Oklahoma Administrative Code section 165:25-3-62(a)(1) for 1,279 days. Consequently, the Board reinstates the Region's proposed assignment of a 5.5 DNM to Count 15.

D. *Penalty Calculations*

Because the Board upholds the ALJ's penalty determination for Count 1, the Board only recalculates the penalties for Counts 3, 14, 15, and 16. In reviewing the Region's proposed penalty and the ALJ's penalty assessment, the Board observes that the Region and the ALJ used base matrix values as provided in the UST Penalty Policy and unadjusted for inflation. For consistency, the Board uses UST Penalty Policy matrix values that are similarly unadjusted.

1. *Counts 3 and 14*

As to the gravity-based component of the penalty for Counts 3 and 14, the Board reinstates the Region's proposed characterization of the potential for harm

as "major." The uncontested characterization for the extent of deviation from the requirements is also "major," resulting in a matrix value of $1,500 for each violation. UST Penalty Policy, ex. 4. There are no violator-specific adjustments, and the environmental sensitivity multiplier, not contested, is 1. The DNM, also uncontested, is 3, and it is multiplied by the $1,500 matrix value, for a sum of $4,500. Because there is no economic benefit component of the penalties for Counts 3 and 14, the gravity-based component of $4,500 for each count constitutes the final penalty amounts.

2. *Count 15*

Count 15 concerned four tanks. The Region did not seek to establish an economic benefit component to the penalty. As to the gravity-based component, the Board reinstates the Region's proposed characterization of the potential for harm as "moderate." The uncontested characterization for the extent of deviation from the requirements is "major," resulting in a matrix value of $750 for each violation. *Id.* There are no violator-specific adjustments, and the environmental sensitivity multiplier, not contested, is 1. The Board applies a DNM of 5.5. Accordingly, each tank in Count 15 is assessed a $4,125 penalty, and the final penalty amount for Count 15 is $16,500.

3. *Count 16*

Four tanks were at issue in Count 16. The economic benefit component, which was not challenged, is $86.78 per tank.[19] As to the gravity-based component, the Board reinstates the Region's proposed characterization of the potential for harm as "moderate." The uncontested characterization for the extent of deviation from the requirements is "major," resulting in a matrix value of $750 for each violation. *Id.* There are no violator-specific adjustments, and the environmental sensitivity multiplier is 1. The uncontested DNM is 6. The resultant gravity-based component of the penalty for each tank is $4,500. Accordingly, the sum of the economic benefit and gravity-based components of the penalty for each tank is $4,586.78, and the total penalty for four tanks in Count 16 is $18,347.12.

III. *CONCLUSION*

Based on the foregoing, the Board rejects Ram's challenges to the applicability of the federal UST Penalty Policy, the ALJ's finding that Ram stipulated to liability for Count 1, and the ALJ's failure to assess a lower penalty for Count 1 than was assessed. The Board further finds that Ram has not demonstrated that the

[19] The economic benefit component of the Region's proposed penalty consisted of only avoided costs, which the ALJ considered and adopted. Init. Dec. ¶ 51, at 21.

Region selectively prosecuted or targeted Ram in this enforcement action. Finally, the Board assesses a penalty of $43,847.12 for Ram's violations of the UST regulations described in Counts 3, 14, 15, and 16. Accordingly, Ram's total penalty is $86,012.[20] Payment of the entire amount of the civil penalty ($86,012) shall be made within thirty (30) days of service of this Final Decision and Order, by cashier's check or certified check payable to the Treasurer, United States of America, to the following address:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

The check shall note the case name and the EPA docket number. 40 C.F.R. § 22.31(c).

So ordered.

[20] The total penalty assessed is the sum of the amount not in controversy, $42,164.88, and the revised assessment for Counts 3, 14, 15, and 16, $43,847.12.