IN RE JOHN A. CAPOZZI D/B/A CAPOZZI CUSTOM CABINETS

RCRA (3008) Appeal No. 02-01

FINAL DECISION

Decided March 25, 2003

Syllabus

This is an appeal by the Chief of the Enforcement and Compliance Assurance Branch, Waste, Pesticides, and Toxics Division, U.S. Environmental Protection Agency Region V ("Region V"), from an Initial Decision issued on February 11, 2002, by Administrative Law Judge Carl C. Charneski ("ALJ"). The appeal arises out of a civil administrative enforcement action against John A. Capozzi d/b/a/ Capozzi Custom Cabinets ("Capozzi"), for alleged violations of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k, and the Ohio Administrative Code ("OAC") §§ 3745-50 to -66, which are directly enforceable under RCRA § 3008(a), 42 U.S.C. § 6908(a).

In the proceedings below, Region V charged Capozzi with (1) operating a hazardous waste management unit for disposal at the facility without a permit; (2) improper land disposal of toluene; (3) failing to obtain analysis of hazardous waste before disposal; (4) failing to maintain hazardous waste training records; (5) failing to have a contingency plan; and (6) failing to have a written closure plan. Region V proposed the assessment of a total civil penalty of $156,064. Capozzi disputed its liability for all six counts of Region V's Complaint and argued that the proposed penalty was excessive. The ALJ granted Region V's motion for summary judgment on the issue of liability as to Counts IV, V, and VI, but denied summary judgment as to Counts I, II, and III. After holding an evidentiary hearing on the issue of liability for Counts I, II, and III and on the penalty issue, the ALJ found Capozzi liable for Counts I, II, and III. On the issue of the penalty, the ALJ rejected the Region's proposed penalty and instead assessed a total penalty for all six counts of $37,600, reflecting the ALJ's consideration of the fact that Capozzi is a small entity that employs approximately six workers, generates relatively small amounts of hazardous waste, and is no longer in violation of RCRA and OAC permitting requirements.

On appeal, Region V argues that the ALJ erred in reducing the penalty and asks the Environmental Appeals Board ("Board") to reinstate the proposed penalty. More specifically, Region V argues, *inter alia*, that: (1) the ALJ erred by failing to take into account under Count I of the Complaint evidence of the environmental risks posed by Capozzi's noncompliance; (2) the ALJ erred by rejecting the Region's economic benefit analysis for Count I; and (3) the ALJ's alleged failure either to apply the RCRA Penalty Policy, or to adequately explain his departure from the Policy, renders his penalty determination for Counts I, III, IV, V, and VI arbitrary and capricious.

On cross-appeal, Capozzi argues that: (1) the total penalty assessed by the ALJ is excessive; (2) the ALJ erred when he found that a violation occurred during the period running from June 30, 1995, to October 26, 1995; (3) in the alternative, if a violation did occur during the period running from June 30, 1995, to October 26, 1995, the ALJ erred with respect to his determination of the amount of waste Capozzi discarded during that time; (4) the ALJ failed to apply the RCRA Penalty Policy principle regarding multiple violations springing from the same transgression; and (5) the ALJ erred in issuing a compliance order.

Held: (1) The Board affirms the ALJ's ruling that Capozzi's disposal violations occurred during the four-month period running from June 30, 1995, to October 25, 1995. Based on, among other things, the statements made by John Capozzi and his employees during the two inspections conducted by the Ohio Environmental Protection Agency ("OEPA"), as well as the testimony of Capozzi's expert witness, Laura Lyden, it was reasonable for the ALJ to infer that Capozzi's disposal violations occurred on a regular basis during the four-month period running from June 30, 1995, to October 25, 1995.

(2) The Board affirms the ALJ's determination that Capozzi disposed of eight gallons of solvent waste in the four-month period running from June 30, 1995, to October 25, 1995, based on the statements of John Capozzi and Cindy Garris during the two OEPA inspections, as well as John Capozzi's testimony at the evidentiary hearing.

(3) The Board affirms the ALJ's treatment of the issue of multiple violations springing from a single transgression because the ALJ was not bound by the RCRA Penalty Policy, and because the Penalty Policy's approach to the issue did not support Capozzi's argument in any event.

(4) The Board affirms the ALJ's issuance of a compliance order inasmuch as Capozzi has shown no error in the issuance of the order.

(5) (a) The Board affirms the ALJ's reading of Count I of the Complaint as concerning the failure to obtain a permit, rather than an allegation of unlawful disposal, because Region V styled it as such in the Complaint. In addition, Region V's argument to the contrary notwithstanding, the ALJ did not ignore the environmental implications of Capozzi's illegal behavior.

> (b) The Board affirms the ALJ's rejection of Region V's economic benefit analysis for Count I. Region V's economic benefit calculation was based on the theory of Capozzi achieving compliance by obtaining a RCRA permit. Given Capozzi's size, the small amount of waste generated, the significant expense of obtaining and maintaining RCRA permittee status, and the comparatively small expense of offsite disposal, the more rational approach would have been for Capozzi to do precisely as it did after Region V commenced its enforcement action: collect the waste in containers and hire a contractor to characterize and properly dispose of it offsite. The Board does not read the RCRA Penalty Policy as compelling consideration of the most expensive compliance scenario in calculating Capozzi's economic benefit of noncompliance, particularly when that compliance scenario does not reflect reality.

(6) The Board rejects Region V's assertion that the ALJ's decision not to engage in a detailed discussion of the RCRA Penalty Policy renders his decision arbitrary and capricious. While the ALJ's rationale for reducing the penalty is brief, it is sufficiently reasoned and supported by the record to constitute an adequate justification for departing from the Penalty Policy.

Accordingly, the Board affirms the ALJ's issuance of a compliance order and his assessment of a total civil penalty of $37,600 against Capozzi.

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

Opinion of the Board by Judge Fulton:

This is an appeal by the Chief of the Enforcement and Compliance Assurance Branch, Waste, Pesticides, and Toxics Division, United States Environmental Protection Agency Region V ("Region V"), from an Initial Decision issued on February 11, 2002, by Administrative Law Judge Carl C. Charneski ("ALJ"). The appeal arises out of a civil administrative enforcement action against John A. Capozzi d/b/a/ Capozzi Custom Cabinets ("Capozzi"), for alleged violations of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k, and the Ohio Administrative Code ("OAC") §§ 3745-50 to -66, which are directly enforceable under RCRA § 3008(a), 42 U.S.C. § 6928(a).

In the proceedings below, Region V charged Capozzi with operating a hazardous waste management unit for disposal at the facility without a permit, improper land disposal of toluene, failing to obtain analysis of hazardous waste before disposal, failing to maintain hazardous waste training records, failing to have a contingency plan, and failing to have a written closure plan. The Region proposed the assessment of a total civil penalty of $156,064. Capozzi disputed its liability for all six counts of Region V's Complaint and argued that the Region's proposed penalty was excessive. The ALJ granted the Region's motion for summary judgment on the issue of liability as to Counts IV, V, and VI, but denied summary judgment as to Counts I, II, and III. After holding a hearing on the issue of liability for Counts I, II, and III and on the penalty issue, Judge Charneski found Capozzi liable for Counts I, II, and III, and reduced the total penalty for all six counts to $37,600 on the basis that Capozzi is a small entity that employs approximately six workers and generates relatively small amounts of hazardous waste, and because Capozzi is no longer in violation of RCRA and OAC permitting requirements.

On appeal, Region V argues that the ALJ erred in reducing the penalty and asks the Environmental Appeals Board ("Board") to reinstate the proposed penalty. On cross-appeal, Capozzi argues that the ALJ made erroneous findings with respect to the duration of the violations, the amount of waste disposed of, the penalty, and the compliance order. For the reasons stated below, we affirm the

ALJ's finding of liability and his assessment of a $37,600 civil penalty against Capozzi.

I. *FACTUAL AND PROCEDURAL HISTORY*

A. *Factual History*

John A. Capozzi owns and operates Capozzi Custom Cabinets, a cabinet-manufacturing facility in Leavittsburg, Ohio, which is located in a residential area between a residence and a church. Hearing Transcript Volume I ("Tr. I") at 73-74, 195; *see also* Complainant's Exhibit ("C Ex") 6 at US-77. Mr. Capozzi has operated this cabinet-making facility for approximately thirty years, Hearing Transcript Volume II ("Tr. II") at 611, and employs six to seven workers, *id*. at 615. In the course of building custom cabinets, fixtures, and counter tops, Mr. Capozzi and his staff use laminates, adhesives, paints, lacquer, and thinner. *Id*. at 616. Over a period of years Mr. Capozzi and his employees disposed of hazardous waste solvents from the facility's cabinet finishing operations by tossing them onto the soil outside the facility, using them to ignite other waste, or exhausting them through the facility's finishing room ventilation system. *See* Tr. I at 49; C Ex 8.

1. *OEPA's October 26, 1995 Inspection*

a. *Allegations of Former Capozzi Employee*

Acting upon the allegations of a former Capozzi employee, Mr. Lee Clevidence,[1] Inspector Ron Fodo[2] of the Ohio Environmental Protection Agency ("OEPA") conducted an inspection of the facility on October 26, 1995.[3] The purpose of the inspection was to determine whether, as alleged by Mr. Clevidence in an October 19, 1995 telephone conversation, Mr. Capozzi was collecting paint-related materials, waste stains, lacquers, thinners, and toluene, in one-gallon coffee cans and other containers, and disposing of this material by tossing it out the rear door of the facility onto the soil, burning it in an open pit, or burying it. *See* C Ex 7; *see also* Tr. I at 183, 190. Following this conversation with Mr. Clevidence, Inspector Fodo determined that Capozzi was never issued a hazard-

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[1] Mr. Clevidence is erroneously identified as "Mr. Klevnante" in the hearing transcript. *See, e.g.,* Tr. I at 183; *see also* Brief of the Complainant-Cross-Appellee at 4 n.3 (May 6, 2002).

[2] Inspector Fodo is a member of the OEPA Special Investigations Unit and conducts criminal investigations regarding the illegal disposal, transportation, and handling of solid and hazardous waste. Tr. I at 34-35.

[3] Inspector Fodo was accompanied by Dennis DiRienzo of the Bureau of Criminal Investigations and Identification Division of the Ohio Attorney General's Office. *See* C Ex 8.

ous waste facility identification number by either the Region or OEPA. Tr. I at 189.

b. *Statements Attributed to John Capozzi*

When questioned by Inspector Fodo regarding the facility's method of disposing of waste solvents, Mr. Capozzi replied, "I toss it out. It's been tossed out the back door." *Id*. at 49. According to Inspector Fodo, Mr. Capozzi also volunteered that solvent waste was exhausted through the spray gun's ventilation system in the facility's finishing room. *Id*. at 50-51. Finally, Inspector Fodo testified that, with regard to the volume of the waste tossed out the back door, Mr. Capozzi estimated that one [gallon-sized] coffee can of waste was disposed every two or four weeks. *Id*. at 51-52.

c. *Statements Attributed to Capozzi Employee, Cindy Garris*

After his conversation with Mr. Capozzi in the office area of the facility, Inspector Fodo proceeded to the "finishing room" of the facility, which contained paint cans, containers, and solvents. *See* C Ex 6 at US-77. While in this area, Inspector Fodo questioned Cindy Garris, a Capozzi employee. Tr. I at 49-51. According to Ms. Garris, who at that time had worked in the facility's finishing room for approximately four-and-a-half years, solvent waste was disposed of by either placing it in the facility's dumpster or by throwing it out the back of the finishing room and onto the ground at a rate of one gallon every two weeks. *Id.* at 54, 72; *see also* C Ex 6 at US-75.

d. *Photo Ionization Detector & Soil Sample*

After his conversation with Ms. Garris, Inspector Fodo made a visual inspection of the area that Ms. Garris had indicated was used as a dumping site for solvent waste. Tr. I at 56. After stepping from the finishing room of the facility through a rear door, Inspector Fodo detected a solvent odor and observed solvent stains starting at the finishing room's door and extending outward ten to fifteen feet. *Id*. at 56-57; C Ex 6 at US-71, -73. Inspector Fodo disturbed the soil of the area outside the facility's finishing room door and took a reading with a hand-held Photo Ionization Detector ("PID").[4] Tr. I at 61. According to Inspector Fodo, the PID detected the presence of volatile organic compounds ("VOCs") in the area immediately outside the finishing room door, and he interpreted the reading to be consistent with the presence of spent lacquer thinners. *Id*.

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[4] A pump on the PID pulls in the ambient air to determine whether volatile organic compounds, such as solvents, paints, and stains, are present. Tr. I at 58.

Inspector Fodo then took a soil sample of the stained area and marked the sample as "CAB02." *Id*. at 69-70, 85-86; *see* C Ex 6 at US-71. Inspector Fodo stated that soil sample CAB02 emitted a "strong solvent smell." Tr. I at 85-85. A laboratory analysis of soil sample CAB02 performed by Ross Analytical Services, Inc. revealed the presence of the following hazardous[5] wastes: acetone,[6] methyl isobutyl ketone[7] (also known as 4-methyl-2-pentanone and MIBK), and toluene.[8] Tr. I at 93-96; C Ex 2.

e. *Notice to Capozzi*

At the conclusion of the October 26, 1995 inspection, Inspector Fodo informed Mr. Capozzi that the facility's solvent waste, particularly the solvent waste generated in the finishing process, could not be placed in the dumpster, exhausted through the ventilation fan, or tossed outside onto the ground. Tr. I at 54-55, 80; C Ex 8. Mr. Capozzi testified during the hearing held in this matter that Inspector Fodo provided to him a copy of the relevant portions of Ohio's hazardous waste regulations and explained that Mr. Capozzi would have to collect the waste in containers. Tr. II at 632-33. Mr. Fodo testified at the hearing that he also advised Mr. Capozzi that there were "proper means to dispose of hazardous waste" and that he "would have to get a contractor[9] or a facility" to "properly characterize or analyze it and then dispose of it." Tr. I at 55.

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[5] Some solid wastes are identified as hazardous based on the characteristics exhibited by the specific waste. 40 C.F.R. §§ 261.20-.24. The four characteristics that may render a material hazardous are the following: ignitability, corrosivity, reactivity, and toxicity. *Id*. Some wastes generated from certain sources, processes, or uses are "listed" as hazardous based on the propensity of the constituents of such wastes to present a hazard, *see* 40 C.F.R. §§ 261.30-.33, and each listed waste is assigned a numeric code. Pursuant to OAC § 3745-51-03(A), a waste is a hazardous waste if it exhibits a characteristic of hazardous waste as identified in OAC §§ 3545-51-20 to -24, or is listed in OAC §§ 3745-51-30 to -35.

[6] Acetone is a listed hazardous waste from a non-specific source that has the characteristic of ignitability (D0001) and is assigned the industry and EPA hazardous waste number F003. *See* 40 C.F.R. § 261.31(a).

[7] Methyl isobutyl ketone is a listed hazardous waste from a non-specific source that has the characteristic of ignitability and is assigned the industry and EPA hazardous waste number F003. *See* 40 C.F.R. § 261.31(a).

[8] Toluene is a listed hazardous waste from a non-specific source that has the characteristics of ignitability and toxicity and is assigned the industry and EPA hazardous waste number F005. *See* 40 C.F.R. § 261.31(a).

[9] Inspector Fodo also testified at the hearing that when asked by Mr. Capozzi for the name of a consulting company, he informed him that it would be a conflict of interest for him, as an OEPA employee, to endorse a particular waste disposal company and, therefore, advised Mr. Capozzi to consult the "yellow pages." Tr. I at 56.

2. *OEPA's May 23, 1996 Inspection*

After the inspection of October 26, 1995, this enforcement matter was transferred from OEPA's Criminal Division to its Civil Division. *Id*. at 193. OEPA conducted a second inspection of Capozzi on May 23, 1996. Inspector Fodo conducted this inspection in conjunction with inspectors from OEPA's Division of Hazardous Waste, Karen Nesbit and Chris Prosser. *Id*. at 108.

During the inspection of the finishing area of the facility, Inspector Fodo observed one five-gallon container partially filled with solvent waste that did not have a hazardous waste label and did not bear a hazardous waste accumulation date. *Id*. at 110-11. He also observed five or six five-gallon containers that were empty. *Id*. According to Mr. Capozzi, he had not hired a contractor to dispose of his hazardous waste, *id*. at 122, because he had not received replies to telephone calls placed to two contractors. Tr. II at 633. Mr. Capozzi also stated that the facility had accumulated solvent waste at the rate of between fifteen and twenty-five gallons in the seven months since the first inspection conducted by OEPA. Tr. I at 235-36. In addition, Inspector Fodo learned that Capozzi's employees had continued the practice of disposing of solvent waste by exhausting it through the finishing room's ventilation fan. C Ex 8.

a. *Capozzi's Use of Solvent Waste to Ignite Refuse*

While in the finishing room, Inspector Fodo spoke with Ms. Cindy Garris. Ms. Garris informed Inspector Fodo that two of Capozzi's employees had used the solvent waste that had been stored in the now empty containers to start a fire to burn unusable material. Tr. I at 110. This material was allegedly burned in a "burn pit" approximately ten to twelve feet in diameter and located on Mr. Capozzi's property between his facility and the neighboring church. *Id.* at 77, 200; *see* C Ex 5; C Ex 6 at US-85. Ms. Garris also estimated that Capozzi generated between one-half and one gallon of hazardous waste per week. Tr. I at 206-07; C Ex 5.

Based on Mr. Capozzi's statements to Inspector Nesbit regarding the rate of accumulation of waste at the facility, and the amount of waste collected since the October 26, 1995 inspection, *see* Tr. I at 110, 235-36; Tr. II at 638, Inspector Fodo estimated that between fifteen to twenty gallons of the solvent waste has been used on the fire. Tr. I at 110. According to Inspectors Fodo and Nesbit, Capozzi confirmed that his employees had used solvent waste to burn fixtures because there was no room for them in Capozzi's dumpster. Tr. I at 112.

b. *May 23, 1996 Soil Samples*

Inspector Nesbit collected soil samples from the burn area and from beneath the finishing room ventilation fan. *Id*. at 203. Laboratory analysis of the burn area

sample showed the presence of arsenic[10] above the applicable regulatory level and exhibiting the characteristic of toxicity. *Id*. In addition, the soil sample taken from the burn area revealed the presence of acetone, methyl isobutyl ketone, and toluene. *Id*.; C Ex 8. This finding was confirmed by the Material Safety Data Sheet ("MSDS") provided to OEPA by Capozzi for the lacquer thinner used at the shop. Specifically, this MSDS showed that the thinner contained acetone, methyl isobutyl ketone, and toluene. Tr. I at 100-03. Inspector Nesbit testified that the chemicals found are not naturally occurring and "would have gotten there somehow by the mismanagement of material." *Id.* at 225.

c. *May 23, 1996 Water Samples*

Inspector Fodo took water samples from the well on the Capozzi property, as well as from wells at the residence and church next door. *Id*. at 113. OEPA reported that while toluene was detected in the Capozzi site water sample, the amount detected did not exceed the allowable maximum concentration level for the chemical. C Ex 8. In addition, VOCs were not detected in the well-water samples taken from the church or the residence on either side of the Capozzi facility. *Id*.

Sometime after the inspection of May 23, 1996, OEPA took well-water samples from the Capozzi site on two more occasions. The first sample was split between Capozzi and OEPA; OEPA's laboratory detected acetone contamination at twenty-three and twenty-five parts per billion, Tr. I at 293-94, while the laboratory used by Capozzi did not. Tr. I at 265, 268-69. The second sample tested "clean" as the levels detected were considered "safe." Tr. I at 298-99.

d. *Waste Analysis Performed by CSI*

On or about June 10, 1996, Capozzi obtained an analysis of its waste for the first time by submitting to Chemical Solvents, Inc. ("CSI") a sample of its hazardous waste. C Ex 11; C Ex 9. In a Laboratory Analysis Report dated July 10, 1996, CSI reported that Capozzi's waste contained toluene, various forms of acetate, and methyl isobutyl ketone, and was identified as hazardous based on the characteristics of ignitability and on their listing as hazardous wastes. C Ex 11; C Ex 9; Tr. I at 218-21; *see also* 40 C.F.R. § 261.31(a); OAC §§ 3745-51-30 to -35.

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[10] We note that the record suggests the elevated arsenic level was likely caused not by Capozzi's waste disposal practices, but rather by the placement of rat poison in the area. *See* Tr. I at 253.

3. *The Remediation Plan*

After lengthy negotiations with OEPA starting in August 1996, Capozzi submitted a remediation plan that was subsequently approved by OEPA in 1998. Tr. II at 580-88; C Ex 22. The remediation plan required Capozzi to excavate between six and ten inches of topsoil in a thirteen-and-a-half by twelve-and-a-half foot section of the "burn area" (Area I), and between six and ten inches of top soil in a ten square foot section of the portion of the driveway immediately outside the garage door of the facility (Area II). Respondent's Exhibit ("R Ex") D. Because an analysis of the soil excavated from Areas I and II showed that the soil was "clean," Capozzi was allowed to return it to the excavated areas. Tr. II at 551-62.

B. *Procedural History*

1. *Region V's Complaint*

On March 31, 2000, the Region filed a complaint, in which it alleged that Capozzi violated RCRA, 42 U.S.C. §§ 6901-6992k, and the regulations thereunder at 40 C.F.R. §§ 260-271, as well as the regulations implementing the OAC §§ 3745-50-45(A), -59-40, -65-13(A)(1), -65-16(a)-(c), -65-51(A), -66-12(A).[11] Specifically, the Complaint, which consisted of six counts, alleged that Capozzi: (1) operated a hazardous waste management unit for disposal at the facility without obtaining a permit[12] for such disposal or submitting a waste manifest to OEPA; (2) improperly land disposed of toluene, a hazardous waste; (3) failed to obtain a detailed chemical and physical analysis of hazardous waste prior to disposal; (4) failed to maintain employee hazardous waste training records; (5) failed to have a contingency plan for the facility in the event of any unplanned release of hazardous waste; and (6) failed to have a written closure plan for the facility.[13]

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[11] EPA has the authority pursuant to RCRA § 3008(a)(1), 42 U.S.C. § 6928(a)(1) to enforce any requirement of an authorized state hazardous waste program. *See In re Bil-Dry Corp.*, 9 E.A.D. 575, 577 n.2 (EAB 2001); *In re Rybond, Inc.*, 6 E.A.D. 614, 616 n.1 (EAB 1996); *In re CID-Chem. Waste Mgmt. of Ill., Inc.*, 2 E.A.D. 613, 615-19 (CJO 1988).

[12] When Congress enacted RCRA in 1976, it required EPA to develop standards for new treatment, storage, and disposal facilities and for facilities already in existence on the date of promulgation of such standards. RCRA § 3004(a), 42 U.S.C. § 6924(a). Congress also directed EPA to promulgate regulations requiring both new and existing facilities to have a permit for the treatment, storage, or disposal of hazardous waste. RCRA § 3005(a), 42 U.S.C. § 6925(a). Accordingly, to handle hazardous waste, a new facility must obtain a permit in accordance with 40 C.F.R. part 270 before it begins operations. *See* 40 C.F.R. pt. 270.10. On the other hand, facilities already in existence on November 19, 1980, or on the effective date of changes that require the facility to have a permit, and that comply with certain notification and application requirements, are subject to another set of standards until they receive their permits. *See* 40 C.F.R. pt. 265; *see also id.* §§ 270.70-.73. These facilities are known as "interim status" facilities. *See* 44 U.S.C. § 6925(e)(1).

[13] More specifically, the counts in the Complaint were as follows:
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Initially, in both its March 31, 2000 Complaint, and its June 30, 2000 Amended Complaint, the Region sought a non-specific penalty of "up to $25,000 per day of violation." *See, e.g.*, Motion for Leave to Amend Penalty Proposal and Explanation at 2. On August 10, 2000, the Region proposed a civil penalty of $283,603, *see* Complainant's 40 C.F.R. § 22.19(a)(4) Penalty Proposal and Explanation (Aug. 10, 2000), which was reduced to $183,448 by motion dated October 27, 2000.[14] The ALJ granted the Region's motion at the start of the evidentiary hearing on November 15, 2000. Finally, the Region further reduced its penalty proposal to $156,064 following the evidentiary hearing.[15]

2. *Capozzi's Answer to Region V's Complaint*

On April 26, 2000, Capozzi answered the Region's complaint by asserting that it was a conditionally exempt small quantity generator[16] and, consequently, a

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Count I alleged that Capozzi operated a hazardous waste management unit for disposal of hazardous waste at the facility without a permit in violation of RCRA § 3005(a), 42 U.S.C. § 6925(a), and OAC § 3745-50-45(A).

Count II alleged that Capozzi violated OAC § 3745-59-40 by improperly land disposing of toluene, a hazardous waste, without prior treatment.

Count III alleged that Capozzi violated OAC § 3745-65-13(A)(1) by failing to obtain a detailed chemical and physical analysis of hazardous waste prior to its disposal.

Count IV alleged that Capozzi violated 40 C.F.R. § 265.16(d)(4) and OAC § 3745-65-16(D)(4) by failing to maintain employee hazardous waste training records.

Count V alleged that Capozzi failed to have a contingency plan for the facility in the event of any unplanned release of hazardous waste in violation of 40 C.F.R. § 265.51(a) and OAC § 3745-65-51(a).

Count VI alleged that Capozzi violated 40 C.F.R. § 265.112(a) and OAC § 3745-66-12(A) by failing to have a written closure plan for the facility.

[14] The Region proposed a penalty of $62,569 for Count I; $42,246 for Count II; $6,164 for Count III; $11,575 for Count IV; $14,655 for Count V; and $18,855 for Count VI.

[15] According to the Region, a further reduction in the penalty was warranted because its penalty witness, Mr. Valentino, had "used incorrect tables in checking the Agency's RCRA Cost Manual." *See* Brief of the Complainant-Appellant at 48 n.39.

[16] A generator who creates less than 100 kg/month of non-acute hazardous waste is called a "conditionally exempt small quantity generator," *see* 40 C.F.R. § 261.5, and is not required to comply with many of the RCRA generator requirements if certain conditions are met, *see id*. §§ 262.11, 261.5(g)(2)-(3). This Board has previously held that a party seeking to invoke an exception, such as the exemption available to small quantity generators, bears the burden of persuasion and production. *In re Rybond*, 6 E.A.D. 614, 637 n.33 (EAB 1996).

The ALJ determined that Capozzi failed to establish that it qualifies for the small quantity generator exemption. *See* Init Dec. at 9 n.12. In one sentence of its appeal brief, Capozzi half-heartedly

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permit or application for interim status under Ohio or federal law was unnecessary. *See* Answer and Request for Hearing at 1-4. In addition, Capozzi asserted that the proposed penalties were excessive and unreasonable. *Id*. at 8.

3. *Summary Judgment Order*

In an order dated November 9, 2000, the ALJ granted the Region's motion for accelerated decision on liability[17] with respect to Counts IV, V, and VI, but denied accelerated decision on liability as to Counts I, II, and III.

4. *The Evidentiary Hearing*

On November 15-16, 2000, an evidentiary hearing was conducted before the ALJ in Chicago, Illinois, pursuant to 40 C.F.R. part 22. During that hearing the ALJ considered the issue of liability for Counts I, II, and III and the issue of the appropriate civil penalty in this matter.

5. *The Initial Decision*

On February 11, 2002, the ALJ issued an Initial Decision in which he found Capozzi liable for all six counts of the Region's complaint. The ALJ determined that Capozzi's management, storage, and disposal of hazardous wastes rendered its facility a hazardous waste management facility. The ALJ held that as an owner and operator of a hazardous waste management facility, and as a generator of hazardous waste, Mr. Capozzi was required, but failed, to comply with the permitting, management, and administrative obligations imposed by the authorized Ohio hazardous waste regulations at Title 3745 of the OAC, which are directly enforceable under RCRA § 3008(a). As such, the ALJ found Capozzi liable and assessed a civil penalty of $37,600, which was calculated on a per-count basis.[18]

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maintains that it does, in fact, qualify for the small quantity generator exemption. *See* Capozzi Cross-Appeal at 16 ("Mr. Capozzi generates a small amount of hazardous waste and, therefore, falls within the TSD guidelines. He is exempt from compliance with almost all regulations as a CESQG."). However, because this sentence represents the sum of Capozzi's effort to persuade this Board that it qualifies for this exemption, we find that Capozzi has failed to demonstrate that the ALJ's decision on this point was erroneous.

[17] *See* Complainant's Motion for Accelerated Decision on Liability (Oct. 16, 2000).

[18] Specifically, the ALJ assessed a civil penalty of $5,000 for Count I, $30,000 for Count II, $2,000 for Count III, $500 for Count IV, $50 for Count V, and $50 for Count VI. *See* Init. Dec. at 14-21.

6. *The Appeal and Cross-Appeal*

On appeal, Region V argues that the ALJ erred in reducing the penalty and asks the Board to reinstate the proposed penalty. More specifically, Region V argues, *inter alia*, that: (1) the ALJ erred by failing to take into account under Count I of the Complaint evidence of the environmental risks posed by Capozzi's noncompliance; (2) the ALJ erred by rejecting the Region's economic benefit analysis for Count I; and (3) the ALJ's alleged failure either to apply EPA's RCRA Civil Penalty Policy of October 1990 (the "Penalty Policy"), or to adequately explain his departure from the Policy, renders his penalty determination for Counts I, III, IV, V, and VI arbitrary and capricious.

Capozzi's Cross-Appeal, which was filed on April 16, 2002, raises five issues: (1) whether the total penalty assessed by the ALJ is excessive; (2) whether the ALJ erred when he found that a violation occurred during the period June 30, 1995, to October 26, 1995; (3) in the alternative, if a violation did occur during the period June 30, 1995, to October 26, 1995, whether the ALJ erred with respect to his determination of the amount of waste Capozzi discarded; (4) whether the ALJ erroneously failed to apply the RCRA Penalty Policy principle regarding multiple violations springing from the same transgression; and (5) whether the ALJ erred in issuing a compliance order.

II. *DISCUSSION*

We now turn to the issues presented on appeal. In sections II.A.1-.5, we address the issues raised in Capozzi's Cross-Appeal, and in sections II.B.1-.7, we address the issues raised in Region V's Appeal. The Board generally reviews the ALJ's factual and legal conclusions on a *de novo* basis. *See* 40 C.F.R. § 22.30(f).

A. *Capozzi's Arguments on Appeal*

1. *The Duration of Capozzi's Disposal Violations*

Capozzi argues that the ALJ erred when he found that the disposal violations occurred during the four-month period from June 30, 1995, to October 25, 1995. *See* Capozzi Cross-Appeal at 10. According to Capozzi, its violations occurred prior to June 30, 1995 and, thus, were beyond the statute of limitations[19]

[19] The parties agree that the Region is restricted to the five-year statute of limitations contained in 28 U.S.C. § 2462, which provides in relevant part:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pe-
> Continued

date of June 30, 1995. *Id*. Capozzi also asserts that OEPA and U.S. EPA inspectors did not determine the precise dates of disposal, frequency of disposal, or amounts disposed of and, accordingly, failed to establish that violations occurred during the period June 30, 1995, to October 25, 1995. *Id*. at 12. By contrast, the Region argues that the ALJ's decision on this point is fully supported by the evidence in the record.[20] Based on our review, we reject Capozzi's claims as they are contradicted by the evidence in the record, and the reasonable inferences of fact that this evidence supports.

First, the Region firmly established that Capozzi's routine method of disposing of solvent waste was to throw it onto the ground immediately outside the finishing room door or to place it in the facility's dumpster. It established this by offering the admissions of John Capozzi, *see* Tr. I at 49 ("I toss it out. It's been tossed out the back door."), and Cindy Garris, *id.* at 54; Tr. II at 539 (informing Inspector Fodo that, in addition to the waste that was sometimes discarded in the facility's dumpster, one gallon of solvent waste was thrown out the back door of the finishing room and onto the ground every two weeks). Notably, neither John Capozzi nor Cindy Garris stated that it was a rare practice or one that had ceased prior to the October 26, 1995 inspection.

Additionally, Inspector Fodo testified during the evidentiary hearing that during the first OEPA inspection, Mr. Capozzi estimated that one gallon-sized coffee can of waste was disposed of every two or four weeks. Tr. I at 51. On appeal, however, Mr. Capozzi claims that he never informed Inspector Fodo that his workers disposed of a gallon of waste every two weeks. *See* Capozzi Cross-Appeal at 5. Rather, Mr. Capozzi claims that he had stated that it took one or two weeks to fill a can with lacquer thinner, but since some of that thinner is reused, a gallon of waste was not actually discarded every two or four weeks. *Id*.

(continued)

> cuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462. The Region, however, asserts that while it limited its *penalty* proposals to the 119-day period between June 30, 1995, and October 26, 1995, its Amended Complaint did not similarly limit the periods of violation to that 119-day period. *See* Brief of Complainant Cross-Appellee at 17-22. Rather, the Region asserts that, at least for Counts III and IV, the actual statute of limitations date is March 21, 1995. *Id*.

[20] In the alternative, the Region argues that even if the ALJ erred when he determined that Capozzi disposed of hazardous waste during the period between June 30, 1995, and October 25, 1995, Capozzi would nevertheless be liable under either the "continuing violation principle" or the "relation-back rule." *See* Brief of the Complainant-Cross-Appellee at 14, 21. Because, as discussed below, we conclude that the evidence supports the ALJ's conclusion that Capozzi illegally disposed of its hazardous waste during the relevant time period, we need not reach these alternative theories.

We find it telling, however, that Capozzi offers no similar explanation for Cindy Garris' statement to Inspector Fodo. Specifically, Ms. Garris indicated during both the October 26, 1995 and May 23, 1996 inspections that, in the four and a half to five years she had been employed by Capozzi, the facility disposed of one gallon of solvent waste *every two weeks*. *See* Tr. I at 54, 72, 206-07; Tr. II at 531, 539. Thus, even if we accept Capozzi's claim that Inspector Fodo had misunderstood Mr. Capozzi's statements, we are still left with Ms. Garris' statements, which Capozzi has made no attempt to explain or discredit.

Furthermore, as the Region points out, the results of OEPA's October 26, 1995 soil sample, in conjunction with the testimony of Capozzi's witness, Laura Lyden, supports the conclusion that Capozzi did, in fact, dispose of solvent waste after June 30, 1995. *See* Brief of the Complainant-Cross-Appellee at 13. Specifically, Ms. Lyden testified that volatile organic wastes such as Capozzi's would likely evaporate quickly if, after being discharged in small amounts, they were exposed to sunlight and heat. *See* Tr. II at 568, 571-72. Since Capozzi maintains on appeal that it always discharged solvent waste in small amounts, *see* Capozzi Cross-Appeal at 1, 14, if Capozzi had not disposed of its wastes between June 30, 1995, and October 25, 1995, one would have expected the soil sample taken outside the facility's finishing room door by Inspector Fodo on October 26, 1995, not to indicate the presence of VOCs. Rather, VOCs discarded prior to June 30, 1995 would have been expected to have long since evaporated in the summer heat. This, however, was not the case. As noted earlier, the October 26, 1995 soil sample indicated the presence of acetone, methyl isobutyl ketone, and toluene. Tr. I at 86, 92-96; C Ex 2. Therefore, the testimony of Capozzi's witness, taken in conjunction with the data from the October 26, 1995 inspection, tends to corroborate the conclusion that Capozzi disposed of VOCs after June 30, 1995.

Thus, based on the weight of the evidence, it was reasonable for the ALJ to infer that Capozzi's disposal violations occurred on a regular basis during the four-month period from June 30, 1995, to October 25, 1995. Accordingly, we affirm the ALJ's ruling on his issue.

2. *The Volume of Capozzi's Hazardous Waste*

Capozzi also challenges the ALJ's determination that Capozzi disposed of eight gallons of solvent waste in the four-month period between June 30, 1995, and October 25, 1995. Capozzi bases its challenge on: (1) John Capozzi's statements that he purchased seventy-eight gallons of lacquer thinner every year, that the only lacquer thinner discarded was that used to clear the spray gun after applying paint, and that less than ten jobs per year required paint; and (2) Capozzi's (post-inspections) Hazardous Waste Disposal Log, which showed that Capozzi generated waste at a rate of five gallons per year. *See* Capozzi Cross-Appeal at 13. We are not persuaded by Capozzi's argument regarding the volume of waste dis-

carded because it is squarely contradicted by statements made by John Capozzi and Cindy Garris.

At the outset, we note that Mr. Capozzi's estimate of the volume of hazardous waste disposed at this facility has changed frequently. For example, prior to receiving a letter from OEPA detailing its findings from the May 23, 1996 inspection,[21] Mr. Capozzi estimated that his facility disposed of hazardous waste at a rate of two gallons per month. Tr. I at 110, 235-36. However, after receiving the letter, Mr. Capozzi amended his estimate to 1.6 gallons per month. *See* C Ex 15. Finally, after the Region initiated its enforcement action, Mr. Capozzi further amended his estimate to 0.4 gallons per month. *See* Post-Hearing Brief at 2-3.

Capozzi's argument is also undermined by statements made by Cindy Garris during the October 26, 1995 and May 23, 1996 inspections, wherein she indicated that in the four-and-a-half to five years she had worked for Capozzi, solvent waste had been disposed of by either placing it in a solid waste dumpster or by tossing it out the finishing room door at a rate of *one gallon every two weeks*. *See* Tr. I at 54; Tr. II at 539, 672.[22] Capozzi's argument is further contradicted by John Capozzi's statement to Inspector Nesbit during the May 23, 1996 inspection, that in the seven months between the two inspections, the facility had accumulated between fifteen and thirty gallons of hazardous waste. *See* Tr. I at 110, 235. In addition, John Capozzi testified during the hearing held in this matter that after the first OEPA inspection on October 26, 1995, the facility accumulated *eight* gallons of hazardous waste *from one job alone*.[23]

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[21] *See* Letter from Karen L. Nesbit, OEPA, to John Capozzi, Capozzi Custom Cabinets (July 8, 1996); C Ex 8.

[22] Notably, Mr. Capozzi's daughter, Ruth Ann Capozzi-Gray, testified that she was with Cindy Garris when Ms. Garris informed the OEPA inspectors that she (Ms. Garris) had placed solvent waste "in a can," and disposed of it "out the back door." *See* Tr. II at 539.

[23] We note in particular the following passage from Mr. Capozzi's testimony:

> Q. Following that [October 26, 1995] inspection did you get a job requiring color paint?
>
> A. Yes.
>
> Q. When Ms. Nesbit testified and Mr. Fodo put in his report that there had been some waste accumulated in five-gallon cans -
>
> A. Yes.
>
> Q. You heard that?
>
> A. Yes.
>
> Q. And, do you recall approximately how much waste would have been generated by that job?

Continued

Likewise, we are not persuaded by Capozzi's Hazardous Waste Disposal Log, which purportedly shows that Capozzi generated waste at a rate of five gallons per year. Based on this figure, Capozzi appears to argue that during the four months in question, it generated only 1.6 gallons of waste. The Region argues that it has "refuted any notion that the [Hazardous Waste Disposal] Log supports [Capozzi's] claims of a waste generation rate of 5 gallons per year * * * ." Brief of the Complainant-Cross-Appellee at 22. We agree. Inasmuch as the Log was prepared *after* both of OEPA's inspections, and its entries are inconsistent with the information provided by John Capozzi and Cindy Garris prior to the commencement of an enforcement action against Capozzi, we find it self-serving and unreliable.

Accordingly, we affirm the ALJ's holding that Capozzi disposed of eight gallons of solvent waste between June 30, 1995, and October 25, 1995.

3. *Multiple Violations Springing from a Single Transgression*

Capozzi alleges that the ALJ also erred by not reducing the penalty he assessed against Capozzi based on the RCRA Penalty Policy's principle regarding multiple violations springing from a single transgression. *See* Capozzi Cross-Appeal at 19. According to Capozzi:

> [T]he Penalty Policy explains that a separate penalty should not be assessed for each violation, where multiple violations spring from a single occurrence. * * * [I]n this case, Mr. Capozzi is alleged to have tossed some waste lacquer thinner onto the ground outside the west door of his shop. From this single occurrence stem all of the other counts of the Complaint.

Id. at 19-20. At the outset, Capozzi's argument incorrectly assumes that the ALJ was obligated to follow whatever guidance the RCRA Penalty Policy provided on this point. As the Board has explained on numerous occasions, penalty policies do not bind either the ALJ or the Board since these policies, not having been subjected to the rulemaking procedures of the Administrative Procedure Act, lack the force of law. *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 758 (EAB 1997); *e.g.*, *In re Allegheny Power Serv. Corp.*, 9 E.A.D. 636,658-59 (EAB 2001), *aff'd* No. 6:01-cv-241 (S.D. W.Va. Apr. 5, 2002).

(continued)

A. Approximately eight gallons.

Tr. II at 638 (Direct examination of John Capozzi by his attorney, Mary Davis).

Beyond this, Capozzi's argument misconstrues the penalty policy's treatment of this issue. The policy provides, in pertinent part, as follows:

> There are instances where a company's failure to satisfy one statutory or regulatory requirement either necessarily or generally leads to the violation of numerous other independent regulatory requirements. * * * In cases * * * where multiple violations result from a single initial transgression, assessment of a separate penalty for each distinguishable violation may produce a total penalty which is disproportionately high. Accordingly, in the specifically limited circumstances described, enforcement personnel have discretion to forego separate penalties for certain distinguishable violations, so long as the total penalty for all related violations is appropriate considering the gravity of the offense and sufficient to deter similar future behavior and recoup economic benefit.

RCRA Penalty Policy at 21.

While it is true that the policy gives enforcement officials the discretion to reduce their penalty demand in cases in which there are multiple violations arising from a "single initial transgression," we question whether the policy contemplated a case of the kind before us. Capozzi's violations did not result so much from a single transgression as they did from multiple unlawful disposal events occurring over a period of time. Moreover, even assuming that Capozzi's violations could be viewed as arising from a single initial transgression, the policy clearly states that the discretion to reduce the penalty is only to be exercised when the combined penalty from the related violations is "disproportionately high, * * * considering the gravity of the offense and [the need to] deter similar future behavior and recover economic benefit." *Id*. As discussed further below, we find that the penalty assessed by the ALJ was appropriate in view of the facts and circumstances of the case. Accordingly, even if the ALJ had been bound by the penalty policy on this point, which he was not, no further reduction of the penalty would have been warranted based on this consideration.

Based on the foregoing, we reject Capozzi's argument that the ALJ erred in not reducing his assessed penalty on this ground.

4. *The ALJ's Compliance Order*

Capozzi argues that, based on the ALJ's findings that Capozzi was in compliance with the hazardous waste laws embodied in RCRA and the OAC, it was clear error to issue a compliance order in the Initial Decision. Capozzi Cross-Appeal at 21.

The ALJ's compliance order directs Capozzi to:

> [C]ease all treatment, storage, or disposal of any hazardous waste, except such treatment, storage, or disposal as is in compliance with the standards applicable to Generators of hazardous waste as set forth at OAC (Section) 3745-52.

Init. Dec. at 22. As can be seen, the ALJ's compliance order merely directs Capozzi to comply with existing hazardous waste regulations set forth in OAC section 3745-52; it does not require Capozzi to take any action not already required by law. Assuming the veracity of Capozzi's statement that it is currently in compliance with the RCRA and OAC permitting requirements, the compliance order actually requires *nothing* of the facility. Thus, inasmuch as Capozzi has alleged no prejudice to it by allowing the compliance order to stand, and has shown no error in the issuance of the order in any event, we reject the company's argument that the ALJ's compliance order should be reversed.

5. *The Penalty*

Capozzi argues on appeal that the total penalty is excessive, punitive in nature, and exceeds the intended purpose of the RCRA penalty policy. *See* Capozzi Cross-Appeal at 15-18. Specifically, Capozzi asserts that the Board should reduce the amount of the penalty "to no more than $10,000.00 since this will be more than adequate to deter Mr. Capozzi form [sic] such conduct in the future." *Id*. at 22. In support of its argument for a reduced penalty, Capozzi reiterates that it generates a small amount of hazardous waste and employs only six or seven workers, that the soil analysis conducted as part of its remediation plan indicates the soil was not contaminated, and that it allegedly met its regulatory obligations as soon as it learned of them. As further support for reducing the penalty, Capozzi cites to several ALJ decisions.

At the outset we note that the ALJ's penalty assessment already reflects a substantial reduction, $118,464, from the Region's proposed penalty of $156,064. We note further that the reasons articulated by the ALJ in support of the reduction are essentially the ones advanced by Capozzi as grounds for further reduction. *See infra* Section III.B.5.b. Thus, the ALJ gave ample consideration to the factors now cited by Capozzi on appeal.

Like the ALJ below, we reject Capozzi's suggestion that since its soil tested "clean" at the completion of its remediation activities, its disposal violations were "insignificant." It is indeed fortunate that, upon implementation of Capozzi's remediation plan, the soil tested "clean." This does not mean, however, that Capozzi's behavior did not unnecessarily put the environment at risk. Indeed, the only apparent reason that the soil tested clean was that the toluene, acetone, and methyl isobutyl ketone previously dumped onto the soil had, over a two-year pe-

riod, dissipated through evaporation, leaching, and/or surface water run-off. *See* Tr. II at 354-55; 568, 571-72, 607-08 (Testimony of Messrs. Kmiec and Valentino and Ms. Lyden regarding the ability of acetone, toluene and methyl isobutyl ketone to evaporate and migrate in groundwater and surface water runoff). The ALJ's analysis reflects an effort to balance consideration of Capozzi's serious disregard of its regulatory obligations against the fact that, fortunately, there were no long-term environmental consequences that flowed from Capozzi's neglect. Capozzi has failed to persuade us that the ALJ's penalty assessment was overly punitive under the circumstances.

Additionally, we reject Capozzi's assertion that "without any threat of penalty whatsoever Mr. Capozzi complied with the regulations concerning waste management immediately upon being told what to do." *See* Capozzi Cross-Appeal at 18. The evidence in the record establishes not only that, prior to OEPA's inspections, Capozzi was operating in serious dereliction of its regulatory obligations, but also that seven months after OEPA notified Capozzi of its violations and advised it on how to achieve compliance,[24] Capozzi continued to collect hazardous waste in unlabeled containers, burn it in an open pit, and dispose of it by exhausting it through the finishing room's ventilation fan, and had failed to arrange for its legal disposal. In light of this record, Capozzi's efforts to paint itself as a good actor are simply not credible.

Furthermore, Capozzi's comparison of cases in which ALJs have reduced proposed penalties ignores prior Board precedent that emphasizes the case-by-case nature of penalty assessments. *See, e.g.*, *In re Newell Recycling Co., Inc.*, 8 E.A.D. 598, 642 (EAB 1999) ("[w]e continue to hold to the principle that penalty assessments are sufficiently fact- and circumstance-dependent that the resolution of one case cannot determine the fate of another"), *aff'd*, 231 F.3d 204 (5th Cir. 2000), *cert. denied*, 122 S. Ct. 37 (2001); *In re Schoolcraft Constr., Inc.*,

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[24] We are also not convinced by Mr. Capozzi's assertion that he did not know how to achieve compliance with the company's regulatory obligations. *See* Capozzi Cross-Appeal at 7 ("Mr. Capozzi was concerned that he had not received any letter from Mr. Fodo advising him of what to do with the accumulated waste."). First, Capozzi's assertion is contradicted by Inspector Fodo, who testified that he specifically informed Mr. Capozzi on how to achieve compliance. *See* Tr. I at 56. Furthermore, Mr. Capozzi testified that after the first inspection he placed a few telephone calls to waste disposal companies:

> Q. And, Mr. Capozzi then did you take any other actions to find out what you should do with this waste that was accumulated?
>
> A. Well, we made a few calls. I believe we called Chemical Solvents, and I believe we called somebody else, and we never got any replies.

Tr. II at 633 (Direct Examination of John Capozzi by his attorney, Mary Davis). Thus, assuming *arguendo* that OEPA did not advise Mr. Capozzi on how to achieve compliance, the record demonstrates that Mr. Capozzi did, in fact, know prior to the second inspection that he should have retained the services of a waste disposal company, but neglected to do so.

8 E.A.D. 476, 493-94 (EAB 1999) (holding that a penalty assessment that is higher than others is not grounds for finding clear error or abuse of discretion); *In re Spang & Co.*, 6 E.A.D. 226, 242 (EAB 1995) ("[g]enerally speaking, unequal treatment is not an available basis for challenging agency law enforcement proceedings") (quoting Koch, 1 *Administrative Law and Practice* § 5.20 at 361 (1985)). Accordingly, we reject Capozzi's attempt to compare its own case with others in an attempt to secure a further reduction to the penalty assessed by the ALJ.[25]

In sum, while we acknowledge that Capozzi is a small business, employs a small number of workers, and disposed of a relatively small amount of waste, we also must recognize that Capozzi undermined the RCRA regulatory program and unnecessarily put the environment and the surrounding residential neighborhood at risk by, as a matter of course over several years, improperly disposing of its hazardous waste by pouring it onto the ground. Accordingly, for all the foregoing reasons, we reject Capozzi's request for a further reduction of the civil penalty assessed by the ALJ for Counts I through VI.

B. *The Region's Argument on Appeal*

The Region argues in essence that the ALJ committed an abuse of discretion and/or clear error by allegedly failing to reasonably apply the RCRA statutory factors with respect to his penalty determinations for Counts I, III, IV, V, and VI, and by allegedly departing from the RCRA Penalty Policy without explanation. *See* Brief of the Complainant-Appellant at 5-50. Before addressing these as-

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[25] Capozzi assumes that if we were to engage in a comparison of its circumstances to those of other cases, we would be moved to further reduce the penalty assessed here. This seems far from a safe assumption. For example, although it may be true that in each of the cases cited by Capozzi in its brief there was a higher percentage reduction between the Region's proposed penalty and the penalty ultimately assessed than occurred here, we find it striking that in two of the cases cited, the penalty ultimately determined to be appropriate was comparable to the penalty assessed here, *see In re Cytec Indus.*, Dkt. No. V-W-009-94 (ALJ, July 31, 1996) ($36,500 penalty assessed); *In re Morrison Brothers Co.*, Dkt. No. VII-98-H-0012 (ALJ, Aug. 31, 2000) ($34,495 penalty assessed), and in one of the two remaining cases the penalty was dramatically higher, *see In re Harmon Elec., Inc.*, Dkt. No. VII-91-H-0037 (ALJ, Mar. 24, 1997) ($586,716 penalty assessed). In only one of the cases cited, *In re Rybond*, 5 E.A.D. 732 (EAB 1995), was the penalty assessed materially lower than the penalty assessed by the ALJ here, and even there the assessed penalty was still $25,000 - far from a nominal sum. Moreover, even a cursory review of the Board's recent decisions in RCRA enforcement cases reveals significant penalties being assessed for dereliction of RCRA regulatory requirements. *See, e.g.*, *In re Bil-Dry*, 9 E.A.D. 576 (EAB 2001) ($89,150 penalty assessed); *In re Newell Recycling*, 8 E.A.D. 598 (EAB 1999) ($1.345 million penalty assessed). It might be argued, consistent with Capozzi's reasoning, that these outcomes auger in favor of increasing, rather than decreasing, Capozzi's penalty. But this would, of course, ignore case-specific considerations that would serve to distinguish Capozzi from these higher penalty cases. And this is precisely our point. Because each case necessarily turns on its unique circumstances, comparison of penalty outcomes across cases is neither terribly illuminating nor instructive.

sertions, we will discuss the RCRA penalty provision, the RCRA Penalty Policy, and the Board's practice in reviewing ALJs' penalty determinations.

1. *The RCRA Penalty Provision*

According to the RCRA penalty provision, the Agency must consider the seriousness of the violation and the violator's good faith efforts to comply with the applicable requirements:

> Any penalty assessed in the order shall not exceed $25,000[26] per day of noncompliance for each violation of a requirement of this subchapter. In assessing such a penalty the Administrator [or her delegatee] shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3). As in all civil penalty cases, the Region has the burden of proof on the appropriateness of the penalty.[27] *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 537 (EAB 1994); *Premex, Inc. v. Commodity Futures Trading Comm'n*, 785 F.2d 1403, 1409 (9th Cir. 1986).

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

[27] However, in contrast to a number of other environmental statutes, such as section 14(a)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act, RCRA does not include ability to pay as one of the factors EPA must consider in assessing a penalty, and therefore it is not an element of the Agency's proof. *See In re Cent. Paint & Body Shop, Inc.*, 2 E.A.D. 309, 313-14 (CJO 1987) ("RCRA, however, does not include ability to pay as one of the factors that EPA must consider in assessing a penalty, and Congress certainly knew how to include such a factor in an environmental statute if it so desired. The logical conclusion is that ability to pay is not an element of EPA's proof." (footnote omitted)). Specifically, the RCRA Penalty Policy provides that:

> The burden to demonstrate inability to pay rests on the Respondent, as it does in any mitigating circumstance. * * * If the respondent fails to fully provide sufficient information [to meet this burden] then * * * enforcement personnel should disregard this factor in adjusting the penalty.

RCRA Penalty Policy at 36.

2. *The RCRA Penalty Policy*

The stated purpose of the RCRA Penalty Policy is to:

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

RCRA Penalty Policy at 5. Echoing this sentiment, the Board has stated that the Agency developed its penalties policies, such as the RCRA Penalty Policy, "to assure that Regional enforcement personnel calculate civil penalties that are not only appropriate for the violations committed, but are assessed fairly and consistently." *In re DIC Americas*, 6 E.A.D. 184, 189 (EAB 1995); *see also In re Allegheny Power Serv. Corp.*, 9 E.A.D. 636, 655 (EAB 2001) ("Agency-issued penalty policies provide a framework that allows a presiding officer to apply his or her discretion to statutory factors, thereby facilitating a uniform application of the factors."), *aff'd* No. 6:01-cv-241 (S.D. W.Va. Apr. 5, 2002).

This being said, the Board has repeatedly explained that this regulatory requirement does not compel an ALJ to use a penalty policy in making his or her penalty determination. Rather, "a Presiding Officer, having considered any applicable civil penalty guidelines issued by the Agency, is nonetheless free not to apply them to the case at hand." *In re Employers Ins. of Wausau*., 6 E.A.D. 735, 758 (EAB 1997); *accord Allegheny*, 9 E.A.D. at 656.

Nevertheless, an ALJ's departure from a penalty policy must be adequately explained. *See In re Chem. Lab Prods., Inc.*, 10 E.A.D. 711, 725 (EAB 2002); *see also In re EK Assocs. L.P.*, 8 E.A.D. 458, 473 (EAB 1999) ("We have generally held that, while the presiding officer must consider the Agency's penalty policy, in any particular instance the presiding officer may depart from the penalty policy as long as the reasons for the departure are adequately explained."); *In re A.Y. McDonald Indus., Inc.*, 2 E.A.D. 402, 414 (CJO 1987) ("An ALJ's discretion in assessing a penalty is in no way curtailed by the Penalty Policy so long as he considers it and adequately explains his reasons for departing from it.").

Although an ALJ may depart from a penalty policy, he or she may not depart from the statutory penalty criteria or any statutory cap limiting the size of the assessable penalty. *See Employers Ins. of Wausau*, 6 E.A.D. at 758-59 ("The [ALJ'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[28] 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).").

3. *Board Review of ALJ's Penalty Determination*

The Board generally reviews the ALJ's factual and legal conclusions on a *de novo* basis. *See* 40 C.F.R. § 22.30(f). Specifically, the Consolidated Rules of Procedure ("CROP") specify that the Board, on appeal, "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 may assess a penalty that is higher or lower than the amount recommended to be assessed in the decision or order being reviewed or from the amount sought in the complaint." *Id*.

With respect to an ALJ's penalty determination, the Board has stated that in cases where the penalty assessed by the ALJ "falls within the range of penalties provided in the penalty guidelines, the Board will 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 Chem. Lab Prods., Inc.*, 10 E.A.D. 711, 725 (EAB 2002); *In re Chempace, Corp.*, 9 E.A.D. 119, 131 (EAB 2000); *In re Britton Constr. Co.*, 8 E.A.D. 261, 293 (EAB 1999) (citing *In re Predex Corp.*, 7 E.A.D. 591, 597 (EAB 1998)); *In re Johnson Pac., Inc.*, 5 E.A.D. 696, 702 (EAB 1995) ("[the Board] customarily defer[s] to the Presiding Officer if [he or she] has provided a reasonable explanation for the assessment, and if the penalty amount is within the range prescribed by any applicable guidelines"); *In re Pac. Ref. Co.*, 5 E.A.D. 607, 613 (EAB 1994); *see also In re Mobil Oil Corp.*, 5 E.A.D. 490, 515 (EAB 1994) ("[i]f the penalty assessed by a presiding officer falls within the range of penalties determined through proper application of a penalty policy, the Board will not usually substitute its judgment for that of the presiding officer").

Although the Board's precedents, as cited above, demonstrate that the Board will customarily defer to an ALJ's penalty assessment, the Board nonetheless reserves the right to closely scrutinize substantial deviations from the relevant penalty policy and may set aside the ALJ's penalty assessment and make its own *de novo* penalty calculation where the ALJ's reasons for deviating from the penalty policy are not persuasive or convincing. *See Chem. Lab*, 10 E.A.D. 711, 725 (EAB 2002) (rejecting ALJ's penalty assessment where ALJ's reason for departure was based on an impermissible comparison of penalties derived in a settlement context with the penalty to be assessed in a fully litigated case); *In re M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 613 (EAB 2002) (rejecting ALJ's penalty

[28] 5 U.S.C. § 706 (1994).

assessment where ALJ's departure from penalty policy was based on ALJ's misunderstanding as to how the penalty policy would apply); *In re Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994).[29]

4. *The ALJ's Penalty Determination*

We now turn to the Region's contention that the ALJ committed an abuse of discretion and/or clear error by failing to reasonably apply the RCRA statutory factors with respect to his penalty determinations for Counts I, III, IV, V, and VI, and in his departure from the RCRA Penalty Policy.

a. *The Penalty for Count I - Owning or Operating a Hazardous Waste Management Unit for Disposal Without a Permit*

i. *Violation of RCRA Section 3005(a)*

Having determined that Capozzi operated a "hazardous waste management unit" within the meaning of the Ohio Administrative Code,[30] and that Capozzi routinely disposed of hazardous waste by throwing it out the back door of the facility and onto the ground, the ALJ launched his penalty analysis with a recognition that RCRA provides for a civil penalty up to $25,000 per day for each violation of Subtitle C. *See* Init Dec. at 14. The ALJ also noted that RCRA Section 3008(a)(3) requires the seriousness of the violation and any good faith effort to comply to be considered. *Id*.[31]

Count I of the Region's Complaint alleged that Capozzi operated a hazardous waste management unit for disposal at the facility without a permit in violation of RCRA section 3005(a), which prohibits the disposal of hazardous waste "except in accordance with a permit," and OAC section 3745-50-45(A), which

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[29] In so doing, the Board may itself employ the guidance set forth in the penalty policy, although it is not bound to do so. For example, in *In re Carroll Oil Co.*, 10 E.A.D. 635, 655 (EAB 2002), the Board, after rejecting the ALJ's penalty assessment, applied portions of the applicable penalty policy but rejected other portions. Thus, although the policy ranked one aspect of a violation as *major*, the Board lowered the ranking to *moderate*, concluding that a moderate ranking was "more appropriate." *Id.* at 47 n.34.

[30] Specifically, the OAC defines "hazardous waste management unit" as a "contiguous area of land on or in which hazardous waste is placed, or the largest area in which there is significant likelihood of mixing hazardous waste constituents in the same area." OAC § 3745-50-10(A)(46).

[31] RCRA § 3008(a)(3) provides that the seriousness, or gravity, of a violation must be taken into account in assessing a penalty for the violation. Under the RCRA Penalty Policy, the gravity-based component of the penalty is determined by examining two factors: (1) potential for harm; and (2) extent of deviation from a statutory or regulatory requirement. RCRA Penalty Policy at 2.

requires that owners and operators of "hazardous waste management units" for the disposal of hazardous waste obtain a permit for the disposal activity.

The ALJ, reading Count I as an allegation of a failure to obtain a permit, rather than an allegation of unlawful disposal, considered the Region's proffered evidence of the high probability of worker exposure to hazardous waste, the intentional and regular releases of hazardous wastes, and the moderate potential seriousness of contamination, as relevant to Count II rather than Count I.[32] *See* Init. Dec. at 14. Noting that Capozzi "is a small entity, employing approximately six workers, and generating relatively small amounts of hazardous waste," and crediting Capozzi for curing its violations of RCRA and OAC permitting requirements by engaging in proper offsite waste disposal practices, the ALJ assessed a civil penalty of $5,000 for Count I, rather than the $62,569 civil penalty proposed by the Region. *Id*. The Region argues that this was clear error because the gravamen of the violations in Count I is the unlawful disposal of hazardous waste, rather than the failure to obtain a permit, and the ALJ failed to consider the environmental implications of Capozzi's unlawful disposal in deriving a penalty. *See* Region's Appeal Brief at 31-36.

We disagree with the Region's characterization of the ALJ's analysis. While it may be true that the ALJ did not address the environmental implications of Capozzi's dumping without a permit for purposes of Count I, he does give them serious consideration under Count II. Specifically, the ALJ determined that, as alleged in Count II of the Complaint, Capozzi violated OAC section 3745-59-40 by improperly land disposing of hazardous waste without prior treatment, for which he assessed a civil penalty of $30,000. *See* Init. Dec. at 15-18. In reaching that determination, the ALJ provided a detailed discussion of the Region's proffered evidence of the presence of VOCs as determined by Inspector Fodo's PID, John Capozzi's and Cindy Garris' statements to the OEPA inspectors, the testimony of the OEPA inspectors, the results of the soil and water samples, and the MSDS provided to OEPA by Capozzi for the lacquer thinner that showed the chemicals present in Capozzi's hazardous waste posed serious health risks. *See id.*

It bears noting that the ALJ's reading of Count I as concerning the failure to obtain a permit is consistent with how it is styled in the Complaint, *see* Amended Complaint at 5 ("Count 1: Operation of Hazardous Waste Management Unit Without a Permit"). Given this framing in the Complaint, we do not regard as clearly erroneous the ALJ's decision to confine his analysis under Count I to process considerations and to consider the environmental significance of Capozzi's unpermitted disposal under Count II - a closely related Count. Thus, while we would agree with the Region's assertion that the ALJ should not ignore the envi-

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[32] *See supra* note 13.

ronmental implications of Capozzi's illegal behavior, we do not read his Initial Decision as having done so. Moreover, his combined penalty for Counts I and II, $35,000, does not strike us as inappropriate. Accordingly, we decline to disturb this aspect of the ALJ's ruling.

ii. *Economic Benefit Analysis*

The Region's appeal also challenges the ALJ's penalty assessment for Count I with respect to the ALJ's ruling on the Region's economic benefit analysis,[33] on the basis that the ALJ rejected the Region's economic benefit analysis without explaining whether he calculated a smaller amount and, if so, whether he included that figure in his own penalty recommendation. *See* Region's Brief at 48-49. Capozzi argues that its ongoing cost of compliance is "approximately $30.00 per year" to test its waste and arrange for drum removal and disposal. *See* Capozzi Cross-Appeal at 15.

At the outset we note that the goal of the economic benefit component of the RCRA Civil Penalty Policy is to eliminate any economic incentives for noncompliance by recapturing "any significant economic benefit of noncompliance that accrues to a violator." *See* RCRA Penalty Policy at 25. Although RCRA does not on its face reference economic benefit in its list of penalty factors, courts have recognized economic benefit as a relevant consideration in determining penalties under RCRA. *See, e.g., United States v. WCI Steel, Inc.*, 72 F. Supp.2d 810, 828 (N.D. Ohio 1999) (citing *United States v. Ekco Housewares, Inc.*, 62 F.3d 806, 814 (6th Cir. 1995) ("In imposing civil penalties [under RCRA], it is appropriate for the court to take into account the seriousness of the violation and any good faith efforts to comply. Numerous other factors are relevant, including * * * economic benefit derived from noncompliance * * * .")); *see also United States v. Bethlehem Steel Corp.*, 829 F. Supp. 1047, 1055 (N.D. Ind. 1993) (considering the statutory penalty criteria along with several other factors, including the economic benefit derived by defendant, in the determination of penalties under RCRA).

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[33] Under the RCRA Penalty Policy, the economic benefit component is calculated by evaluating the benefit from delayed costs and the benefit from avoided costs. RCRA Penalty Policy at 26. The benefit from delayed costs is a measure of the "expenditures deferred by the violator's failure to comply" with the statutory and/or regulatory requirements. *Id.* at 27. Avoided costs, on the other hand, are "expenditures nullified by the violator's failure to comply." *Id.* Specifically, *delayed costs* are measured as the accrued interest on deferred expenditures needed for compliance and *avoided costs* are calculated as the cost of complying with the requirements, adjusted to reflect anticipated rate of return and income tax effects on the company. *See id.* By using "Ben: A Model to Calculate the Economic Benefits of Noncompliance, User's Manual" the Agency may calculate a violator's economic benefit of noncompliance based on delayed and avoided costs by considering as many as eleven, and as few as seven, data items. *See* RCRA Penalty Policy at 28.

In the instant case, the Region calculated Capozzi's economic benefit by using "the March 1997 Estimating Costs for the Economic Benefits of RCRA Noncompliance [U.S. Environmental Protection Agency, Office of Regulatory Division RCRA Enforcement Division, March 1997]", as well as the "Ben: A Model to Calculate the Economic Benefits of Noncompliance, User's Manual." *See* Complainant's Amended Penalty Proposal and Explanation (Nov. 21, 2000). Taking into account such factors as the non-compliance date of October 29, 1995, and the compliance date of September 1, 2000, the Region arrived at an economic benefit figure of $9,991. *Id.*

The ALJ rejected the Region's economic benefit analysis on the following basis:

> The USEPA's "economic benefit" analysis is deserving of comment. Complainant submits that by failing to comply with the permit provisions in Count I, respondent saved $9,991, i.e., the avoided cost of non-compliance. Given the fact that in order to come into compliance all that Capozzi Cabinets had to do was to containerize its hazardous waste and to arrange for a contractor to haul it away for proper disposal, this economic benefit overstates respondent's avoided cost.

Init. Dec. at 14 n.19. We do not find error in the ALJ's conclusion that the Region's analysis does not represent the most appropriate measure of the economic benefit that enured to Capozzi by virtue of its noncompliance. Specifically, we note that in calculating Capozzi's economic benefit of noncompliance, the Region used as its reference point the costs of applying for and maintaining a RCRA permit. *See* Complainant's Amended Penalty Proposal and Explanation (Nov. 21, 2000). Thus, the Region's calculation was based on the theory of Capozzi's achieving compliance by obtaining a RCRA permit. Ultimately, the compliance strategy pursued by Capozzi was not to secure a RCRA permit, but rather to temporarily store its hazardous waste in containers and hire a waste disposal contractor to characterize and properly dispose of the waste offsite. Indeed, given Capozzi's size, the small amount of waste generated, the significant expense of obtaining and maintaining RCRA permittee status, and the comparatively small expense of offsite disposal, we question whether it would ever have made economic sense for Capozzi to become a RCRA-permitted facility. Instead, the more rational approach would have been for Capozzi to do precisely what it did do after the Region commenced its enforcement action: collect the waste in containers and hire a contractor to characterize and properly dispose of it offsite. We do not read the RCRA Penalty Policy as compelling consideration of the most expensive compliance scenario in calculating Capozzi's economic benefit of noncompliance, particularly when that compliance scenario does not reflect reality. Under the circumstances presented, we do not find error in the ALJ's conclusion that the more

suitable measure of the economic benefit of noncompliance is the avoided costs of proper offsite disposal.[34]

Having concluded that the avoided costs of offsite disposal were the more appropriate measure of economic benefit, the ALJ then essentially viewed those costs as dismissible because of their nominal size. In this regard, we note that the RCRA Civil Penalty Policy authorizes a waiver of the economic benefit component of the penalty where it appears that the amount of economic benefit is likely to be less than $2,500 for all violations alleged in the complaint. *See* RCRA Penalty Policy at 26. The ALJ's decision to forego the economic benefit under the circumstances presented here appears to be consistent with the thrust of this guidance. Indeed, the Region, relying entirely on its costs-of-acquiring-a-RCRA--permit theory, did not present any evidence on the costs of proper offsite disposal or the costs of the waste characterization needed for offsite disposal.[35] Absent such proof, which clearly fell to the Region to adduce,[36] we have no basis for rejecting the ALJ's conclusion that the economic benefit here was nominal in nature. To the contrary, given that the only evidence in the record regarding the cost of offsite disposal[37] indicates that it cost Capozzi only $30 a year for proper offsite disposal, the ALJ's conclusion does not appear to be unreasonable.

Thus, for all the foregoing reasons, we affirm the ALJ's decision to reject the Region's economic benefit analysis, and affirm his penalty assessment of $5,000 for Count I.

b. *The Penalty for Counts III - VI*

The Region proposed a civil penalty of $6,164 for Count III, which was rejected by the ALJ on the basis that the Region had not offered sufficient evidence to support the proposed penalty. The ALJ instead assessed a civil penalty of $2,000. Init. Dec. at 19. With respect to Count IV, the ALJ did not agree with the Region's penalty proposal of $11,575 based on the small amount of waste dis-

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[34] We agree with the Region's assertion that the ALJ's statement that "all that Capozzi Cabinets had to do was to containerize its hazardous waste and to arrange for a contractor to haul it away for proper disposal" is not altogether accurate. This formulation by the ALJ oversimplifies the heavily regulated process of offsite disposal, *see* 40 C.F.R. parts 163 and 162, and ignores the costs to Capozzi of waste characterization preliminary to offsite disposal. This being said, for the reasons discussed below, we do not find that this inaccuracy by itself warrants reversal of the ALJ's holding on this issue.

[35] Likewise, the Region did not develop, or provide evidentiary support for, the theory that Capozzi's soil remediation activity at the site, which cost Capozzi $5,200, should have been undertaken earlier and, accordingly, Capozzi realized an economic benefit by deferring this expenditure.

[36] *See, e.g., In re New Waterbury*, 5 E.A.D. 529, 536-40 (EAB 1995).

[37] The only evidence in the record on this point was introduced by Capozzi.

carded and the small number of employees exposed, and assessed a civil penalty of $500. *Id*. at 19-20. Likewise, the ALJ rejected the Region's proposed civil penalty of $14,655 for Count V and assessed a penalty of $50 based on the Region's failure to prove there was a grave risk to the local population and to the environment, as was assumed by the Region's penalty calculation. *See id.* at 20. Lastly, the ALJ rejected the Region's proposed penalty of $18,855 for Count VI and assessed a civil penalty of $50 instead, based on his determination that the Region did not, among other things, give adequate weight to the small size of Capozzi's business.[38]

We disagree with the Region's assertion that the ALJ's decision not to engage in a detailed discussion of the RCRA Penalty Policy renders his decision arbitrary and capricious. As we have explained, the ALJ is not required to strictly follow any such policy, and can depart from a penalty policy as long as he or she adequately explains the reasons for doing so. *See In re Chem. Lab Prods., Inc.*, 10 E.A.D. 711, 725 (EAB 2002); *In re EK Assocs. L.P.*, 8 E.A.D. 458, 473 (EAB 1999); *In re A.Y. McDonald Indus., Inc.*, 2 E.A.D. 402, 414 (CJO 1987). In this case, while the ALJ's rationale for reducing the penalty is admittedly brief, it is sufficiently reasoned and supported by the record to constitute an adequate justification for departing from the Penalty Policy. Specifically, rather than arbitrarily producing a penalty figure, the ALJ offered an explanation for rejecting the Region's proposed penalty on a count-by-count basis. *See, e.g., In re B & R Oil Co.*, 8 E.A.D. 39, 63-64 (EAB 1998) (holding that while the ALJ offered a terse rationale for lowering the penalty, his rationale was sufficiently reasoned because he considered the Penalty Policy in the context of how the Region applied the Policy to the respondent's penalty). The methodical approach that the ALJ followed - considering the calculations produced through the Region's application of the pol-

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[38] The Region challenges the ALJ's consideration of the small size of Capozzi's business, which it interprets as a consideration of Capozzi's alleged inability to pay. According to the Region, since Capozzi refused to provide financial documentation to support its alleged inability to pay, the ALJ impermissibly reduced the Region's proposed penalty on that basis. *See* Region's Reply Brief at 12. As stated previously, RCRA does not include ability to pay as one of the factors EPA must consider in assessing a penalty, and therefore it is not an element of the Agency's proof. *See In re Cent. Paint & Body Shop, Inc.*, 2 E.A.D. 309, 313-14 (CJO 1987). In addition, the RCRA Penalty Policy provides, in relevant part, "[t]he burden to demonstrate inability to pay rests on the Respondent, as it does in any mitigating circumstance. * * * If the respondent fails to fully provide sufficient information [to meet this burden] then * * * enforcement personnel should disregard this factor in adjusting the penalty." RCRA Penalty Policy at 36.

However, we do not interpret the ALJ's consideration of the small size of Capozzi's business as tied exclusively to a consideration is its alleged inability to pay. Rather, the small size of Capozzi's business appears to refer to both the small number of workers employed by Capozzi (six or seven), the relatively small amount of waste generated (approximately twenty-four gallons annually), and Mr. Capozzi's apparent lack of sophistication. These strike us as relevant considerations under the statutory penalty factors. Accordingly, we determine that the ALJ did not err in reducing the Region's proposed penalty based on the small size of Capozzi's business.

icy and the policy-based rationale advanced by the Region, and offering a justification for arriving at a different number - produced a penalty that, on the whole, strikes us as appropriate in view of the totality of the circumstances presented. Accordingly, we affirm the ALJ's penalty determination for Counts III - VI.

III. *CONCLUSION*

Upon consideration of the issues raised on appeal by Region V and Capozzi, we affirm the ALJ's Initial Decision in its entirety. Accordingly, Capozzi is directed to satisfy the terms of the Compliance Order issued by the ALJ. In addition, pursuant to RCRA section 3008(a)(3), 42 U.S.C. § 6928(a)(3), a civil penalty of $37,600 is assessed against Capozzi. Capozzi shall pay the full amount of the civil penalty within thirty (30) days after the filing of this Final Decision. Payment shall be made by forwarding a certified cashier's check payable to the Treasurer, United States of America, at the following address:

U.S. Environmental Protection Agency
Region V
Sonja R. Brooks,
Regional Hearing Clerk
P.O. Box 70753
Chicago, IL 60673

So ordered.