# IN RE B&R OIL COMPANY

RCRA (3008) Appeal No. 97–3

***FINAL DECISION***

Decided November 18, 1998

Syllabus

This is an appeal by B&R Oil Company, Inc. ("B&R"), a petroleum marketing firm based in Granger, Indiana, from an Initial Decision by Administrative Law Judge Carl C. Charneski ("Presiding Officer") arising out of an administrative action by Complainant EPA Region V ("Region") against B&R for violations of regulations found at 40 C.F.R. part 280, subpart H. These regulations require owners and operators of petroleum underground storage tanks ("USTs") to, *inter alia,* demonstrate financial responsibility for taking corrective action and compensating third parties for bodily injury and property damage caused by accidental releases resulting from the operation of USTs. Specifically, the Region asserted that B&R, as a petroleum marketing firm owning between 100 and 999 USTs, failed to demonstrate the requisite financial responsibility by the compliance deadline of October 26, 1989.

The financial responsibility regulations at issue specify the amount of coverage that UST owners and operators must obtain, as well as types of financial mechanisms that they must use to show evidence of financial responsibility for petroleum releases. This case arose from B&R's relying on a "state fund"—Indiana's Underground Petroleum Tank Excess Liability Fund ("ELF")—as its mechanism of financial assurance. B&R and other UST owners in Indiana paid into the ELF through mandatory tank registration fees. The financial responsibility regulations permit such state-organized funds to be used as an alternative to more traditional and expensive mechanisms of assurance such as letters of credit, surety bonds, and private insurance, but require that states submit a description of their state funds for review and approval by the Regional Administrator before the fund can be used to demonstrate financial responsibility. Upon this submission, a state fund automatically becomes an acceptable form of financial assurance pending the Regional Administrator's final determination that the state fund is "equivalent" to other financial mechanisms permitted by the regulations.

At the time of these proceedings, state funds had become the overwhelming choice of financial assurance for UST owners and operators in Region V, but unlike other states in the Region, Indiana had not submitted a description of its fund for review and approval by the Regional Administrator. As such, UST owners and operators in Indiana became a target of an enforcement investigation by the Region, which sought to determine whether they were obtaining federally qualified alternative financial assurance, since the state fund was unavailable for this purpose. The Region's administrative action against B&R was prompted by the company's responses to information request letters from the Region, in

which B&R stated it was relying solely upon the ELF as its form of financial assurance, because other forms of financial assurance were "prohibitively expensive."

In its amended one-count complaint against B&R, the Region, following the Penalty Guidance for Violations of UST Regulations ("Penalty Policy"), proposed a $76,601 penalty, which was calculated primarily to remove the economic benefit the company enjoyed by avoiding the cost of obtaining acceptable private insurance coverage during the alleged period of violation. After an evidentiary hearing, the Presiding Officer issued an initial decision finding B&R liable for violating the financial responsibility regulations. However, the Presiding Officer departed from the Penalty Policy by lowering the Region's proposed penalty to $60,000.

On appeal, B&R contends that (1) the Presiding Officer erred in finding B&R liable for violating the financial responsibility regulations because once the ELF was "formally" submitted to the Region for review and approval in July 1991 and thus became an allowable mechanism, the company's liability was extinguished by the ELF's "retroactive" effect; (2) even if B&R was not in compliance with the regulations, the Region practiced illegal selective enforcement against it; (3) the penalty should be "suspended" because of B&R's good faith efforts to comply with the financial responsibility regulations and its "enviable environmental record"; (4) the Region erred in computing B&R's "avoided costs" according to the Penalty Policy because the Region failed to offset those costs with B&R's payments into the ELF and its environmental expenditures; and (5) the Presiding Officer's decision to only lower B&R's penalty to $60,000 was "arbitrary" and "capricious."

Held: (1) B&R's "retroactivity" defense to liability is untimely and will not be considered.

(2) B&R's affirmative defense of selective enforcement is without merit. Specifically, the Region did not "single out" B&R among a group of similarly situated violators or otherwise invidiously discriminate against it. Rather, the Region investigated a group of UST owners sharing similar characteristics, and began enforcement action against B&R when it determined that B&R was the only violator of the financial responsibility regulations within the group. The Region's decision to narrow its enforcement investigation to the State of Indiana was rational. Also, in light of the enforcement discretion that courts have traditionally accorded regulatory agencies because of constraints on their resources, the Region acted reasonably by limiting its enforcement investigation to a small number of UST owners.

(3) B&R did not exhibit good faith sufficient to merit a suspension or reduction of its penalty because, while openly acknowledging that the ELF did not qualify as an acceptable instrument of financial assurance, the company nevertheless insisted upon relying on the ELF as its form of assurance without making diligent attempts to procure alternative coverage. The company's substantial environmental work in replacing and upgrading its USTs does not demonstrate good faith because it was undertaken in anticipation of meeting a separate regulatory requirement.

(4) B&R's payments into the ELF are not appropriate offsets against the costs B&R avoided by not obtaining appropriate financial assurance because these payments were made into a financial mechanism that did not provide coverage equivalent to a functioning, federally approved state fund. Also, granting an offset would subvert a primary purpose of the Penalty Policy, which is to remove the competitive advantage that violators gain through noncompliance. Allowing B&R to offset its avoided costs with payments all UST owners made would contravene the Penalty Policy by giving B&R a financial boost over its compliant competitors. In addition, B&R's environmental expenses in replacing and upgrading tanks were mandated by a separate regulation and are thus not appropriate setoffs against its avoided costs.

(5) The Presiding Officer's penalty assessment is upheld because there is no clear error or abuse of discretion on his part. The Presiding Officer did not act "arbitrarily and capriciously" in only reducing the Region's proposed penalty to $60,000. After largely ratifying the Region's application of the Penalty Policy, the Presiding Officer nevertheless found that a reduction in the penalty was warranted to account for evidence that B&R faced a difficult market for insurance coverage and made limited inquiries into obtaining assurance. In sum, the Presiding Officer acted consistently with 40 C.F.R. § 22.27(b) and relevant case law by considering the Penalty Policy and then providing an adequate explanation for departing from it.

***Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.***

***Opinion of the Board by Judge McCallum:***

## I. *INTRODUCTION*

Respondent B&R Oil Company, Inc. ("B&R") appeals from an Initial Decision by Administrative Law Judge Carl C. Charneski ("Presiding Officer") arising out of an action by Complainant EPA Region V ("Region V" or "Region") alleging violations by B&R of regulations at 40 C.F.R. part 280, subpart H. The regulations require owners of petroleum underground storage tanks to, *inter alia,* demonstrate financial responsibility for covering the costs of corrective action and compensating third parties for bodily injury and property damage caused by accidental releases from such tanks. In its amended complaint, Region V alleged that B&R, as a petroleum marketing firm owning from 100 to 999 underground storage tanks, had failed to demonstrate satisfactory financial responsibility through one or a combination of mechanisms described in subpart H by the deadline of October 26, 1989. The Region assessed B&R a proposed penalty of $76,601. In his Initial Decision, the Presiding Officer found that Region V had established B&R's liability for the violations, but reduced the penalty amount to $60,000.

On appeal, B&R (1) maintains that its payments into Indiana's Underground Petroleum Tank Excess Liability Fund, Ind. Code Ann. § 13–7–20–31 (Burns 1991), have extinguished its liability for the alleged violations because of the Fund's "retroactive" effect; (2) raises the affirmative defense of illegal selective enforcement against it by the Region; (3) asserts that its good faith efforts to comply with the financial responsibility regulations and "outstanding environmental record" merit a suspension of the penalty; (4) asserts that the Region erred in calculating its penalty according to the U.S. EPA Penalty Guidance for Underground Storage Tanks; and (5) challenges the Presiding Officer's decision to only lower the Region's penalty to $60,000 as "arbitrary and capricious" and "unsupported by the evidence."

For the reasons stated below, B&R's arguments are rejected and the Initial Decision upheld.

## II. *BACKGROUND*

### A. *Regulatory Background*

Region V alleges that B&R has violated provisions found at 40 C.F.R. part 280, subpart H, requiring owners of petroleum underground storage tank ("UST") systems to "demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks." 40 C.F.R. § 280.93(a).

The regulation at issue in this proceeding is authorized by section 9003(c)(6) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6991b(c)(6). Both the regulation and statutory provision are part of a comprehensive regulatory program for USTs containing petroleum and other regulated substances, 42 U.S.C. §§ 6991 *et seq.* (Subchapter IX—Regulation of Underground Storage Tanks).

The regulations in 40 C.F.R. part 280, subpart H, require owners and operators of petroleum storage tanks to show evidence of financial responsibility for corrective action and third party liability in "per occurrence" and "aggregate" amounts, the level to be determined by the type of activity in which the owner or operator is engaged, the amount of petroleum handled, and the number of tanks owned and operated. 40 C.F.R. § 280.93 (a), (b). For example, owners and operators of USTs located at petroleum marketing facilities, such as B&R, are required to show evidence of financial responsibility of at least $1 million per occurrence. 40 C.F.R. § 280.93(a)(1). The amount of aggregate coverage depends upon the number of tanks owned or operated: those owning or operating 1 to 100 are required to show evidence of at least $1 million aggregate coverage, while those owning or operating 101 or more tanks, such as B&R, are to show evidence of at least $2 million aggregate coverage. 40 C.F.R. § 280.93(b).

The regulations allow tank owners and operators to avail themselves of a variety of different mechanisms to satisfy their financial responsibility requirements. All owners and operators may demonstrate financial responsibility through one or a combination of the following mechanisms, listed at 40 C.F.R. § 280.95 through § 280.103: self-insurance (§ 280.95), guarantee (§ 280.96), insurance and risk retention group coverage

(§ 280.97), surety bond (§ 280.98), letter of credit (§ 280.99), state-required mechanism (§ 280.100), state fund or state assurance (§ 280.101), trust fund (§ 280.102), and standby trust fund (§ 280.103).

In promulgating the regulation, the Agency allowed UST owners and operators to choose among these various mechanisms (or combination of mechanisms) in order to address the difficulty many were encountering in obtaining traditional pollution liability insurance. *See* Financial Responsibility Requirements for Petroleum Underground Storage Tanks, 53 Fed. Reg. 43,322, 43,324–25 (Oct. 26, 1988).

State funds (§280.101) are one of the mechanisms of financial responsibility allowed by the Agency to address the difficulty in obtaining traditional liability insurance by petroleum UST owners or operators.[1] An owner or operator of a petroleum UST can use a state fund as an acceptable instrument if the Regional Administrator determines that it is "at least equivalent to the financial mechanisms" in subpart H. 40 C.F.R. § 280.101. Once a state submits its state fund to the Regional Administrator for his or her approval, the UST owner or operator who uses the state fund "will be deemed to be in compliance with" the requirements for the scope and amount of financial responsibility at 40 C.F.R. § 280.93, pending the Regional Administrator's final determination. 40 C.F.R. § 280.101(c).

Subpart H imposes phased deadlines for complying with the financial responsibility requirements. Petroleum marketing firms are subject to the following deadlines according to the number of USTs they own: 1,000 or more USTs—January 24, 1989; 100–999 USTs—October 26, 1989; 13–99 USTs—April 26, 1991; all others—December 31, 1993. 40 C.F.R. § 280.91. As a petroleum marketing firm owning between 100 and 999 USTs, B&R was required to meet a compliance deadline of October 26, 1989.

## B. *Factual and Procedural Background*

Respondent B&R is a privately-held petroleum marketing firm incorporated in the State of Indiana with headquarters and principal place of business in Granger, Indiana. B&R owned USTs containing petroleum at

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[1] State funds are set up by states to provide funding to meet the costs of corrective action and/or third party liability resulting from petroleum releases. The revenue sources for state funds include fees on tanks, taxes, fines, penalties, and legislative appropriations. At the evidentiary hearing, Gerald Phillips, Chief of the Office of Underground Storage Tanks, Region V, stated that all six states in Region V had developed state funds to address petroleum releases from USTs. Hearing Transcript ("Tr.") at 18.

facilities in Indiana and Michigan,[2] from which it supplied the petroleum-dispensing activities[3] of retail operations, primarily convenience stores. At the time of the incidents giving rise to these proceedings, B&R owned 38 facilities in the State of Indiana, Complainant's Trial Exhibit ("CTE") No. 9, consisting of a total of "approximately" 138 USTs. Testimony of Gerald W. Phillips, Chief of the Office of Underground Storage Tanks, EPA Region V, Hearing Transcript ("Tr.") at 34.

In late 1989, Region V began an initiative to enforce compliance with financial responsibility regulations for petroleum USTs. The Region's Office of Underground Storage Tanks began investigating compliance by petroleum marketing firms owning between 100–999 USTs, and therefore subject to the phase-in deadline of October 26, 1989. Tr. at 18–19. According to the hearing testimony of Gerald W. Phillips, Chief of the Office of Underground Storage Tanks, Region V, the Office's investigation focused on the State of Indiana, because Indiana was the only state among the Region's six states that did not have a state fund approved by the Region pursuant to 40 C.F.R. § 280.101. Therefore, UST owners and operators in Indiana were expected to demonstrate financial responsibility through alternative mechanisms,[4] even though they were still required, under Indiana law, to fund the Underground Petroleum Storage Tank Excess Liability Fund ("ELF")[5] through mandatory UST registration fees. Sometime thereafter, the Region requested the Indiana Department of Environmental Management ("IDEM") to supply the Office with a list of

[2] The instant proceedings arise only from B&R's activities in Indiana.

[3] At the evidentiary hearing, B&R President Ralph Dobson indicated that B&R supplied its customers with gasoline, i.e., motor fuel. Tr. at 132.

[4] At the evidentiary hearing, Mr. Phillips indicated that once a state obtained Agency approval of its fund, the fund became in practice the exclusive mechanism that UST owners and operators used to demonstrate financial responsibility. Tr. at 31.

[5] Indiana's Underground Petroleum Tank Excess Liability Fund, Ind. Code Ann. § 13–7–20–31, was established by the Indiana Legislature in 1988 in order to allow owners and operators of petroleum USTs to establish evidence of financial responsibility for corrective action and third party liability as required by RCRA § 9003(c)(6). All UST owners in the state pay into the ELF through required annual tank registration fees. During the time of the events which concern this proceeding, the annual tank registration fees were $90 per tank, half of which went into the ELF and half of which went into the petroleum trust fund. The petroleum trust fund, a separate fund, is designed to defray the State of Indiana's costs for undertaking corrective action in response to a petroleum release, or in recovering these costs from responsible owners and operators. Use of fund proceeds is ordinarily restricted to cases in which the responsible operator cannot be found, in emergencies, or when an owner or operator refuses to take corrective action in response to an order by the State. *See* Ind. Code Ann. § 13–7–20–20 (Burns 1991).

petroleum marketing firms owning between 100 and 999 USTs in the state, and received from IDEM a list of 36 or 37 companies in that category. Tr. at 37. Of these, the Office selected a "study group" of nine companies (which included B&R), sending to each company an information request letter asking it to certify its compliance with the financial responsibility requirements of 40 C.F.R. part 280, subpart H.

The Agency eventually received certification responses from all nine companies except one that was mistakenly identified as belonging to the 100–999 tank group. According to the Region, all properly identified companies except B&R were able to satisfy the financial responsibility requirements through self-insurance or by procuring private insurance coverage. Tr. at 18. In its July 5, 1990 response to the Region, B&R identified the ELF as its form of financial responsibility. CTE No. 2, letter from Mark Dobson, B&R, to Region V (July 5, 1990). In the July 5th letter, B&R explained that it had opted to rely upon the ELF as its financial assurance mechanism after trying to obtain private insurance coverage, and finding that such coverage was prohibitively expensive. CTE No. 2; Tr. at 22.[6]

In an October 24, 1990 response, the Region informed B&R that it could not use the ELF as its financial responsibility mechanism because the IDEM had not yet submitted it to the Region for formal review and approval. The Region again requested B&R to submit certification of financial responsibility. CTE No. 3. In an October 31, 1990 response, B&R explicitly acknowledged that its payments into the ELF did not constitute compliance with financial responsibility requirements for USTs:

> Because the IDEM has not applied for certification of the Indiana tank fund we cannot show financial responsibility in the manner prescribed by subpart H of 40 C.F.R. Part 280.

[6] At the evidentiary hearing, Region V's Phillips testified that in early 1990, prior to B&R's response to the Region's information request letter, IDEM had sought the Region's advice about whether a bill to amend the ELF then before the Indiana legislature would make the ELF an acceptable instrument under 40 C.F.R. part 280, subpart H. According to Phillips, this was the first occasion that the IDEM approached the Region regarding the acceptability of the ELF. In response, the Region informed IDEM that the bill—which according to Phillips contained a "variety of problems"—did not adequately address deficiencies in the ELF. Tr. at 25. Phillips said that after the bill was passed by the legislature in 1990, the Region received a request from IDEM for "technical assistance" to make the ELF an acceptable financial instrument, and that the Region responded by submitting comments to the state agency. *Id.* (There is no evidence in the record that the original unamended ELF, enacted in 1988, was ever submitted to the Region for review and approval.)

CTE No. 4, Letter from Mark Dobson, Vice-President, B&R, to Dolores Sieja, Office of Underground Storage Tanks, EPA Region V (Oct. 31, 1990). B&R again recounted its difficulties in obtaining affordable or complete coverage from insurers, providing examples of premium and deductible proposals it had received from carriers. Saying that it had "discontinued efforts" to obtain private insurance, and that it was relying on the ELF to be its financial responsibility mechanism, B&R asserted that its efforts would be "best spent working with the IDEM to get the [ELF] certified" by the Region. *Id.*

On April 24, 1991, the Region sent B&R a Notice of Violation informing the company that it was in violation of financial responsibility regulations under 40 C.F.R. part 280, subpart H for failure to provide evidence of appropriate financial responsibility by October 26, 1989. CTE No. 5. In a May 8, 1991 response, B&R stated that it hoped that a bill then pending in the Indiana legislature to amend the ELF would be acceptable to the Region. B&R attached a description of the proposed amendment and documentation of another unsuccessful attempt to obtain private insurance. CTE No. 6.

Soon thereafter the Indiana legislature again amended the ELF. On July 16, 1991, the Commissioner of IDEM submitted a request to the Region for review of the recently amended ELF so that "Indiana's Excess Liability Fund can be approved by the U.S. Environmental Protection Agency as a financial assurance mechanism for use by Indiana underground storage tank owners and operators to establish evidence of financial responsibility as required under State law and 42 U.S.C. 6991b(c)(6)." Respondent's Trial Exhibit ("RTE") No. 3, Letter from Kathy Prosser, Commissioner, Indiana Department of Environmental Management to Valdas Adamkus, U.S. EPA Region V (July 16, 1991).

On August 19, 1991, the Region filed an administrative complaint against B&R alleging four counts of violating the financial responsibility regulations and proposing a penalty of $340,756.[7] B&R filed an answer. On September 24, 1991, Administrative Law Judge Daniel Head was designated as the Presiding Officer. On October 15, 1991, the Region filed a motion seeking leave to amend its complaint, which was eventually granted. Subsequent efforts by the parties at a negotiated settlement failed.

The Region filed a Prehearing Exchange on January 16, 1992, and received the Respondent's Prehearing Exchange and Rebuttal on February 3, 1992. B&R also filed a Motion to Dismiss received by the

[7] The Region calculated this penalty using the U.S. EPA Penalty Guidance for Violations of UST Regulations (Nov. 1990) .

Region on January 29, 1992, and the Region filed a motion seeking an accelerated decision as to liability.

No further action was taken on these motions until 1996, when this case was reassigned to Administrative Law Judge Carl C. Charneski. As Presiding Officer, Judge Charneski denied the motions for dismissal and accelerated decision, but did grant the Region's motion for leave to amend the complaint. He also scheduled an evidentiary hearing for June 18, 1996.

The Region's May 20, 1996 amended complaint alleged violations by B&R of the following regulations:

> (1) 40 C.F.R. § 280.91(b), requiring petroleum marketers owning between 100–999 USTs to comply with the financial responsibility requirements of 40 C.F.R. part 280, subpart H, by October 26, 1989;
>
> (2) 40 C.F.R. § 280.93(a)(1) and § 280.93(b)(2), requiring owners or operators of petroleum USTs at petroleum marketing facilities who own 101 or more USTs to demonstrate financial responsibility for corrective action and third party liability in the per-occurrence amount of $1 million and aggregate amount of $2 million; and
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> (3) 40 C.F.R. § 280.94, requiring owners and operators of USTs to demonstrate financial responsibility by any one or a combination of the allowable mechanisms described at 40 C.F.R. § 280.95 through 40 C.F.R. § 280.103.

The amended complaint compressed these three violations to one count, which had the effect of lowering the original penalty amount sought to $76,601. The amount was calculated primarily to remove the economic benefit B&R allegedly enjoyed by avoiding the costs of obtaining a satisfactory financial assurance mechanism during the period in question.[8]

[8] Following the U.S. EPA Penalty Guidance for Violations of UST Regulations (Nov. 1990) ("Penalty Policy"), the Region based its calculation of B&R's "avoided cost" upon the premiums—$86,000—that a competitor within the same compliance category as B&R (100–999 USTs) was required to pay under a private insurance policy to cover its USTs over two years (roughly the period of B&R's violation). The Region applied the Penalty Policy formula for determining "avoided costs" (which includes the equity discount and marginal tax rates) to the $86,000 figure to arrive at an "avoided cost" of $72,663. The balance of the penalty consisted of a small "gravity" component of $3,938.

A hearing in this proceeding was held on June 18, 1996. Both parties submitted post-hearing briefs. The Presiding Officer issued his Initial Decision on September 8, 1997, finding B&R liable for the violations alleged in the Amended Complaint, but reducing the penalty to $60,000. *See infra* section III.D.

B&R filed a timely Notice of Appeal, with an attached brief ("Appeal Brief"), on September 26, 1997, to which the Region filed a reply ("Reply Brief"). The Region did not appeal the Initial Decision.

As noted before, B&R contests the Initial Decision on the following grounds:

> (1) The Presiding Officer erred in finding B&R liable for violating the financial responsibility regulations at 40 C.F.R. part 280, subpart H, because B&R's payments into the ELF extinguished its liability, since the Fund operated "retroactively";
>
> (2) Even if B&R was not in compliance with these regulations, the Region practiced illegal selective enforcement against it, and therefore the Presiding Officer's liability determination must be vacated;
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> (3) The penalty assessed should be "suspended" because of B&R's good faith efforts to comply with the financial responsibility regulations and its "enviable environmental record";
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> (4) The Region erred in computing B&R's "avoided costs" according to the Penalty Policy because (i) the Region failed to offset those costs with B&R's payments into the ELF and its environmental expenditures and (ii) miscalculated B&R's period of noncompliance; and
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> (5) The Presiding Officer's decision to impose a reduced penalty of $60,000 was "arbitrary and capricious" and unsupported by the evidence.

After considering B&R's contentions, we find, for the reasons explained below, that the Presiding Officer did not err in finding B&R liable for violating the financial responsibility regulations at 40 C.F.R. part 280, subpart H, and in assessing it a penalty of $60,000.

## III. *DISCUSSION*

### A. *Effect of Retroactivity of ELF on B&R's Liability*

B&R argues that the when the ELF became an acceptable mechanism of financial assurance on July 16, 1991, as a result of IDEM's submission of the ELF for Region V's review and approval on that date,[9] B&R's liability was extinguished because the ELF is retroactive to April 1, 1988—before the company's alleged period of noncompliance, which began on October 26, 1989. B&R bases its contention on a court decision, *Pantry Inc. v. Stop-N-Go Foods, Inc.,* 777 F. Supp. 713 (S.D. Ind. 1991), which holds that Indiana's UST laws apply retroactively. It argues that its position is buttressed by the fact that the ELF "retroactively" pays out claims that arise on or after April 1, 1988,[10] the date the law establishing the ELF and authorizing the fund's payoff of claims took effect.[11] Respondent's Appeal Brief ("Appeal Brief") at 8–10.

B&R's retroactivity argument was not raised below; therefore, we will not consider it in our decision. We have held previously that the Board does not ordinarily review arguments raised for the first time on appeal.[12] *In re Woodcrest Mfg., Inc.,* 7 E.A.D. 757, 764 (EAB 1998); *In re James C. Lin and Lin Cubing, Inc.,* 5 E.A.D. 595, 598 (EAB 1994); *In re Genicom Corp.,* 4 E.A.D. 426, 440 (EAB 1992) (rejecting respondent's contention that an issue had been raised below). B&R's retroactivity arguments are deemed waived.[13]

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[9] *See* 40 C.F.R. § 280.101; *supra* section II.B.

[10] In support of this point, B&R cites IDEM's Excess Liability Claim Application Package (Appeal Brief, Ex. B), which states in relevant part on page 1:

> Corrective action costs and third party liability claims arising from [petroleum] releases [from USTs] reported AFTER March 31, 1988, are eligible for an amount up to 1 million dollars maximum [from the ELF] less the deductible per occurrence.

[11] An Act to Amend the Indiana Code Concerning Underground Storage Tanks, P.L. 69–1988 (1988).

[12] B&R had ample opportunity to bring this argument up in the proceedings below. The primary case which B&R relies upon to make this argument, *Pantry*, was decided October 22, 1991, more than four and a half years before the June 1996 hearing in this case.

[13] Even though we decline to consider appellant's argument, if we were to do so, we would likely find it unpersuasive. *Pantry*, upon which B&R relies, turned on the issue of whether past owners or operators of USTs could be sued by current owners or operators for cleanup of contamination that occurred before the amendment's enactment. Drawing an analogy between the retroactive liability provisions of the Comprehensive

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## B. *The Affirmative Defense of Selective Enforcement*

B&R asserts in affirmative defense that even if it violated the financial responsibility regulations in 40 C.F.R. part 280, subpart H, it is not

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Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 to 9675, and the remedial purpose of the state's petroleum tank laws, the court held that liability encompasses releases which precede the amendment's enactment. *Pantry,* 777 F. Supp. at 720–21.

However, B&R misapplies *Pantry* because the issue of a party's retroactive liability for releases from USTs is distinct from the issue of whether the "retroactivity" of the fund exculpates UST owners and operators for failing to demonstrate financial responsibility in a timely manner. Most importantly, B&R's approach to retroactivity would work against the very remedial objectives of the UST regulatory program that were so decisive to the court in *Pantry.*

In the preamble to the final regulations, the Agency stated that the "purpose of the financial responsibility regulations is to ensure that funds will be available in a timely manner to cover the costs of corrective action and compensation of third parties arising from UST releases." Financial Responsibility Requirements for Petroleum Underground Storage Tanks, 53 Fed. Reg. 43,322, 43,327. Describing the requirement for "adequate and reliable" financial assurance as a "guiding objective" of the program, the Agency identified three criteria which underpinned this objective:

(1) The *certainty* that funds will be available;

(2) The *sufficiency* of funds to cover the costs of release; and

(3) The *availability* of funds for corrective action and third-party liability.

53 Fed. Reg. at 43,324 (emphasis added).

The words "certainty," "sufficiency," and "availability," above, strongly suggest the need for UST owners and operators to secure adequate financial assurance during all periods of operation, to ensure that funds can be readily disbursed in response to environmental damage and third party claims arising from petroleum releases. Considering the strong connection the regulations draw between timely, adequate financial responsibility and protecting the public and environment, owners and operators should not be able to use their eventual compliance with the financial responsibility regulations to exculpate their prior delinquency in doing so.

This is especially true in the present case, where Region V rejected the ELF as an acceptable instrument on the basis of an omission—the failure to require owners and operators to financially guarantee deductibles—that bears directly on the achievement of the regulations' objectives. In the preamble to the final regulations, the Agency described this requirement as important to ensure expeditious payout of liability claims. 53 Fed. Reg. at 43,349. Therefore, allowing UST owners and operators to invoke the retroactive application of ELF defeats the purpose of the financial responsibility regulations by sanctioning owners' and operators' reliance upon a form of assurance that failed to ensure the "certainty," "sufficiency," and "availability" of funds during the period of time between the compliance deadline and the date the ELF was submitted for approval. B&R's argument would legitimize tardy compliance with the financial responsibility regulations, thus undermining their remedial purpose.

subject to liability because the Region engaged in illegal selective enforcement. Appeal Brief at 10. B&R contends that the Region arbitrarily singled it out for enforcement action while ignoring the violations of competitors. In raising this argument in defense, B&R relies on evidence that Region V limited its investigation to only one state in the Region, Indiana, and did not choose to pursue potential violators in the other states. Appeal Brief at 10–18. The company also claims that the Region impermissibly used the Paperwork Reduction Act as a justification for limiting the scope of its investigation to a narrow group of potential violators of the financial responsibility regulations. Appeal Brief at 20–21.

Respondent 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. This deference to prosecutorial discretion is founded upon sound policy considerations, discussed below. As a consequence, the judicial decisions establish that an affirmative defense of selective enforcement or prosecution requires proof 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. *U.S. v. Smithfield Foods, Inc.,* 969 F. Supp. 975 (E.D. Va. 1997); *see also U.S. v. Anderson,* 923 F.2d 450 (6th Cir. 1988); *Schiel v. Commissioner,* 855 F.2d 364, 367 (6th Cir. 1988).

On the facts before us, we cannot find a sufficient claim of selective enforcement; B&R has not even made a threshold showing that it was "singled out" for enforcement action while other similarly situated violators were not. B&R was one of several members of a small group having similar characteristics. Nor has B&R presented any evidence that the Agency targeted it for being a member of a protected group or for exercising a constitutional right. *See Smithfield Foods,* 969 F. Supp. 975.

The record reveals that B&R was the only violator within the group identified by the Region as a result of its enforcement initiative. The Region confined the initiative to Indiana because it was the only state in the Region not to have an Agency-approved state fund covering releases from USTs. Thirty-six (36) Indiana companies fell within the ownership range of 100–999 USTs, a group that was the focus of the Region's initiative because the group's compliance deadline of October 26, 1989, had recently passed. The Region then reduced the number of companies in this group to nine simply to avoid triggering certain Paperwork Reduction Act requirements, i.e., those that obligate federal agencies to submit their

information requests for review and approval by the Office of Management and Budget ("OMB") if the group targeted for the requests includes ten or more persons.[14] To these nine companies, the Region sent information request letters asking them to certify their compliance with the financial responsibility requirements for USTs. After reviewing the responses it received, the Region found that B&R was the only violator among this small group.

The foregoing choices made by the Region that culminated in an enforcement action against B&R clearly refute B&R's contention that it was "singled out." Rather, the Region followed an orderly, rational process to arrive at a target group for investigation, and then focused its enforcement efforts on the one company, B&R, whose response to the information request revealed it was not in compliance with the financial responsibility regulations. Moreover, B&R has presented no evidence that other UST owners and operators in Indiana or the Region were in violation of the regulations. The fact that the Agency limited its search for violators to a small group of nine companies in only one state hardly indicates illegal discrimination; as a recent decision has held, "[a] government legitimately could enforce its law against a few persons, even just one, to establish a precedent, ultimately leading to widespread compliance * * *. A vendor's bleat that it should not bear the competitive disadvantage of enforcement does not establish a constitutional wrong." *Falls v. Town of Dyer,* 875 F.2d 146, 148 (7th Cir. 1989); *accord FTC v. Universal-Rundle Corp.,* 387 U.S. 244 (1967); *Moog Indus., Inc. v. FTC,* 355 U.S. 411 (1958).

Recognizing that government officials often operate under limited budgets and must inevitably exercise their discretion in selecting which cases to pursue, courts have traditionally allowed regulators considerable leeway in initiating enforcement actions. This reasoning was recently enunciated by the Sixth Circuit Court of Appeals in rejecting a defendant's assertion of selective enforcement by state regulators: "Legislatures often combine tough laws with limited funding for enforcement. A regulator is

[14] In order to prevent unnecessary and burdensome collection of information, the Paperwork Reduction Act requires federal agencies, before making such requests, to (1) consult with the Director of OMB, (2) announce and explain the need for the request in the Federal Register, and (3) obtain the OMB Director's approval for the request. *See* 44 U.S.C. § 3507(a)(1)–(3). The Act defines "collection of information," in relevant part, as:

> [O]btaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for * * * answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, *ten or more persons,* other than agencies, instrumentalities, or employees of the United States * * *.

44 U.S.C. § 3502(4)(A) (emphasis added).

required to make difficult, and often completely arbitrary, decisions about who will bear the brunt of finite efforts to enforce the law. As a result, even a moderately artful complaint could paint almost any regulatory action as both selective and mean-spirited." *Futernick v. Sumpter Township,* 78 F.3d 1051, 1058 (6th Cir. 1996).

In this case, the Region's use of the Paperwork Reduction Act as a justification for not investigating more than nine parties, in order to avoid the Act's reporting and approval requirements, is the essence of the type of discretion that the case law seeks to accommodate. Investigating more than nine parties would have subjected the Agency to more delay, paperwork, and therefore expense as a result of first reporting its inquiries to the OMB and obtaining OMB approval.

B&R relies on *Encyclopaedia Britannica, Inc. v. F.T.C.,* 605 F.2d 964 (7th Cir. 1979), and other cases for the proposition that once the government decides to single out a group of similarly situated violators, it cannot decide to pursue one and not others absent a "reasonable evaluation" of the competitive market. *Id.* at 974. In *Encyclopaedia Britannica,* which involved enforcement actions of the Federal Trade Commission against an encyclopedia company for its alleged illegal sales practices, the court ruled that the FTC did not have unlimited discretion to take enforcement actions that would "destroy one of many violators in the market." *Id.* B&R cites *Encyclopaedia Britannica* in maintaining that the Region was required to do a study of the impacts of the proposed penalty on the company's competitive posture vis-à-vis other companies, so as to ensure that the penalty would not "destroy" B&R. Appeal Brief at 11, 17, 22–23. But as the facts above reveal, the Agency's actions never amounted to the "singling out" among violators, which according to B&R's own cited cases, would trigger the need to conduct such a review of the penalty's impact on B&R's competitiveness.[15]

Because B&R has not shown that it was singled out among a group of similarly situated violators and otherwise discriminated against for invidious reasons, we find that B&R fails to make a claim of selective prosecution in affirmative defense to its liability for failing to obtain financial assurance pursuant to 40 C.F.R. part 280, subpart H.

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[15] B&R challenges the Region's use of ABLE (a computer program which the Region used to determine that B&R could pay a penalty amount five times larger than the penalty sought under the amended complaint) as an inadequate inquiry into the impact of the penalty assessment on the company's competitive posture. B&R maintains that such an inquiry is mandated by *Encyclopaedia Britannica.* Appeal Brief at 27; *see also* Tr. at 87–89. We will not consider this argument, because we find that such an inquiry is not necessary, since B&R was never "singled out" for enforcement.

## C. *Alleged Error in Setting Penalty*

The penalty provisions in RCRA Subtitle I direct the Administrator to assess a penalty for UST violations "which [he or she] determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements." 42 U.S.C. § 6991e(c). In this proceeding, the Region used the U.S. EPA Penalty Guidance for Violations of UST Regulations, (Nov. 1990) ("Penalty Policy"), to implement this statutory directive and arrive at a proposed total penalty amount of $76,601, made up of a $72,663 "economic benefit" component and a $3,938 "gravity-based" component. For the reasons below, we find that the Region did not err in calculating the penalty according to the Penalty Policy, as B&R contends. The Presiding Officer largely ratified the Region's use of the Penalty Policy, and likewise we find that he did not err in supporting the Region's use of the Policy.

### 1. *Alleged Grounds for Good Faith Adjustment of Penalty*

B&R asserts that the penalty assessed against it should be "suspended" because of its good faith efforts to comply with the financial responsibility regulations and its "enviable environmental record." Appeal Brief at 24. Insofar as B&R seeks a drastic reduction of its penalty on the ground of good faith,[16] we note at the outset that taking good faith into consideration in setting penalty amounts is explicitly required under the statute.[17] The UST Penalty Policy embodies the statutory principle by providing for a downward adjustment of as much as 25% of the initial matrix value for the gravity component of a penalty for cooperative or good faith actions by a violator that go "beyond what is minimally required to comply with requirements that are closely related to the initial harm addressed." Penalty Policy at 18.

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[16] We note that B&R does not directly challenge the Region's failure to incorporate good faith considerations in assessing the company's penalty under the Penalty Policy. This may be because the "gravity-based" component of B&R's penalty, where good faith factors can be considered, accounts for only a small portion of the company's total penalty. Nevertheless, because RCRA § 9006 requires consideration of good faith in assessing a penalty, *see infra n.17,* we will inquire whether the Presiding Officer erred by not properly accounting for the company's asserted good faith in his penalty determination.

[17] RCRA § 9006(c), 42 U.S.C. § 6991e(c), states in relevant part:

> (1) any order issued under this section shall * * * assess a penalty, if any, which the Administrator determines is reasonable taking into account the seriousness of the violation and *any good faith efforts to comply with the applicable requirements.* (Emphasis added.)

Neither the Region nor the Presiding Officer found that B&R had exhibited good faith that would merit a reduction in B&R's penalty amount. In support of its good faith claim, B&R asserts that it did the best it could in the face of a set of trying circumstances, alleging that it could not simultaneously make mandatory payments into Indiana's ELF, while also complying with the federal requirement of procuring private or other types of financial coverage for its USTs. B&R also contends that the burden of these expenses threatened to undermine the viability of its expensive ongoing retrofitting plan to modernize its tanks and make them comply with UST upgrade requirements that would take effect in 1998.[18] Unable to find private insurance coverage that was affordable or provided full coverage, B&R states that it had no resort but to rely on the ELF as its financial assurance mechanism. Its good faith argument also rests on the contention that in contributing to the ELF, it was obtaining coverage that was in all important respects equivalent to what EPA required, and would fulfill the program's purpose, and that therefore obtaining additional coverage would have been duplicative. As B&R asserts: "B&R's violation, if indeed there was a violation * * * was technical only. The Indiana Fund would have provided funds had a release occurred. Therefore there was never a danger to the public." Appeal Brief at 26–27.

The Agency has found on previous occasions that good faith efforts to comply with RCRA financial responsibility requirements justify the lowering of penalty amounts. In *In re Landfill, Inc.,* 3 E.A.D. 461 (CJO 1990), for example, the respondent was assessed a reduced penalty for its failure to obtain financial assurance for its hazardous waste landfill as required by RCRA section 6924(a),[19] based upon a finding (1) that the company made good faith efforts to comply with the requirements, but was unable to obtain private insurance; and (2) that it had relied in good faith upon a state regulator's letter mistakenly informing it that it did not have to submit documentation on financial assurance. *Id.* at 472.

A comparison of the circumstances in the instant case with those that justified a reduced penalty on good faith grounds in *Landfill* is revealing. Here, unlike the landfill operator in *Landfill,* B&R was repeatedly told by the Region of the financial responsibility requirements at 40 C.F.R. part

[18] According to 40 C.F.R. § 280.21, by December 22, 1998, all existing UST systems, except those slated for closure, must be upgraded or meet new tank performance standards to prevent releases of regulated substances by spills, overflows, and corrosion. Upgrade standards are described at 40 C.F.R. § 280.21(b)–(d) and new tank performance standards are described at 40 C.F.R. § 280.20.

[19] Detailed financial responsibility requirements for treatment, storage, and disposal facilities under RCRA can be found at 40 C.F.R. § 265.140–.151 and § 264.140–.151.

280, subpart H, and the inadequacy of the ELF as an appropriate financial instrument (since IDEM had not applied to the Region for the Fund's approval). CTE Nos. 1, 3, 5. Yet despite these warnings, and while acknowledging the deficiency of the ELF, B&R continues to insist on relying upon the ELF as its financial instrument. CTE Nos. 2, 4. In an October 31, 1990 response by B&R to a Region letter reminding the company of its financial responsibility obligations, Mark Dobson, B&R Vice-President, acknowledged the legal inadequacy of relying on the ELF:

> Because the IDEM has not applied for certification of the Indiana tank fund we cannot show financial responsibility in the manner prescribed by subpart H of 40 C.F.R. part 280 * * *. It is our position that the fund serves as our financial responsibility program. However your letter states that we are incorrect in the position that the fund can be our program.

CTE No. 4. Certainly, B&R's staunch resolve to continue on a path that diverged from the applicable financial security requirements, despite an open-eyed awareness that doing so was departing from the applicable requirements, is a far cry from the circumstance of mistaken reliance that warranted a penalty reduction in *Landfill.* Accordingly, we reject *Landfill* as grounds for making an allowance for good faith to B&R's penalty assessment.

With respect to the company's asserted difficulty in complying with the applicable regulations, the Presiding Officer remarked that testimony on both sides described a difficult market for obtaining private insurance,[20] but also noted that B&R's efforts to obtain coverage were less than diligent. Initial Decision at 11. As explained by the Presiding Officer, B&R's attempts at private coverage were limited to inquiries on insurance quotes, and B&R did not even seek to obtain partial coverage, a factor that, though not a defense to liability, "could have been considered favorable to respondent in mitigation of the penalty." *Id.*

B&R also argues that its decision to upgrade its facilities for environmental reasons is itself evidence of good faith. We reject this argument. At the evidentiary hearing, B&R testified that it spent over $2 million on environmental expenses during the time of violation, including

[20] At the evidentiary hearing, B&R's witnesses Ralph Dobson and Mark Dobson testified on their inquiries into obtaining private insurance coverage for their petroleum tanks. They stated that premiums were prohibitively expensive or liability coverage was inadequate. Tr. at 155, 166–172, 203. Complainant's witness Gerald Phillips also acknowledged that companies like B&R faced a limited market for private insurance coverage of their tanks and that such insurance was expensive. Tr. at 32–33.

replacing and retrofitting tanks and installing monitoring equipment. Tr. at 142–149, 153–154, 182–183. As the Region observed in its reply brief, B&R's expenses reflect not good faith, but rather the company's response to a separate regulatory mandate under 40 C.F.R. § 280.21 to upgrade tanks or install new ones to heightened standards of environmental performance by December 1998. Moreover, the wording of the statutory clause on UST penalties states that the Agency shall take into account "good faith efforts *to comply with the applicable requirements.*" (Emphasis added.) The applicable requirements in the instant case are the financial security requirements under 40 C.F.R. part 280, subpart H, not the tank upgrading and new performance standards at 40 C.F.R. § 280.20 and § 280.21. In *In re Everwood Treatment Co.,* 6 E.A.D. 589 (EAB 1996), we rejected a respondent's request for a reduction in penalties based on good faith because its cleanup of an earlier spill, which the respondent offered as evidence of good faith, was not related to the permitting and land disposal requirements for the soil contaminated by the spill, which requirements formed the basis of the violations in that proceeding. *Everwood,* 6 E.A.D. at 608.[21]

We also reject B&R's contention that its required payments into the ELF are an indicator of good faith because the fund allegedly complied in spirit, if not in letter, with the financial responsibility requirements. Appeal Brief at 26. While it may be regrettable that B&R had to spend considerable money toward a fund explicitly designed, albeit unsuccessfully, to meet EPA coverage requirements, the deficiencies in the fund were more than a "technicality," as B&R contends. *Id.* The "technicality"—the failure of the ELF to specify that tank owners must guarantee all deductible levels—was of considerable importance, since the requirement for the insured to demonstrate evidence of financial responsibility for the "first dollar" of coverage had been identified by the Agency as important in ensuring quick payoffs of claims, one of the main objectives of the financial responsibility regulations. *See* Financial Responsibility Requirements for Petroleum Underground Storage Tanks, 53 Fed. Reg. 43,322, 43,349 and *supra* n.13.

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[21] Moreover, insofar as B&R contends that its "enviable environmental record"—consisting of upgrading and replacing tanks—is a basis independent from "good faith" for "suspending" its penalty, we can find no reasonable grounds in case law, statute, Penalty Policy, or otherwise for doing so. The Penalty Policy does contain a provision allowing reductions of penalties for "other unique factors" that "arise on a case-by-case basis," *see* Penalty Policy at 19, but B&R's environmental projects, which were simply carried out to meet a separate regulatory mandate, do not rise to this level.

In sum, we find that the Presiding Oficer did not err in finding that B&R did not demonstrate good faith sufficient to merit a reduction in its assessed penalty.

2. *Avoided Cost of Compliance*

B&R also contends that the Region erred in calculating the "economic benefit" component of the Penalty Policy, which seeks to deny a violator the economic benefit of avoiding or delaying compliance with regulatory requirements. In B&R's case, the economic benefit consisted of the costs the company avoided in not securing an appropriate form of financial assurance during its alleged period of violation.

a. *Impossibility of Compliance*

B&R maintains that its avoided costs should be set at zero, asserting that because it was impossible for it to obtain adequate insurance coverage for its tanks, it could not have avoided any costs. Appeal Brief at 33. The company points to what it claims were the prohibitively expensive rates and the inadequate coverage that different insurers offered. *Id.*

In short, we conclude that the Initial Decision's $72,663 calculation of economic benefit was appropriate in light of all the circumstances. While both B&R and the Region testified that insurance was expensive and difficult to obtain, two of B&R's competitors, Crystal Flash and Gas America, were able to obtain insurance, thereby undermining B&R's claim that obtaining insurance was "impossible." Tr. at 20–21; Reply Brief at 33. And notwithstanding the difficulties it confronted, B&R's failure to obtain partial coverage of its facilities, or to explore mixing private insurance coverage with other forms of financial assurance, such as a letter of credit, also weakens B&R's impossibility contention. And lastly, the $72,663 penalty component for avoided costs that EPA assessed is hardly excessive given B&R's own testimony on the high cost of the insurance market.[22]

[22] The Region's calculation of B&R's avoided costs according to the Penalty Policy was based on the annual premium cost—$43,000—paid by one of B&R's competitors, Gas America. Tr. at 83–85. B&R's witness testified that the company received higher premium quotes from the following insurers: Petromark ($68,000) and AESIC ($182,834). CTE No. 4; Tr. at 175.

#### b. *Using B&R's Payments into Excess Liability Fund to Offset Avoided Costs*

B&R also maintains that the Region should have deducted B&R's required payments into the ELF from its avoided costs, on the ground that such payments provided liability coverage equivalent to that required by federal law. As B&R states, "the funds expended [into the ELF] reduced the potential threat to the public in almost exactly the same manner required by the federal regulations at issue." Appeal Brief at 26–27.

We disagree with B&R's equivalency arguments. First, the ELF before being amended in 1991 did not provide coverage equivalent to a functioning, federally approved fund. During the alleged period of violation, claims could not be paid out or processed from the ELF, because the State of Indiana had not yet adopted implementing regulations.[23] As IDEM informed B&R in an undated letter, the state agency had developed "draft regulations" but these required "formal adopt[ion] by the Financial Assurance Board," which had not yet been appointed, in order to become effective. CTE No. 6, Letter from Jacqueline W. Strecker, Chief, Underground Storage Tank Branch, IDEM, to Mark Dobson, Vice-President, B&R Oil (undated). Second, the ELF also lacked equivalency because it did not obligate UST owners and operators to furnish evidence of financial responsibility with respect to deductible items in the ELF; hence, there was a risk that corrective action and third party claims would not be paid off expeditiously in keeping with the timeliness objective of the financial responsibility regulations. *See supra* section III.C.1.

Most importantly, we support the Presiding Officer's decision not to offset B&R's avoided costs with its payments into the ELF because allowing an offset would undercut one of the major purposes of the economic benefit component of the Penalty Policy, which is to remove the financial benefit that violators reap through noncompliance so that they do not gain a competitive advantage over others in the marketplace. This objective is stated in the Agency's general policy on civil penalties and informs the penalty policies of most statutes the Agency administers. *See* EPA General Enforcement Policy #GM–21, Policy On Civil Penalties 3 (1984). *See also In re B.J. Carney Indus.,* 7 E.A.D. 171, 208 (EAB 1997) (stating that "the economic benefit of noncompliance component of a penalty helps 'ensure a level playing field by ensuring that violators do not obtain an economic advantage over their competitors who made the necessary investment in environmental compliance.'").

[23] The Region's testimony indicates that implementing regulations for the ELF were not adopted until 1995. Tr. at 78.

All UST owners and operators were obligated to make payments into the ELF through mandatory tank registration fees. B&R was no different in this respect. B&R differed, however, by not also obtaining some form of federally qualified alternative financial assurance, as did the other members of the group examined by the Region. For instance, two members of the group purchased private insurance coverage for their USTs. Granting B&R an offset for payments other USTs owners and operators made would thrust B&R into a competitive advantage over its compliant competitors, a result clearly at odds with the purpose of the Penalty Policy. Accordingly, we reject B&R's request to use its payments into the ELF as an offset against its avoided costs.

#### c. *Using B&R's Environmental Expenditures to Offset Avoided Costs*

B&R asserts that the Region erred in not offsetting the company's costs with the more than $2 million it spent replacing and retrofitting tanks in order to comply with the December 1998 deadline to meet upgrade and new performance standards for USTs. Appeal Brief at 27. We agree with the Presiding Officer that B&R should not receive an offset for complying with other legal obligations. Subscribing to B&R's argument amounts to treating environmental upgrades of tanks as a surrogate for complying with financial responsibility requirements. However, these requirements are not interchangeable; they are the outgrowth of separate legislative actions and regulatory considerations and have different objectives. Also, the Penalty Policy's objective of deterring violations of UST regulations, by applying penalties that remove any financial advantage to flouting the regulations, would be defeated if tank owners could offset such penalties by merely citing their compliance with other UST requirements.

#### d. *Calculating B&R's Period of Noncompliance*

B&R contends that the Region erred in calculating its avoided cost by basing it on a two-year period of noncompliance.[24] The company argues

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[24] In computing B&R's penalty, the Region actually used a period of noncompliance of 565 days beginning on October 26, 1989, the compliance deadline for the 100–999 UST category, *supra* section II.A, and ending on May 13, 1991, the last date the Region had proof of B&R's noncompliance. In calculating B&R's avoided costs using the Penalty Policy, the Region rounded up this time period to two years. The two-year period was multiplied by $43,000, the estimated yearly cost for B&R to obtain private insurance. *See supra* note 22. The product, $86,000, was adjusted upward by the equity discount (interest) rate and downward by the marginal tax rate to yield a total avoided cost of $72,663. CTE No. 9.

that its period of noncompliance extended from October 26, 1989 (the compliance deadline) to June 29, 1990, a period of only 246 days. The latter date, according to B&R, is the date that activates the ELF for purposes of federal compliance. We disagree.

According to 40 C.F.R. part 280, subpart H, the suitability of state funds as instruments of financial responsibility is contingent upon the Regional Administrator's determination that a state fund provides a level of coverage equivalent to the financial mechanisms allowed by subpart H. 40 C.F.R. § 280.101(a). These regulations direct the state to submit a description of its state fund to the Regional Administrator so that the Regional Administrator can conduct a proper determination. 40 C.F.R. § 280.101(c). Once the description of the fund is submitted for review, the fund is deemed to be in compliance with the coverage requirements, pending the Regional Administrator's final determination. *Id.*

B&R proposes June 29, 1990, as the date Indiana submitted a description of the ELF for an equivalence determination. As the record indicates, that date is merely when Jacqueline Strecker of the Underground Storage Tank Branch of IDEM, prompted by the Region's earlier identification of deficiencies in the ELF legislation,[25] sent a letter to the Region seeking its assistance in amending the ELF to meet EPA requirements. Tr. at 67 (Testimony of Gerald W. Phillips, Chief of Office of Underground Storage Tank Program, Region 5). B&R's attempts to turn this request for assistance into a formal request for review and approval by the Region is overreaching. Its position is further undermined by another letter, only a few months later, from Jacqueline Strecker, IDEM, to Mark Dobson of B&R, which indicates that by the time of the letter's writing, the state agency was still well short of submitting its fund for an EPA equivalence determination. Reply Brief at 37–38. As Strecker informed Dobson in the letter, which was dated November 9, 1990, "[IDEM is] now in the process of making recommendations for revisions to the [ELF] so the State legislature can address the technical deficiency during the upcoming Session. We are working closely with the EPA to ensure all of EPA's concerns will be addressed. *Once the necessary statutory revisions have been enacted we will submit the law to EPA for formal approval.*" RTE No. 3 at 122 (emphasis added). Using the November 9, 1990 letter as a reference point, it is clear that on June 29, 1990, the date of IDEM's letter to the Region, the IDEM was engaged in a preliminary consultation with the Region that fell short of a request for an equivalence determination.

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[25] *See supra* note 6.

Rather, as the Region maintains, it is clear from the record that July 16, 1991, is the date the ELF became an allowable mechanism of financial responsibility. On that date, IDEM sent the Region V Administrator, Valdas Adamkus, a letter requesting approval of Indiana's newly amended ELF, a copy of which the state agency attached. RTE No. 3 at 135–138. Our conclusion is bolstered by the evidence that from the perspective of the two relevant parties, the July 16, 1991 letter served as the formal request for review: from the Region's perspective, because the letter was sent directly to the Regional Administrator by the Commissioner of the state agency, in keeping with EPA guidance, Tr. at 53; and from IDEM's, because sending the letter at this time was consistent with its intention, expressed in its November 9, 1990 letter to B&R, to submit the ELF for formal approval after the Indiana legislature enacted the necessary amendments to the ELF. Therefore, we agree with the Region that the appropriate period of B&R's noncompliance should be measured from October 26, 1989, to July 16, 1991, a period of 628 days.[26]

### D. *The Presiding Officer's Reduction of the Assessed Penalty*

In his initial decision, the Presiding Officer lowered the Region's assessed penalty from $76,601 to $60,000, providing the following succinct explanation:

> The bulk of this [$60,000] penalty assessment is due to respondent's insistence on relying upon a state tank fund which it knew was not to be an approved financial mechanism under part 280, subpart H. The fact that the penalty is less than that sought by EPA constitutes a recognition that underground storage tank insurance was not so easy to obtain and that respondent at least made some inquiries in this area. This limited effort did not, however, relieve B&R Oil of its obligation to comply with the regulations.

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[26] In his Initial Decision, the Presiding Officer did not discuss B&R's objection to the Region's assessment of its period of noncompliance, but did indicate the "hearing established" that the ELF became an allowable mechanism of financial assurance on July 16, 1991, a period of 628 days from the compliance deadline of October 26, 1989. He also observed that because this period was shorter than the two-year period used by the Region to assess B&R's avoided costs, *supra* n.24, "[B&R's] avoided expenditures were somewhat less than those calculated by EPA." Initial Decision at 11 n.6. In light of his later decision to lower the Region's assessed penalty by approximately $16,000, *infra* section III.D, he noted that "EPA's miscalculation of the avoided expenditures has no significance." Initial Decision at 11 n.6.

Initial Decision at 12. B&R describes the Presiding Officer's decision to reduce the Region's proposed penalty to only $60,000 as in error because "unsupported by the evidence." Appeal Brief at 29. B&R further challenges the Presiding Officer's decision as arbitrary and capricious, stating that the Officer "picked a number out of the air" to satisfy the Region. Appeal Brief at 28–29. We disagree.

Under the regulations governing a civil penalty proceeding, the Presiding Officer must consider any civil penalty policies issued by the Agency. 40 C.F.R. § 22.27(b). However, the Presiding Officer 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. *In re Everwood Treatment Co.,* 6 E.A.D. 589, 600 (EAB 1996); *In re DIC Americas, Inc.,* 6 E.A.D. 184, 190 and n.10 (EAB 1995); *In re A.Y. McDonald Indus., Inc.,* 2 E.A.D. 402, 414 (CJO 1987). Also, because the Presiding Officer is not bound by any penalty policy, but rather by the statutory penalty criteria, a Presiding Officer may reject a proposed penalty even if that penalty is calculated in accordance with the penalty policy. *See,* e.g., *In re Employers Ins. of Wausau,* 6 E.A.D. 735, 756 (EAB 1997). As we stated in *Wausau* (describing the TSCA Penalty Policy):

> The Penalty Policy has never been subjected to the rulemaking procedures of the Administrative Procedure Act, and thus does not carry the force of law. Indeed, for that reason the ALJ could simply have considered the Penalty Policy's analytical framework and concluded that, in this particular case, application of the [statutory] criteria in the manner suggested by the Penalty Policy did not yield an "appropriate" penalty. The ALJ could likewise have rejected an "appropriate" penalty generated in accordance with the Penalty Policy, in favor of another appropriate penalty better suited to the circumstances of this particular case.

*Id.* at 759 (citations omitted).

In this case, we find that the Presiding Officer exercised his discretion to depart from the Penalty Policy in a manner consistent with the regulations and relevant case law such as *Wausau.* Rather than whimsically producing a penalty figure, the Presiding Officer complied with 40 C.F.R. § 22.27(b) by considering the Penalty Policy in the context of how the Region applied the Policy to determining B&R's penalty. In turn, the Presiding Officer addressed the gravity and economic benefit (avoided cost) components of the Region's proposed penalty, in the course of which he addressed each of B&R's arguments that the Region's calculation

was in error. Initial Decision at 9–12. While largely ratifying the manner in which the Region applied the Policy, the Presiding Officer nonetheless decided that to arrive at an appropriate penalty, an additional downward adjustment was warranted to account for evidence that B&R faced difficulties in obtaining insurance and had made some inquiries in this area. Initial Decision at 12. While the Presiding Officer gave an admittedly terse rationale for lowering the penalty, it was sufficiently reasoned and supported by the record to constitute an adequate justification for departing from the Penalty Policy. In sum, the methodical approach that the Presiding Officer followed is far from the arbitrary and capricious one described by B&R.

The regulations give us discretion to increase or decrease the civil penalties set by Presiding Officers. But finding no clear error or abuse of discretion on his part, we see no need to disturb the penalty decision. *See,* e.g.*, In re Pacific Refining,* 5 E.A.D. 607 (EAB 1994); *In re Ray Birnbaum Scrap Yard,* 5 E.A.D. 120, 124 (EAB 1994) (holding that absent clear error or abuse of discretion, the Board will not overturn penalties assessed by ALJs).

In sum, the final assessment strikes us as a reasonable attempt by the Presiding Officer to affirm the importance of petroleum tank owners securing mechanisms of financial assurance for corrective action and third party liability that meet Agency requirements, while at the same time according B&R some measure of consideration for the difficult insurance market it confronted. Therefore, we will not alter the penalty amount set by the Presiding Officer.

## **IV.** *CONCLUSION*

For the above reasons, we conclude that a preponderance of the evidence in the record establishes that B&R is liable for violations of the financial responsibility requirements for petroleum tank owners set out at 40 C.F.R. part 280, subpart H and that the Presiding Officer's penalty assessment is appropriate. Therefore, the Presiding Officer's Initial Decision is upheld.

In accordance with the Initial Decision and pursuant to RCRA section 9006(d), 42 U.S.C. § 6991e(d), a civil penalty of $60,000 is hereby assessed against Respondent, B&R Oil Company, Inc. Respondent shall pay the full amount of the civil penalty within sixty (60) days of receipt

of this decision. Payment shall be made by forwarding a cashier's or certified check payable to the Treasurer, United States of America, to the following address:

> EPA-Region V
> Regional Hearing Clerk
> P.O. Box 360582M
> Chicago, IL 60673

So ordered.