IN RE TITAN WHEEL CORPORATION OF IOWA

RCRA (3008) Appeal No. 01-3

FINAL DECISION

Decided June 6, 2002

Syllabus

This is an appeal of an Initial Decision issued by Administrative Law Judge William B. Moran ("ALJ") assessing against Titan Wheel Corporation ("Titan"), a civil penalty of $150,289 for violations of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k, and its implementing regulations. The three-count complaint, filed by U.S. EPA Region VII ("Region"), charged Titan with: (1) the storage of hazardous wastes without a permit in violation of RCRA § 3005(a), 42 U.S.C. § 6925(a); (2) the failure to develop or implement a personnel training program in violation of 40 C.F.R. § 265.16; and (3) the failure to have and update an adequate contingency plan for the facility containing provisions required by 40 C.F.R. § 265.50-.52. In addition to the penalty assessment, the Initial Decision ordered Titan to comply with the provisions of a compliance order previously issued by the Region.

Titan did not dispute its liability for these violations before the ALJ and does not do so before the Board. Rather, Titan asserts that certain evidentiary rulings made by the ALJ, as well as certain determinations related to the amount of the penalty, were erroneous.

Held: The Board upholds the Initial Decision in its entirety. More particularly, the Board finds:

(1) The ALJ did not err in excluding evidence sought to be admitted by Titan related to other penalty assessment proceedings by both EPA and the State of Missouri. Penalty assessments are sufficiently fact- and circumstance-dependant that the resolution of one case cannot determine the fate of another. Comparing penalties between disparate cases does not account for the multiplicity of factors that may impact a penalty determination. In any event, the exhibits proffered by Titan would not have been sufficiently probative to establish the existence of significant disparities in penalty assessments;

(2) The ALJ did not err in striking certain exhibits submitted by Titan with its post-hearing brief. The exhibits were intended to support Titan's assertion in its post-hearing brief that the Region had agreed to allow Titan to complete a soil assessment study in lieu of a closure plan. Given the existence of this alleged agreement, Titan asserts that no closure plan or financial assurance can be required. In a motion to strike, the Region argued, *inter alia*, that because these exhibits were not submitted as part of the pre-hearing exchange, and because Titan failed to demonstrate good cause for failing to submit the exhibits earlier, the exhibits should be struck from the record. The ALJ con-

cluded, among other things, that the exhibits were untimely and, therefore, declined to admit them into the record.

As the Consolidated Rules of Practice make clear, parties must submit any document, exhibit, witness name, or summary of expected testimony during the pre-hearing information exchange, unless good cause exists for failing to do so. *See* 40 C.F.R. §§ 22.19(a)(1), .22(a). In this case, Titan's argument that it had good cause for seeking to admit certain documents along with its post-hearing brief is unconvincing. ALJ's rulings on the admission of evidence are given considerable deference, and, absent clear error, the Board will generally not interfere with the ALJ's determination; and

(3) The ALJ did not clearly err in his penalty assessment. As a general rule, absent a showing that the ALJ has committed an abuse of discretion or a clear error in assessing a penalty, the Board will not substitute its judgment for that of an ALJ where, as here, the penalty assessed by the ALJ falls within the range of penalties provided in the penalty guidelines. Such guidelines implement the statutory criteria for penalty assessment. The record in the instant case shows that the Region reasonably applied the applicable penalty policy to the facts of this case, and that the ALJ did not err in adopting the penalty proposed by the Region.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Reich:

Before us is an appeal of an Initial Decision issued by Administrative Law Judge William B. Moran ("ALJ") in an administrative enforcement action brought by U.S. EPA Region VII ("Region") against Titan Wheel Corporation ("Titan") for violations of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k, and its implementing regulations. The alleged violations occurred at a wheel manufacturing facility in Walcott, Iowa ("facility") that Titan has leased and operated since July 1988.

In his Initial Decision, dated May 4, 2001, the ALJ assessed a total penalty of $150,289, the amount sought by the Region,[1] for violations related to: (1) the storage of hazardous wastes without a permit in violation of RCRA § 3005(a), 42 U.S.C. § 6925(a); (2) the failure to develop or implement a personnel training program in violation of 40 C.F.R. § 265.16; and (3) the failure to have and update an adequate contingency plan for the facility containing provisions required by 40 C.F.R. § 265.50-.52. Init. Dec. at 2-3. In addition to the penalty assess-

[1] The Region initially sought a penalty of $153,209. *See* Complaint, Compliance Order, and Notice of Opportunity for Hearing ("Complaint") ¶ 34. This was later reduced to $150,289 based on the Region's revised calculation of the economic benefit of noncompliance for each count. *See* Complainant's 2nd Supplement to Pre-Hearing Exchange and Amendment of Complaint Regarding Proposed Penalty (Nov. 24, 1999) at 2.

ment, the Initial Decision ordered Titan to comply with the provisions of a compliance order previously issued by the Region. *Id.* at 16-17.

Titan filed a Notice of Appeal along with a brief in support of the appeal on June 7, 2001. *See* Appellate Brief of Titan Wheel Corporation of Iowa, Appellant ("Titan Appeal"). The Region, joined by EPA's Office of Enforcement and Compliance Assurance, filed a response on June 28, 2001. *See* Response Brief of Appellee United States Environmental Protection Agency ("Agency Response"). Titan does not dispute its liability for the violations alleged in the Region's complaint. Rather, Titan asserts that certain determinations made by the ALJ related to the amount of the penalty, as well as certain evidentiary rulings, were erroneous. For the reasons stated below, the Initial Decision is affirmed in its entirety.

I. *BACKGROUND*

The essential facts of this case are undisputed. Indeed, the parties entered into a Joint Statement of Facts on November 24, 1999 ("Joint Statement"), in which Titan admitted the facts establishing the violations alleged in the complaint and waived its right to an administrative hearing.

Since July of 1998, Titan has leased and operated a facility manufacturing steel wheels for agricultural purposes. Operations at the facility include metal rolling, metal welding, metal grinding, parts washing, priming, and painting. As a result of these activities, Titan generated solid and hazardous wastes.[2] Joint Statement at 1.

On September 17, 1998, following a RCRA compliance inspection conducted on February 10-11, 1998,[3] the Region filed a three-count complaint against Titan charging Titan with various RCRA violations, namely (1) the storage of hazardous waste at the facility for periods exceeding 90 days without interim sta-

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[2] Under RCRA, solid wastes can fall into the hazardous waste category and are subject to RCRA's Subtitle C regulatory program by either being individually listed as hazardous (i.e., listed hazardous wastes) or exhibiting characteristics of a hazardous waste (i.e., ignitability, corrosivity, reactivity, and toxicity). *See* 40 C.F.R. pt. 261. It is undisputed in the present case that the wastes at issue (consisting of spent solvents generated from flushing paint lines and from cleaning equipment) are hazardous wastes. The spent solvent is a hazardous waste because it exhibited the characteristic of ignitability (D001), and is a listed hazardous waste (F003 and F007). *See* Report of RCRA Compliance Inspection (Feb. 10-11, 1998) (Exhibit CX2 to Region's Pre-hearing Exchange); Joint Statement at 1-2 (stating that Titan stored containers of D001, F003, and F005 spent solvent waste on-site for various periods of time exceeding 90 days).

[3] *See* Report of RCRA Compliance Inspection (Exhibit CX2 to Complainant's Pre-hearing Exchange).

tus[4] or a valid permit (Count I);[5] (2) the failure to develop or implement an adequate personnel training program ensuring compliance with the requirements of 40 C.F.R. part 265 and the failure to document that personnel had received the required training (Count II);[6] and (3) the failure to have and update a contingency plan to minimize hazards to human health in the event of a release of hazardous waste (Count III).[7] *See* Complaint, Compliance Order, And Notice of Opportunity for Hearing ("Complaint") ¶¶ 11-33.

On November 5, 1998, Titan filed an answer to the Complaint, denying the violations and challenging the propriety of the proposed penalty. *See* Respondent Titan Wheel Corporation of Iowa's Answer to Complaint, Affirmative Defenses and Request fo Hearing. On April 28, 1999, the parties each filed pre-hearing briefs as required by a Pre-Hearing Order issued by the ALJ on February 18, 1999. The Region filed a first supplement to its pre-hearing brief on April 28, 1999, and a second supplement on November 24, 1999. In its second supplement, the Region amended the Complaint by lowering the proposed civil penalty from $153,209 to $150,289. Titan did not file an amended answer in response to the Region's amended Complaint.

As previously noted, Titan did not dispute its liability for these violations before the ALJ,[8] and does not do so before this Board. Rather, Titan makes the following three arguments on appeal.

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[4] 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, were subject to another set of standards until they received their permit. *See* 40 C.F.R. pt. 265; *see also* 40 C.F.R. §§ 270.70-.73. These facilities are known as "interim status" facilities. *See* 44 U.S.C. § 6925 (e)(1).

[5] *See* Complaint ¶¶ 12,16. The complaint, as amended, sought a penalty of $55,050 for Count I. Complainant's 2nd Supplement to Pre-Hearing Exchange and Amendment of Complaint Regarding Proposed Penalty at 2 (Nov. 24, 1999).

[6] *See* Complaint ¶ 21. The complaint, as amended, sought a penalty of $74,381 for Count II. Complainant's 2nd Supplement to Pre-Hearing Exchange and Amendment of Complaint Regarding Proposed Penalty at 2 (Nov. 24, 1999).

[7] *See* Complaint ¶¶ 26-26, 28, 30, 32. The complaint, as amended, sought a penalty of $20,858 for Count III. Complainant's 2nd Supplement to Pre-Hearing Exchange and Amendment of Complaint Regarding Proposed Penalty at 2 (Nov. 24, 1999).

[8] The Initial Decision states:

Continued

First, Titan argues that the ALJ erred in striking certain exhibits submitted by Titan as part of its pre-hearing exchange. These included the following: (1) summaries of other enforcement actions compiled by Titan's counsel; (2) documents obtained from the State of Missouri pertaining to enforcement actions filed and/or settled under the Missouri Hazardous Waste Management law during the previous two years;[9] (3) letters from Titan requesting summaries of other enforcement actions, and the Region's response to these requests; (4) a list of enforcement actions taken by EPA as printed from EPA's website; and (5) documents received from the Region following a Freedom of Information Act request pertaining to enforcement actions filed or settled under RCRA. Titan Appeal at 1-2. Titan sought to admit these exhibits, relating to penalty assessments in other enforcement actions, as support for its "affirmative defense" that the amount of the civil penalty requested by the Region was unreasonable, arbitrary and capricious and an abuse of discretion.[10] *Id.* at 2. Titan asserted that the Region failed to adhere to its penalty policy by failing to assure the assessment of consistent penalties for similar violations, including penalties assessed by the State of Missouri, that Titan characterizes as "virtually identical violations." *Id.*

(continued)

> As [Titan] has conceded all factual and legal issues regarding the three Counts, the Court finds [Titan] liable for all three counts. [Titan's] storage of D001, F003, and F005 hazardous waste on site without a permit or interim status for more than 90 days, violated Section 3005 of RCRA, 42 U.S.C. § 6925(a). [Titan's] failure to develop or use a personnel training program in a manner that ensures compliance with the regulations of 40 C.F.R. Part 265, violated 40 C.F.R. § 265.16. Last, [Titan's] failure to have and to update a contingency plan for the facility that contains all of the requirements of 40 C.F.R. Part 265, violated 40 C.F.R. §§ 265.52(c), (d), and (e).

Init. Dec. at 5.

[9] There is no indication in the record that the State brought an enforcement action against Titan for the violations at issue here.

[10] We note that Titan's characterization of its argument in this regard as an "affirmative defense" is not technically correct. Because it is the Agency's burden to prove the appropriateness of the penalty (*see* 40 C.F.R. § 22.24), the assertion that the Region has failed in this regard constitutes a direct challenge to the Region's *prima facie* case. Thus, Titan's assertion cannot be classified as an "affirmative defense." *See, e.g., In re City of Salisbury*, 10 E.A.D. 263, 289 n.38 (EAB 2002) (clarifying that petitioner's defense was not technically an affirmative defense for it raised a defense that directly challenged portions of the Region's prima facie case); *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 540 (EAB 1994) ("'A true affirmative defense, which is avoiding in nature, raises matters *outside* the scope of the plaintiff's prima facie case.'") (quoting 2A Moore's Federal Practice Manual 8-17a (2d ed. 1994)).

Second, Titan argues that the ALJ erred in granting the Region's motion to strike certain documents submitted by Titan with its "post-hearing" reply brief.[11] Specifically, the ALJ did not admit the affidavit of Stanley A. Riegel, counsel for Titan, and a letter from the Region to Mr. Riegel dated October 12, 1999. Titan had sought to admit these documents in support of its argument that, at the Region's request, Titan had developed a work plan for additional soil assessment in lieu of developing a closure plan for the facility. Thus, according to Titan, the Region's request for a compliance order containing a requirement that Titan develop and implement a closure plan should have been denied. The ALJ declined to admit these documents on the grounds that they were irrelevant to the determination of liability and were submitted in an untimely manner. Init. Dec. at 1-2 n.1. On appeal, Titan asserts that the ALJ's determination in this regard was erroneous.

Finally, Titan asserts that the amount of the penalty assessed was unreasonable, arbitrary and capricious, and an abuse of discretion, citing numerous alleged errors in the application of the RCRA Penalty Policy.[12] Titan Appeal at 17.

II. *DISCUSSION*

A. *Consistency of Penalties*

As previously stated, in its pre-hearing exchange, Titan sought to admit exhibits related to other penalty assessment proceedings by both EPA and the State of Missouri[13] in support of its assertion that the penalty assessed in this case was "unreasonable, arbitrary and capricious and an abuse of discretion." Titan Appeal at 4; Pre-hearing Exchange of Respondent Titan Wheel Corporation of Iowa, Inc. (Apr. 28, 1999). According to Titan, "[t]he documents at issue prove that penalties administered by state environmental agencies acting on behalf of EPA are, on

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[11] On January 29, 2001, the parties submitted "post-hearing" briefs. Both parties submitted reply briefs on February 12, 2001. Although, as previously stated, Titan waived its right to a hearing in this matter, in their submissions before this Board the parties nevertheless refer to "pre-hearing" briefs and "post-hearing" briefs. We will do the same. *See* Complainant's Brief in Support of Complainant's Proposed Findings of Fact, Conclusions of Law, and Order ("Complainant's Post-Hearing Brief") (Jan. 29, 2001); Respondent Titan Wheel Corporation of Iowa's Post-Hearing Brief ("Titan's Post-Hearing Brief") (Jan. 29, 2001); Complainant's Reply to Respondent's Post-Hearing Brief (Feb. 12, 2001); Respondent Titan Wheel Corporation of Iowa's Reply Brief (Feb. 12, 2001).

[12] In arriving at a proposed penalty, the Region in the instant case applied the 1990 Revised RCRA Civil Penalty Policy ("RCRA Penalty Policy") (Exhibit CX4 to Region's Pre-Hearing Exchange).

[13] The State of Missouri is authorized under RCRA § 3006(b), 42 U.S.C. § 6926(b), and 40 C.F.R. part 271, subpart A, to administer a hazardous waste management program in lieu of the federal program. 40 C.F.R. §§ 272.1300-1301.

average, far lower than those imposed directly by EPA for virtually identical violations." Memorandum in Opposition to Complainant's Motion to Exclude Exhibits at 1.

By motion dated December 1, 1999, the Region sought to exclude these exhibits as "irrelevant, immaterial, and of little or no probative value to this proceeding and thus not admissible pursuant to 40 C.F.R. § 22.22(a)." Complaint's Motion to Exclude Exhibits at 1 (Dec. 1, 1999). The ALJ granted the Region's Motion on December 13, 2000. *See* Order Granting Complainant's Motion to Strike (Dec. 13, 2000). In so doing, the ALJ rejected Titan's premise that the Region's penalty assessments must be consistent with those assessed by a state enforcement agency. According to the ALJ, even if penalties assessed by state and federal enforcement actions vary widely, such variations are not relevant in the present context. *Id*. "[O]nly wide disparities for similar penalties imposed *by a particular enforcement agency* can, theoretically, be subject to the claim that a proposed penalty is arbitrary or an abuse of discretion." *Id*. (emphasis in original).

The ALJ also concluded that even in those instances where Titan alleges inconsistency in penalty assessments by EPA itself, Titan failed to point to any specific documents that would establish an identity of facts and circumstances in those cases with the present case that would demonstrate an abuse of discretion. *Id.* at 8-9. "[T]he reasonableness of a penalty," the ALJ stated, "is a fact driven question that ultimately rests on the particular circumstances of each case." *Id.* at 8. The ALJ declined to search through the record to determine if any of the documents Titan sought to admit into evidence supported its assertion. "The court is not obliged to sift through hundreds of pages, in search of one-to-one situations that [Titan] believes exist but has failed to identify." *Id*. at 9-10.

On appeal, Titan asserts that the ALJ's exclusion of the exhibits at issue here violated Titan's due process rights to a full and fair hearing. Titan Appeal at 4-7. Titan argues that the Agency's RCRA civil penalty policy mandates a uniform application of penalties for like violations, and that examples of disparities between past penalty assessments by EPA and the State of Missouri are, therefore, relevant "to determine the legitimacy of the penalty in question." *Id.* at 6.

For the following reasons, we agree with the ALJ that the documents relating to a comparison of penalties assessed by the EPA and the State of Missouri in other cases are not relevant in the present context, and we therefore affirm the ALJ's December 13, 2000 Order Granting Complainant's Motion to Strike.

1. *Penalties Assessed in Other Enforcement Cases*

As the Supreme Court has stated, "[t]he employment of a sanction within the authority of an administrative agency is * * * not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases." *Butz v.*

Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973), *reh'g denied*, 412 U.S. 933 (1973). *See also Newell Recycling Co., Inc. v. United States Environmental Protection Agency*, 231 F.3d 204, 210 n.5 (5th Cir. 2000) (an administrative penalty need not resemble those assessed in other cases); *Cox v. United States Dept. of Agric.*, 925 F.2d 1102, 1107 (8th Cir. 1991) (where a sanction is warranted in law and fact, it will not be overturned simply because it is more severe than sanctions imposed in other cases).

Moreover, this Board has previously stated that "penalty assessments are sufficiently fact- and circumstance-dependant that the resolution of one case cannot determine the fate of another." *In re Newell Recycling Co., Inc.*, 8 E.A.D. 598, 642 (EAB 1999) (ALJ did not err in failing to address penalties assessed in other cases cited by respondent when calculating a penalty amount) *aff'd, Newell Recycling Co., Inc. v. United States Environmental Protection Agency*, 231 F.3d 204 (5th Cir. 2000); *see also 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)). Nothing in Titan's appeal, or in the administrative record before us, convinces us that any change in the Board's position in this regard is warranted.[14]

Further, comparing penalties between disparate cases does not account for the multiplicity of factors that may impact a penalty determination. For example, in determining the appropriateness of settling a matter for a specified amount, the Agency must consider, among other things, the risks of litigation and the demands on the Agency's enforcement resources. The Agency must also consider such things as the size of the business involved, the ability of a company to pay a penalty, and any history of prior violations. Looking simply to the penalty ultimately assessed in a particular matter, even if the same statutory provisions are involved, will not reflect these considerations. Thus, we do not consider the dis-

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[14] While, as Titan correctly points out, one purpose of the Agency's RCRA Penalty Policy is "to ensure that RCRA civil penalties are assessed in a fair and consistent manner" (RCRA Penalty Policy at 5), the policy does not, as Titan argues, suggest identical penalties in every case. Penalty assessments are fact-specific and calculated on a case-by-case basis. Variations in the amount of penalties assessed in other cases, even those involving violation of the same statutory provisions or regulations, do not, without more, reflect an inconsistency with the RCRA Penalty Policy. In any case, as stated later in this Decision, the Agency's penalty policies do not have the force of law and ALJs are not required to strictly adhere to them. *See infra* note 21.

Moreover, many of the exhibits Titan seeks to admit involve penalties assessed after settlement with the Agency. As the Board has previously stated, comparisons of penalties assessed by an ALJ after a hearing with those assessed after negotiation with the Agency's enforcement staff but prior to a hearing, "are difficult, if not impossible, to make." *In re Schoolcraft Constr., Inc.*, 8 E.A.D. 476, 494 (EAB 1999) (quoting *In re Briggs & Stratton Corp.*, 1 E.A.D. 653, 666 (JO 1981)).

puted exhibits probative in the present context.[15]

Even if the exhibits were admitted into evidence, we agree with the ALJ that they fail to establish the existence of any significant inconsistencies in penalty assessments by either EPA or the State of Missouri in comparable cases or for comparable violations. As the ALJ stated in discussing the exhibits:

> [Titan's] pages * * * 000001-000015 involve extremely brief violation summaries concerning, for the most part, different RCRA statutory and/or regulatory sections than those cited in this litigation. Among many deficiencies with the summaries, beyond the weight that could be given to any summary, there is no indication of the duration of or other details concerning the violations nor the particular circumstances attending settlements.
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> In some instances the documents in [Titan's] pages * * * 000016-000591 do not even identify the type of RCRA violation involved; the description only informs that a payment has been made for a violation of state environmental laws. Where settlement agreements are included within these pages, spot reviews reveal that the settlements involved different violations than those in this litigation and the agreements disavow any admission that violations in fact occurred. It is also highly questionable whether penalty settlements are material for comparison to a penalty in a litigated case. [*See In re SchoolCraft Construction, Inc.*, 8 E.A.D. 476, 494 (EAB 1999) (in-

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[15] Titan would also have this Board compare penalties assessed by EPA with those assessed by an authorized state. However, as the Agency points out in its response (*see* Agency Response at 6-7), RCRA and its implementing regulations contemplate that penalties assessed by authorized states may be significantly lower than those assessed by the Agency. That is, in the enforcement cases it brings, the Agency may assess civil penalties "not to exceed $25,000" for each violation. RCRA § 3008(g), 42 U.S.C. § 6928(g). In contrast, in order to receive authorization to administer and enforce a hazardous waste program in lieu of the Federal program (*see* RCRA § 3006(b), 42 U.S.C. § 6926(b)), states must, *inter alia*, allow for the assessment of civil penalties of at least $10,000 per day for any violation. 40 C.F.R. § 271.16(a)(3)(i). Thus, even if the disputed exhibits were to reflect disparities in penalties assessed by EPA and those assessed by the State of Missouri, such disparities are anticipated by the Act and implementing regulations as a byproduct of a federalized system of administration.

Titan cites to *Harmon Indus., Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999), for the proposition that, with regard to penalty assessments, state programs must be "at least as rigorous as the federal program." Titan Appeal at 10. *Harmon*, however, addresses EPA's ability to initiate an enforcement action in an authorized state where a state also initiates its own enforcement action. It does not address whether state and federal enforcement programs are required to assess uniform penalties. *Harmon* is, therefore, inapposite in the present context.

> quiry into other cases is inappropriate where proceedings involved prosecutorial discretion in settlement and in the decision to bring an action)].
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> For [Titan's] pages * * * 000718-000720, these documents reveal that the inquiries by [Titan's] Counsel were not focused on the violations in issue in this litigation but rather were directed to Missouri's, not EPA's, enforcement of hazardous waste regulations.[16]
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> The documents set forth at [Titan's] pages * * * 000721-000732, identified as "Region 7 Enforcement Actions," provide information only as to the party cited, the penalty amount, and the name of the statute but without the particular section involved, and do not inform as to the particular facts involved such as the duration of the violation or the gravity.
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> As with the other document groups discussed above, the documents found at [Titan's] pages * * * 001081-001537, largely involving EPA consent agreements or complaints, are equally unilluminating. For example, [pages] 001201-001214 represent a complaint involving entirely different RCRA regulatory and statutory sections from those in this litigation and seek a penalty in excess of that sought here. Within this group are [pages] 001168-001184. This group provides an example of Respondent's indiscriminate approach to its uneven penalty assessment claim, as these are the *very* pages of the complaint in this litigation.

Order Granting Complainant's Motion to Strike at 10 n.6 (Dec. 13, 2000). Thus, the ALJ was correct that those exhibits would have not been sufficiently probative to establish the existence of significant disparities in penalty assessments.

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[16] The documents at pages 000718-000720 are a letter requesting a summary of penalties assessed during the previous 24 months by the State of Missouri for violations of Missouri's Hazardous Waste Management Regulations and a reply stating that the State was unable to provide such a summary. *See* Letter from Stanley A. Reigel, Titan Counsel, to Linda Gentry (Feb. 4, 1999) (Exhibit TW000718 to Pre-Hearing Exchange of Respondent Titan Wheel Corporation of Iowa, Inc. (Apr. 28, 1999)); Letter from Ronald L. Smith to Stanley A. Reigel (Feb. 19, 1999) (Exhibit TW000719 to Pre-Hearing Exchange of Respondent Titan Wheel Corporation of Iowa, Inc. (Apr. 28, 1999)).

2. *ALJ's Authority to Exclude Evidence*

Titan further asserts that the ALJ imposed too high of an evidentiary standard on Titan in ruling on the Region's motion to exclude during the pre-hearing stage instead of waiting until the filing of post-hearing briefs. Titan Appeal at 10-13. In Titan's view, the ALJ's authority to exclude evidence is limited to the hearing stage. *Id.* at 10-11. Titan arrived at this conclusion because section 22.22(d) of 40 C.F.R., which provides for the admission and exclusion of evidence, is contained in subpart D of 40 C.F.R. part 22 entitled "Hearing Procedures." Titan reasons that because the evidentiary hearing was waived and the parties relied upon written briefs, the ALJ should have made his determination on the relevancy of the exhibits following the filing of the post-hearing briefs where Titan would have had a "full opportunity to establish relevance." *Id*. at 11. For the following reasons, we disagree.

First, we reject Titan's suggestion that it did not have a full and fair opportunity to defend the relevancy of evidence sought to be admitted. In its motion to exclude, the Region openly attacked the relevancy of the documents by arguing that the cases reflected in the documents were "potentially tremendously different from the case at bar," and that ascertaining the existence of any similarities with the case at bar "would be a lengthy exercise in futility." Complainant's Motion to Exclude Exhibits at 2. Titan had the opportunity to contradict the Region's assertion, and, in fact, Titan vigorously argued that the exhibits related to other penalty assessment were relevant in this case. *See* Memorandum in Opposition to Complainant's Motion to Exclude Exhibits.

Second, Titan's interpretation of the ALJ's authority to exclude evidence where, as here, an evidentiary hearing has been waived is erroneous. Nothing in the Consolidated Rules of Practice ("CROP") governing these proceedings at 40 C.F.R. part 22, prohibits an ALJ from excluding evidence prior to the submission of "post-hearing" briefs. On the contrary, the CROP vests ALJs with broad authority to conduct proceedings and make any necessary decisions at all stages of a proceeding. In particular, under 40 C.F.R. § 22.4(c), the ALJ may, among other things:

> (1) Conduct administrative hearings under these Consolidated Rules of Practice;
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> (2) Rule upon motions, requests and offers of proof, and issue all necessary orders;
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> * * * * * * *
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> (6) *Admit or exclude evidence*; [and]

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> (10) Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by [the CROP].

40 C.F.R. § 22.4(c)(1)-(10) (emphasis added). Further, the CROP provides ALJs with discretion to resolve questions arising at any stage of the proceeding which are not specifically addressed in the CROP. *See* 40 C.F.R. § 22.1(c).

In addition, section 22.22(a) gives the ALJ the discretion to exclude evidence deemed, among other things, irrelevant, immaterial, or of little probative value. As the Board has previously stated, an ALJ "has broad discretion in determining what evidence is properly admissible * * *." *In re J.V. Peters & Co.*, 7 E.A.D. 77, 99 (EAB 1997) ("[T]he admission of evidence is a matter particularly within the discretion of the administrative law judge * * *.") (quoting *In re Sandoz*, 2 E.A.D. 324, 332 (CJO 1987)), *aff'd sub nom. Shillman v. United States*, I:97-CV-1355 (N.D. Ohio Jan. 14, 1999), *cert. denied sub nom. J.V. Peters & Co. v. United States*, 69 U.S.L.W. 3269 (Jan. 8, 2001). Absent an abuse of discretion, the Board will give an ALJ's rulings in this regard substantial deference. *J.V. Peters*, 7 E.A.D. at 99; *see also Yaffe Iron & Metal Co., Inc. v. U.S. E.P.A.*, 774 F.2d 1008, 1016 (10th Cir. 1985) (Absent an abuse of discretion, an ALJ's determination on whether to exclude or admit evidence will not be disturbed). Thus, we find no support for Titan's assertion that the ALJ was required to delay a ruling on the Region's motion to exclude the exhibits until the submission of post-hearing briefs.

Because we agree with the ALJ that the evidence Titan seeks to admit is not relevant in the present context, and because Titan has failed to convince us that this determination was erroneous or an abuse of discretion, Titan's assertions are rejected.[17]

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[17] Titan has also argued that, by striking the exhibits at issue here, the ALJ "has essentially stricken Titan's affirmative defense of the amount of the civil penalty being unreasonable, arbitrary and capricious and an abuse of discretion since these exhibits form the evidentiary basis for that defense." Titan Appeal at 12. Thus, according to Titan, the "ALJ's ruling should stand only if Titan's defense was insufficient as a matter of law." *Id.* at 13. As previously stated, however, Titan's classification of its argument in this regard as an "affirmative defense" is incorrect. *See supra* note 10. Moreover, even if we accept Titan's standard for the exclusion of the exhibits, we would nevertheless uphold the ALJ's decision. That is, for the reasons stated above, we conclude that the disputed exhibits, relating to penalties assessed in other cases by EPA and the State of Missouri, would be insufficient as a matter of law as a defense to the Region's penalty assessment in this case.

Accordingly, the ALJ's December 13, 2000 Order Granting Complainant's Motion to Strike is affirmed.

B. *Exhibits Submitted With Post-Hearing Reply Brief*

Titan's second contention on appeal is that the ALJ erred in striking certain exhibits submitted by Titan with its post-hearing reply brief. Titan Appeal at 13-16. The exhibits, an affidavit of Stanley A. Reigel, Titan's counsel, and an October 12, 1999 letter from the Region to Mr. Reigel, were intended to support Titan's assertion in its post-hearing brief that the Region had agreed to allow Titan to complete a soil assessment study in lieu of a closure plan.[18] Given the existence of this alleged agreement, Titan asserts that no closure plan or financial assurance can be required. Titan Appeal at 14.

By motion dated February 13, 2001, the Region requested that the ALJ exclude these exhibits. Complainant's Motion to Strike (Feb. 13, 2001). The Region argued that Titan's proffer of evidence was untimely and irrelevant and, therefore, was inadmissable under 40 C.F.R. § 22.19 (pre-hearing information exchange; pre-hearing conference; other discovery). The Region asserted that because these exhibits were not submitted as part of the pre-hearing exchange, and because Titan failed to demonstrate good cause for failing to submit the exhibits earlier, the exhibits should be struck from the record. *Id*. at 2-3. The Region further argued that the exhibits, even if timely submitted, were irrelevant to the issue in dispute and should be excluded on that basis as well. *Id.* at 3.

The ALJ granted EPA's motion to strike the affidavit and the accompanying letter on the grounds that the documents were irrelevant and were, in any case, untimely submitted. Init. Dec. at 1 n.1. The ALJ stated:

> The documents EPA seeks to have excluded do not affect liability one way or another, that is, the material contained in these two documents do not change the Court's findings that Respondent committed the violations that EPA alleged in the Complaint. As such, the court concludes that these documents are irrelevant to the determination of liability on the part of Respondent. It is on this basis, and because the exhibits were submitted in an untimely man-

[18] The Complaint contained a compliance order requiring Titan, among other things, to submit, within forty-five days of the receipt of the order, a closure plan for the hazardous waste storage areas in accordance with the requirements of 40 C.F.R. part 264, subpart G, and evidence, within fifty days of the receipt of the order, that Titan has established financial assurance for closure, as required by 40 C.F.R. section 264.143. Complaint at 13, ¶¶ c.-d.

> ner, at the time Respondent submitted its reply brief, that they will not be admitted.

Init. Dec. at 2 n.1. The ALJ also ordered Respondent to take all actions listed in the compliance order. *Id.* at 16.

On appeal, Titan asserts that the exhibits are relevant to the relief ordered by the ALJ and, therefore, should not have been excluded. Titan Appeal at 13. Titan claims that good cause existed for failing to submit the exhibits as part of the pre-hearing exchange. *Id.* at 15-16. According to Titan, the issue of whether Titan should be required to develop a closure plan and financial assurance arose for the first time in the Region's post-hearing brief. *Id*. Titan alleges that the Region changed its position about closure after the pre-hearing exchange, which explains why the struck exhibits were submitted in the post-hearing exchange and not during the pre-hearing exchange. *Id*.

Upon review, we agree with the ALJ that the exhibits at issue were untimely submitted. The ALJ's decision to exclude the exhibits is, therefore, affirmed.

Under 40 C.F.R. § 22.19(a)(1):

> [E]ach party shall file a prehearing information exchange. Except as provided in § 22.22(a), a document or exhibit that has not been included in prehearing information exchange shall not be admitted into evidence, and any witness whose name and testimony summary has not been included in prehearing information exchange shall not be allowed to testify.

40 C.F.R. § 22.19(a)(1). Section 22.22, which deals with the admission of evidence during administrative hearings, provides in relevant part:

> The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, * * *. If, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19(a), * * *, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.

40 C.F.R. § 22.22(a). As these provisions make clear, absent good cause, a document or exhibit will not be admitted into evidence if it was not included in the pre-hearing information exchange.

As stated above, Titan asserts that good cause existed for its failure to submit the exhibits earlier "because it was not until after the hearing date that the EPA alleged — contrary to its previous representations — that Titan Wheel should be required to implement a closure plan." Respondent Titan Wheel Corporation of Iowa's Opposition to Complainant's Motion to Strike at 2 (Feb. 26, 2001). Thus, reasons Titan, the Region's "change in position [in regards to the closure and financial assurance requirements] constitutes unfair surprise." *Id*.

The record before us, however, does not support Titan's position. That portion of the compliance order requiring Titan to submit a closure plan for the hazardous waste storage areas, and evidence that Titan would establish and maintain financial assurance for closure, was part of the Complaint as originally filed by the Region. Its content was known to Titan prior to the pre-hearing exchange and the filing of the Region's post-hearing brief. Viewed in this light, the requirement of a closure plan was not new to Titan.

According to Mr. Reigel's affidavit, Mr. Reigel met with the Region on October 12, 1999, a month prior to the completion of the pre-hearing exchange, and was allegedly informed that if Titan submitted a work plan for additional soil assessment, the Region did not intend to issue an order or require a RCRA closure.[19] Titan, however, did not submit any evidence in that regard during the pre-hearing exchange, even though the alleged agreement was already in existence. Indeed, it was not until February 12, 2001, the last day scheduled for the filing of post-hearing briefs, that Titan attempted to raise this issue.

None of Titan's pre-hearing filings informed the court of any changes in the relief sought by the Complaint. It is surprising that, if Titan believed that the Re-

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[19] The affidavit states that on October 12, 1999, the EPA informed Mr. Reigel that the January 1999 Soil Remediation Report submitted by Titan in lieu of the closure plan required by Section C of the compliance order, did not meet the requirements of 40 C.F.R. part 264, subpart G. *See* Affidavit of Stanley A. Reigel (Exhibit A of Respondent Titan Wheel Corp. of Iowa's Reply Brief). The affidavit further states that on October 26, 1999, Mr. Reigel attended a meeting with the Region in which he was allegedly informed that EPA wanted to handle the matter of soil assessment informally and that if Titan submitted a work plan for additional soil assessment the EPA did not intend to issue an order or require a closure plan, and on March 3, 2000, Titan submitted a work plan for additional soil assessment. *Id*.

The Region contends that the March 3, 2000 soil assessment report, which is not part of the record, does not relate to the issue at hand because it does not address closure of the facility's hazardous waste storage areas. Because the report is not part of the record we are in no position to judge the validity of the Region's assertions in this regard.

gion had withdrawn its demand for a closure plan prior to completion of the pre-hearing exchange, Titan did not say so. Titan's silence becomes even more surprising considering that on November 24, 1999, approximately a month after the meeting in which the Region allegedly agreed to substitute the closure requirement for additional soil remediation studies, the Region amended the Complaint to reduce the penalties proposed for each of the three counts. *See* Complainant's 2nd Supplement to Pre-Hearing Exchange and Amendment of Complaint Regarding Proposed Penalty (Nov. 24, 1999). That amendment did not mention any change to the requirements of the Complaint pertaining to the compliance order. If Titan believed that an agreement existed whereby the Region would forgo its insistence on closure and financial assurance requirements, Titan should have filed an amended answer at that time informing the ALJ of the alleged agreement. Titan did not do so.

As previously explained, the rules are clear that the parties must submit any document, exhibit, witness name or summary of expected testimony during the pre-hearing information exchange, unless good cause exists for failing to do so. We are not persuaded by Titan's "good cause" argument. The evidence sought to be admitted was readily available prior to the conclusion of the pre-hearing exchange. Given that the requirement of a closure plan was attached to the Complaint, Titan's assertion that it was surprised by the Region's position is unconvincing. Petitioner should have filed the exhibits along with its pre-hearing brief, or as part of an amended answer after the Region amended the complaint in November of 1999, without referencing any change in the Complaint's compliance order provisions.

As stated earlier, an ALJ has broad discretion in determining what evidence is properly admissible and his rulings on such matters are entitled to substantial deference. *In re J.V. Peters & Co.*, 7 E.A.D. 77, 99 (EAB 1997) ("[T]he admission of evidence is a matter particularly within the discretion of the administrative law judge because he is hearing the case firsthand and therefore, his rulings are entitled to considerable deference.") (quoting *In re Sandoz*, 2 E.A.D. 324, 332 (CJO 1987)*; see also In re Celetex Corp.*, 3 E.A.D. 740, 744 (CJO 1991) ("In making this determination [whether certain evidence should be admitted], the ALJ is entitled to considerable deference."). Because we find no error in the ALJ's decision, and Titan has not persuaded us that it had good cause for the late submission of exhibits, we see no reason to interfere with the ALJ's determination.[20]

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[20] Titan also argues on appeal that the ALJ erred in disregarding uncontroverted evidence on the basis of irrelevancy. As previously noted, in his Initial Decision the ALJ concluded that the exhibits, in addition to being untimely submitted, were not relevant to the issue of liability, and for that reason as well, he rejected their admission into evidence. Because we have found that the exhibits were not timely submitted, and Petitioner has not shown that it had good cause for such late submission, we find no need to address Titan's arguments or to reach the issue of whether the ALJ erred in concluding that the exhibits were not relevant.

III. *PENALTY ASSESSMENT*

In the instant case, the ALJ upheld the Region's penalty assessment in its entirety, and assessed a civil penalty in the amount of $150,289 against Titan for all three counts as follows: $55,050 for Count I, $74,381 for Count II, and $20,858 for Count III. Because Titan challenges the ALJ's penalty assessment for all counts, each count will be individually addressed in the sections below.

In assessing an appropriate penalty under RCRA, the Agency must "take into account the seriousness of the violation and any good faith efforts to comply with the 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. 40 C.F.R. § 22.24; *see In re Bil-Dry Corp.*, 9 E.A.D. 575, 611 (EAB 2001); *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 537 (EAB 1994).

In calculating the proposed penalty, the Region relied on the RCRA Penalty Policy, a document prepared to:

> [E]nsure 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 non-compliance 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. The RCRA Penalty Policy implements the statutory penalty criteria by taking into account "the seriousness of the violation, and any good faith efforts to comply with the applicable requirements." *In re Everwood Treatment Co.*, 6 E.A.D. 589, 594 (EAB 1996), *aff'd*, *Everwood Treatment Co. v. EPA*, No. 96-1159-RV-M, 1998 WL 1674543 (S.D. Ala., Jan. 21, 1998).

The CROP, which governs the administrative assessment of civil penalties, require that the ALJ base his or her penalty determination "on the evidence in the record and in accordance with any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). Furthermore, ALJs must consider any civil penalty guidance or policies issued by the Agency, *id.*, as such policies derive from the statutory penalty criteria and suggest methods for consistently applying these criteria. Accordingly, in this case the ALJ was required to consider the RCRA Penalty Policy.[21]

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[21] In this regard, we have held that while the regulations governing this proceeding require that ALJs consider any relevant civil penalty policies in reaching their penalty determinations, they are not required to adhere to such policies, since the policies, not having been subjected to the rulemaking procedures of the Administrative Procedure Act, lack the force of law. *In re Robert Wallin*, 10 E.A.D.

Continued

In prior decisions we have made clear that once an ALJ considers the relevant penalty policy, he or she may adopt the penalty computed in accordance with that policy or deviate therefrom, so long as the deviation is explained and the penalty assessed reflects the criteria in the applicable statute. *In re Rogers Corp.*, 9 E.A.D. 534, 569 (EAB 2000); *see, e.g.*, *In re Chempace Corp.*, 9 E.A.D. 119, 142; *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 759-62 (EAB 1997); *In re DIC Americas, Inc.*, 6 E.A.D. 184, 189 (EAB 1995).

While the regulations governing this matter give the Board the discretion to increase or decrease the penalty assessed by ALJs, *see* 40 C.F.R. § 22.30(f), the Board has often stated that when the penalty assessed by an ALJ falls within the range of penalties provided in the penalty guidelines, we will generally not substitute our 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. *Chempace Corp.*, 9 E.A.D. 119, 131 (EAB 2000); *In re Johnson Pacific, Inc.*, 5 E.A.D. 696, 702 (EAB 1995)*; In re Pacific Ref. Co.*, 5 E.A.D. 520, 524 (EAB 1994); *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994).

Under the RCRA Penalty Policy, the penalty is assessed by determining the gravity-based penalty for a particular violation from a penalty assessment matrix (shown below), adding a multi-day component as appropriate to account for the duration of the violation, and adjusting the total penalty up or down for case-specific circumstances such as the willfulness of the violation or any good faith efforts to comply. In appropriate circumstances, an additional penalty component may be assessed to account for the economic benefit gained through non-compliance. RCRA Penalty Policy at 1. The initial gravity-based penalty, a measurement of the seriousness of the violation, is determined by reference to two factors: potential for harm (vertical axis) and the extent of deviation from a statutory or regulatory requirement (horizontal axis). *Id*. at 12-13. The potential for harm factor is made up of two subfactors (not shown on the matrix): the risk of human or environmental exposure to hazardous waste and the adverse effect of noncompliance on the effectiveness of the RCRA program.[22] *Id*. at 13. Both the potential for harm and the extent of the deviation are characterized on the matrix as either major, moderate, or minor. *Id*. at 15-17. The RCRA Penalty Policy then provides recommended penalty ranges on the matrix as follows:

(continued)
18, 25 n.9 (EAB 2001); *In re B & R Oil Co.*, 8 E.A.D. 39, 63 (EAB 1998); *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 758 (EAB 1997).

[22] In this regard, the RCRA Penalty Policy states that even violations that do not cause any actual direct impact on the environment, such as record keeping violations, may nevertheless "create a risk of harm to the environment or human health by jeopardizing the integrity of the RCRA regulatory program." RCRA Penalty Policy at 13. Thus, the policy recognizes that violations undermining the RCRA program can indirectly create a potential for harm to humans or the environment.

Table I: Gravity-Based Penalty

	Extent of Deviation from Requirement		
	MAJOR	**MODERATE**	**MINOR**
Potential for harm			
MAJOR	$25,000 to 20,000	$19,999 to 15,000	$14,999 to 11,000
MODERATE	$10,999 to 8,000	$7,999 to 5,000	$4,999 to 3,000
MINOR	$2,999 to 1,500	$1,499 to 500	$499 to 100

Id. at 19.

Where the violation is a continuing one, the Policy provides for the calculation of an additional multi-day penalty on a separate multi-day matrix when use of multi-day penalties is deemed appropriate. *Id*. at 22. A dollar amount is selected from a multi-day matrix and multiplied by the number of days the violation continued. Multi-day penalties are discretionary for all days of violation where the gravity-based penalty is characterized as moderate-minor, minor-moderate, minor-minor. RCRA Penalty Policy at 23. Multi-day penalties are mandatory or presumed appropriate in all other circumstances. *Id*.

The penalty amount may then be adjusted upwards or downwards based on the application of certain adjustment factors.[23] RCRA Penalty Policy at 32-40. The penalty for each count is discussed below.

A. *Count I — Storage of Hazardous Waste Without a Permit*

Count I alleges that Titan stored hazardous waste at its facility without a permit or interim status in violation of RCRA § 3005(a), 42 U.S.C. § 6925(a), and the regulations at 40 C.F.R. § 262.34(b).[24] Complaint ¶¶ 12-16. According to the

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[23] The RCRA Penalty Policy allows for the application of adjustment factors such as good faith efforts to comply with applicable requirements (or lack thereof), degree of willfulness and/or negligence, history of noncompliance, ability to pay, violator's participation in environmentally beneficial projects, and others, that may increase or decrease the penalty amount. RCRA Penalty Policy at 32-40. In the instant case, no adjustments were determined to be applicable.

[24] Under RCRA § 3005(a), 42 U.S.C. § 6925(a), the owner or operator of a facility where hazardous waste is treated, stored, or disposed of, must have a permit. Under 40 C.F.R. § 262.34, a hazardous waste generator that accumulates hazardous waste for more than 90 days is subject to the standards for owners and operators of hazardous waste treatment, storage, and disposal facilities of
Continued

Complaint[25] and the parties' stipulated facts, *see* Joint Statement of Facts ¶¶ 9-16, on eight different occasions, between May 1994 and April 1998, Titan stored hazardous waste for periods greater than 90 days without a permit, interim status, or an extension from the EPA. In particular, according to the parties' stipulated facts, Titan stored the following at its facility:

> 1. Containers of spent solvent D001 and F003 for a period of 187 days, from October 11, 1997, to April 17, 1998.
>
> 2. Containers of hazardous waste D001, F003 and F005 for a period of 112 days, from April 24, 1997, to August 14, 1997.
>
> 3. Containers of hazardous waste D001, F003 and F005 for a period of 143 days, from December 2, 1996, to April 24, 1997.
>
> 4. Containers of hazardous waste D001, F003 and F005 for a period of 111 days from August 18, 1996, to December 2, 1996.

(continued)
40 C.F.R. part 264, the interim status standards of 40 C.F.R. part 265, and the permit requirements of 40 C.F.R. part 270, unless the facility has been granted an extension to the 90-day period.

[25] Count I states, in part:

> 12. Based on statements by [Titan] and an analysis of the Facility's hazardous waste manifests, during at least eight periods of time between August 11, 1994 and April 17, 1998, Respondent stored containers of * * * hazardous waste on-site at the Facility for periods of more than 90 days.
>
> * * * * * * *
>
> 16. [Titan] does not have, and for all times pertinent to the violations alleged in this Complaint did not have, a permit or interim status for the storage of * * * hazardous waste. Nor has [Titan] been granted an extension to the 90-day period referenced in 40 C.F.R. § 262.34(b). Therefore, [Titan's] storage of * * *hazardous waste are violations of Section 3005(a) of RCRA, 42 U.S.C. § 6925(a). These violations occurred for at least 180 days during the period of time between August 11, 1994 and April 17, 1998.
>
> * * * * * * *

Complaint ¶¶ 12,16.

> 5. Containers of hazardous waste D001, F003 and F005 for a period of 160 days from March 6, 1996, to August 18, 1996.
>
> 6. Containers of hazardous waste D001, F003 and F005 for a period of 264 days from June 16, 1995, to March 6, 1996.
>
> 7. Containers of hazardous waste D001, F003 and F005 for a period of 134 days from February 2, 1995, to June 16, 1995.
>
> 8. Containers of hazardous waste D001, F003 and F005 for a period of 118 days from May 13, 1994, to September 7, 1994.

Joint Statement of Facts ¶¶ 9-16. For these violations, the Region proposed a $5,500 gravity-based penalty, a $49,225 multi-day penalty and a $325 penalty reflecting Titan's economic benefit of noncompliance for a total penalty of $55,050, which the ALJ upheld in its entirety.[26] Each penalty component is discussed below.[27]

1. *Region's Proposed Penalty*

a. *The Gravity-Based Penalty*

In arriving at a proposed penalty for Count I, the Region first considered the seriousness of the violation and found that, under the circumstances of this case, a $5,500 gravity-based penalty was appropriate. In so doing, the Region selected a penalty from the low end of the penalty matrix for violations classified as moderate with regard to both potential for harm and extent of deviation from the statutory and regulatory requirements.[28]

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[26] As previously explained, no upward or downward adjustments were implemented here.

[27] Because Titan's challenge to the method used by the Region in determining "economic benefit of noncompliance" is the same for all three counts, this specific penalty component will be addressed in a separate section. *See infra* Section III.D.

[28] As shown in Table I above, the penalty range for the moderate-moderate cell in the gravity-based matrix varies from $5,000 to 7,999. RCRA Penalty Policy at 19. The $5,500 proposed penalty in this case incorporates a 10% upward adjustment to account for inflation. *See* 40 C.F.R. pt. 19 (adjustment of civil monetary penalties for inflation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note), as amended by the Debt Collection Improvement Act of 1996 (31 U.S.C. § 3701 note)); *see also* U.S. EPA, Memorandum on Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule (May 9, 1997).

In considering the potential for harm, the Region, consistent with the RCRA Penalty Policy, considered the risk of exposure to humans and the environment, as well as the harm caused to the RCRA program. In the Region's view, a moderate potential for harm was appropriate here because "extended periods of hazardous waste storage significantly increase the potential for leaking containers, accidental release and exposure, and improper disposal," and in this case "storage of hazardous waste over 90 days occurred on several occasions." Complainant's Brief in Support of Complainant's Proposed Findings of Fact, Conclusions of Law and Order ("Complainant's Post-Hearing Brief") at 13-14 (Jan. 29, 2001). The Region also stated that "[f]acility workers are * * * placed at serious risk when they work in the vicinity of, or directly handle, leaking hazardous waste containers." *Id*. at 13. The Region further concluded that the operation of hazardous waste storage facility without a permit resulted in significant harm to the RCRA program. *Id*.

With regard to the extent of deviation, the Region concluded that a moderate characterization was appropriate given the degree of non-compliance (i.e., spent still bottoms were stored over the 90-day limit on seven occasions from August 11, 1994, through August 14, 1997; 42 drums were stored outdoors for periods greater than 90-days). *Id.* at 14. The Region rejected a minor characterization for this factor because "storage of hazardous waste over 90 days occurred on several occasions and on none of these occasions was [Titan] complying with the hazardous waste storage facility requirements found in 40 C.F.R. parts 264 and 265, such as having a closure plan or financial assurance." *Id*. at 14.

b. *The Multi-Day Penalty Component*

Where, as here, the gravity-based component of a penalty is categorized as moderate-moderate in the penalty matrix and the violation has occurred over a period of time, the RCRA Penalty Policy presumes that the imposition of a multi-day penalty is appropriate. *See* RCRA Penalty Policy at 23. In determining the multi-day component for this count, the Region selected the lowest-end of the moderate-moderate cell in the multi-day matrix (which ranges from $250 to $1,600). Complainant's Post-Hearing Brief at 15.

The multi-day penalty component was calculated by multiplying a per day amount of $275[29] by 179, the maximum number of days presumed appropriate by the penalty policy. *See* RCRA Penalty Policy at 23. In its post-hearing brief, the Region explained that the full 179-day term was used here because the record shows that Count I violations occurred "during at least eight occasions between August 11, 1994, and April 17, 1998, for a total cumulative illegal storage period of at least 500 days." Complainant's Post-Hearing Brief at 15.

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[29] This amount reflects a 10% inflation adjustment. *See supra* note 28.

c. *Adjustment Factors*

The RCRA Penalty Policy allows for the downward adjustment of a penalty to account for the violator's good faith efforts to comply with the applicable regulation. RCRA Penalty Policy at 33. In discussing what actions demonstrate good faith, the policy explains that a "violator can manifest good faith by promptly identifying and reporting noncompliance or instituting measures to remedy the violation before the Agency detects the violation." *Id.* The policy clarifies that "no downward adjustments should be made if the good faith efforts to comply primarily consist of coming into compliance." *Id.* In this same vein, the policy directs the enforcing agency to "apply a presumption against downward adjustment for respondent's efforts to comply or otherwise correct violations after the Agency's detection of violations." *Id.* This presumption against downward adjustments exists because "the amount set in the gravity-based penalty component matrix assumes good faith efforts by a respondent to comply after EPA discovery of a violation." *Id.*

In the present case, the Region determined that a good faith downward adjustment to the gravity-based penalty was not appropriate because the hazardous waste shipments were consistently stored well beyond the 90-day storage limit, and the violations were discovered during an inspection. Complainant's Post-Hearing Brief at 16. In addition, the Region noted that the record lacked any indication that Titan made efforts to discover the violations or to ascertain its obligations under RCRA. *Id*. Finally, the Region stated that it took Titan more than two months after being notified of its violations, to finally ship containers of spent solvent waste off-site for disposal. *Id*.

2. *Titan's Arguments on Appeal*

On appeal, Titan challenges the ALJ's determinations on the gravity-based and the multi-day penalties, and proposes that both components in the gravity-based penalty be reassessed and placed into the minor category, and that the multi-day component be eliminated entirely. *Id.* at 18-19. According to Titan, the ALJ's determinations are erroneous because they disregard "the fact that drums in Titan's storage facility were not damaged, that at the time of inspection hazardous waste was regularly shipped off-site, and that incompatible wastes were not stored together." *Id.* at 19.

Titan also asserts that the use of the moderate category does not take into consideration Titan's good faith efforts to comply with the applicable RCRA requirements. Titan Appeal at 17-20. As evidence of its good faith efforts to comply with RCRA, Titan states that it made efforts, prior to EPA's inspection, to ship hazardous waste to an off-site facility, and that once the violation was brought to its attention, it instituted a maximum length of storage of 80 days — a

more stringent storage period than the 90-day period allow by the applicable RCRA regulations. *Id*. at 19.

3. *The ALJ Did Not Clearly Err in Adopting the Region's Proposed Penalty for Count I*

As discussed in detail below, Titan has not persuaded us that the ALJ's determination to uphold the Region's proposed penalty for the gravity-based and multi-day components of the penalty assessed for Count I is clearly erroneous or an abuse of discretion. To the contrary, we conclude that the Region reasonably applied the RCRA Penalty Policy to the particular facts of this case, and that the ALJ did not err in adopting the Region's proposed penalty as consonant with the statutory penalty criteria. In so doing, we reject Titan's assertion that both components in the gravity-based penalty (extent of deviation and potential for harm) should have been characterized as minor violations rather than moderate on the penalty matrix. We also reject Titan's assertion that the ALJ erred in failing to adjust the penalty downward for Titan's alleged good faith.

a. *Gravity-Based Penalty — Extent of Deviation*

Under the RCRA Penalty Policy, a minor characterization of the extent of deviation is warranted only when "the violator deviates somewhat from the regulatory or statutory requirements but most (or all important aspects) of the requirements are met," *see* RCRA Penalty Policy at 17, whereas a moderate characterization is appropriate when "the violator significantly deviates from the requirements of the regulation or statute but some of the requirements are implemented as intended." *Id.* We agree with the Region and the ALJ that Titan's storage of hazardous waste without a permit for periods greater than 90-days on at least eight occasions warrants a moderate characterization.

The record shows that in addition to having hazardous waste stored beyond the 90-day regulatory limit, Titan was in violation of various other hazardous waste management requirements including: 40 C.F.R. § 262.34(a)(2)-(3) (failure to date containers with accumulation start dates; failure to mark and label drums as containing hazardous wastes), 40 C.F.R. §§ 265.34,.35 (lack of access to communications or alarm system at hazardous waste storage area; inadequate aisle space), 40 C.F.R. § 262.11 (failure to make hazardous waste determinations), 40 C.F.R. § 262.20(a) (improper completion of manifest). *See* Notice of Violation Pursuant to Requirements of RCRA (Exhibit CX2 to Region's Pre-hearing Exchange). Under these circumstances, we find no error in the ALJ's determination that the extent of deviation was moderate.

b. *Gravity-Based Penalty — Potential for Harm*

The record also supports the ALJ's conclusion regarding the potential for harm. As already explained, the potential for harm is based upon risk of exposure to humans and the environment and the adverse effect that noncompliance may have on the RCRA regulatory program. Characterization of this element as minor is appropriate when the violation poses or may pose a relatively low risk of exposure and/or the actions have or may have a small adverse effect on the RCRA regulatory program. RCRA Penalty Policy at 15. A moderate designation, on the other hand, is appropriate when the risk of exposure and/or the adverse effect on the RCRA regulatory program are significant. *Id*. In the Region's view, (as affirmed by the ALJ), the storage of hazardous waste beyond the 90-day regulatory limit significantly increased the potential of leaking containers, accidental releases and exposure at the storage areas, and improper disposal of hazardous waste. The Region also concluded that these conditions place facility workers at serious risk when working in the vicinity of, or directly handling, leaking hazardous waste containers.[30] We find nothing unreasonable with these determinations.[31]

c. *Downward Adjustments*

Finally, we agree with the ALJ that Titan did not display the type of good faith behavior that would merit a penalty reduction. According to Titan, soon after the violation was brought to its attention, it removed all excess drums of hazardous waste and instituted a maximum length of storage of 80 days, and, in Titan's view, this conduct warrants a downward adjustment.

The RCRA Penalty Policy provides, however, that "no downward adjustments should be made if the good faith efforts to comply primarily consist of coming into compliance." RCRA Penalty Policy at 33. Titan's removal of excess drums and implementation of an 80-day storage policy were prompted by the Region's inspection and discovery of violations. As such, these efforts do not rise to

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[30] Titan asserts that a minor characterization is appropriate here because the drums were not damaged and incompatible wastes were not stored together. This statement, even if true, does not convince us that the ALJ erred in categorizing the potential for harm as moderate under the circumstances discussed above. In this regard we note that in his written testimony, Royce Kemp, the Region's compliance officer who prepared the penalty calculation, stated that these factors were considered in the selection of a moderate rather than major potential for harm. *See* Written Testimony of Royce Kemp (Exhibit CX19 to Region's Prehearing Exchange ("CX19")) at 8.

[31] Titan also challenges the multi-day penalty by claiming that because the gravity-based penalty should be characterized as minor-minor, the multi-day penalty should be eliminated. Because we agree with the ALJ that the gravity-based penalty was properly categorized as moderate-moderate, we find no error in the determination by the Region (as affirmed by the ALJ) that a multi-day penalty is appropriate here. *See* RCRA Penalty Policy at 23 ("Multi-day penalties are presumed appropriate for days 2-180 of violations with" a moderate-moderate gravity-based designation).

the level of "good faith efforts" contemplated by the RCRA Penalty Policy. Furthermore, under the RCRA Penalty Policy, the gravity-based component presumes good faith efforts to comply after EPA has discovered a violation.[32]

Id. at 33. Therefore, Titan's efforts to comply after being notified of the violations are already accounted for in the gravity-based calculation. In the past we have declined to apply downwards adjustments already taken into account by the penalty matrix. *See, e.g., In re Catalina Yachts, Inc.*, 8 E.A.D. 199, 211 (EAB 1999) (declining to apply downward adjustment on the basis that it would be duplicative given that the penalty matrix already accounts for that factor). Given the facts here, we find no reason to deviate from that practice.

Further, as the Board has previously held, significant penalty reductions for good faith, like the ones suggested by Titan (a 40% reduction), should be reserved for those cases where the violator promptly reports its noncompliance, or the possibility of noncompliance, once discovered or suspected. *In re Everwood Treatment Co.*, 6 E.A.D. 589, 609 (EAB 1996), *aff'd, Everwood Treatment Co. v. EPA*, No. 96-1159-RV-M, 1998 WL 1674543 (S.D. Ala., Jan. 21, 1998); *In re A.Y. McDonald Indus., Inc.*, 2 E.A.D. 402, 421 (CJO 1987). In the instant case, the record is devoid of any indication of Titan's efforts to self-discover, self-report, or take actions to correct the violations prior to EPA's inspection.

As already stated, we will generally not substitute our 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. Because the record supports the ALJ's penalty determinations, and because Titan has failed to convince us that these determinations were clearly erroneous, we uphold the ALJ's penalty assessment for Count I.

B. *Count II — Failure to Conduct Personnel Training*

Count II alleges that Titan failed to develop and implement a personnel training program in violation of 40 C.F.R. § 265.16.[33] *See* Complaint ¶ 19. The

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[32] In this regard, the Region indicated that it considered Titan's efforts at compliance in selecting a moderate extent of deviation rather than major, and by selecting the lowest amount from the moderate-moderate cell range in the gravity-based matrix. Agency Response at 20-21.

[33] Count II states, in part:

> 21. During the February 10-11, 1998 inspection, [the Region] discovered that the Facility had failed to develop or use a personnel training program aimed at teaching Facility personnel how to perform their duties in a way that ensures the Facility's compliance with the requirements of 40 C.F.R. Part 265. Also, during this inspection [Titan] informed [the Region] that it did not have a written description of a personnel training

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allegations in the Complaint are based on the findings of an inspection conducted by the Region at Titan's facility on February 10-11, 1998. *Id.* ¶ 21.

According to section 265.16, the owner and/or operator of a hazardous waste facility must provide training to facility personnel designed to teach employees "to perform their duties in a way that ensures the facility's compliance with the requirements of [40 C.F.R. part 265]." *See* 40 C.F.R. § 265.16(a)(1). The regulations further require that certain records be maintained at the facility. In particular, pursuant to section 265.16(d) "the owner or operator must maintain [*inter alia*] , * * * [a] written description of the type and amount of both introductory and continuing training that will be given to each person filing a position [related to hazardous waste management]." 40 C.F.R. § 265.16(d).

The February 1998 inspection revealed that Titan failed to develop a personnel training program that complied with the requirements of section 265.16, and that Titan did not have records documenting that facility personnel had received and completed the training program. *Id.* ¶ 21. The parties later stipulated that Titan "did not develop or implement a personnel training program covering the requirements of 40 C.F.R. [part] 265 as required by 40 C.F.R. § 265.16 at any time prior to August 4, 1998." Joint Statement of Facts ¶ 17.

Titan, however, challenges the ALJ's determination to uphold the Region's proposed penalty, and objects to the Region's evaluation of each of the RCRA Penalty Policy components. The Region proposed a $5,500 gravity-based penalty, a $49,225 multi-day penalty, and a $19,656 penalty reflecting the economic benefit to Titan from noncompliance, for a total penalty of $74,381 for this count.[34] Once again, the Region determined that no upward or downward adjustments were warranted.

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> program that met the requirements of 40 C.F.R. § 265.16, and that it did not have records documenting that the Facility personnel had received and completed such a training program. * * * These failures, which occurred for at least the 180 days prior to the February 10-11, 1998 inspection, are violations of 40 C.F.R. § 265.16.
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> * * * * * * *

Complaint ¶ 21.

[34] As explained in the discussion pertaining to Count I, the economic benefit of noncompliance challenge for all counts is discussed in a separate section below. *See infra* Section III.D.

1. *Region's Proposed Penalty*

a. *The Gravity-Based Penalty*

In assessing the gravity-based penalty amount for this count, the Region, as it did with Count I, selected a penalty from the lowest end of the range provided in the RCRA Penalty Policy.[35] According to the Region, a moderate potential for harm was appropriate for this count because of: (1) the risk that untrained workers pose to themselves and the environment; (2) the fact that some of the violations discovered during the inspection might have been avoided had Titan provided appropriate training to its employees; and (3) harm caused to the RCRA program by Titan's failure to develop and implement a hazardous waste management training program. Complainant's Post-Hearing Brief at 20. The Region further noted that a minor potential for harm was not appropriate here because "the lack of hazardous waste management training placed the employees at risk of harmful exposure and increased the potential of harm to the environment." *Id*. A major potential for harm characterization was rejected on the basis that Titan provided training to its personnel pursuant to the Occupational Safety and Health Act ("OSHA"). *See* Written Testimony of Royce Kemp (Exhibit CX19 to Region's Prehearing Exchange ("CX19")) at 11.

As for the extent of deviation, the Region found that a moderate characterization was appropriate because Titan "largely did not comply with [the personnel training requirements of 40 C.F.R. § 265.16]" and because the facility "did not complete the necessary hazardous waste training and it did not have written job descriptions or documentation of any related training that may have been completed." CX19 (written testimony of Royce Kemp) at 12; Complainant's Post-Hearing Brief at 21. A minor extent of deviation was not selected because, in the Region's view, Titan's failure to conduct initial or annual reviews of the hazardous waste management procedures contributed to the facility's noncompliance with several other RCRA requirements. Complainant's Post-Hearing Brief at 21.

b. *The Multi-Day Penalty Component*

As previously stated, the RCRA Penalty Policy presumes the appropriateness of a multi-day penalty where, as here, the gravity-based portion of the penalty is categorized as moderate-moderate in the penalty matrix. As it did in assessing a multi-day penalty for the violations in Count I, the Region selected a penalty amount at the lowest end of the moderate-moderate cell in the multi-day matrix, namely $275.[36] The $275 figure was multiplied by 179, the maximum

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[35] For gravity-based penalties with a moderate potential for harm and a moderate extent of deviation, the amount in the designated cell ranges from $5,000 to $7,999. RCRA Penalty Policy at 19.

[36] This amount reflects a 10% upward adjustment for inflation. *See supra* note 28.

number of days presumed appropriate by the RCRA Penalty Policy. *See* RCRA Penalty Policy at 23. As the Region explained in its post-hearing brief, the full 179-day term was used because "the facility did not develop or implement a personnel training any time prior to August 4, 1998, and therefore was in noncompliance for well over the total 180 days of violation for which a penalty being assessed." *Id.* at 22.

c. *Adjustment Factors — Violator's Good Faith Efforts to Comply with Applicable Requirements.*

The Region concluded that no downward adjustments to the penalty were warranted in this case because the violations were discovered by the Region during an inspection, rather than being self-reported. Further, according to the Region, there was no indication in the record that Titan made any efforts to comply before being notified of the violation. *Id.* at 22-23. Under these circumstances, the Region found no reason to reduce the penalty based on Titan's alleged good faith.[37] *See id.*

As with Count I, the ALJ found the Region's penalty assessment to be appropriate, and adopted the Region's proposed penalty for Count II in its entirety.

2. *Titan's Arguments on Appeal*

As with Count I, Titan challenges the ALJ's determinations with regard to both the gravity-based and multi-day penalties. *See* Titan Appeal at 20-21. Titan argues that, contrary to the Region's assertions, Titan did provide hazardous waste management training to its employees in accordance with 40 C.F.R. section 265.16 prior to the inspection. *Id*. at 20. Specifically, Titan points to training it provided to employees to satisfy certain OSHA requirements, and asserts that this training also satisfied training requirements under 40 C.F.R. § 265.16. *Id.* Thus, Titan reasons, any failure on its part should be classified as minor rather than moderate on the penalty matrix. *Id*.

In addition, Titan claims that the Region failed to consider its good faith efforts to comply with the RCRA personnel training requirements before and after the inspection. *See id.* Once again, Titan cites to its OSHA training as evidence of its good faith. Titan further claims that once the violation was brought to its attention, it responded rapidly by instituting a hazardous waste management train-

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[37] The Region further indicates that the gravity-based penalty was lowered based on the existence of the OSHA training. Agency Response at 25. In its reply to Titan's post-hearing brief, the Region explained that the OSHA training was taken into consideration by Mr. Kemp in choosing a moderate extent of deviation over major. Complainant's Reply to Respondent's Post-Hearing Brief at 6. Thus, the Region argues, any further reduction under good faith efforts to comply would be redundant and unwarranted. Agency Response at 25.

ing program. *Id.* at 21. Titan also states that it had "two key employees complete a 40-Hour Hazardous Waste Operations Course who were placed in charge of implementing the training program." *Id*. Thus, Titan argues, the gravity-based penalty should be reduced, and the multi-day component should be eliminated. *Id.* at 20-21.

3. *The ALJ Did Not Clearly Err in Supporting the Region's Penalty Determination for Count II*

For the following reasons, Titan has not convinced us that the ALJ erred in adopting the Region's proposed penalty.

a. *Gravity-Based Penalty — Extent of Deviation*

First, we agree with the ALJ's selection of a moderate extent of deviation for this count. As previously explained, a minor characterization for this component is appropriate only when most or all important aspects of the applicable requirements are met. *See* RCRA Penalty Policy at 17. This is not the case here. As stated earlier, Titan asserts that it met the requirements in 40 C.F.R. section 265.16 by providing OSHA training pursuant to 29 C.F.R. section 1910.1200 and, therefore, the extent of deviation should have been minor instead of moderate. Titan Appeal at 20. The record, however, does not support a minor characterization on this basis alone. While the OSHA training provided information to employees on how to handle hazardous material, it does not appear from the record before us that this training included all or most elements required by part 265. For example, as the Region states in its reply to Titan's Post-Hearing Brief, the OSHA training did not adequately address significant elements of the RCRA personnel training requirements set forth in 40 C.F.R. sections 265.16(a)(2) (hazardous waste management procedures), 265.16(a)(3) (emergency procedures), and 265.16(c) (annual reviews). *See* Complainant's Reply to Respondent's Post-Hearing Brief at 9. In addition, Titan did not have records documenting that facility personnel had received and completed the required hazardous waste training, and it did not have written job descriptions or documentation of any related training that may have been completed, as required by section 265.16. *See* CX19 (written testimony of Royce Kemp) at 12. Under these circumstances, we find no error in the ALJ's characterization of the extent of deviation as moderate.

b. *Gravity-Based Penalty — Potential for Harm*

Likewise, we find no error in the ALJ's determination that the potential for harm for this count is moderate. As already explained, the potential for harm considers risk of exposure to humans and the environment, as well as the adverse effect that noncompliance may have on the RCRA regulatory program. RCRA Penalty Policy at 13. A moderate characterization is warranted when the risk of exposure and/or the adverse effect on the RCRA regulatory program are signifi-

cant. *Id.* at 15. Because we agree with the Region and the ALJ that Titan's failure to provide specific hazardous waste training and annual updates to its employees pose a significant risk to untrained employees and the environment, and that some of the violations discovered during the inspection might have been avoided had Titan provided appropriate training to its employees, we affirm the ALJ's determination.[38]

c. *Downward Adjustments*

Finally, we reject Titan's assertion that the ALJ ignored Titan's alleged good faith efforts to comply with RCRA. As the Initial Decision makes clear, the ALJ did consider Titan's arguments in this regard; the ALJ was simply not persuaded that a downward adjustment to the penalty was warranted. *See* Init. Dec. at 13. We find no error in this determination.

The violations in this case were discovered during the course of an inspection. There is no evidence in the record of actions by Titan directed toward the prompt identification and reporting of noncompliance before the Region's detection of the violation. In addition, as previously explained, the policy applies a presumption against downward adjustments for efforts to correct violations after their detection by the Agency. Thus, Titan's efforts to come into compliance after being informed of the violation do not warrant a further adjustment.

Because, in our view, the Region reasonably applied the RCRA Penalty Policy, which in turn implements the statutory penalty criteria,[39] and because Titan has failed to show clear error or an abuse of discretion from the ALJ's part, we uphold the ALJ's penalty assessment for this count.

C. *Count III — Inadequate Contingency Plan*

Count III charges Titan with violations of 40 C.F.R. part 265 subpart D.[40] This subpart requires that each owner or operator of a hazardous waste facility

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[38] Once again, Titan claims that the multi-day penalty should be eliminated from this count because the gravity-based penalty was improperly characterized as moderate-moderate. We disagree. As already explained, the ALJ did not err in categorizing the gravity-based penalty as moderate-moderate, and because multi-day penalties are presumed appropriate for gravity-based penalties designated as moderate-moderate, we uphold the ALJ's multi-day penalty determination for this count.

[39] *See In re Everwood Treatment Co.*, 6 E.A.D. 589, 594 (EAB 1996), *aff'd, Everwood Treatment Co. v. EPA*, No. 96-1159-RV-M, 1998 WL 1674543 (S.D. Ala., Jan. 21, 1998) (stating that the RCRA Penalty Policy implements the requirement in RCRA that in assessing a civil penalty, the Agency take into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements).

[40] Count III states, in part:

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have and update a contingency plan for the facility "designed to minimize hazards to human health or the environment from fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water." 40 C.F.R. § 265.51.

According to the parties' stipulated facts, prior to August 4, 1998, Titan's Contingency Plan "did not describe arrangements agreed to by local police departments, fire departments, hospitals, contractors, and State and local emergency response teams to coordinate emergency services * * *." Joint Statement of Facts ¶ 18. In addition, the Contingency Plan "did not list names, addresses, and phone numbers * * * of all persons qualified to act as emergency coordinators," and it "did not include a list of all emergency equipment at the facility, describe the location and physical attributes of the equipment, or provide an outline of the capabilities of such equipment." *Id.* ¶¶ 19-20.

Based on these facts, the Region proposed a gravity-based penalty of $550, a multi-day-based penalty of $19,690, and estimated an economic benefit of non-

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> 25. Pursuant to Subpart D of 40 C.F.R. part 265 * * * a hazardous waste facility owner or operator is required to have and update a contingency plan for the facility which is designed to minimize hazards to human health or the environment from fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air soil, or surface water.
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> 26. During the February 10-11, 1998 inspection, [Titan] presented [the Region] with a copy of a document entitled "Emergency Action Plan, For Compliance With OSHA Standard 29CFR 1910.38," dated 1995, that [Titan] identified as its contingency plan required under Subpart D of 40 C.F.R. part 265. This "contingency plan" failed to meet several requirements of Subpart D of 40 C.F.R. Part 265, as described below.
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> * * * * * * *
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> 28. [Titan's] 1995 contingency plan did not describe the emergency services arrangements required by 40 C.F.R. § 265.52(c).
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> * * * * * * *
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> 30. [Titan's] 1995 contingency plan did not include a list of emergency coordinators as required by 40 C.F.R. § 265.52(d).
>
> * * * * * * *
>
> 32. [Titan's] 1995 contingency plan did not [provide a list of all emergency equipment at the facility in] violation of 40 C.F.R. § 265.52(e).

Complaint ¶¶ 26-26, 28, 30, 32.

compliance of $618, for a total penalty of $20,858.[41] As with the other two counts, the ALJ adopted the Region's proposed penalty.

1. *Region's Proposed Penalty*

a. *The Gravity-Based Penalty Component*

In selecting a gravity-based penalty for this count, the Region characterized the violation as minor with regard to the potential for harm, and as moderate with regard to the extent of deviation. The Region, once again, determined that a penalty from the lowest end of the range provided in the RCRA Penalty Policy was appropriate in this case.[42]

The potential for harm was categorized as minor because, in the Region's view, the risk of harm to workers and the environment was somewhat limited given that the OSHA emergency plan provided employees with a general knowledge of what to do in an emergency. As Royce Kemp explained in his written testimony:

> Although the OSHA Emergency Action Plan * * *was not completely in compliance with the regulation [40 C.F.R. § 265.52] by not describing arrangements with local authorities, listing emergency coordinators, or listing emergency equipment, the employees would likely have knowledge as to what to do in a general emergency and how to evacuate the facility if necessary as a result of the OSHA training and the emergency response actions described in the Emergency Action Plan.

CX19 (written testimony of Royce Kemp) at 15.

The Region, however, characterized the extent of deviation as moderate because the facility had an emergency action plan that lacked several items of information required by 40 C.F.R. § 265.52 (e.g., the plan did not include a description of the actions facility personnel should take in case of an unplanned hazardous waste release, hazardous waste management provisions were not included, the plan did not describe all arrangements with appropriate authorities in all reasonably possible emergencies, and evacuation procedures were not fully addressed in the plan). *Id.* at 26.

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[41] As with the other two counts, Titan's challenge pertaining to the method used to calculate economic benefit of noncompliance is discussed in Section III.D below.

[42] Penalties in the minor-moderate category range from $500 to $1,499. RCRA Penalty Policy at 19.

b. *The Multi-Day Penalty Component*

Under the RCRA Penalty Policy, multi-day penalties are discretionary for gravity-based penalties that have been categorized as minor-moderate. In this case, the Region opted to exercise its discretion under the policy and assessed a multi-day penalty of $19,690 for this count based, in part, on Titan's failure to correct the violation in a reasonable period of time. *Id.* at 27. In the Region's view, the fact that it took Titan six months after being notified of the violation to respond, led to "easily avoidable additional risks." *Id.*

The Region selected the lowest-end of the minor-moderate cell in the multi-day matrix, $110,[43] and multiplied this figure by 179. The 179 figure was selected because "prior to August 4, 1998, the facility's contingency plan did not contain the required elements, and therefore [the facility] was in noncompliance for well over the total 180 days of violation for which a penalty is being assessed." *Id.*

c. *Adjustment Factors — Violator's Good Faith Efforts to Comply with Applicable Requirements*

In assessing whether adjustments for good faith efforts were warranted, the Region arrived at the same conclusion as with Counts I and II. That is, no adjustments were warranted given that: (1) EPA discovered the violation during an inspection; (2) the record lacked any evidence of efforts made by Titan to discover the violation or to ascertain its obligations under RCRA; and (3) Titan did not correct the violations for approximately six months after becoming aware of them. *Id.* at 28.

In his Initial Decision, the ALJ acknowledged Titan's efforts to remedy the violation by updating its contingency plan to conform to RCRA. Init. Dec. at 16. However, those efforts, in the ALJ's view, did not warrant a downward penalty adjustment. Titan's delay in achieving compliance was regarded by the ALJ as demonstrating a lack of diligence and good faith. *Id.*

2. *Titan's Arguments on Appeal*

As with the other two counts, Titan objects to the ALJ's determinations regarding the gravity-based and multi-day penalties. *See* Titan Appeal at 21-23. However, unlike the other two counts in which Titan objected to both components of the gravity-based penalty (the extent of the deviation and the potential for harm), here Titan only objects the extent of deviation determination. According to Titan, the extent of deviation should have been characterized as minor rather

[43] This figure reflects a 10% upward adjustment for inflation. *See supra* note 28.

than moderate. Titan claims that the Region's characterization as moderate completely disregards the fact that Titan's OSHA emergency action plan was allegedly in substantial compliance with the RCRA contingency plan requirements listed in 40 C.F.R. sections 265.50 to .52. *Id.* at 21-22.

Titan also alleges, as it did with Counts I and II, that neither the Region nor the ALJ considered Titan's good faith efforts to comply with the contingency plan requirements before and after the inspection. *Id*. at 22. The use of the OSHA emergency action plan, in Titan's view, reflects its good faith efforts to comply with RCRA. In addition, Titan argues that once the violation was brought to its attention, it quickly updated its contingency plan and established a policy under which such plan would be consistently updated. *Id*.

3. *The ALJ Did Not Err in Adopting the Region's Proposed Penalty*

Upon review of the record and the RCRA Penalty Policy, we conclude that the Region reasonably applied the penalty policy to the specific facts of this case, and that the ALJ did not err in adopting the Region's proposed penalty for this count as consonant with the statutory penalty criteria.

a. *Gravity-Based Penalty — Extent of Deviation*

As previously explained, in order to characterize the extent of deviation as minor, most or all important aspects of the requirements have to be met.[44] This is not the case here. According to the parties' stipulated facts, Titan's "contingency plan"[45] lacked significant information required by subpart D of 40 C.F.R. part 265. *See* Joint Statement of Facts ¶¶ 18-20.

As the Region points out, although Titan's OSHA emergency action plan covers some of the requirements of a RCRA contingency plan, three of the five requirements specified in 40 C.F.R. sections 265.52(a),(c)-(f) are missing.[46] In

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[44] *See* RCRA Penalty Policy at 17.

[45] As already explained, Titan did not have a RCRA contingency plan per se. Titan had instead an OSHA emergency action plan.

[46] Section 265.52 provides:

> (a) The contingency plan must describe the actions facility personnel must take to comply with §§ 265.51 and 265.56 in response to fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water at the facility.

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particular, Titan failed to satisfy the requirements of sections 265.52(c) (arrangements to coordinate emergency services), 265.52(d) (list of names, addresses, and phone numbers of all persons qualified to act as emergency coordinator) and 265.52(e) (list of all emergency equipment at the facility). In addition, the record shows that the OSHA emergency plan failed to fully satisfy the requirements of sections 265.52(a) (actions facility personnel must take in response to fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste) and 265.52(f) (evacuation plan for facility personnel describing evacuation routes, and alternate evacuation routes in cases where the primary routes could be blocked by releases of hazardous waste or fires).[47] For these reasons, we agree with the ALJ and the Region that the extent of deviation for this count is moderate and not minor.

b. *Downward Adjustments*

As with the previous counts, the record before us does not support Titan's arguments regarding the propriety of "good faith" downward adjustments based on

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> (c) The plan must describe arrangements agreed to by local police departments, fire departments, hospitals, contractors, and State and local emergency response teams to coordinate emergency services, pursuant to § 265.37.
>
> (d) The plan must list names, addresses, and phone numbers (office and home) of all persons qualified to act as emergency coordinator (see § 265.55), and this list must be kept up to date. Where more than one person is listed, one must be named as primary emergency coordinator and others must be listed in the order in which they will assume responsibility as alternates.
>
> (e) The plan must include a list of all emergency equipment at the facility (such as fire extinguishing systems, spill control equipment, communications and alarm systems (internal and external), and decontamination equipment), where this equipment is required. This list must be kept up to date. In addition, the plan must include the location and a physical description of each item on the list, and a brief outline of its capabilities.
>
> (f) The plan must include an evacuation plan for facility personnel where there is a possibility that evacuation could be necessary. This plan must describe signal(s) to be used to begin evacuation, evacuation routes, and alternate evacuation routes (in cases where the primary routes could be blocked by releases of hazardous waste or fires).

40 C.F.R. § 265.52(a), (c)-(f).

[47] In this regard, the Region noted that Titan's OSHA emergency action plan does not describe "alternate evacuation routes in cases where primary routes could be blocked by releases of hazardous waste or fires," and does not explain "the actions facility personnel should take in response to any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water at the facility." Agency Response at 26.

Titan having an OSHA emergency action plan. We agree with the Region that because Titan's emergency action plan was developed to comply with OSHA requirements and not RCRA, it does not reflect a good faith attempt to comply with the applicable regulations. In addition, there is no evidence in the record of Titan's prompt recognition of its failure to comply with the regulatory requirements of sections 265.50-.52, or any attempts to remedy such violations before the Agency's detection.

Thus, we agree with the ALJ that a minor characterization for the extent of deviation component is unwarranted, and that a downward adjustment of the penalty is not supported by the record. The ALJ's penalty assessment is therefore affirmed for this count as well.[48]

D. *Economic Benefit of Noncompliance*

As previously explained, the economic benefit of noncompliance is one of the elements used in the determination of penalties under the RCRA Penalty Policy.[49] Courts have also recognized economic benefit as a relevant factor in the assessment of civil penalties under RCRA. *See, e.g., U.S. v. WCI Steel, Inc.*, 72 F.Supp.2d 810, 828 (N.D. Ohio 1999) citing *U.S. 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 the harm caused by the violation, and 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 sev-

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[48] As with the other counts, Titan objects to the imposition of a multi-day penalty. In Titan's view, because "the application of the multi-day component is discretionary for violations in the minor/minor category, this component should have been deleted from the calculation of the penalty, given that Titan largely complied with the pertinent RCRA regulations." Titan Appeal at 22. The record does not support Titan's position. As explained above, we find no clear error in the ALJ's determination that the penalty for this count merited a minor-moderate characterization instead of minor-minor as suggested by Titan. While multi-day penalties are discretionary for penalties characterized as minor-moderate, *see* RCRA Penalty Policy at 23, Titan has not convinced us that the ALJ abused his discretion in imposing a multi-day penalty in this case. As the RCRA Penalty Policy indicates, the duration of a violation is a significant factor in the determination of an appropriate total penalty amount. *See* RCRA Penalty Policy at 22-23. Because Titan has failed to convince us that the ALJ abused his discretion in this regard, we affirm the ALJ's multi-day penalty assessment for this count.

[49] 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.*

eral other factors, including the economic benefit derived by defendant, in the determination of penalties under RCRA).

In the instant case, the Region employed a method known as weighted average cost of capital ("WACC") to estimate the discount rate used in calculating the present value of avoided and delayed costs incurred by Petitioner as result of noncompliance.[50]

Applying the WACC method, the Region's expert, Jonathan S. Shefftz,[51] concluded that Titan received an economic benefit of $20,599 for the violations in the three counts discussed above. The ALJ found that this determination was supported by the record. As explained more fully below, Titan objects to the use of a WACC discount rate to determine economic benefit of noncompliance, and argues that the WACC methodology is inaccurate and flawed.

1. *Region's Calculation of Economic Benefit*

As a first step in its economic benefit analysis, the Region distinguished between costs delayed and costs avoided.[52] *See* Expert Report on Economic Benefit (Exhibit CX21 to Region's Pre-Hearing Exchange ("CX21-Expert Report")). The Region found that Titan delayed compliance with regard to the RCRA requirements charged under Counts I and III. *See* Complainant's Post-Hearing Brief at 19, 29. That is, Titan complied with the regulations but in an untimely

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[50] In economic benefit calculations, the cost of financing the purchase of pollution control equipment is referred to as a "discount rate." *See In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 210 (EAB 1997), *appeal dismissed*, 192 F.3d 917 (9th Cir. 1999), *vacated as moot*, 200 F.3d 1222 (9th Cir. 2000). As the Board explained in *B.J. Carney*, "[t]he discount rate is an interest rate that reflects the violator's cost of capital, [i]n essence, this is the cost of financing pollution control investments." *Id.* (quoting 61 Fed. Reg. 53,026, 53,029 (Oct. 9, 1996)). The WACC is one method of determining discount rates. It is "a method of determining the cost of capital to a company combining the debt cost of capital and equity cost of capital and weighing those costs based on the proportion of debt and equity in a company's financial structure." *B.J. Carney*, 7 E.A.D. at 210 (quoting *Friends of the Earth, Inc., v. Laidlaw Envtl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 482 n.3 (D.S.C. 1995)).

[51] Jonathan S. Shefftz, a senior associate with Industrial Economics Inc., was hired by the Region to provide an expert opinion regarding the economic benefit derived by Titan as result of Titan's noncompliance with RCRA. *See* Written Testimony of Jonathan S. Shefftz (Exhibit CX21 to Region's Pre-Hearing Exchange ("CX21-Written Testimony")). Mr. Shefftz's job with Industrial Economics Inc. involves the application of economic analysis in the context of environmental enforcement to determine, among other things, economic benefit of noncompliance, ability to pay, impact assessment, and natural resources damages. *See id.*

[52] *See* RCRA Penalty Policy at 27 ("Because the savings that are derived from delayed costs differ from those derived from avoided costs, the economic benefit from delayed and avoided cost are calculated in a different manner.").

fashion.[53] With regard to the violations in Count II, the Region concluded that Titan completely avoided the costs of compliance for a period of five years.[54] *See* CX21-Expert Report at 4.

Using the WACC methodology, the Region's expert calculated the economic benefit of avoiding compliance by estimating the present value of what timely compliance would have cost adjusted for inflation and tax deductibility. *Id.* at 3; *see* RCRA Penalty Policy at 27 ("For avoided costs, the economic benefit equals the cost of complying with the requirements, adjusted to reflect anticipated rate of return and income tax effects on the company."). The benefit from delaying compliance, on the other hand, was calculated by determining the difference between the present value of the cost of timely and untimely compliance.[55] CX21-Expert Report at 3. The expert's report explains:

> To calculate Titan's economic benefit, I use standard financial cash flow and net present value analysis techniques, based on modern and generally accepted financial principles. First, I calculate the costs of complying on-time and of complying late, adjusted for inflation and tax deductibility.

Id. at 2-3.

In comparing the costs of timely and untimely compliance the Region's expert calculated the present value of both costs as of December 2, 1999, the scheduled date for the hearing. *Id.* at 3 ("To compare the on-time and delayed compliance costs in a common measure, I calculate the present value of both streams of costs, or 'cash flows,' as of * * * December [1999]."). As Mr. Shefftz explained:

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[53] The Region found that Titan realized a cost benefit by delaying beyond the 90-day regulatory limit the removal of the hazardous waste from its facility, and from delaying the development of an adequate contingency plan. *See* Complainant's Post-Hearing Brief at 19, 29.

[54] The Region found that Titan should have developed and provided personnel training as early as 1993, but did not do so until 1998, *see* CX21-Expert Report; hence, Titan avoided training costs during this period.

[55] This is consistent with the RCRA Penalty Policy which indicates that:

> For delayed costs, the economic benefit does not equal the cost of complying with the requirements, since the violator will eventually have to spend the money to achieve compliance. The economic benefit for delayed costs consists of the amount of interest on the unspent money that reasonably could have been earned by the violator during noncompliance.

RCRA Penalty Policy at 27.

> [T]he economic benefit calculation is based on the concept of the "time value of money" For example, in simple terms, a dollar yesterday is worth more than a dollar today since one had investment opportunities for yesterday's dollar. Thus, the further in the past the dollar is, the more it is worth in "present-value" terms.

Id. at 2.

The present value of the costs of timely and untimely compliance were derived by "compounding [Titan's] annual cash flows at an estimate of Titan's cost of capital." *Id*. at 3. In explaining the reasons why his present value calculations were based on cost of capital (the WACC method), Mr. Shefftz indicated that most companies make their business decisions by adjusting cash flows to present value at their cost of capital. *Id.* at n.3. Thus, this "economic approach follows the internal analysis a company will normally perform." *Id.*

Applying the foregoing methodology, Mr. Shefftz concluded that Titan received an economic benefit of $325 for the violations in Count I,[56] $19,656 for the violations in Count II,[57] and $618 for the violations in Count III.[58] *Id.* at 4-5.

The ALJ adopted the Region's economic benefit calculations on all three counts. The ALJ agreed with the Region that while Titan claimed that the method used by the Region was flawed, Titan failed to provide its own expert testimony and failed to submit its own evidence. Init. Dec. at 10. Thus, the ALJ found no basis to reject the Region's economic benefit calculation. *Id.* at 10, 13-14, 16.

2. *Titan's Arguments on Appeal*

Titan alleges that the economic benefit calculation for each of the three counts was arbitrary and capricious. Titan Appeal at 23. More particularly, Titan

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[56] As previously explained, the parties stipulated that the violations in Count I occurred on at least eight different occasions between May 13, 1994, and April 17, 1998. The Region, however, chose to seek the economic benefit only for the last of those occurrences. *See* Joint Stipulation ¶¶ 9-16. In that instance the violation extended from January 10, 1998, the date on which Titan was required to remove the hazardous waste from its facility (i.e., 90 days after October 11, 1997, which marks the beginning of the storing period), to April 17, 1998, the date on which Titan removed the hazardous waste off-site. *See* Complainant's Post-Hearing Brief at 19.

[57] Although as of August 4, 1998, Titan had never developed or implemented a hazardous waste management training program for its employees, the Region opted only to seek the economic benefit derived from Titan's failure to provide the annual hazardous waste refresher training required by 40 C.F.R. § 265.16(c) in a five-year period. *See* Complainant's Post-Hearing Brief at 24-25.

[58] The economic benefit for Count III reflected Titan's failure to develop a contingency plan from September 1993 to August 1998. *See* Complainant's Post-Hearing Brief at 29.

claims that the method used by the Region to estimate the economic benefit of noncompliance has been criticized "as seriously flawed and highly inaccurate by courts and analysts alike," and suggests that a "risk-free rate" of 5% be used instead of the WAAC discount rate used by the Region's expert. *Id*. In support of its arguments Titan cites several district court cases that, according to Titan, stand for the proposition that the WACC methodology is "flawed" and highly "inaccurate." *Id*.

In response, the Region states that having met its burden of proof as to the selection of the discount rate method used to determine the economic benefit, the burden of challenging such selection shifted to Titan. Agency Response at 28. Because Titan did not provide its own expert's testimony or evidence to that effect, the Region asserts that Titan failed to meet its burden in this regard. *Id.*

3. *The ALJ's Determination was Not Arbitrary or Capricious*

As already stated, it is the complainant that bears both the initial burden of production and the ultimate burden of persuasion with respect to the appropriateness of the proposed penalty. *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 538 (EAB 1994). An "appropriate" penalty is one which reflects a consideration of each factor the governing statute requires to be considered, and which is supported by an analysis of those factors. *See In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 217-18 (EAB 1997), *appeal dismissed*, 192 F.3d 917 (9th Cir. 1999), *vacated as moot*, 200 F.3d 1222 (9th Cir. 2000).

Once the complainant establishes a *prima facie* case, the burdens shift to the respondent to come forward with evidence that the penalty is not appropriate. *New Waterbury*, 5 E.A.D. at 538. Respondent is then required to show: (1) through the introduction of evidence that the penalty is not appropriate because the Region had, in fact, failed to consider all the statutory factors, or (2) through the introduction of additional evidence that despite consideration of all of the factors the recommended penalty calculation is not supported and, thus, is not "appropriate." *Id*. at 538-39. Although as a procedural matter, a respondent is not obligated to present a competing economic benefit calculation, by not doing so respondent risks being assessed the penalty sought by the complainant. *B.J. Carney*, 7 E.A.D. at 227 n.75. We have also stated that for a respondent's purpose it may be sufficient merely to cross-examine the complainant's witnesses or challenge the complainant's evidence. *Id.* at 227 n.75. Of course, by waiving its right to a hearing, Titan forwent that opportunity here.

Where, as here, the Region seeks to recover a violator's economic benefit of noncompliance, and the calculation of that benefit utilizes a discount rate, the record in any given matter must contain a reasoned explanation and supportable rationale for the selection and use of the discount rate. *Id.* at 227.

In the instant case, the Region proffered the testimony of an expert witness to calculate the present value of the economic benefit of noncompliance. The expert witness provided a reasonable explanation and rationale for the selection of the WACC method. In particular, the expert witness indicated that his economic approach follows the internal analysis a company will normally perform. CX21-Expert Report at 3 n.3. The expert report explains that:

> A company must on average earn a rate of return necessary to repay its debt capital holders * * * and satisfy its equity capital owners * * *. While companies often earn rates in excess of their cost of capital, companies that do not on average earn at least their cost of capital will not survive * * *. The cost of capital therefore represents the minimum expected return a company can earn on average on monies not invested in pollution control, or viewed alternatively, represents the avoided costs of financing pollution control investments. Thus, a company should make its business decisions by adjusting cash flows to present values at its cost of capital, and my economic benefit approach follows the internal analysis a company will normally perform.

Id.

In asserting that the Region's analysis was flawed, the only support provided by Titan to rebut the Region's case is the reference to five cases and to several legal articles which, according to Titan, are critical of the WACC method as "seriously flawed and highly inaccurate." Titan Appeal at 23. We have reviewed the cases cited by Titan and conclude that they do not support Titan's position.[59]

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[59] Titan cites to the following cases in support of its assertion: *Atl. States Legal Fund, Inc. v. Universal Tool & Stamping Co.*, 789 F. Supp. 743, 749 (N.D. Ind. 1992); *United States v. Roll Coater*, No. 89-828C, 1991 U.S. Dist. LEXIS 8790, at *13 (S.D. Ind. Mar. 22, 1991); *Proffitt v. Lower Bucks County Joint Mun. Auth.*, No. 86-7220, 1988 U.S. Dist. LEXIS 4381, at *18 (E.D. Penn. May 12, 1988); *Student Pub. Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, 19 E.L.R. 20903, 20905 (D.N.J. 1989) ("*Hercules*"); and *United States v. WCI Steel, Inc.*, 72 F. Supp.2d 810 (N.D. Ohio 1999). None of these cases, however, convinces us that the Region erred in its calculation of the economic benefit component of the penalty.

In *Atl. States*, 786 F. Supp. at 751, the first case cited by Titan, the court used the defendant's "average return on equity" to estimate the economic benefit of delayed compliance. The case cited makes no reference whatsoever to the use of the WACC methodology or its alleged flaws. Likewise, contrary to Titan's suggestions, *Roll Coater*, 1991 U.S. Dist. LEXIS 8790, at *13, does not criticize the use of the WACC methodology in economic benefit calculations. Indeed, the case actually supports the use of the WACC method in that particular case.

Continued

Indeed, the only case cited by Titan that we find somewhat relevant to the issue before us, *United States v. WCI Steel, Inc*., 72 F. Supp.2d 810 (N.D. Ohio 1999), is of no aid to Titan. In *WCI Steel*, unlike the present case, each party proffered the testimony of an expert witness. The plaintiff's witness defended the use of a WACC discount rate while the defendant's witness defended the use of a risk-free rate. *See id*. at 830. The court, after observing the conflicting testimony of both experts, found the defendant's expert to be more credible and supported the use of a risk-free rate under the particular circumstances of that case. *Id*. at 831. In this case, however, Titan forfeited its opportunity to cross-examine the Region's expert on its WACC-related concerns and further failed to proffer any evidence before the ALJ that use of the WAAC method was erroneous. We also note that in *United States v. Smithfield Foods, Inc.*, 972 F.Supp. 338, 339 (E.D. Va. 1997), *aff'd* 191 F.3d 516, 531 (4th Cir. 1999), the court, persuaded by the testimony of the United States' economic benefit expert, rejected the risk-free rate analysis offered by the defendant and found the WACC method to be the best and most appropriate method to determine, in that particular case, defendant's economic benefit gained from noncompliance. Given the fact-dependent nature of penalty authorities and the absence of controlling countervailing precedent, we decline Titan's invitation to depart from the ALJ's determination, particularly in view of Titan's failure to effectively join the issue below.

IV. *CONCLUSION*

Based on the foregoing, the Board finds no error in the ALJ's decision to strike Titan's proffer of evidence, submitted with its pre-hearing brief. In addition, we uphold the ALJ's decision to strike the exhibits submitted with Titan's post-hearing brief as being untimely. Finally, the Board finds no clear error or abuse of discretion in the penalty assessed by the ALJ for each of the three counts.

(continued)

Similarly, *Proffitt*, 1988 U.S. Dist. LEXIS 4381, at *18 does not criticize the use of the WACC method. Unlike the present case, the trial judge in *Proffitt* was presented with two expert witnesses: plaintiff's expert defending the use of the EPA computer model BEN and defendant's expert propounding a different approach. The court found the testimony of the defendant to be more credible and rejected the economic benefit calculation generated by EPA's computer model because the BEN model used standard fixed rates and the defendant's expert utilized interest and inflation rates that were prevalent at the time.

Finally, in *Hercules*, 19 E.L.R. at 20905, the fourth case cited by Titan, the court adopted, with some modifications, the method employed by the plaintiff based on the BEN model over the approach suggested by the defendant, a rough estimate of the economic benefit to "avoid resorting to complicated calculations of interest rates." Because none of the methods employed in *Hercules* were used in the Region's calculation of economic benefit in the present case, *Hercules* is of no relevance in the present context.

For these reasons, the civil penalty assessed by the ALJ against Titan in the amount of $150,289, and the ALJ's order requiring that Titan take those actions listed in the compliance order,[60] are hereby upheld. Titan 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:

Mellon Bank
U.S. Environmental Protection Agency
Region VII
(Regional Hearing Clerk)
P.O. Box 360748
Pittsburgh, PA 15251-6748

So ordered.

[60] As stated earlier, paragraph 35.c. of the Complaint requires that Titan submit a closure plan in accordance with the requirements of 40 C.F.R. part 264 subpart G (Closure and Post-Closure). We note that, under certain conditions, subpart G allows the Region to replace the requirements of part 264 with alternative requirements. *See* 40 C.F.R. § 264.110(c) (allowing the Region to replace closure requirements where, among other things, it is not necessary to apply closure requirements because alternative requirements will protect human health and the environment). Nothing in this Final Decision precludes the parties from pursuing possible alternatives to closure consistent with subpart G.