BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
John A. Capozzi d/b/a/ Capozzi Custom Cabinets	)	RCRA (3008) Appeal No. 02-01
Docket No. RCRA-5-2000-005	)	

ORDER DENYING MOTION FOR RECONSIDERATION

I. *INTRODUCTION*

On April 17, 2003, the Chief of the Enforcement and Compliance Assurance Branch, Waste, Pesticides, and Toxics Division, United States Environmental Protection Agency Region V (Region V) filed a motion for reconsideration of the Environmental Appeals Board s March 26, 2003 Final Decision in the above-captioned matter. *See* Complainant-Appellant s Motion to Reconsider Final Order, and Memorandum of Law in Support (Apr. 17, 2003) (Reconsideration Motion). Region V s Reconsideration Motion raises two issues: (1) whether the Board erred in not reversing Administrative Law Judge (ALJ), Carl C. Charneski s purported failure to consider environmental harm as part of his seriousness of harm assessment under Count I of Region V s Complaint; and (2) whether the Board neglected to address Region V s argument that the ALJ failed to consider the duration of Capozzi s violation under Count I of the Complaint.

For the reasons stated below, the motion is denied.

II. *BACKGROUND*

The Board s final disposition concerns Region V s appeal from an Initial Decision issued on February 11, 2002, by the ALJ. The appeal arose out of a civil administrative enforcement action against Capozzi for alleged violations of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq*., and provisions of the Ohio Administrative Code (OAC), §§ 3745-50 to 3745-66, which are directly enforceable under RCRA § 3008(a), 42 U.S.C. § 6908(a).[1] Specifically, in the underlying Complaint, Capozzi had been charged with: (1) operating a hazardous waste management unit without a permit (Count I); (2) unlawful land disposal of hazardous waste (Count II); (3) failing to obtain analysis of hazardous waste before disposal (Count III); (4) failing to maintain hazardous waste training records (Count IV); (5) failing to have a contingency plan (Count V); and (6) failing to have a written closure plan (Count VI). The ALJ granted Region V s motion for summary judgment on the issue of liability as to Counts IV, V, and VI, but denied summary judgment as to Counts I, II, and III. After holding an evidentiary hearing on the issue of liability for Counts I, II, and III, and on the penalty issue, the ALJ found Capozzi liable for Counts I, II, and III. Region V appealed the ALJ s decision; Capozzi filed a cross-appeal.

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[1]We note that the applicable regulations are Ohio s hazardous waste regulations because the State of Ohio was granted final authorization to administer a hazardous waste program in lieu of the federal hazardous waste management program. *See* Ohio Authorization of State Hazardous Waste Management Program, 60 Fed. Reg. 38,502 (July, 27, 1995).

The Board ultimately affirmed the ALJ s ruling in all respects, giving rise to the instant Reconsideration Motion.

III. *DISCUSSION*

A. *Standards for Motions for Reconsideration*

Under the Consolidated Rules of Practice, parties may file a motion for reconsideration within ten (10) days after service of the final order. 40 C.F.R. § 22.32. Such motions must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. *Id*. As this Board has stated on numerous occasions, the filing of a motion for reconsideration should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of [the Board] clearly erroneous factual or legal conclusions. *In re Michigan CAFO Gen. Permit,* NPDES Appeal No. 02-11, slip op. at 3 (EAB, July 8, 2003) (Order Denying Motion for Reconsideration); *In re Hawaii Elec. Light Co.*, PSD Appeal Nos. 97-15 through 97-22, slip op. at 6 (EAB, Mar. 3, 1999) (Order Denying Motion for Reconsideration) (citing *In re Ariz. Mun. Storm Water NPDES Permits*, NPDES Appeal No. 97-3, at 2 (EAB, Aug. 17, 1998) (Order Denying Motion for Reconsideration)); *In re S. Timber Prods*., 3 E.A.D. 880, 889 (JO 1992).

B. *Consideration of Environmental Harm under Count I of the Complaint.*

Region V interprets the Board s Final Decision as standing for the proposition that the statutory requirement to consider the seriousness of the violation in assessing civil penalties does not require consideration of the environmental harm resulting from the violation alleged in the count for which the penalty is assessed. *See* Reconsideration Motion at 5, 13-30. As this Board has consistently held, an ALJ s penalty analysis under each count of the complaint should reflect consideration of each of the statutory factors. *See In re Employers Ins. of Wausau*, 6 E.A.D. 735, 758 (EAB 1997)(the [ALJ] must also ensure that the penalty he or she ultimately assesses reflects a reasonable application of the statutory penalty criteria to the facts of the particular violations.). Additionally, the Board has long held and continues to hold to the view that the seriousness of the violation factor under the statute is sufficiently broad to include concepts of harm to the environment, harm to the regulatory program, and the duration of the violation. *See, e.g., In re Everwood Treatment Co., Inc.*, 6 E.A.D. 589, 594 (1996) (explaining that the initial gravity-based penalty, a measurement of the seriousness of the violation, is determined by reference to the potential for harm, which refers to the risk of exposure of humans or the environment to hazardous waste and the adverse effect of noncompliance on the RCRA program, as well as consideration of a multi-day component to account for the duration of the violation).

The Board s decision in this case takes nothing away from these precepts. Rather, it stands for the proposition that, in keeping with the general principle of giving ALJs deference on questions of penalty assessment, where, as here, the combined penalty assessed for two *closely*

related counts[2] is in the Board s view appropriate, the Board will not reverse the ALJ s penalty determination on one of the two counts based solely on a failure to reference each of the statutory factors in discussing the penalty relative to that count. *See In re Chempace Corp.*, 9 E.A.D. 119, 131 (EAB 2000) (This Board generally will not substitute its judgment for that of a[n ALJ] when the penalty assessed falls within the range of penalties provided in the penalty guidelines, absent a showing that the [ALJ] committed an abuse of discretion or a clear error in assessing the penalty.).[3]

Accordingly, our decision turned on the unique facts and circumstances of this case and should not be viewed as altering the responsibility of ALJs to faithfully and meaningfully consider each of the statutory penalty factors in assessing civil penalties.

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[2]The two closely related counts at issue are Count I, which alleges that Capozzi operated a hazardous waste management unit without a permit, and Count II, which alleges that Capozzi engaged in unlawful land disposal of hazardous waste. The counts are related in the sense that Count II alleges violations of the substantive waste management requirements that would have undoubtedly been central to a properly secured hazardous waste management permit.

[3]In Count I of the Amended Complaint, Region V alleged that Capozzi operated a hazardous waste management unit without a permit in violation of Ohio Administrative Code section 3745-50-45(A). *See* Amended Complaint at 5. Section 3745-50-45(A) provides, in relevant part:

> (A) Scope of hazardous waste permit requirements. Chapter 3734 of the Revised Code requires a permit for the treatment , storage , or disposal of any hazardous waste as identified in Chapter 3745-51 of the Administrative Code. The terms treatment , storage , disposal , and hazardous waste are defined in rule 3745-50-10 of the Administrative Code. *Owners and operators of hazardous waste management units must have permits during the active life (including the closure period) of the unit.*

Id (emphasis added). Given the focus in the regulatory text on the imperative of obtaining and maintaining a permit, we do not find it necessarily incorrect for the ALJ to have interpreted this provision as being concerned primarily with ensuring the efficacy of the regulatory program. This is not to say that harm to the environment is immaterial to a violation of this kind, but rather that, in terms of relative materiality or importance, the ALJ s primary focus was not misplaced.

C. *Duration of the Violation Under Count I*

Region V argues that the Board erred in failing to reverse the ALJ s alleged failure to consider the duration of Capozzi s violation under Count I. The Region maintains that the practical effect of this alleged oversight was to leave the impression that the statutory term seriousness of the violation does not require consideration of the duration of the violation. *See* Reconsideration Motion at 8, 30-31.

Contrary to Region V s characterization of the import of our decision, we have not deviated from our established view that the duration of a violation is an important consideration in assessing penalties.[4] We arrive at a different conclusion than that advanced by the Region principally because we disagree with Region V s predicate assumption that the ALJ failed to consider the duration of Capozzi s violation under Count I. We find that the ALJ did, in fact, consider the duration of the violation, as reflected by the following discussion in the Initial Decision:

> As late as USEPA s Second Amended Complaint, the period of alleged violation in Count 1 (as well as in Counts 2 and 3) was June 30, 1995, through October 26, 1995. USEPA had ample opportunity to include in the amended complaint that the violative period relating to Count 1 encompassed May 16 to May 23, 1996, as well. It didn t. Nor did complainant articulate at the hearing, or at anytime prior to its post-hearing brief, that the events surrounding the outdoor

[4] *See In re Titan Wheel Corp. of Iowa*, RCRA Appeal No. 01-3, slip op. at 24, 49 n. 48 (EAB, June 6, 2002), 10 E.A.D. ___ (explaining that the gravity-based penalty includes the duration of the violation, and describing the duration of the violation as a significant factor in the determination of an appropriate total penalty amount under RCRA).

> burn supported the finding of an additional period of violation. Accordingly, to do so now would be manifestly unfair to respondent. To the extent that the events surrounding the outdoor burn and the OEPA inspection of May 23, 1996, cast light upon the violation alleged in the complaint, they may be considered. They may, not, however, serve as the basis for finding an additional period of violation.

Init. Dec. at 11. As can be seen, the ALJ ruled that, like Counts 2 and 3, the duration of violation for Count I was June 30, 1995, through October 26, 1995. Thus, his penalty calculation, which came on the heels of this ruling, can be assumed to have been based on this period of violation.

With respect to Region V s argument that the ALJ erred in not being more explicit on this point in calculating the penalty for Count I, the Board addressed this argument, albeit indirectly, when it ruled as follows:

> As we have explained, the ALJ is not required to strictly follow any such policy, and can depart from a penalty policy as long as he or she adequately explains the reasons for doing so. *See In re Chem. Lab Prods., Inc*., slip op. at 19, 10 E.A.D. __ ; *In re EK Assoc. L.P.*, 8 E.A.D. at 473; *In re A.Y. McDonald Indus., Inc*., 2 E.A.D. at 414. In this case, while the ALJ s rationale for reducing the penalty is admittedly brief, it is sufficiently reasoned and supported by the record to constitute an adequate justification for departing from the Penalty Policy. Specifically, rather than arbitrarily producing a penalty figure, the ALJ offered an explanation for rejecting the Region s proposed penalty on a count-by-count basis. *See, e.g., In re B&R Oil Co.*, 8 E.A.D. 39, 63-64 (EAB 1998) (holding that while the ALJ offered a terse rationale for lowering the penalty, his rationale was sufficiently reasoned because he considered the Penalty Policy in the context of how the Region applied the Policy to the respondent s penalty). The methodical approach that the ALJ followed considering the calculations produced through the Region s application of the policy and the policy-based rationale advanced by the Region, and offering a justification for arriving at a different number produced a penalty that, on the whole, strikes us as appropriate in view of the totality of the circumstances presented.

See Capozzi, slip op. at 40.

In short, Region V has failed to persuade us that we erred in our earlier assessment of this issue. Accordingly, we reject Region V s claim that the ALJ failed to consider the duration of Capozzi s violation under Count I, and deny Region V s motion for reconsideration as it relates to this issue.

IV. *CONCLUSION*

For the foregoing reasons, Region V s motion for reconsideration of our Final Decision is denied.

So ordered.[5]

ENVIRONMENTAL APPEALS BOARD

Dated: 10/16/03

By /s/
Scott C. Fulton
Environmental Appeals Judge

[5] The three-member panel deciding this matter is comprised of Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich. *See* 40 C.F.R. § 1.25(e)(1)(2002).

CERTIFICATE OF SERVICE

I hereby certify that copies of the Order Denying Motion for Reconsideration in the matter of John A. Capozzi d/b/a Capozzi Custom Cabinets, RCRA Appeal No. 02-01, were sent to the following persons in the manner indicated:

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