IN RE CARROLL OIL COMPANY

RCRA (9006) Appeal No. 01-02

FINAL DECISION

Decided July 31, 2002

Syllabus

U.S. EPA Region VIII ("Region") appeals from an Initial Decision in which the Administrative Law Judge ("ALJ") assessed a civil penalty of $3,500 upon Carroll Oil Company ("Carroll Oil"), an inactive gas station located in Cheyenne, Wyoming, for failing to permanently close its underground storage tanks ("USTs") in accordance with regulations at 40 C.F.R. part 280 subpart G ("UST closure regulations").

The UST closure regulations, part of a comprehensive regulatory program for USTs implementing Subtitle I of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k, require that owners or operators of USTs that temporarily close for a period exceeding 12 months either achieve new performance or upgraded standards for their USTs or otherwise permanently close. The UST closure regulations also prescribe procedures for UST owners and operators to follow in permanently closing their tanks, such as cleaning USTs and either removing USTs or filling them with an inert material. In addition, the UST closure regulations require that owners and operators conduct a site assessment to characterize potential releases from USTs, and take corrective action if a release is detected.

On July 27, 1998, the Region conducted an inspection of Carroll Oil's Western 66 Facility ("Facility"). The inspectors found visible amounts of gasoline in the Facility's USTs and noted that the USTs did not meet performance standards for new or upgraded USTs. According to Mr. Neil Carroll ("Mr. Carroll"), the president and sole stockholder of Carroll Oil, the company had stopped actively using its USTs in September 1991.

On July 28, 1999, the Region filed an administrative complaint ("Complaint") against Carroll Oil, charging the company with violating the UST closure regulations. The Region alleged that the company had temporarily closed its tanks for a period exceeding 12 months, did not meet performance standards for new or upgraded USTs, and failed to permanently close its USTs in accordance with the required procedures. The Region proposed a $19,500 penalty for the alleged violations, which it calculated in accordance with the penalty guidelines the EPA has developed for UST violations (the "Penalty Policy"). Together with its Complaint, the Region issued a compliance order to obtain the company's compliance with permanent closure requirements.

In its Answer, Carroll Oil admitted its liability but raised the affirmative defense that it could not pay the proposed penalty or comply with the compliance order because of lack of financial resources.

Following the filing of its Complaint, the Region sought to obtain detailed information from Carroll Oil regarding its affirmative defense of inability to pay. In particular, the Region sought to obtain detailed financial information about two other affiliated entities — Pershing Service, Inc. ("Pershing Service") and Cheyenne Vending and Amusement, Inc. Carroll Oil declined to respond to questions regarding these entities on the ground that they were not parties to the case.

On March 31, 2000, the Region filed a motion to amend its Complaint ("Motion to Amend") to include Pershing Service and Neil Carroll as additional respondents, or alternatively, to examine their assets in consideration of Carroll Oil's inability to pay claim. At the evidentiary hearing, the ALJ issued a bench decision denying the Region's Motion to Amend. The ALJ provided numerous, independent reasons in support of his determination, including prejudice to Carroll Oil from the Region's delay in filing the Motion.

In his Initial Decision, the ALJ assessed a $3,500 penalty against Carroll Oil, significantly reducing the penalty from the amount sought by the Region. In assessing a penalty, the ALJ decided not to apply the Penalty Policy, stating that the Region's application of the Penalty Policy was "flawed" and that as applied by the Region, "the basic propositions of the Policy did not yield an appropriate penalty." Instead, the ALJ applied the Subtitle I statutory penalty factors directly to the violation. Among his grounds for departing from the Penalty Policy, the ALJ maintained that the Region, in determining the penalty's "gravity" component pursuant to the Penalty Policy, had failed to address the actual harm associated with Carroll Oil's violation. He also stated that, contrary to the Region's assertions, the amount of product that might have been released from the company's USTs before the period of temporary closure was irrelevant to the calculation. With regard to the "gravity" component, the ALJ further stated that the Region inappropriately enhanced the penalty based on the violation's duration and Carroll Oil's lack of cooperation without considering the company's limited financial ability to comply with the law. In addition, the ALJ concluded that assessing an economic benefit component under the Penalty Policy to capture the economic gain the company reaped through noncompliance was inappropriate given the company's alleged financial hardship. Finally, the ALJ declined to order Carroll Oil to comply with the UST requirements on the ground that doing so would be "futile" in light of the company's "defunct" state.

In appealing the Initial Decision, the Region contends that the ALJ erred by denying its Motion to Amend, assessing a $3,500 penalty absent a rational basis for departing from the Region's penalty calculation under the Penalty Policy, and determining that Carroll Oil lacked the financial ability to return the Facility to compliance.

Held: (1) The ALJ did not abuse his discretion in denying the Region's Motion to Amend, notwithstanding the liberal pleading policy that the Board has followed in previous decisions. Here, the ALJ's determination that granting the Motion to Amend would result in undue prejudice to Carroll Oil and cause undue delay in the proceeding constituted a sufficient basis for his denial of the Motion. In particular, amending the Complaint to add Pershing Service and Mr. Carroll as respondents constituted substantive new claims that likely would have required additional fact-finding and investigation and the development of new legal theories shortly before trial, thereby causing potential prejudice to Carroll Oil. Moreover, the rules governing this proceeding, at 40 C.F.R. part 22, accord significant deference to presiding officers' efforts to assure judicial economy and avoid undue delay in proceedings.

(2) The ALJ failed to provide a compelling reason for choosing not to apply the Penalty Policy in assessing a penalty. In this regard, the ALJ's penalty assessment:

- undercuts, rather than facilitates, the application of the twin statutory penalty factors of "seriousness of violation" and "good faith efforts to comply with the applicable requirements" that must ultimately form the basis of any penalty determination. The ALJ's determination that the Region did not assess the "actual gravity" of Carroll Oil's violation is inconsistent with previous decisions by the Board making it clear that "seriousness of a violation" is, or can be, based on potential rather than actual harm. Moreover, the ALJ's determination that the Region inappropriately enhanced the penalty based on the duration of the violation without considering the company's financial ability to comply is misdirected given that the company's protracted failure to conduct a site assessment aggravated the potential harm associated with its violation. In addition, the ALJ misapprehends the statutory factor of "good faith" in charging that the Region inappropriately enhanced the penalty based on the company's lack of cooperation without considering its financial situation. By failing to respond to and act upon communications regarding its UST closure obligations, Carroll Oil, regardless of its financial status, did not demonstrate a minimum degree of diligence, concern, or initiative constituting "good faith."

- inappropriately ignores the economic benefit of Carroll Oil's noncompliance. An entity's allegedly defunct financial status does not per se bar imposition of an economic benefit component under the Penalty Policy and the statute. Even if an entity is defunct, it may still have reaped ill-gotten gains from previous malfeasance that may enable it, or its successors, to obtain unfair market advantages.

Because the ALJ did not provide a compelling reason for deciding not to apply the Penalty Policy, the ALJ's penalty determination does not merit the Board's usual deference. The Board will, therefore, perform its penalty analysis *de novo,* consistent with the procedural rules at 40 C.F.R. part 22.

(3) Carroll Oil did not provide sufficient information regarding its financial situation to support its affirmative defense of inability to pay the penalty, on which it bore the burden of presentation and persuasion. Consequently, Carroll Oil is not entitled to a penalty reduction on the basis of ability to pay.

(4) Using the Penalty Policy as a starting point to apply the statutory penalty factors, the Board imposes a final penalty of $13,725 upon Carroll Oil for its violation of the UST closure regulations. The Board largely adopts the Region's penalty calculation but downgrades the violation's "potential for harm" from "major" to "moderate" in light of evidence in the record indicating that Carroll Oil's USTs contained a relatively small amount of gasoline during the period of closure.

(5) Regarding the Region's compliance order, the ALJ lacked an adequate basis for concluding that Carroll Oil did not have the financial ability to comply with UST closure regulations. Moreover, companies are generally required to comply with their environmental requirements regardless of economic circumstance. Therefore, the Region's compliance order is reinstated.

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

Opinion of the Board by Judge Fulton:

I. *INTRODUCTION*

In this proceeding, U.S. EPA Region VIII ("Region") appeals from an Initial Decision by Administrative Law Judge ("ALJ") William P. Moran imposing a penalty of $3,500 upon Carroll Oil Company ("Carroll Oil") for its admitted failure to permanently close its underground storage tanks ("USTs") as prescribed by regulations contained in 40 C.F.R. part 280 ("UST regulations").[1] The Region appeals the amount of the penalty as well as the ALJ's denial of a motion to amend the Region's Complaint to include additional respondents. In addition, the Region challenges the ALJ's decision not to order Carroll Oil to come into compliance.

II. *REGULATORY BACKGROUND*

The UST regulations are part of a comprehensive regulatory program for USTs implementing Subtitle I of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k.[2] The UST regulations, authorized by RCRA § 9003, 42 U.S.C. § 6991b,[3] and promulgated in 1988, are designed to prevent, detect, and clean up releases from USTs containing petroleum and other regulated substances.[4] In describing this comprehensive regulatory program, the preamble to the UST regulations emphasized that of the nation's then 700,000 UST systems, "10 to 30 percent" had "leaked or [were] presently leaking," constituting an "important threat to the nation's groundwater resources." 53 Fed. Reg. 37,082, 37,097 (Sept. 23, 1988). Furthermore, the preamble to the UST regulations identified USTs lacking the types of protective features discussed below as a

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[1] Carroll Oil did not file a brief in response to the Region's appeal. Because we are thus without the benefit of Carroll Oil's views on appeal, we will look to Carroll Oil's filings below and to the ALJ's decision for the thrust of Carroll Oil's position.

[2] Subtitle I is contained in sections 9001 through 9008 of RCRA, 42 U.S.C. §§ 6991-6991i.

[3] RCRA § 9003(a) directs the Administrator to "promulgate release detection, prevention, and correction regulations applicable to all owners and operators of underground storage tanks, as may be necessary to protect human health and the environment." 42 U.S.C. § 6991b(a).

[4] RCRA Subtitle I defines "regulated substances" as "petroleum" and any substances falling within the definition of section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601(14), except for those substances defined as "hazardous" under Subtitle C of RCRA. RCRA § 9001(2), 42 U.S.C. § 6991(2).

leading cause of tank failure contributing to this threat. *See* Complainant's Exhibit ("C Ex.") 16; 53 Fed. Reg. at 37,101 (preamble).

One of the most important features of the UST regulations is the requirement for UST owners and operators to phase in modern design, construction, and installation standards for the purpose of preventing releases of regulated substances from USTs due to corrosion, overspilling, and overfilling. To this end, the UST regulations require that owners and operators of USTs installed after December 22, 1988,[5] ("new UST systems") adhere to certain "performance standards." *See* 40 C.F.R. § 280.20. For "existing UST systems" (those whose installation began before the above date), the regulations require that owners and operators either meet the performance standards for new USTs or upgrade their USTs not later than December 22, 1998. *See id.* § 280.21. Upgrading can be accomplished by adding to USTs certain protective features, such as linings for tanks and pipes, corrosion protection, and equipment to prevent overspilling and overfilling. See *id*.

The regulations found at 40 C.F.R. part 280 subpart G ("UST closure regulations"), which Carroll Oil was charged in this proceeding with violating, address the closure of existing UST systems. These provisions require that USTs that temporarily close for a period exceeding twelve months either achieve new performance or upgraded standards at the end of this period or otherwise permanently close. *See id.* §§ 280.70-.74. These provisions further prescribe procedures for owners and operators to follow in permanently closing their USTs. *See id.* §§ 280.71-.72.

In particular, to permanently close an UST, an UST owner or operator must "empty and clean [the UST] by removing all liquids and accumulated sludges." *Id.* § 280.71. In addition, the out of service UST must be either removed from the ground or "filled with an inert solid material." *Id.*

Moreover, the closure procedures emphasize the need for UST owners and operators to characterize UST sites for the presence of releases and to take corrective action against releases if they are discovered. *See id.* § 280.72(a). In this regard, UST owners and operators are directed, before permanent closure, to perform a site assessment "to measure for the presence of a release where contamination is most likely to be present at the UST site," taking into consideration "the nature of the stored substance, the type of backfill, the depth to ground water, and other factors appropriate for identifying the presence of a release." *Id.* If a release is discovered based on this characterization, the UST closure regulations further obligate owners and operators to "begin corrective action in accor-

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[5] December 22, 1988, marks the date the UST regulations went into effect. *See* 53 Fed. Reg. 37,082 (1988).

dance with subpart F [of the UST regulations]." *Id.* § 280.72(b). The corrective action requirements at subpart F, which apply to owners and operators of UST systems, provide for reporting, investigation, abatement, removal, and corrective action in response to "confirmed releases" of petroleum and hazardous waste from UST systems. *See id.* § 280.60.

In this proceeding, Carroll Oil, whose USTs did not meet new performance or upgrade standards, admitted that it was subject to the requirement to permanently close its USTs, and that it had failed to do so following the procedures prescribed by the UST closure regulations.

III. *FACTUAL AND PROCEDURAL BACKGROUND*

Following is a description of the factual and procedural background of this case. This rather lengthy and detailed account will facilitate a clearer understanding of the issues on appeal, discussed in Part IV, below.

The Western 66 facility ("Facility"), a currently out-of-business gas station located in a commercial area of Cheyenne, Wyoming, is owned and was formerly operated by Carroll Oil, a Wyoming corporation.[6] C Ex 16. Neil R. Carroll ("Mr. Carroll") serves as Carroll Oil's president, vice-president, treasurer, and secretary and is the company's sole stockholder. Transcript of EPA Hearing Proceedings ("Tr") at 204; C Ex. 29. During its active operations, which ended in 1991, the company stored gasoline in USTs located at the Facility. C Ex. 29. At the time this proceeding began, the company was in delinquent standing with the Secretary of State of Wyoming for failing to file its annual corporate report. *See* Stipulations of Facts and Exhibits ("Stip.") ¶ 5.

On July 27, 1998, three inspectors (two from the Region and one from the Wyoming Department of Environmental Quality ("WDEQ")) inspected the Facility. C Ex. 2. During their inspection, the inspectors observed that the Facility had three USTs — one 8,000-gallon tank and two 6,000-gallon tanks. Tr. at 91. The first was installed in 1975, and the others were installed in 1966. Stip. ¶ 9. The USTs lack features such as protective lining and overspill protection and, according to records submitted to the State of Wyoming by Mr. Carroll, are of bare steel or asphalt-coated construction. C Exs. 2, 16-17; Tr. at 92. The inspectors also noted that the USTs contained visible amounts of gasoline. Tr. at 92. In their

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[6] The State of Wyoming operates an UST program under delegation from the EPA. The program, the Oil Pollution from Underground Storage Tanks Corrective Action Act of 1990, has requirements that are identical to EPA's program. Transcript of EPA Hearing Proceedings at 125. Since Wyoming's UST program has not been approved by the Agency as a substitute for the federal UST program pursuant to RCRA § 9004, 42 U.S.C. § 6991c, the EPA presently enforces federal UST requirements in Wyoming.

inspection report, the inspectors noted that the gas station was "boarded up" and that Mr. Carroll had told them that the company had gone out of business in 1990 or 1991. C Ex. 2. According to Mr. Carroll, the USTs had been removed from active use on the approximate date of September 10, 1991, and most of the gasoline within them had been pumped out into drums and taken off site. C Ex. 2; Stip. ¶ 12; Tr. at 219.

Prior to the date of the Region's inspection, Carroll Oil had received numerous communications from WDEQ regarding the company's need to comply with UST closure requirements. For example, in March 1993, the WDEQ, apparently after receiving notification from Carroll Oil that the company's USTs were out of use, informed the company of the steps it should take to achieve compliance with the UST closure regulations and requested the company's response within 30 days. C Ex. 15 (Letter from Pat Jordan, WDEQ, to Carroll Oil Co. (Mar. 2, 1993)). Several months later, Carroll Oil's counsel replied that the company could not undertake tank removal and other closure procedures because of economic difficulties that had forced an end to its business operations. C Ex. 13 (Letter from Georg Jensen to Pat Jordan, WDEQ (Dec. 6, 1993)). In reply, WDEQ reiterated the company's continuing noncompliance with closure regulations, and advised the company to notify the WDEQ of the company's plan to achieve compliance within ten days. C Ex. 12 (Letter from Pat Jordan, WDEQ, to Georg Jensen (Dec. 10, 1993)). In a letter to the Region, the WDEQ noted that it had not received responses from Carroll Oil and requested that the Region undertake "the appropriate enforcement action." C Ex. 11 (Letter from LeRoy Feusner, WDEQ, to Suzanne Stevenson, Region VIII (Jun. 30, 1994)). On August 9, 1994, the Region sent an information request letter to Carroll Oil pursuant to 42 U.S.C. § 6991(d), in which it sought information concerning the Facility, monitoring and release detection records, and information on any UST closure activities. C Ex. 10 (Letter from J. William Geise, Jr., Region VIII, to Neil Carroll, Carroll Oil (Aug. 9, 1994)). Carroll Oil did not reply to the Region's information request.

During this time, the Facility continued to receive notices of other state and federal UST obligations. In various communications to Carroll Oil, the WDEQ notified the company that it was in arrears on state tank fees it owed to cover the costs of corrective action and third-party compensation in the event of a release from its tanks.[7] It also advised Carroll Oil that the company had not provided

[7] As part of financial responsibility requirements mandated by RCRA Subtitle I, Wyoming requires owners or operators of storage tanks (both underground and above-ground) containing regulated substances (as defined by Subtitle I) to pay yearly fees of $200 per tank into a state fund to qualify for coverage of corrective action and third-party compensation in the event of accidental releases from such tanks. *See* RCRA § 9003(d), 42 U.S.C. § 6991b(d); Wyo. Stat. Ann. §§ 35-11-1424, -1427 (Michie 2001); Tr. at 125-30. In this regard, Wyoming financial responsibility requirements are broader than the federal requirements since RCRA Subtitle I only applies to USTs. *See* RCRA § 9003(a); 42 U.S.C. § 6991b(a).

required annual tank notices for many years.[8] *See* C Exs. 5, 8-9, 12. At the time of the inspection, the company owed fees on its three USTs from 1994, 1996, 1997, and 1998. Tr. at 129-30; *see also* C Exs. 4-9.

On June 28, 1999, the Region filed a complaint ("Complaint"), pursuant to RCRA § 9006(d), 42 U.S.C. § 6991e(d),[9] against Carroll Oil, alleging violations of the UST regulations over a five-year period. The Region specifically alleged that Carroll Oil had violated 40 C.F.R. § 280.70(c), which states that:

> When an UST system is temporarily closed for more than 12 months, owners and operators must permanently close the UST system if it does not meet either performance standards in 40 C.F.R. § 280.20 for new UST systems or the upgrading requirements in 40 C.F.R. § 280.21. * * * Owners and operators must permanently close the substandard UST systems at the end of this 12-month period in accordance with 40 C.F.R. §§ 280.71-280.74, *unless* the implementing agency provides an extension of the 12-month temporary closure period. Owners and operators must complete a site assessment in accordance with 40 C.F.R § 280.72 before such an extension can be applied for.

40 C.F.R. § 280.70(c).

In charging a violation, the Region asserted that Carroll Oil: (1) had temporarily closed its USTs for a period exceeding 12 months; (2) did not meet performance standards for new or upgraded USTs; (3) did not obtain an extension from EPA or the WDEQ of the 12-month temporary closure period; and (4) failed to permanently close its USTs in accordance with 40 C.F.R. § 280.70(c). Complaint ¶¶ 18-25.

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[8] Wyoming law requires owners or operators of storage tanks (both underground and above-ground) containing regulated substances (as defined by RCRA Subtitle I) to register their storage tanks on or before July 1 of each year, providing to the WDEQ such information as the identity and address of owners and operators; the location, age, size and contents of each tank; whether or not tanks are in use; testing data on tanks; and the availability and amount of financial assurance to cover corrective action and third-party damages. Wyo. Stat. Ann. § 35-11-1419 (Michie 2001).

[9] RCRA § 9006(d) provides, in relevant part, that "[a]ny owner or operator of an underground storage tank who fails to comply with * * *any requirement or standard promulgated by the Administrator under section 6991b of this title * * * shall be subject to a civil penalty not to exceed $10,000 for each tank for each day of violation." 42 U.S.C. § 6991e(d). The statutory penalty maximum was increased to $11,000, pursuant to the Debt Collection Improvement Act of 1996, s*ee* 31 U.S.C. § 3701, and applies to violations under § 9006(d) that occur after January 30, 1997. *See* 40 C.F.R. pt. 19 (Adjustment of Civil Monetary Penalties for Inflation).

The Region proposed a total penalty of $19,500 for the alleged violation, *see* Complaint at 7, which it calculated in accordance with the penalty guidelines the EPA has developed for UST violations. *See* C Ex. 22 (U.S. EPA, *Penalty Guidance for Violations of UST Regulations* (Nov. 1990)) ("Penalty Policy"). It calculated the penalty for a five-year period extending from July 27, 1993, to July 27, 1998, the date of the inspection. Tr. at 79.

Together with its Complaint, the Region, pursuant to RCRA § 9006(a), 42 U.S.C. § 6991e(a),[10] issued a compliance order to obtain, *inter alia*, the company's compliance with the following closure requirements: cleanup of its USTs by removal of liquids and accumulated sludges (40 C.F.R. § 280.71) (Compliance Order ¶ 3); removal of the USTs from the ground or filling them up with an inert material (40 C.F.R. § 280.71) (Compliance Order ¶ 4); performance of a site assessment prior to permanent closure in order to measure for the presence of releases (40 C.F.R. § 280.72) (Compliance Order ¶ 5); and performance of corrective action in the event a site assessment reveals contamination (40 C.F.R. § 280.72) (Compliance Order ¶ 6).

In addition, the compliance order directed Carroll Oil to pay all of its outstanding tank fees, including late fees owed to the WDEQ, or, in the alternative, to demonstrate financial assurance to the EPA and WDEQ in accordance with RCRA § 9003(d), 42 U.S.C. § 6991b(d). Compliance Order ¶ 7. The compliance order also required the company to submit a "Notification of USTs" form to the WDEQ and EPA indicating the "present status" of its USTs. The compliance order specified timetables for completing the above actions and instructed Carroll Oil to provide documentation of their completion. Compliance Order ¶ 8.

In its August 4, 1999 Answer, Carroll Oil admitted that it had failed to permanently close its USTs twelve months after they were temporarily closed, as required by the UST regulations. *See* Answer ¶ 1. However, in "affirmative defense," the company stated that it could not pay the proposed penalty or comply with the compliance order because of lack of financial resources. *Id.* ¶ 8.

In a prehearing order filed September 13, 1999, the ALJ directed the parties to submit their prehearing exchanges. The ALJ also directed Carroll Oil to "furnish supporting documentation such as financial statements or tax returns" if the company intended to assert that it was unable to pay the proposed penalty" or that payment would "have an adverse effect on Respondent's ability to continue in business." Prehearing Order at 2.

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[10] RCRA § 9006(a) provides, in relevant part, that "whenever on the basis of any information, the Administrator determines that any person is in violation of any requirement of this subchapter, the Administrator may issue an order requiring compliance within a reasonable specified time period * * *." 42 U.S.C. § 6991e(a)(1).

The Region and Carroll Oil submitted their initial prehearing exchanges on November 9, 1999 (Region) and November 12, 1999 (Carroll Oil). On November 9, 1999, Carroll Oil filed with the EPA an annual tank notification form, in which it reported an additional 500-gallon tank at the Facility. C Ex. 20.

At this time, the Region, in a letter to Carroll Oil's counsel, sought further information regarding Carroll Oil's claim that it was financially unable to pay a penalty. *See* C Ex. 26 (Letter from Amy Swanson, Region VIII, to Brenda Hammit, Esq. (Nov. 10, 1999)). In its letter, the Region requested that the company fill out a financial questionnaire, entitled "Ability To Pay Claim Form," that would permit the Region to evaluate the company's financial data.

Carroll Oil responded to the Region's information request with limited data. *See* C Ex. 27 (Letter from Brenda Hammitt, Esq., to Amy Swanson, Region VIII (Nov. 19, 1999)). On March 14, 2000, the Region, in an attempt to obtain additional information about Carroll Oil, sent the company's counsel a questionnaire entitled "Financial Business Questionnaire Pertaining to Respondent's Inability to Pay Claim." C Ex. 28. Besides inquiring about Carroll Oil's finances, the questionnaire sought detailed information about two other entities, Pershing Service, Inc. and Cheyenne Vending and Amusement, Inc., which the Region indicated were affiliated with Carroll Oil. *Id.;* Tr. at 176.

On March 29, 2000, the ALJ filed a hearing notice in which he scheduled a hearing for May 18 and 19, 2000, and stated that motions in the proceeding could not be filed after April 14, 2000. On March 31, 2000, the Agency filed a motion to amend its complaint, seeking to add Pershing Service, Inc. ("Pershing Service"), a Wyoming corporation, and Neil Carroll, as additional respondents, or, alternatively, to examine the assets of the above in consideration of Carroll Oil's inability to pay claim. *See* Motion to Amend Complaint ("Motion to Amend"). On April 11, 2000, the Region filed its First Supplemental Prehearing Exchange.

On April 27, 2000, Carroll Oil filed an objection to the Region's Motion to Amend. *See* Respondent's Objection to Complainant's Motion to Amend Complaint. Although Carroll Oil's objection was filed late according to the governing procedural rules, the ALJ, during a conference call between the parties held on April 28, 2000, stated that he would be amenable to a motion from Carroll Oil seeking an extension of time to file its objection to the Motion to Amend. The ALJ, during the conference call, denied the Region's request that, in view of Carroll Oil's tardy response, he grant the Region's Motion to Amend. However, the ALJ acceded to the Region's request to hold oral argument on the Motion to Amend immediately prior to the upcoming hearing. *See* Tr. at 9. Carroll Oil subsequently filed a motion to extend the time period to permit the late-filed objection, to which the Region filed a response. *See* Respondent's Motion for Extension of Time to File Response; Complainant's Objection to Respondent's Motion for Extension of Time to File Response.

On May 4, 2000, the two parties, in accordance with the ALJ's prehearing order, filed a joint statement stipulating to facts not genuinely in dispute. *See* Stipulations of Facts and Exhibits. The parties agreed that "the issues genuinely remaining in dispute are whether a penalty should be assessed and whether the requirements of the compliance schedule should be imposed based on [Carroll Oil's] claim of impossibility due to economic hardship." Stip. at 4.

On May 8, 2000, the Region received Carroll Oil's response to its March 14, 2000 questionnaire. Carroll Oil did not reply to questions regarding Pershing Service and Cheyenne Vending and Amusement, Inc., stating that these entities "are not party to or part of this litigation." C Ex. 29.

At the start of the evidentiary hearing held May 18 and 19, 2000, the ALJ, after hearing the parties' oral arguments, issued a bench decision denying the Region's Motion to Amend. Tr. at 38-46. His decision recited ten "independent" reasons for denying the Region's Motion to Amend. Tr. at 42. Following the evidentiary hearing, which addressed the issues of the penalty and Carroll Oil's affirmative defense of lack of financial resources, the Region, on June 19, 2000, filed a motion seeking reconsideration of the ALJ's denial of its Motion to Amend. *See* Complainant's Motion for Reconsideration. Each party filed a post-hearing brief, to which each filed a reply brief. *See* Complainant's Brief in Support of Proposed Findings of Fact, Conclusions of Law and Proposed Order; Respondent's First Post-Hearing Brief; Respondent's Reply to Complainant's Brief in Support of Proposed Findings of Fact; Conclusions of Law, and Proposed Order; Complainant's Reply Brief to Respondent's Post-Hearing Brief.

In an Initial Decision dated April 30, 2001, the ALJ denied the Region's Motion for Reconsideration seeking amendment of the Complaint. Initial Decision ("Init. Dec.") at 3-12. The ALJ also assessed a penalty of $3,500 against Carroll Oil, significantly reducing the penalty from the $19,500 sought by the Region, principally because of the Region's failure to adequately consider in its penalty calculation Carroll Oil's limited ability to comply because of its financial situation. *Id.* at 17. In so doing, the ALJ chose not to apply the Agency's UST Penalty Policy and rather based his penalty determination solely on the statutory penalty assessment factors. *Id.* In addition, the ALJ refused to enter a compliance order against Carroll Oil on the ground that such an action would be "useless" and "futile" given the company's financially "defunct" status. *Id.* at 20.

In an appeal brief filed July 6, 2001, the Region contended that the ALJ erred by:

> (1) Denying EPA's Motion to Amend to include Pershing Service and Mr. Carroll as additional parties;

> (2) Assessing a $3,500 penalty absent a rational basis for disregarding the Region's penalty calculation under the Penalty Policy, and based on inappropriate consideration of the statutory penalty factors;
>
> (3) Determining that Carroll Oil was unable to pay a penalty and return the facility to compliance because Carroll Oil failed to sustain its burden of proof and provide substantial evidence to support such a finding; and
>
> (4) Denying the Region's Motion to Amend to consider the financial status of Pershing Service and Mr. Carroll in examining Carroll Oil's ability to pay the penalty.

Appeal Brief ("Appeal") at 1-2.

For the reasons discussed below, we uphold the ALJ's decision to deny the Region's Motion to Amend its Complaint. Also, we conclude that the ALJ erred by departing from the Penalty Policy and in determining that Carroll Oil was unable to pay the proposed penalty, and impose a final penalty of $13,725. In addition, we reinstate the Region's Compliance Order.

IV. *DISCUSSION*

A. *Region's Motion to Amend*

The Region maintains that the ALJ erroneously denied its Motion to Amend the Complaint to include Pershing Service, and Mr. Carroll in his individual capacity, as respondents. Appeal at 15.

As described in its Motion to Amend, the Region sought to add Pershing Service as a respondent based on materials the Region had received from WDEQ on January 20, 2000. *See* Motion to Amend at 2. These materials consisted of a check and accompanying invoice that Mr. Carroll had submitted to WDEQ on December 31, 1999, in partial payment of delinquent Wyoming state tank registration fees for the Western 66 facility. *See id*; C Exs. 18-19. The Region noted that Mr. Carroll had "crossed out Carroll Oil Company, Inc. and written in Pershing Service, Inc., as the owner of the Facility's USTs" on both the check and invoice. Motion to Amend at 2. The Region also claimed that Mr. Carroll wrote a note at the bottom of the invoice stating that "Pershing Service, Inc. has owned this station the last 9 years." *Id.* In addition, the Region sought to add Mr. Carroll as a Facility "operator" based on his "service throughout the history of the Facility operations as president of Carroll Oil Company and personal participation in, control of and/or responsibility for the Facility's daily operations, including but not

limited to the underground storage tanks." *Id.* at 2. In this regard, the Region notes that Mr. Carroll previously identified himself as "Contact Person in Charge of Tanks" in the UST notification forms he submitted to the State of Wyoming in 1992 and 1999. *Id.*

In denying the Region's Motion for Reconsideration, the ALJ defended the rationale he provided in his bench decision to deny the Region's Motion to Amend. Among the multiple, "independent" reasons he listed in his bench decision, the ALJ identified the following as "procedural reasons" warranting denial of the Motion to Amend:

> (1) The Region unduly waited until March 31, 2000, at the "eleventh hour," to file its Motion to Amend to add new parties, despite knowing that Carroll Oil was in delinquent corporate status at the time of its Complaint on June 24, 1999 — which should have alerted the Region to Carroll Oil's financial difficulties;
>
> (2) The Region unduly delayed filing its Motion to Amend until March 31, 2000, despite knowing at least as early as January 20, 2000, that Pershing Service was a potential owner or operator of Western 66, and that Mr. Carroll was a potential owner/operator;
>
> (3) The Region failed to allege that Carroll Oil was a sham corporation;
>
> (4) The Region failed to seek to "pierce the corporate veil" in alleging that Pershing Service was a liable owner;
>
> (5) The Region did not avail itself of additional discovery provisions of 40 C.F.R. § 22.19 to determine whether other owner/operators existed; and
>
> (6) The documents that the Region used to support its Motion to Amend were not attached to the Motion as instructed by the governing regulations at 40 C.F.R. § 22.16, but rather were included in Region's subsequent Supplemental Hearing Exchange filed eleven days later. In addition, the Region failed to reference these documents as those described in the Motion to Amend until May 10, 2000, "only eight days before the trial."

See Tr. at 37-42; Init. Dec. at 3-6.

In his Initial Decision, the ALJ cited two additional "independent," record-based grounds for denying the Motion to Amend:

> (1) The Region lacked a record basis for adding Pershing Service as a party because Mr. Carroll's handwritten notes on the check and invoice lent themselves to contradictory interpretations and in addition, the Region had "conceded" that in all previous correspondence between it and "Carroll Oil," Carroll Oil had identified itself as the owner of Western 66 Facility; and
>
> (2) Mr. Carroll's signature as the contact person for Carroll Oil did not establish that he was the owner or operator of the violating facility.

Init. Dec. at 5, 9, 11.

In its appeal brief, the Region generally asserts that the ALJ failed to adhere to the Board's liberal pleading policy on amendment of complaint and therefore "committed reversible error." *See* Appeal at 15-17. The Region also seeks to rebut each of the ALJ's procedural arguments for denying the Motion to Amend.[11] In addition, the Region asserts that contrary to the ALJ's determination, it had established an appropriate "factual basis" for naming Pershing Service as an "owner" and Mr. Carroll as an "operator" based on how these terms are defined in the UST closure regulations.[12] Appeal at 25-26. The Region also argues that its substantive case is bolstered by the decision in *United States v. Bestfoods*, 524 U.S. 51 (1998), in which the Supreme Court found, in a CERCLA case, that a parent corporation could be found directly liable as an "operator" of a facility owned by a

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[11] Challenging the ALJ's procedural reasons for denying its Motion to Amend, the Region asserts that: (1) its Motion was not untimely as it was filed "two weeks" before the Motion Deadline, *see* Appeal at 27-28; (2) Carroll Oil's delinquent status with the Wyoming Secretary of State is based on its annual filing of reports and is completely unrelated to a corporation's financial condition, *see id.* at 28; (3) under the recent holding in *United States v. Bestfoods*, 524 U.S. 51 (1998), the Region was not required to pierce the corporate veil or allege that Carroll Oil was a "sham corporation" to name Pershing Service or Mr. Carroll as liable owner/operators of the USTs at the Facility, *see id.* at 25-26; (4) the governing regulations, 40 C.F.R. pt. 22, did not require it to use discovery to obtain financial information from Carroll Oil, and that in any case, it had "twice tried by letter to request pertinent information * * * and there is nothing to suggest that the Company's answers to discovery would be any more forthcoming than its answers to EPA's letters," Appeal at 27; and (5) although the documents supporting the Motion to Amend were not attached to its Motion, they were, nevertheless, part of the administrative record, and as such adequately notified the court of the existence of these documents. *See id.* at 29.

[12] Section 280.30 defines owner as "any person who owns an UST system used for storage, use, or dispensing of regulated substances" and operator as "any person in control of, or having responsibility for, the daily operation of the UST system." 40 C.F.R. § 280.30.

subsidiary corporation without the need to pierce the corporate veil if that parent managed, directed, and conducted operations specifically related to pollution at that facility. *Id.* at 65. The Region contends that, with respect to their activities, Mr. Carroll and Pershing Service met the direct liability test articulated in *Bestfoods.* Appeal at 25-26.

The regulations governing this proceeding at 40 C.F.R. part 22 do not specify the circumstances under which ALJs should grant motions to amend complaints; rather, they more generally state that after a respondent has filed an answer, the "complainant may amend the complaint only upon motion granted by the Presiding Officer." 40 C.F.R. § 22.14(c). In the absence of administrative rules on this subject, it is helpful to consult the Federal Rules of Civil Procedure as they apply in analogous situations.[13]

The Federal Rules of Civil Procedure adopt a permissive stance toward amending pleadings. The Rules declare that leave to amend a pleading "*shall be freely given when justice so requires.*" Fed. R. Civ. P. 15(a) (emphasis added). The leading case on amendment of pleadings under the Rules, *Foman v. Davis*, 371 U.S. 178 (1962), expresses this liberality, stating that "the Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." See *id.* at 181-82 (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)). *Foman* further states that "if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Id.* at 181. The Board has on several occasions followed the liberal pleading policy enunciated by the Federal Rules and *Foman. See, e.g., In re Asbestos Specialists*, 4 E.A.D. 819, 830 (EAB 1993); *In re Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 525 n.11 (EAB 1993); *In re Port of Oakland*, 4 E.A.D. 170, 205 (EAB 1992).

Foman, however, makes clear that within the context of this liberal pleading policy, the decision whether to grant or deny a motion to amend is "of course * * * within the discretion of the [court]." *Foman*, 371 U.S. at 182. *Foman* provides the following set of frequently cited factors for courts to consider in exercising their discretion in this context:

> In the absence of any apparent or declared reason — such as undue delay, bad faith or dilatory motive on the part of

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[13] Although the Federal Rules of Civil Procedure are not directly applicable to administrative proceedings, the Board has consulted the Federal Rules from time to time to aid in the interpretation and application of the part 22 rules. See, e.g., In re *Lazarus, Inc.*, 7 E.A.D. 318, 330 (EAB 1997); *In re Asbestos Specialists*, 4 E.A.D. 819, 827 n.20 (EAB 1993).

> the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendments, futility of amendments, etc. — - the leave sought should, as the rules require, be 'freely given.'

Id. at 182 (quoting Fed. R. Civ. P. 15(a)).

Of these *Foman* "factors," the one held to be most significant by many courts is whether an amendment would "undu[ly] prejudice" the opposing party. *See In re Lazarus, Inc.*, 7 E.A.D. 318, 331-32 (EAB 1997) (discussing *Foman* factors); *see also Jackson v. Bank of Haw.*, 902 F.2d 1385, 1387 (9th Cir. 1990) (stating that in deciding whether leave to amend should be granted under Rule 15(a), "prejudice to the opposing party is the most important factor"); *accord Howze v. Jones & Laughlin Steel Corp.*, 750 F.2d 1208, 1212 (3rd Cir. 1984).

In our view, the ALJ's denial of the Region's Motion to Amend in this case falls within the ambit of his discretion. As we noted in *Lazarus*, "[o]ur rules depend on the presiding officer to exercise discretion throughout an administrative penalty proceeding." 7 E.A.D. at 334; *see also In re J.V. Peters & Co.*, 7 E.A.D. 77, 96 (EAB 1997) (recognizing the presiding officer's discretion in shaping the conduct of the hearing), *aff'd sub nom. Shillman v. United States*, 1:97-CV-1355 (N.D. Ohio Jan. 14, 1999), *aff'd in part*, 221 F.3d 1336 (6th Cir. 2000), *cert. denied sub nom. J.V. Peters & Co. v. United States*, 69 U.S.L.W. 3269 (U.S., Jan. 8, 2001). In particular, we believe that the ALJ acted within his discretion in denying the Motion to Amend on the basis that granting the Motion to Amend, due to the Region's delayed filing, would potentially prejudice Carroll Oil.[14] *See* Tr. at 42; Init. Dec. at 7.

While the ALJ could have been more precise in discussing how the Region's delay in filing its Motion to Amend would have prejudiced Carroll Oil, this does not itself indicate an abuse of discretion. In his Initial Decision, the ALJ cited several Agency administrative decisions and federal court cases denying motions to amend filed late in proceedings on the grounds that granting them would have introduced new legal theories or claims shortly before trial, imposing prejudice on non-moving parties in the form of additional discovery, delayed litigation, and attendant legal costs. Thus, the concerns expressed by the ALJ are consonant with those expressed by many others courts. *See, e.g., Feldman v. Alle-*

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[14] In his bench decision denying the Motion to Amend, the ALJ observed that "granting the [Motion to Amend] would cause the hearing, of necessity, to be postponed," noting that "[Mr. Carroll] and Pershing Service would not have sufficient time to prepare an appropriate defense." Tr. at 42. The ALJ's statement alluded to Carroll Oil's request, during oral argument on the Motion to Amend, that the evidentiary hearing "be continued" to allow Mr. Carroll and Pershing Service to obtain counsel if the Motion were granted. *See id.* at 28.

gheny Int'l, Inc., 850 F.2d 1217, 1225 (7th Cir. 1988) (holding that trial court's denial of motion to amend pleading was not an abuse of discretion where it was likely that amending pleading to add new claim on the eve of trial would have led to additional discovery and protracted litigation, thereby prejudicing defendant); *accord Bohen* v. *City of East Chicago*, 799 F.2d 1180, 1185-86 (7th Cir. 1986). For example, in reaching its conclusion, the court in *Feldman* stated:

> Parties to litigation have an interest in speedy resolution of their disputes without undue expense. Substantive amendments to the complaint just before trial are not to be countenanced and only serve to defeat these interests.

Feldman, 850 F.2d at 1225.

In light of the above concerns, it was not unreasonable for the ALJ to deny the Motion to Amend on this basis. Amending the Complaint to add Pershing Service and Mr. Carroll respectively, as "owner" and "operator," constitute substantive new claims that likely would have required additional fact-finding and investigation and presented new legal theories shortly before trial. *See, e.g., Bell v. Allstate Ins. Co.*, 160 F.3d 452, 454 (8th Cir. 1998) (holding that "when late tendered amendments involve new theories of recovery and impose additional discovery requirements, courts are less likely to find an abuse of discretion due to the prejudice involved").[15]

Another ground for supporting the ALJ's exercise of discretion is the concern for assuring judicial economy. Federal courts interpreting the Federal Rules have cited prejudice and burden to the judicial system as grounds for denying motions to amend. *See, e.g., Perrian v. O'Grady*, 958 F.2d 192, 194 (7th Cir. 1992) (denying amendment to add additional parties nine weeks before trial on basis that granting motion would harm public's interest in speedy resolution of legal dispute.). In this regard, one court held, "[b]eyond prejudice to the parties, a trial court can deny amendment when concerned with the costs that protracted litigation places on the courts. Delay impairs the 'public interest in the prompt resolution of legal disputes. The interests of justice go beyond the interest of the parties to the particular suit; * * * delay in resolving a suit may harm other litigants by making them wait longer in the court queue.'" *Fort Howard Paper Co. v. Standard Havens, Inc.*, 901 F.2d 1373, 1380 (7th Cir. 1990) (citation omitted).

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[15] In this regard, we do not find unreasonable the ALJ's concern that the Region's additional delay in adducing the material upon which its Motion to Amend was based aggravated the potential prejudice to Carroll Oil. *See* Init. Dec. at 6-7.

The EPA's procedural rules likewise demonstrate a solicitude for judicial economy. These rules state in relevant part that a presiding officer is authorized to:

> Rule upon motions, * * * dispose of procedural requests, * * * [h]ear and decide questions of facts, law, or discretion * * *, and do all other acts and take all measures necessary for the maintenance of order and for the *efficient*, fair, and impartial adjudication of issues in proceedings.

40 C.F.R. § 22.4(c)(10) (emphasis added). As the ALJ notes, the Board and its predecessors have in several past decisions accorded significant deference to the needs of presiding officers to manage cases in such a manner as to avoid delay. As we held in *Lazarus*, "[a]voidance of undue delay is contemplated by the regulatory obligations at 40 C.F.R. § 22.04."[16] *Lazarus*, 7 E.A.D. at 334; *see also J.V. Peters*, 7 E.A.D. at 96.

In light of the foregoing, we conclude that the ALJ did not abuse his discretion in denying the Region's Motion to Amend the Complaint to include additional parties.[17]

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[16] We do not quibble with the ALJ's view that the Region could have proceeded with greater alacrity in seeking to amend its Complaint. With respect to its attempt to add Pershing Service to the Complaint, the Region delayed several months in filing its Motion to Amend once it had obtained information indicating Carroll Oil's connection to Pershing Service. With respect to the Region's attempt to add Mr. Carroll, it appears that the Region was aware at the filing of the Answer, if not earlier, that Carroll Oil would raise ability to pay concerns and was likewise aware from the inception of the case that Neil Carroll was Carroll Oil's principal.

[17] We need not review the numerous other arguments the ALJ presented for denying the Region's Motion to Amend because the matters of prejudice and avoidance of undue delay here constitute sufficient, independent reasons for denying the Motion. Although it thus has no bearing on our decision to uphold the ALJ's denial of the Region's Motion, the Board takes issue with the ALJ's conclusion that independently from these procedural shortcomings, there was an insufficient substantive basis for the Region's Motion to Amend. We find particularly problematic the ALJ's summary conclusion that the Region lacked a substantive basis for adding Mr. Carroll as a respondent in his own capacity. In his Initial Decision, the ALJ placed importance on the fact that EPA "did not aver that Carroll Oil is a 'sham corporation,' nor was it seeking, in the motion to amend, to pierce the corporate veil," *see* Init. Dec. at 4, and that Mr. Carroll could not be "legally" ordered to follow the Region's proposed compliance order. *Id.* at 21 n.30. In our view, the ALJ did not have sufficient information before him to make such a determination, particularly in light of the recent decision in *United States v. Bestfoods*, 524 U.S. 51 (1998). In *Bestfoods*, the Supreme Court found that a person could be directly liable under CERCLA (i.e., without piercing the corporate veil or proving that corporate form is a sham) as an "operator" of a facility if that person managed, directed, and conducted operations specifically related to pollution. *Bestfoods*, 524 U.S. at 65. Given that RCRA Subtitle I's definition of operator, 40 C.F.R. § 280.12, is quite similar to the CERCLA definition interpreted by the Supreme Court in *Bestfoods*, we think it was error for the ALJ to assume non-liability in this

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B. *The ALJ's Penalty Determination*

In challenging the ALJ's penalty assessment, the Region contends that the ALJ departed from the Region's application of the Penalty Policy without a rational basis. Appeal at 32. In addition, the Region contends that the ALJ committed "clear error and/or an abuse of discretion" in applying the statutory penalty factors (at RCRA § 9006(e), 42 U.S.C. § 6991(e)), to Carroll Oil's violation. Appeal at 30. Also, the Region contends that in assessing a penalty, the ALJ erroneously considered the company's affirmative defense of "inability to pay" despite a "consistent line of RCRA cases holding that ability to pay is not an appropriate consideration to determine a penalty amount." *Id.* at 41; *see infra* Part IV.C. (discussion of Carroll Oil's "inability to pay" defense).

RCRA section 9006(c), 42 U.S.C. § 6991e(c), directs the Agency to apply certain factors in determining penalties for violations of RCRA Subtitle I. Specifically, the provision directs the Administrator to:

> [A]ssess a penalty, if any, which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.

42 U.S.C. § 6991e(c). Pursuant to the rules governing this proceeding at 40 C.F.R. part 22, the Region bears the burden of demonstrating that its proposed penalty amount is appropriate. *See* 40 C.F.R. § 22.24.

In proposing a $19,500 penalty, the Region employed the Penalty Policy, which the Agency has designed to guide its implementation of the statutory penalty factors. In understanding the ALJ's penalty assessment as well as the Region's challenge to it on appeal, it is helpful to first understand the manner in which the Region applied the Penalty Policy in deriving a penalty. We will later revisit the Penalty Policy in imposing an appropriate penalty in this case. *See infra* Part IV.E.

1. *The Region's Application of the Penalty Policy*

In accordance with the Penalty Policy's methodology, the Region's penalty consisted of two basic elements: (1) a gravity component reflecting the seriousness of the penalty; and (2) an economic benefit component designed to capture

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(continued)
setting in the absence of a fully developed record on this issue. Nevertheless, the error was harmless in view of the independent bases discussed above for the ALJ's decision not to allow amendment of the Complaint.

the economic gain the company reaped by deferring compliance over a five-year period. Penalty Policy at 8-21.

The Region arrived at a "gravity-based component" by determining a base "matrix value" for Carroll Oil's violation and then adjusting this value based on a number of selected criteria. *Id.* at 14. First, the Region selected a base matrix value by ranking two violation criteria — the "extent of deviation from requirements" and the "potential for harm" — forming the axes of a grid of dollar values, and then finding the point on the grid where the rankings intersected. *Id.* In this case, the Region ranked Carroll's violation as "major" for both criteria (among the categories of "major," "moderate," and "minor"), resulting in a matrix value of $1,500. Tr. at 83-84. Next, the Region considered a set of "violator-specific adjustments" (degree of cooperation/noncooperation; degree of willfulness or negligence; history of noncompliance; and other unique factors) by which to adjust the previous value. Under these factors, the Region chose to adjust the previous value upward by 10% to $1,650, to reflect the company's lack of cooperation in coming into compliance with the UST closure requirements. *Id.* at 85. Finally, the Region multiplied the previous figure by a "environmental sensitivity multiplier"of "1" to reflect the "low" environmental sensitivity of the site,[18] and a "number of days of noncompliance multiplier" of "7" based on a Penalty Policy formula incorporating a violator's number of days of violation (in Carroll Oil's case, 1,825 days or five years). *See* Penalty Policy at 20-21; Tr. at 90-92. This resulted in a total gravity-based penalty of $11,550 ($1,650 x 1 x 7). Tr. at 93.

The Region also computed an "economic benefit" of $7,950 representing the economic benefit Carroll Oil allegedly reaped by delaying compliance with the UST regulations over a five-year period. Tr. at 72, 78. This figure was based on the estimated cost — $15,000 — of Carroll's achieving compliance by removing USTs from its property. *Id.* at 73.

The Region then added the gravity-based and economic benefit-based components together to arrive at a total proposed penalty amount of $19,500 ($11,550 + $7,950). *Id.* at 93.

2. *The ALJ's Penalty Assessment*

In his Initial Decision, the ALJ substantially reduced the Region's proposed penalty of $19,500 to $3,500, assessing a charge of $1,000 per UST for the three tanks Carroll had reported to the MDEQ plus $500 for the fourth tank that the company had disclosed in late 1999. *See supra* Part III. The ALJ explained that he

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[18] The Region explained that it assigned an environmental sensitivity multiplier of "1" to Carroll Oil's violation under the Penalty Policy because the Region "didn't have information with regards to the environmental sensitivity of the area." Tr. at 89.

would "depart" from the UST Penalty Policy because, "as applied by EPA in this instance, the basic propositions of the Policy did not yield an appropriate penalty," and because the Region's application of the Penalty Policy, under the "gravity" and "economic benefit" components, was seriously "flawed." Init. Dec. at 16-17. In this regard, the ALJ observed that, by failing to measure the "amount and nature" of gasoline left in Carroll Oil's USTs, the Region did not determine the actual gravity attendant with the violation." *Id.* at 17. Alluding to the Region's enhancement of the penalty through a "days of noncompliance" multiplier, he remarked that this Penalty Policy criterion ignored Carroll Oil's financial ability to come into compliance given the company's defunct status, which left it subject to tax liens and a mortgage deed on the property. *Id.* at 18. He also faulted the Region for enhancing the penalty based on the company's "lack of cooperation" without considering whether the company had the financial means to comply with the law. *Id.* Finally, the ALJ claimed that assessing an economic benefit component was "otherworldly" given the company's financially "defunct status." *Id.*

Applying the statutory penalty factors to Carroll Oil's violation, the ALJ concluded that the factors failed to support the Region's proposed penalty. *Id.* at 19. For example, the ALJ emphasized that because of the Region's failure to measure for the level of gasoline in the "near empty" state of the tanks as indicated by the record, the statutory factor of "seriousness" could at most be considered "minimal." *Id*. He further asserted that the Region's application of the "good faith" statutory factor was "incomplete" because it did not consider whether Carroll Oil had the financial resources to comply with the UST closure regulations. *Id.* The ALJ concluded that his reduced penalty of $3,500 constituted a "realistic evaluation of the statutory criteria." *Id.*

In analyzing the Initial Decision and the Region's argument on the subject of an appropriate penalty, we note that the rules governing this proceeding require presiding officers to "determine the amount of the recommended civil penalty based 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). The rules also require ALJs to "consider any civil penalty guidelines issued under the Act," such as the Penalty Policy in the case at hand. *Id.*

In abandoning the Penalty Policy and opting for a penalty assessment based on the statutory penalty factors, the ALJ observed that "EPA's adjudicative officers must refrain from treating a Penalty Policy as a rule." Init. Dec. at 17. It is correct, as suggested by the ALJ statement, that the Agency's penalty policies, not having been subjected to rulemaking procedures under the Administrative Procedure Act, are not binding upon ALJs or the Board. *See, e.g., In re City of Marshall*, 10 E.A.D. 173, 189 n.29 (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, 759 (EAB 1997) ("*Wausau*"). Accordingly, we have held that while an ALJ must *consider* the applicable penalty policy, he or she has the "*discretion either to* adopt the rationale

of an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant." *In re DIC Americas, Inc.*, 6 E.A.D. 184, 189, (EAB 1995); *see Wausau*, 6 E.A.D. at 759 (ALJ is free to deviate from the penalty policy in a given case). In addition, while the Board possesses *de novo* review authority over an ALJ's penalty determinations,[19] the Board will generally not substitute its judgement for that of an ALJ absent a showing that the ALJ committed clear error or abused his or her discretion in assessing a penalty. *In re Chempace Corp.*, 9 E.A.D. 119, 131 (EAB 2000); *In re Britton Constr. Co.*, 8 E.A.D. 261, 293 (EAB 1999) (citing *In re Predex Corp.*, 7 E.A.D. 591, 597 (EAB 1998)).

This being said, the Board has emphasized that the Agency's penalty policies should be applied whenever possible because such policies "assure that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner." *In re M.A. Bruder & Sons*, 10 E.A.D. 598, 613 (EAB 2002) (citing *In re Chempace Corp.*, 9 E.A.D. 119, 131 (EAB 2000). Accordingly, in circumstances in which an ALJ has chosen not to apply an Agency's penalty policy at all, rather than applying the policy differently than advocated by the complainant, we will closely scrutinize the ALJ's reasons for choosing not to apply the policy to determine if they are compelling. *Bruder*, 10 E.A.D. 598, 613. If the ALJ's reasons are not compelling, we will not grant deference to the ALJ's penalty determination and will perform our penalty analysis *de novo*, consistent with the statutory authority vested in us by 40 C.F.R. § 22.30(f). *Bruder*, 10 E.A.D. at 613. With these principles in mind, we proceed to analyze the ALJ's decision not to apply the Penalty Policy in assessing a penalty.

3. *ALJ's Decision Not to Apply the Penalty Policy*

We believe the ALJ provided no compelling reason for choosing not to apply the Penalty Policy in assessing a penalty that would warrant deference in this case. Indeed, the ALJ's abandonment of the Penalty Policy in this case would undercut, rather than facilitate, the application of the twin statutory penalty factors of "seriousness of violation" and "good-faith efforts to comply with the applicable requirements," that must ultimately form the basis of any penalty determination. *See Predex Corp.*, 7 E.A.D. at 597 (stating that "ultimately any penalty assessed must 'reflect' a reasonable application of the statutory penalty criteria to the facts of the particular violations") (citing *Wausau*, 6 E.A.D. at 758). We also reject the ALJ's conclusion that imposition of an "economic benefit" component as contemplated by the Penalty Policy was inappropriate given Carroll Oil's "defunct" status.

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[19] Section § 22.30(f) provides in relevant part that "[t]he Environmental Appeals Board may assess a penalty that is higher or lower than the amount recommended to be assessed in the decision or order being reviewed or from the amount sought in the complaint * * *." 40 C.F.R. § 22.30(f).

In his Initial Decision, the ALJ concluded that the Region failed to assess the "actual gravity" attendant with Carroll Oil's violation because it did not determine the amount and nature of gasoline left in Carroll Oil's USTs and failed to provide evidence of any "leakage" from the company's USTs. Init. Dec. at 17. In this regard, the ALJ stated that "it is inconsistent for the Agency to assert that the violation poses a serious threat to human health and the environment without determining the quantity and nature of product that actually remained in the tank." *Id.* The ALJ maintained that it is "pointless speculation" for the Region to "assert that the real issue is not the amount of residue left in the bottom of the tanks, but rather the amount of product that leaked out of the tank for the roughly 20 years when it was in operation," and furthermore that the "violation here pertains to a failure to permanently close tanks and has nothing to do with leaks that may have occurred during the years preceding the temporary closure." *Id.* The ALJ rejected the Region's Penalty Policy-based penalty, and instead developed a penalty based on the statutory seriousness of harm criterion, influenced significantly by his determination that the Region had failed to demonstrate actual harm.

In our view, the ALJ's departure from the Penalty Policy in part based on the Region's failure to identify "actual" gravity or harm misapprehends the statutory penalty factor of "seriousness" with regard to Carroll Oil's violation. We agree with the Region that the ALJ's reasoning is at odds with previous decisions by the Board holding that "seriousness of a violation" is or can be based on *potential* rather than actual harm. Appeal at 36; *see In re Everwood Treatment Co.*, 6 E.A.D. 589, 602-03 (EAB 1996), *aff'd*, No. 96-1159-RV-M (S.D. Ala., Jan. 21, 1998). In *Everwood*, analyzing a set of statutory penalty factors virtually identical to those at hand,[20] we reversed an ALJ's conclusion that Region I had "overstated" the "seriousness" of a respondent's violation of RCRA land disposal regulations because there was no evidence of actual environmental damage from the violation. *See Everwood*, 6 E.A.D. at 600, 605. Instead, we held that the respondent's failure to adhere to the requirements was a "violation of major significance" meriting an increased penalty because the particular violation raised the *potential* that environmental damage, if it should occur, would go undetected. *Id.; see also In re V-1 Oil Co.*, 8 E.A.D. 729, 755 (EAB 2000) (holding in an UST case that "[p]roof of actual harm to the environment need not be proven to assess a substantial penalty").

In light of the foregoing, we cannot agree with the ALJ's statement that the UST program is concerned merely with actual releases that occur during temporary closure of USTs. While we agree with the ALJ that consideration of the

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[20] The statutory penalty factors applicable to RCRA land disposal requirements featured in *Everwood* provide that in issuing an order assessing a civil penalty, the Agency "shall take into account the seriousness of the violation and any good-faith efforts to comply with applicable requirements." RCRA § 3008(a)(3), 42 U.S.C. § 6298(a)(3).

amount of gasoline in the tanks during the period of the USTs' closure is a relevant fact to consider in evaluating the seriousness of the violation (particularly on potential for harm), an appropriate inquiry into this factor cannot be confined to observed contamination or the limited time frame of temporary closure. Rather, in light of the broad, remedial purposes of Subtitle I and the UST closure regulation, this inquiry must also examine the significant potential harm that is inherent in Carroll Oil's failure to implement measures to detect possible releases from its USTs regardless of the time such releases first occurred. *See Everwood*, 6 E.A.D. at 605.

In our opinion, the ALJ's narrow view of the UST closure regulations seriously misapprehends the importance that RCRA Subtitle I accords to identifying UST contamination and the function and logic of the UST closure provisions within the structure of the UST regulations. First, the statutory language authorizing the UST regulations broadly mandates:

> [T]he Administrator * * *shall promulgate release detection, prevention, and correction regulations applicable to all owners and operators of underground storage tanks, as may be necessary to protect human health and the environment.

RCRA § 9003(a), 42 U.S.C. § 6991b(a).

Consistent with the Subtitle I's purpose, the Agency has stated that the "the principal objective of the UST closure regulations is to *identify and contain existing contamination* and to *prevent* releases from UST systems no longer in service." 53 Fed. Reg. 37,082, 37,181 (Sept. 23, 1998) (emphasis added). The UST closure regulations thus target UST systems lacking modern upgraded features, which the Agency has identified as posing the greatest risk of release and as constituting the primary cause of the existing UST contamination problem. *See supra* Part I; 53 Fed. Reg. at 37,088-90.[21]

Here, the ALJ's limited view of the concerns of the UST closure regulations is not commensurate with the scale of the harms and risks associated with releases from USTs — both current and future — as described by the Agency, or the regulations' correspondingly broad objectives.

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[21] Also at sharp variance with the ALJ's limited view of the purpose of the UST closure regulations, the Preamble to the proposed UST regulations characterizes the purpose of the site assessment requirement as "ensur[ing] that there is a *clean* site at closure." Underground Storage Tanks; Technical Requirements, 52 Fed. Reg. 12,662, 12,758 (proposed April 17, 1987). Notably, this articulation contains no reference to the timing of releases requiring cleanup.

The ALJ's narrow perspective is particularly misdirected in view of the fact that the site characterization and corrective action requirements of the UST closure regulations, are designed to work in conjunction to promote Subtitle I's goal of identifying and containing existing contamination from USTs. *See supra* Part II. As part of permanent closure procedures, UST owners and operators must conduct a site assessment to measure for possible releases from USTs, and, if a release is confirmed, begin corrective action under subpart F of the UST regulations. *Id.* There is nothing in the language of subpart F that restricts such "releases" by time, and indeed, such a view would be contrary to case law. *See Dydio v. Heston Corp.*, 887 F. Supp. 1037, 1045 (N.D. Ill. 1995) (holding that UST owner's failure to undertake corrective action to remedy contamination from an UST constitutes a violation, regardless of when release first took place). Carroll Oil's failure to conduct a site assessment as part of its corrective action obligations has significant consequences because it perpetuates the kind of risk of undetected and uncorrected UST contamination highlighted of concern under Subtitle I and the Agency's regulations.[22]

Given the UST closure regulations' broad remedial agenda, the ALJ's abandonment of the Penalty Policy on the grounds that it ignores the importance of "actual contamination" and that any releases that occurred previous to the USTs' temporary closure would be irrelevant, is inconsistent with a proper application of the statutory penalty factor of "seriousness." Thus, we reject the ALJ's decision not to apply the Penalty Policy on these grounds.

In addition, we reject as grounds for abandoning the Penalty Policy the ALJ's view that it inappropriately allows for enhancement of the gravity component of the penalty (using the Policy's days of noncompliance multiplier) without consideration of Carroll Oil's financial ability to come into compliance. We see no compelling reason why economic considerations should inform an evaluation of the gravity or "seriousness" of a violation as these factors relate to the duration of a violation. In the instant case, the company's protracted failure to conduct a site assessment prolonged the time during which potential releases from the company's USTs went undetected and unremediated, aggravating the potential harm associated with its violation. Even if the company's financial situation prevented it from coming into compliance, this strikes us as irrelevant to the relationship between a violation's duration and its "seriousness." Therefore, we reject the ALJ's departure from the Penalty Policy on this basis as inconsistent with a proper application of the penalty factor of "seriousness."

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[22] Notably, the statutory language in Subtitle I mandating reporting and corrective action in response to releases is not time-constrained. It simply provides that "regulations promulgated pursuant to this section shall include, * * *requirements for reporting of releases and corrective action taken in response to a release from an underground storage tank." RCRA § 9003(c), 42 U.S.C. § 6991b(c).

Morever, the ALJ in our view misapprehended the factor of "good faith" when he concluded, as a basis for departing from the Penalty Policy, that "the application of the [Penalty Policy] is flawed by EPA's conclusion that Carroll Oil failed to make any good faith efforts to comply * * * because [the Region] did not realistically consider whether Carroll had the financial means to do so." Init. Dec. at 18. Even if a company's financial condition is theoretically relevant to an evaluation of this penalty factor (see discussion of Carroll Oil's inability to pay claims, Part IV.C and Part IV.F, below), we see little in Carroll Oil's behavior that evinces good faith or cooperation.

As the Region aptly observes, "Carroll Oil has disregarded the UST closure regulations and communications from the regulatory agencies for nearly ten years." Appeal at 31. The record shows that Carroll responded only once to the long chain of correspondence it received from the State of Wyoming concerning its UST closure obligations. *See supra* Part II; C Ex. 13 (Letter from Georg Jensen to Pat Jordan, WDEQ UST Program (Dec. 6, 1993)). The company also did not respond to the August 9, 1994 letter from EPA Region VIII seeking information from the company about its USTs at the Facility. C Ex. 10.

On the single occasion that Carroll Oil did respond to the WDEQ's inquiries concerning its compliance, the company demonstrated no follow-up or initiative indicative of good faith or cooperation. In its letter to the WDEQ, the company stressed that it was undergoing financial difficulties but stated that it would be willing to mortgage its property to cover the expense of removing the USTs from its property. *Id.* However, when the WDEQ, in a reply letter, reminded Carroll Oil of its proposal to raise compliance funds through borrowing and directed Carroll Oil, within ten days of receipt of the letter, to provide a description of its compliance plans, the company failed to respond. C Ex. 12 (Letter from Pat Jordan, WDEQ, to Georg Jensen (Dec. 10, 1993)).

In addition, Carroll Oil exhibited no particular concern for the condition of its unprotected USTs and the risks these might pose to the environment during their extended period of temporary closure. We note that the approximately seven years of correspondence in the record involving WDEQ, the Region, and Carroll Oil does not reveal a single instance of the company providing information to these two regulatory agencies on the condition of its USTs and the surrounding environment. Moreover, Mr. Carroll admitted at the evidentiary hearing that Carroll Oil had not checked its USTs since August or September of 1991 except for a site visit at the time of the hearing. Tr. at 227.

In sum, Carroll Oil, regardless of its financial situation, did not demonstrate a minimum degree of diligence, concern, or initiative that could arguably constitute "good faith." If Carroll Oil had demonstrated these attributes, one at least would have expected the company to respond promptly to inquiries about its compliance status, to keep the WDEQ and Region informed about the physical condi-

tion of its tanks, and to seek and follow up on guidance from the relevant agencies on how to work towards compliance. Even though such efforts would not have been financially burdensome, Carroll Oil remained silent and inactive. Because the company, even if lacking the financial ability to comply fully, did not undertake simple, minimal-cost actions showing its "good faith," we reject as a ground for departing from the Penalty Policy the Region's failure to consider Carroll's Oil's economic situation in evaluating this penalty factor.

Finally, we reject as a ground for choosing not to apply the Penalty Policy the ALJ's argument that imposing an economic benefit component pursuant to the Policy was "otherworldly" due to the company's "defunct" status. *See* Init. Dec. at 18. An entity's financially defunct status does not per se bar imposition of the economic benefit portion of a penalty. Even if an entity is financially defunct, it may still have reaped ill-gotten gains from previous malfeasance that may enable it, or its successors, to obtain unfair market advantages at a later point. *See In re B.J. Carney Indus.*, 7 E.A.D. 171, 208 (EAB 1997) (stating that "the economic benefit of noncompliance component of a penalty helps 'ensure a level playing field by ensuring that violators do not obtain an economic advantage over their competitors who made the necessary investment in environmental compliance'") (citation omitted), *appeal dismissed*, 192 F.3d 917 (9th Cir. 1999), *vacated as moot*, 200 F.3d 1222 (9th Cir. 2000).

For the foregoing reasons, we conclude that the ALJ provided no compelling reason for departing from the Penalty Policy in the case at hand, and thus we will not accord his penalty determination our usual deference. *See Bruder*, 10 E.A.D. at 613. In assessing a penalty upon Carroll Oil *de novo*, we will use the Penalty Policy as a starting point for implementing the statutory penalty factors. *See infra* Part IV.E. Before doing so, however, we examine Carroll Oil's claim that it lacked the financial resources to pay the Region's proposed penalty, which it raised as an affirmative defense in its Answer.

C. *Carroll Oil's Affirmative Defense of Inability to Pay*

In its appeal, the Region avers that the ALJ erred by finding in favor of Carroll Oil's claims that it was unable to pay a penalty and return the facility to compliance[23] because "Carroll Oil failed to sustain its burden of proof and provide substantial evidence in the record to support any such finding." Appeal at 41. In connection with this argument, the Region also contends that Carroll Oil failed to sustain its burden, in part, by not providing information detailing its relationship

[23] The issue of whether Carroll Oil demonstrated that it was unable to achieve compliance with the UST closure regulations, which was the basis of the ALJ's refusal to issue an compliance order, will be discussed in Part IV.F, *infra.*

with Mr. Carroll, its sole shareholder, and Pershing Service, an affiliated corporation. Appeal at 44, 46-48, 54.

Carroll Oil raised the inability to pay claims as an affirmative defense in its Answer. Carroll Oil explained that it could not pay the penalty because it had "no assets from which any penalties could be paid nor any credit which could be used to pay any costs, fees or other judgements entered against the respondent." Answer at 3.

The issue of whether and how Carroll Oil's affirmative defense of inability to pay should be considered in the context of a penalty assessment has engendered considerable confusion in this proceeding. For example, the ALJ maintains that because "inability to pay" is absent as a statutory penalty factor, "the Court may not consider a Respondent's ability to pay in assessing an appropriate penalty"; yet at the same time, the ALJ faults the Region for not considering the company's "defunct" financial status in imposing a "gravity-based" penalty under the statutory penalty factors. Init. Dec. at 18. In a similarly puzzling vein, the Region appears to argue that because "ability to pay" is not a statutory penalty factor, the ALJ inappropriately considered the ability to pay in his penalty assessment; yet in the same breath, the Region contends that "ability to pay may be considered at hearing if raised as an affirmative defense" and that the company failed to "sustain its burden of proof [] to provide substantial evidence in the record" to support its ability to pay claim. Appeal at 41, 61.

To bring coherence to this issue, it is important to first recognize that the statutory penalty factors are restricted to "seriousness of the violation" and "good faith" efforts to comply. Thus, considering "ability to pay" is not part of the Agency's prima facie burden in determing a penalty amount.[24] *See In re Cent. Paint & Body Shop, Inc.*, 2 E.A.D. 309, 313-14 (CJO 1987) ("RCRA, however, does not include ability to pay as one of the factors that EPA must consider in assessing a penalty, and Congress certainly knew how to include such a factor in an environmental statute if it so desired. The logical conclusion is that ability to

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[24] In this regard, RCRA respondents face a more difficult burden in justifying penalty reductions than respondents challenging penalty assessments in other types of administrative actions. For example, in contrast with RCRA, most statutes administered by the Agency list ability to pay and economic impact among statutory penalty factors that comprise the Agency's prima facie penalty case. *See, e.g.*, Clean Air Act § 113(e)(1), 42 U.S.C. § 7413(e)(1) ("economic impact of the penalty on the business"); Clean Water Act § 309(g)(3), 33 U.S.C. § 1319(g)(3) ("ability to pay"); Federal Insecticide, Fungicide, and Rodenticide Act § 14(a)(4), 7 U.S.C. § 136*l*(a)(4)("appropriateness of such penalty to the size of the business of the person charged" and "effect on the person's ability to continue in business"); Toxic Substances Control Act § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B) ("ability to pay" and "effect on ability to continue to do business"). In administrative actions under these statutes, the *Agency* bears the burden of producing evidence on and establishing the appropriateness of a penalty after considering all the statutory factors, including ability to pay and the economic impact of a penalty. *See In re New Waterbury, Ltd.*, 5 E.A.D. 529, 543 (EAB 1994).

pay is not an element of EPA's proof.") (footnote omitted). This being said, "ability to pay" is not per se an inappropriate factor to consider in assessing a penalty under the Subtitle I penalty factors. Rather, because it is not part of the Agency's required proof, "ability to pay," in order to be considered, must be raised and proven as an affirmative defense by the respondent.[25] *See* 2A *Moore's Federal Practice Manual* 8-17a (2d ed. 1994) ("A true affirmative defense, which is avoiding in nature, raises matters *outside* the scope of the plaintiff's prima facie case."). The rules governing this proceeding provide that "the respondent has the burdens of presentation and persuasion for any affirmative defenses." 40 C.F.R. § 22.24. Consistent with the foregoing, in previous RCRA cases, recognizing that statutory penalty factors do not include "ability to pay," the Board and its predecessors have treated "ability to pay" as a defense that must be raised and substantiated by respondents. *See In re Bil-Dry Corp.*, 9 E.A.D. 575 (EAB 2001); *Cent. Paint*, 2 E.A.D. at 313-14.

In accordance with the foregoing, we will treat Carroll Oil's claim of "inability to pay" as an affirmative defense and proceed to determine whether the company satisfied its burden of proof on its claim that it lacked the financial resources to pay the penalty or reach compliance.[26] In analyzing Carroll Oil's affirmative defense, we will first examine the information that Carroll presented in support of its claim, consisting primarily of tax records, a mortgage deed, and tax liens. Next we will analyze Carroll Oil's close affiliation with other entities as this bears upon the company's ability to pay, an issue raised by the Region.

1. *Evidence Presented by Carroll Oil in Support of Its Inability to Pay Claim*

Carroll Oil's main source of information on its alleged inability to pay consisted of federal tax returns from 1988 to 1999, which it submitted in its Prehear-

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[25] In this proceeding, we do not treat "ability to pay" as an affirmative defense in the traditional sense that financial hardship, if demonstrated, would completely bar imposition of a penalty; rather we treat it as a mitigating factor that must be raised and substantiated by the respondent.

[26] In deciding to consider Carroll's ability to pay claim, we acknowledge that the Region and ALJ appear to be correct in observing that the Penalty Policy does not itself contemplate consideration of a respondent's ability to pay outside the context of settlement negotiations. *See* Penalty Policy at 23; Tr. at 213; Complainant's Brief in Support of Proposed Findings of Fact, Conclusions of Law and Proposed Orderat 22-23. However, in considering a respondent's ability to pay in *Central Paint, supra*, the Chief Judicial Officer stated that although the relevant statutory penalty factors in RCRA only required consideration of "seriousness of the violation" and "good faith efforts," the "statute does not prohibit taking into account other criteria." *Cent. Paint*, 2 E.A.D. at 314 n.10. He concluded that the Administrator, in his or her discretion, "could consider additional factors in assessing a penalty." *Id.; see also In re Woodcrest Mfg., Inc.*, 7 E.A.D. 757, 774 n.11 (EAB 1998) (stating that in assessing penalty under section of Emergency Planning and Community Right-to-Know Act that lacked statutory penalty factors, Agency had the discretion to use as guidance penalty factors from other sections of the statute.) We similarly exercise our discretion in this case.

ing Exchange and response to the Region's March 14, 2000 questionnaire. *See* C Ex. 29; Respondent's Exhibit ("R Ex.") 4; *supra* Part III. These records indicated that the company produced no gross sales from 1992 through 1999. *See* C Ex. 30. In addition, the company submitted a mortgage deed in which the company contracted a debt of approximately $154,000, as well as a federal tax lien of approximately $137,000. *See* R Exs. 2-3.

Ms. Daniela Golden, a financial analyst for the Region's enforcement program, testified on the financial information that Carroll Oil had submitted in support of its ability to pay claim. *See* Tr. at 147-203. She surveyed the Region's methodology for determining a respondent's ability to pay, which in addition to cash flow, involves such considerations as an entity's assets (liquid and long term) and its corporate structure, which includes parent-subsidiary relationships or other types of affiliations. Ms. Golden explained that the latter consideration was important in the ability to pay analysis because it could reveal any "less than arm's length transactions" such as "loans to and from a shareholder * * *and if there are dividends paid out to a shareholder." Tr. at 154.

Analyzing Carroll Oil's ability to pay claim, Ms. Golden noted that the company's tax records from 1998 and 1999 contained missing pages that would have revealed information concerning the company's distribution of assets, income, and dividends. Tr. at 189, 198; C Ex. 29. Ms. Golden also related that she was unable to obtain Internal Revenue Service-verified copies of the company's tax returns.[27] She noted that Carroll Oil did not submit audited financial statements as requested by the Region. Tr. at 187. In this regard, Ms. Golden explained that the information contained in an audited financial statement was "critical because it augments the sparse information provided on the tax returns" and observed that "[t]he balance sheet [of the audited financial statement] indicates assets owned by the company, if there's any divestors of assets, if there are any interrelated transactions between parties, et cetera." *Id.* at 187. Moreover, she remarked that the company's information on tax liens and encumbrances was incomplete, and that the company refused to reveal any information about affiliated entities in response to the Region's questionnaire. *Id.* at 187, 197. Asked by Region's counsel to state her opinion of Carroll Oil's ability to pay claim, Ms. Golden answered that "I believe that the respondent has not demonstrated an inability to pay claim because of too many missing items requested." *Id.* at 199.

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[27] Ms. Golden testified that the Region had requested Carroll Oil to fill out a "Form 8821" authorizing the Region to obtain Internal Revenue Service-verified copies of the company's federal tax returns. As explained by Ms. Golden, Form 8821s are used in the Agency's normal ability to pay analysis to ensure that entities provide accurate tax information to the Agency. Ms. Golden related that Mr. Carroll did not adequately fill out the Form 8821, thereby preventing the Region from obtaining verified tax returns from the company. Tr. at 155-56, 186.

The Board has held that much of the kind of financial information that Carroll Oil submitted to the Region does not adequately support an inability to pay claim. For example, in *Bil-Dry*, we held that a respondent's unverified tax returns, unsupplemented by audited financial statements, did not provide the type of detailed analysis necessary to substantiate an inability to pay claim. *See Bil-Dry*, 9 E.A.D. 575, 613-14 (EAB 2001); *see also Cent. Paint*, 2 E.A.D. at 317 (holding that unverified financial statements submitted by respondent in RCRA case did not satisfy its burden of showing inability to pay). Notwithstanding the fact that in this case we do have additional information in the form of a tax lien and a mortgage deed, liabilities which appear to exceed Carroll Oil's assets, *see* C Ex. 29, the fact that Carroll Oil has frustrated efforts to develop a more comprehensive understanding of its financial situation, instead salting the record selectively, leaves us less than confident that Carroll Oil has painted an accurate or complete picture.

Our concern in this regard is heightened when we consider Carroll Oil's affiliation with other entities, an area we regard as relevant. In particular, as explained below, we view Carroll Oil's failure to provide sufficient information on its close relationship with Pershing Service, of which Mr. Carroll was a director and sole stockholder, *see* Tr. at 15, 24, as providing further support for our determination that Carroll Oil failed to meet its burden of production in showing an inability to pay.

2. *Relationship Between Carroll Oil and Pershing Service with Respect to Carroll Oil's Claim of Inability to Pay*

As the Region notes, *see* Appeal at 57, the Board has held the Agency may look at the financial condition of a related company to determine whether the related company may be a legitimate source of funds affecting the respondent's ability to pay or the economic impact of the penalty. *See In re New Waterbury, Ltd.*, 5 E.A.D. 529, 546-50 (EAB 1994). In *New Waterbury*, the Board reversed an ALJ's conclusion that a respondent company had demonstrated that it did not have the ability to pay a penalty and should consequently not be assessed a penalty for its TSCA violations. *New Waterbury*, 5 E.A.D. at 546-49. In holding that the ALJ had erred, the Board determined that the respondent's interwoven financial relationship with another enterprise from which it had a record of receiving essential financial assistance was relevant in considering the respondent's alleged inability to pay. Underlying the Board's decision was the assumption that because of its close financial relationship with the enterprise, the respondent could obtain the necessary resources to pay the proposed penalty amount. *Id.*; *see also United States v. Mun. Auth. of Union Township*, 150 F.3d 259, 268-69 (3rd Cir. 1998) (holding in Clean Water Act case that the financial condition of the defendant company's parent corporation is a relevant consideration in assessing company's ability to pay where parent corporation retained company's earnings).

In its March 14, 2000 questionnaire, *see supra* Part III, the Region sought to obtain from Carroll Oil more detailed financial information regarding it and two other companies the Region had identified through a corporate search to be affiliated with Carroll Oil — Pershing Service and Cheyenne Vending and Amusement, Inc.[28] *See* C Ex. 28; Tr. at 178. In the cover letter accompanying the questionnaire, the Region stated that based on "information indicating a relationship between Carroll Oil to other potential parent and/or sister corporations * * * EPA cannot determine [Carroll Oil's] ability to pay without considering the financial situation of these companies and their financial relationship with Carroll Oil Company." C Ex. 28. The Region advised Carroll Oil that it bore the burden of "supporting a penalty reduction based on an inability to pay" and that it was in the company's "best interest" to complete the questions in the questionnaire because "[w]ithout cooperation in ascertaining information, it is highly unlikely that the EPA will make any adjustment for inability to pay." *Id.* In its May 8, 2000 response to the questionnaire, Carroll Oil refused to answer any questions about entities other than Carroll Oil on the ground that these were not named as parties to the case. C Ex. 29.

At the evidentiary hearing, however, Mr. Carroll revealed for the first time a financial arrangement whereby Pershing Service, in 1992, purchased for a nominal sum a gas station on Pershing Boulevard owned by Carroll Oil. R Ex. A. As part of this transaction, Carroll Oil and Pershing Service agreed to an arrangement designed by Carroll Oil's tax accountant whereby Pershing Service "assumed" from Carroll Oil a loan of approximately $200,000 that Carroll Oil had obtained to purchase the Pershing Boulevard station. *Id.* at 210, 221. While Pershing Service made payments on the loan, the payments were still made "taxwise through Carroll [Oil]" and Carroll Oil still held the loan with the original lending institution. *Id.* at 221.According to Mr. Carroll, the arrangement ended in 1998, when Pershing Service "refinanced" the loan and began making payments to another financial institution without Carroll Oil as an intermediary. *Id.*

Carroll Oil did not earlier identify this unusual financial arrangement with Pershing Service, even though at least two of the questions on the Region's March 14, 2000 questionnaire were designed to elicit information about such practices:

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[28] At the evidentiary hearing, Ms. Golden, the Region's financial analyst, explained that the Region's search was prompted by Carroll Oil's indication on its federal corporate tax returns that "it was a member of a controlled group subject to the provisions of Section 1561." *See* Tr. at 172 (Golden Testimony); R Exs. 4-14 (Response to Schedule B, Question No. 4, Form 1120S). Ms. Golden said that the term "controlled group" referred, for Internal Revenue Service purposes, to a corporation being "either involved in a parent-subsidiary relationship or [having] an affiliation with another company." Tr. at 172. She indicated that such an affiliation could encompass a situation in which two entities "have the same director or same president or same officer." *Id.*

> 7. Identify and explain Carroll Oil Company's, Pershing Service's and Cheyenne Vending and Amusement's assignment of any and all outstanding debt, claim, cause of action, demand, liability, or duty to an affiliate or subsidiary corporation, or any shareholder with 5% or more ownership interest.
>
> * * * * * * *
>
> 12. Identify and explain any and all instances where Carroll Oil Company, Inc., Pershing Service , Inc. and/or Cheyenne Vending and Amusement, Inc., has acted as guarantor or surety on a loan or mortgage to another corporation, partnership, or individual. Attach any documents relating to the same. Please state:
>
> > (a) the terms of the loan, mortgage or agreement;
> >
> > (b) the name and address of the borrower or mortgagor;
> >
> > (c) the purpose of the loan, mortgage, or agreement;
> >
> > (d) the address or location of the guaranteed property; and
> >
> > (e) the amount outstanding, if any.

C Ex. 28.[29]

This close financial arrangement between Carroll Oil and Pershing Service strikes us as relevant to a proper consideration of an "ability to pay" claim as mitigating factor in assessing a penalty. The companies' joint arrangement presumably conferred a financial advantage to Carroll Oil: Carroll Oil was relieved of paying principal and interest on a loan of approximately $200,000; at the same

[29] We find disingenuous Carroll Oil's attempt at the hearing to explain why it did not answer questions on the questionnaire concerning Carroll Oil's loan relationship to Pershing. Mr. Carroll testified that it did not occur to him to provide information on this subject because he "didn't think it was significant going that far back" and because there was no more connection between the two entities at the time he received the questionnaire. Tr. at 222. But as the Region pointed out, the questionnaire requested Carroll Oil to identify and explain "any and all instances" of loan relationships involving Carroll Oil and Pershing Service. *Id.* at 223.

time, since Carroll Oil still held the loan, the company was able to list that property as an asset on its federal corporate tax forms through 1997 and report on its tax forms the interest payments it made on the loan. *See* Tr. at 210. As the Region asserts, this arrangement illustrates "the entanglement of the two companies and the ease with which Mr. Carroll moved funds assets, and liabilities from one company to the other." Appeal at 62. This entanglement, at the least, made highly relevant the question of whether Pershing Service, because of its close association with Carroll Oil, could be a source of financial support to Carroll Oil affecting the latter's ability to pay. As such, the arrangement illustrates the type of "less than arms length" transaction that the Region's financial analyst characterized as an important consideration in informing an ability to pay determination.

Despite the ALJ's warning to Carroll Oil that it employ its direct testimony at the evidentiary hearing as its "last chance" to demonstrate its "inability to pay," Tr. at 214, Carroll failed to present any detailed information on the terms of the loan on the Pershing Boulevard gas station property, the agreement between Pershing Service and Carroll Oil setting up the arrangement, or the purpose underlying the arrangement. As to the last point, Mr. Carroll merely described the arrangement as an Internal Revenue Service "accounting procedure." In addition, Mr. Carroll was tentative on matters related to this transaction and other items in his tax records, explaining on several occasions that he was unable to provide more definite answers because his accountant was not available.[30,31] *Id.* at 210, 215, 217. In sum, Carroll Oil did not provide sufficient information on this transaction such that the company could dispel any suggestion that Pershing Service could be a source of financial support to Carroll Oil affecting its "ability to pay" the penalty.

Here, the consequences of this information shortfall on the relevant matter of Carroll Oil's close financial relationship with Pershing must fall upon Carroll Oil since it bears the burden of presentation and persuasion on the defense of "ability to pay." It is our determination that Carroll failed to provide sufficient "detailed" information on this relationship to satisfy its initial burden of presentation on this matter. *See Bil-Dry*, 9 E.A.D. 575, 613-14 (EAB 2001). Thus, Carroll Oil is not entitled to a penalty reduction on the basis of "ability to pay."

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[30] Mr. Carroll remarked that his tax accountant was unavailable because he was in jail "serving time" for an Internal Revenue Service violation. Tr. at 210, 215.

[31] For example, Mr. Carroll could not specifically identify shareholder income and asset distributions reported on Carroll Oil's federal corporate tax returns for 1992, 1993, 1995, 1996, and 1997, besides saying that they involved "no cash" and surmising that they were an Internal Revenue Service "accounting procedure" related to the transfer of the Pershing Boulevard gas station to Pershing Service and Pershing Service paying off the loan on this property. Tr. at 215-17.

D. *The ALJ's Denial of the Region's Motion to Amend for the Purpose of Considering the Financial Status of Pershing Service, Inc. and Mr.Carroll*

The Region claims that the ALJ erred in not allowing its Complaint to be amended to consider the financial status of Pershing Service and Neil Carroll in examining Carroll Oil's ability to pay. Appeal at 57. This objection strikes us as an attempt by the Region to repackage its original objection to the ALJ's denial of its motion to amend the Complaint. We see no need to revisit our determination that the ALJ did not abuse his discretion in denying the Region's Motion to Amend based on his conclusion that the Region's delay in filing its motion would unduly prejudice Carroll Oil, and thus we reject this challenge to the Initial Decision.

In any event, the Region's objection is rendered moot by our conclusion, *supra* Part IV.C, that Carroll Oil failed to meet its burden of presentation to demonstrate an inability to pay. Also, as the Board has previously held, it is not necessary to include related entities as liable parties in order to determine a respondent's ability to pay because "evaluation of ability to pay is separate from liability." *See New Waterbury*, 5 E.A.D. at 549 n. 32; *see also Union Township*, 150 F.3d at 268-69 (holding in Clean Water Act case that inquiry into corporate parent's finances for purpose of evaluating defendant subsidiary's ability to pay penalty did not require that parent corporation be made a party to the case).

E. *Computation of Revised Penalty Under the Penalty Factors*

We will now recompute Carroll Oil's penalty using the Penalty Policy as our starting point for implementing the statutory penalty factors. In light of our above discussion and rejection of Carroll's defense of "inability to pay," we will adopt, with one exception, the Region's application of the Penalty Policy, discussed in Part IV.B.1, *supra.*

In determining the gravity component of Carroll Oil's penalty, we revise the Region's initial matrix value by ranking the violation's "potential for harm" downward to "moderate" from "major"[32] (while retaining its ranking as "major" with respect to "extent of deviation from requirements" criterion). *See supra* Part IV.B.

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[32] As defined by the Penalty Policy, a violation's "potential for harm" is "moderate" if the violation:

> [C]auses or may cause a situation resulting in a significant risk to human health and the environment and/or may have a significant adverse effect on the regulatory program.

A violation's potential for harm is considered "major" if the violation:

Continued

In our view, such a change is appropriate in light of the evidence in the record indicating that the USTs contained a minimal amount of gasoline after the company pumped out gasoline from its USTs upon ending operations.[33] *See* Tr. at 112, 219. Because the amount of product left in Carroll Oil's USTs during temporary closure bears inevitably on the Facility's potential to pose substantial harm to the environment, at least during the period of temporary closure, we regard it as relevant in assessing the seriousness of the violation in this case.[34] The revision of this matrix ranking to "moderate" yields a new matrix value of $750. *See* Penalty Policy at 16.

Next, we apply to the revised matrix value the same upward adjustment factors as did the Region. Thus, we first increase the matrix value 10%, to $825, to reflect Carroll's lack of good faith cooperation in complying with the UST closure regulations. *See supra* Part IV.B.1. Next, we apply to this value an environmental sensitivity multiplier of "1" (reflecting the low environmental sensitivity of the Facility) and the "days of noncompliance multiplier " of "7" (reflecting the protracted nature of Carroll Oil's violation). *Id.* This results in a total gravity-based penalty assessment of $5,775 ($825 x 1 x 7).

Next, we adopt the Region's economic benefit calculation of $7,950, which was not challenged in the proceeding below, as a reasonable calculation of Carroll Oil's economic benefit of noncompliance under the Penalty Policy. *Id.*

In accordance with the Penalty Policy, we add the gravity-based and economic-based components, arriving at a total final penalty assessment of $13,725.

(continued)

> [C]auses or may cause a situation resulting in a substantial or continuing risk to human health and the environment and/or may have a substantial adverse effect on the regulatory program.

Penalty Policy at 17.

[33] In his testimony, Mr. Carroll recounted that in 1991, Carroll Oil "pumped all the product out of the tanks at [the Western 66 facility] to as low a number as we possibly could * * *." Tr. at 219. The Region does not contest the company's testimony in this regard.

[34] We acknowledge that the Penalty Policy, Appendix A, automatically ranks violations of 40 C.F.R. § 280.70(c) as "major" with respect to "potential for harm" and "extent of deviation from requirements." However, the Board is not bound by the Agency's penalty policies, *see In re Rybond, Inc.*, 6 E.A.D. 614, 639 (EAB 1996), and in this case, as explained above, we regard a "moderate" ranking for the "potential for harm" criterion as more appropriate.

F. *The ALJ's Refusal to Issue a Compliance Order on Grounds of Futility*

In his Initial Decision, the ALJ set aside the compliance order included by the Region in its Complaint, *see supra* Part III, stating that under the circumstances a compliance order would be "futile" given the fact that "Carroll Oil is not an ongoing concern and * * * has been in a defunct state since 1992." Init. Dec. at 20.

In support of its affirmative defense regarding the compliance order, Carroll Oil offered in its Answer the same basic arguments it made to avoid imposition of a penalty. The company asserted that "the respondent is without business operations, unencumbered assets or any credit with which to obtain funds to perform the requirements in the compliance order * * *." Answer at 3. The company explained that the real property containing the USTs had been sold for delinquent real property taxes and that its value stood "at less than 20% of the total encumbrances against the subject property which include * * * mortgage debt[,] tax liens and judgment liens." *Id.*

For the same reasons that we found Carroll Oil's proof insufficient to establish inability to pay a penalty, *see supra* Part IV.C, we conclude that the ALJ lacked an adequate basis for concluding that Carroll Oil did not have the financial ability to comply with its UST closure regulations, and thus we reverse his decision setting aside the Region's compliance order.

Moreover, in taking this action, we are mindful that companies are generally required to comply with their environmental requirements regardless of economic circumstance. *See, e.g., Commonwealth Ref. Co. v. EPA*, 805 F.2d 1175 (5th Cir. 1986) (holding that debtor hazardous waste facility in bankruptcy proceeding was subject to RCRA compliance order); *see also Union Elec. Co. v. EPA*, 427 U.S. 246, 256-57 (1976) (holding that economic feasibility is not a proper basis for staying compliance with the Clean Air Act requirements). In addition, we recognize the essential role that the UST closure regulations play in advancing Subtitle I's purpose of protecting human health and the environment, *see supra* Part IV.B.3, and thus view circumspectly any determination that will relieve companies of fulfilling their environmental obligations.

For the reasons stated above, the Region's compliance order is reinstated in its entirety.[35]

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[35] The rules governing this proceeding at 40 C.F.R. pt. 22 provide that "the [EAB] may adopt, modify or set aside any recommended compliance or corrective action order or Permit Action." 40 C.F.R. § 22.30(f).

V. *CONCLUSION*

In accordance with the foregoing and pursuant to RCRA § 9006(d), 42 U.S.C. § 6991e(d), Carroll Oil is ordered to pay a penalty of $13,725 for its violation of UST closure regulations at 40 C.F.R. § 280.70(c). Carroll Oil shall pay the full amount of the penalty within thirty (30) days of receipt of this decision. Payment shall be made by forwarding a cashier's or certified check payable to the Treasurer, United States of America, to the following address:

Mellon Bank
EPA-Region VIII
Tina Artemis
Regional Hearing Clerk
P.O. Box 360859M
Pittsburgh, PA 15251-6859

Furthermore, the Region's compliance order is reinstated and Carroll Oil is ordered to comply with its provisions.

So ordered.