IN RE ANDREW B. CHASE, a/k/a ANDY CHASE, CHASE SERVICES, INC., CHASE CONVENIENCE STORES, INC., AND CHASE COMMERCIAL LAND DEVELOPMENT, INC.

RCRA (9006) Appeal No. 13-04

FINAL ORDER AND DECISION

Decided August 1, 2014

Syllabus

Respondents Andrew B. Chase a/k/a Andy Chase, Chase Services, Inc., Chase Convenience Stores, Inc., and Chase Commercial Land Development, Inc. appeal from an initial decision imposing a $127,069 civil penalty on them for violations of section 9006 of the Solid Waste Disposal Act, 42 U.S.C. § 6991e, and associated regulations at 40 C.F.R. part 280. The Administrative Law Judge ("ALJ") had found Respondents liable for 19 violations of regulatory requirements for underground storage tank ("UST") leak detection testing, prevention, and correction at six retail gasoline stations in upstate New York. Respondents challenge the ALJ's liability determination for four counts and also argue that the penalty amount should be further reduced for several reasons, including Respondents' alleged inability to pay. The U.S. Environmental Protection Agency ("EPA") Region 2 ("Region") cross-appeals, contending that the ALJ erroneously interpreted the term "annual" when she applied the relevant regulation to Count 2's second period of violation and improperly applied the Agency's penalty policy to several other violations.

Held: The Board reverses the ALJ's interpretation of the term "annual" and increases the ALJ's penalty against Andrew B. Chase individually for Count 2 by $3,945, for a total penalty against all Respondents of $131,014. The Board adopts the ALJ's remaining findings of fact and conclusions of law.

(1) Liability for Leak Detector Tests. Respondents are liable for failing to conduct leak detection tests required by 40 C.F.R. §§ 280.41(b)(1) and 280.44(a)-(c). The tests Respondents submitted to refute liability either concern different tests than those the ALJ found Respondents failed to perform or were performed on dates outside the period of violation. The Board therefore declines to modify or set aside the ALJ's finding of liability for these violations.

(2) Definition of "Annual" as Used in 40 C.F.R. § 280.44(a). In determining whether Mr. Chase failed to conduct the annual test required by 40 C.F.R. § 280.44(a), the ALJ erroneously defined "annual," as used in that regulation, to refer to a period greater than 12 consecutive months. Because Mr. Chase conducted the required test more than sixteen months after the previous test (and thus four months after the due date), the Board concludes that he violated the regulation and assesses a penalty of $3,945.

(3) The Appropriate "Potential for Harm" in This Case: "Major" vs. "Moderate." The ALJ did not clearly err or abuse her discretion in classifying Respondents' failure to conduct an annual test of the leak detector system at four of the service stations as having a moderate, rather than a major, potential for harm in this case and assessing a penalty within the UST Penalty Policy's range of penalties. The ALJ reasonably distinguished between those service stations where some leak detection (monthly monitoring) had been performed and those where no leak detection had been performed in determining the "potential for harm" for failing to perform the required annual test at each of the stations.

(4) Use of an "Environmental Sensitivity Multiplier" Below Those Included in the UST Penalty Policy. The ALJ did not clearly err or abuse her discretion in departing from the UST Penalty Policy by using a lower "Environmental Sensitivity Multiplier" than the policy contemplates for a significantly smaller tank containing substantially less product. The Board finds that the ALJ adequately explained her departure from the UST Penalty Policy and the record supports her reasoning.

(5) Exclusion of Financial Information from the Record. Under the circumstances presented here, the ALJ did not err or abuse her discretion in excluding Respondents' financial information from the record. The Region made repeated efforts to obtain financial documentation from Respondents, and Respondents never produced more than a limited set of documents and then failed to comply with the ALJ's order to produce adequate documentation of their financial condition prior to the hearing.

(6) Further Penalty Reductions Not Required. The ALJ did not clearly err or abuse her discretion in declining to further reduce the penalty amount for any of the reasons Respondents presented. Actual harm to the environment need not be proven to assess a substantial penalty. Furthermore, neither law nor policy prohibits assessing a gravity component of a penalty that is substantially larger than the economic benefit component.

Before Environmental Appeals Judges Randolph L. Hill, Catherine R. McCabe, and Kathie A. Stein.

Opinion of the Board by Judge McCabe:

I. *STATEMENT OF THE CASE*

Respondents Andrew B. Chase a/k/a Andy Chase, Chase Services, Inc., Chase Convenience Stores, Inc., and Chase Commercial Land Development, Inc. appeal from an Initial Decision imposing a $127,069 civil penalty for violations of section 9006 of the Solid Waste Disposal Act, 42 U.S.C. § 6991e, and associated regulations at 40 C.F.R. part 280. The Administrative Law Judge ("ALJ")[1] had found Respondents liable for 19 of the 21 counts alleged in the complaint, all of which involved violations of regulatory requirements for underground storage tank ("UST") leak detection testing, prevention, and correction at six retail gasoline stations in upstate New York. Respondents challenge the ALJ's liability determination for four counts and argue that the penalty amount should be further reduced for several reasons, including Respondents' alleged inability to pay. In a response and cross-appeal, the U.S. Environmental Protection Agency ("EPA") Region 2 ("Region") contends that the ALJ assessed an inadequate penalty because she erroneously interpreted the applicable regulations in considering Count 2. The Region also claims that the ALJ improperly applied the Agency's penalty policy to several other violations.

For the following reasons, the Environmental Appeals Board ("Board") concludes that the ALJ erroneously interpreted the regulatory term "annual" as used in 40 C.F.R. § 280.44(a). The Board thus increases the ALJ's penalty against Andrew B. Chase individually for Count 2 by $3,945, for a total penalty against all Respondents of $131,014. The Board adopts the ALJ's remaining findings of fact and conclusions of law.

II. *FACTS AND PROCEDURAL HISTORY*

A. *Complaint and Parties*

In 2011, the Region filed a 21-count administrative complaint under section 9006 of the Solid Waste Disposal Act, 42 U.S.C. § 6991e, against Respondents, the owners and/or operators of six retail gasoline stations located in or near Plattsburgh, New York (identified as Service Stations I-VI). The

[1] ALJ M. Lisa Buschmann presided over the matter.

complaint alleged that between 2006 and 2009 Respondents violated various regulatory requirements of 40 C.F.R. part 280 for prevention and detection of leaks from USTs at Service Stations I-VI. The Region sought a total penalty of $265,211.63, relying on EPA's relevant penalty guidance for its calculations.[2] Compl. at 38-40 (citing *U.S. EPA Penalty Guidance for Violations of UST Regulations*, OSWER Directive 9610.12 (Nov. 1990) ("*UST Penalty Policy*")).

At the time of the alleged violations, Respondent Andrew B. Chase was the chairman or chief executive officer of Respondents Chase Convenience Stores, Inc., Chase Services, Inc., and Chase Commercial Land Development, Inc. (together, "Corporate Respondents"). *Id*. ¶ 31; Init. Dec. at 11. Respondents have asserted, both before the ALJ and on appeal, that five of the six service stations at issue were sold prior to the Region's filing of the complaint[3] and that the other station (Service Station I) is owned by Belmont, Inc. ("Belmont"), a company that is not one of the Corporate Respondents.[4] Declaration of Thomas W. Plimpton in Opposition to Complainant's Motion for Partial Accelerated Decision ¶¶ 3-4 (Mar. 29, 2012) ("Mar. 29, 2012 Plimpton Decl."); Appeal Br. at 2. At all times relevant to the complaint, however, Mr. Chase was the operator of the USTs at each of the stations, and either Mr. Chase or the Corporate Respondents owned the USTs. *See* Init. Dec. at 12 (Service Stations II-VI), 15 (Service Station I).

B. *Liability and Penalty Determinations*

The ALJ issued a Partial Accelerated Decision in which she found Respondents liable for 19 of the 21 counts alleged in the complaint. Order on Complainant's Motion for Partial Accelerated Decision ("Partial Accel. Dec.") (June 21, 2012). A week later, the ALJ issued an order precluding Respondents

[2] The Region's original penalty demand was $232,838.63. Compl. at 40. The Region later revised this amount to $265,211.63, citing a calculation error in the original amount. Declaration of Paul M. Sacker in Support of Assessing the Penalty Sought Against Respondents in Each of Counts 1 through 16, 18, 19, and 21 of the Complaint ¶ 204 (Aug. 9, 2012) ("Aug. 9, 2012 Sacker Decl.").

[3] Respondents appear to have made this statement again on appeal in an attempt to suggest either that they are not liable or that they are financially unable to pay a penalty. The Board addresses these contentions below in note 8 and in Part IV.B.5.d, respectively.

[4] Belmont is not a named respondent. *See* Compl. ¶ 26 (listing all respondents). The ALJ noted, however, that Mr. Chase is a principal of Belmont. *See* Init. Dec. at 15 (citing to Declaration of Gail B. Coad ¶¶ 8, 13 (Sept. 21, 2012)). The fact that, as discussed below, Mr. Chase submitted financial information for Belmont in support of his inability to pay claim, supports the ALJ's finding.

from presenting any evidence concerning their alleged inability to pay or financial hardship. Order on Complainant's Motion to Preclude Documentation and Draw Adverse Inference at 3-4 ("June 28, 2012 Order"). After the ALJ issued these orders, the parties waived their rights to a hearing on the penalty amount for 19 counts, and the Region agreed not to seek judgment on the remaining 2 counts. *See* Init. Dec. at 2.

Thereafter, the ALJ issued an Initial Decision assessing a total of $127,069 in penalties against the Respondents as follows: Mr. Chase, individually, $82,503 penalty for violations at Service Stations I, II, and VI; Mr. Chase and Chase Convenience Stores, jointly and severally, $12,670 penalty for violations at Service Station III; Mr. Chase and Chase Services, Inc., jointly and severally, $22,942 penalty for violations at Service Station IV; and Mr. Chase and Chase Commercial Land Development, Inc., jointly and severally, $8,954 penalty for violations at Service Station V.[5] *See id.* at 54, 57. In assessing the penalty, the ALJ significantly relied on EPA's UST Penalty Policy and a guidance document entitled "Revision to Adjusted Penalty Policy Matrices Issued on November 16, 2009." *See, e.g., id.* at 4-8, 20-21, 23, 25. *See generally* Memorandum from Rosemarie A. Kelley, Dir., Waste & Chem. Enforcement Div., Office of Civil Enforcement, U.S. EPA, to Regional Counsels, U.S. EPA, at 1 & attach. C (Apr. 6, 2010) (containing revisions to the adjusted penalty policy matrices based on the EPA's inflation rule) [hereinafter Revised Matrices Guidance].

III. *JURISDICTION AND STANDARD OF REVIEW*

The Board has jurisdiction to adjudicate this civil penalty appeal under Section 9006 of the Solid Waste Disposal Act, 42 U.S.C. § 6991e, and sections 22.1(a)(4) and 22.30(a) of EPA's Consolidated Rules of Practice, 40 C.F.R. part 22. The Board reviews a presiding officer's factual and legal conclusions on a *de novo* basis. 40 C.F.R. § 22.30(f) (the Board shall "adopt, modify, or set aside" the presiding officer's findings of fact and conclusions of law or exercise of discretion); *see* Administrative Procedure Act § 8(b), 5 U.S.C. § 557(b) ("[o]n appeal from or review of the initial decision, the agency has all the powers [that] it would have in making the initial decision except as it may limit the issues on

[5] The ALJ also denied Respondents' motion for reconsideration of the June 28, 2012 Order excluding evidence of Respondents' alleged inability to pay, finding that the Respondents' motion had merely reiterated their earlier arguments and that "[t]he Respondents [did] not assert that there were any errors of fact or law in the ruling, and [did] not assert that there were any changes in relevant law or factual circumstances since the ruling." Init. Dec. at 5.

notice or by rule"). All matters in controversy must be established by a preponderance of the evidence. 40 C.F.R. § 22.24(b). The complainant has the burdens of presentation and persuasion to prove that "the violation occurred as set forth in the complaint and that the relief sought is appropriate." *Id*. § 22.24(a).

IV. *ANALYSIS*

A. *Liability Issues*

1. *Respondents Are Liable Under Counts 1, 2, 18, and 19 for Failing to Conduct Certain Required Leak Detection Tests*

On appeal, Respondents first challenge the ALJ's conclusion that they failed to perform certain required leak detection tests for the underground piping at Service Stations I and VI (Counts 1, 2, 18, and 19). Appeal Br. at 2. Respondents contend that the ALJ erred in "awarding penalties" for these counts because Respondents had submitted four leak detector tests demonstrating that the tanks at those stations passed inspection.[6] *Id*. at 2. In support of their argument, Respondents rely on the following four tests: (1) an April 22, 2009 leak detector test performed at Service Station I; (2) a September 7, 2010 leak detector test performed at Service Station I; (3) an August 23, 2011 leak detector test performed at Service Station I; and (4) an August 23, 2011 leak detector test performed at Service Station VI. *Id*. at 2-3 (referring to Mar. 29, 2012 Plimpton Decl. Exs. A, B).

As explained more fully below, the Board concludes that these four tests are irrelevant to the challenged violations because either they concern different tests than those the ALJ found Respondents failed to perform or they were performed on dates outside the period of violation. Consequently, the Board declines to modify or set aside the ALJ's finding of liability for Counts 1, 2, 18, and 19.

a. *Regulatory Requirements: Testing of Underground Piping*

Section 280.41 of title 40 of the Code of Federal Regulations contains several testing requirements for petroleum UST systems. Of relevance to this

[6] Respondents do not explicitly challenge "liability" in their appeal brief. The Board, nevertheless, interprets their challenge to be to the ALJ's liability determination rather than to the penalty calculation because Respondents question the awarding of any penalty for these counts and because they used this same evidence to challenge the Region's motion for accelerated decision on liability before the ALJ. *See* Partial Accel. Dec. at 24-26 (discussing Mar. 29, 2012 Plimpton Decl. at 2).

case, the regulation requires monitoring of underground piping that routinely contains regulated substances as follows:

> (1) *Pressurized piping*. Underground piping that conveys regulated substances under pressure must:
>
> (i) Be equipped with an automatic line leak detector[7] conducted in accordance with § 280.44(a); *and*
>
> (ii) Have an annual line tightness test conducted in accordance with § 280.44(b) *or* have monthly monitoring conducted in accordance with § 280.44(c).

40 C.F.R. § 280.41(b)(1) (emphasis added). Importantly, the section 280.44 provision describing automatic line leak detector requirements further requires that "[a]n annual test of the operation of the leak detector [] be conducted" to ensure that it is operable within the required parameters. *Id*. § 280.44(a). Reading these regulations together, they, in essence, contain two distinct testing requirements: (A) an annual test of the required automatic line leak detector ("Requirement A"), and (B) an annual line tightness test or monthly monitoring of the piping ("Requirement B").

b. *Count 1*

The ALJ found that Mr. Chase, as owner and operator[8] of Service Station I, failed to conduct an annual line tightness test or monthly monitoring for the underground piping for two USTs at that station between April 24, 2008, and December 15, 2010, in violation of 40 C.F.R. § 280.41(b)(1)(ii). Partial Accel. Dec. at 24; Init. Dec. at 18; *see also* Compl. ¶¶ 77-78 (Count 1). In other words, the ALJ determined that Mr. Chase failed to meet "Requirement B," as delineated above, and she assessed a penalty for this violation. Init. Dec. at 20-21. Respondents challenge the ALJ's conclusions, arguing that their contractors

[7] The regulations define automatic line leak detectors as "methods that alert the operator to the presence of a leak by restricting or shutting off the flow of regulated substances through piping or triggering an audible or visual alarm." 40 C.F.R. § 280.44(a).

[8] In their appeal, Respondents mention that the complaint "incorrectly alleged that Service Station I * * * is owned by Andrew Chase individually." Appeal Br. at 2. According to Respondents, Belmont owns that station. *See* note 4 and accompanying text. The ALJ addressed this issue in the Initial Decision, finding that Mr. Chase owned and operated the *USTs* at Station 1. *See* Init. Dec. at 15. Respondents do not challenge this determination and thus have waived any challenge to it.

performed "leak detector testing" at Service Station I in 2009, 2010, and 2011. Appeal Br. at 2 (referring to the first three tests listed above.). The three tests that Respondents rely on in an attempt to refute the ALJ's finding of violation are *automatic line leak detector tests*, i.e., "Requirement A" tests, not "Requirement B" tests (annual line tightness or monthly monitoring tests). The ALJ pointed out this distinction when she considered these same tests. *See* Partial Accel. Dec. at 24 ("[T]hese forms show passing tests for leak *detectors*, and do not show any annual line tightness testing or monthly monitoring for underground piping." (referencing Respondents' Opposition to Complainant's Motion for Accelerated Decision Ex. A)). Evidence that Mr. Chase's contractors performed "Requirement A" testing is insufficient to demonstrate that Mr. Chase complied with "Requirement B." The Board therefore concludes that Mr. Chase failed to conduct annual line tightness tests or monthly monitoring for underground piping at Station I between April 24, 2008, and December 15, 2010.[9]

c. *Count 2*

The ALJ found that Mr. Chase failed to conduct an annual test of the operation of the automatic line leak detector for underground piping for two USTs at Service Station I from May 2006 until April 22, 2009, and from April 22, 2010, until September 7, 2010, in violation of 40 C.F.R. §§ 280.41(b)(1)(i) and 280.44(a).[10] Partial Accel. Dec. at 25; Init. Dec. at 21; *see also* Compl. ¶ 85 (Count 2). In other words, the ALJ determined that Mr. Chase failed to meet "Requirement A" for two specified periods. In challenging these findings, Respondents again rely on the three leak detector tests their contractors performed at Station I. Here, although the tests Respondents rely upon are the correct type of test, the *dates* of the tests – April 22, 2009, September 7, 2010, and August 23, 2011 – do not support Respondents' challenge. The first test was performed after

[9] Notably, the ALJ did decrease the Region's proposed penalty based, in part, on the April 2009 and September 7, 2010 tests Respondents submitted. *See* Init. Dec. at 20 (explaining that she reduced the values representing extent of deviation and potential for harm because Respondent tested the automatic line leak detectors twice during the period of violation for annual line tightness tests or monthly monitoring and there was "no evidence that the [leak detectors] failed, were otherwise inadequate or lacked the specified features"). In other words, the "Requirement A" test results helped demonstrate that the failure to conduct the "Requirement B" tests merited a lower penalty because they showed that failure to comply with "Requirement B" had a lower potential for harm than the Region had proposed.

[10] Contractors conducted tests on April 22, 2009, and on September 7, 2010. These test dates define the end dates for the two periods of violation the Region alleged in Count 2.

the first period of violation and before the second period of violation. The other two tests were performed *after* both periods of violation. These tests, therefore, are irrelevant and immaterial to the time periods in which the ALJ found Respondents to have violated the regulatory requirements. The ALJ came to the same conclusion when she considered these three tests. *See* Partial Accel. Dec. at 25. The Board therefore concludes that Mr. Chase failed to conduct annual testing of the operation of the automatic line leak detector for underground piping at Station I from May 2006 until April 22, 2009, and from April 22, 2010, until September 7, 2010.[11]

d. *Count 18*

The ALJ found that Mr. Chase failed to conduct annual automatic line leak detector tests (i.e., failed to conduct a "Requirement A" test) for the underground piping for three USTs at Service Station VI from December 31, 2008, through September 7, 2010, as required by 40 C.F.R. §§ 280.44(a) and 280.41(b)(1)(i). Partial Accel. Dec. at 25; Init. Dec. at 49-50; *see also* Compl. ¶ 260 (Count 18). In challenging these findings, Respondents rely on an August 23, 2011 leak detector test that a contractor performed for the three relevant USTs at Station VI. As the ALJ had similarly found, although this test is the correct type of test, the *date* of the test, which is nearly a year *after* the period of violation, does not support Respondents' challenge. *See* Partial Accel. Dec. at 25. The Board therefore concludes that Mr. Chase failed to conduct annual testing of the operation of the automatic line leak detector for underground piping at Station VI from December 31, 2008, through September 7, 2010.

e. *Count 19*

The ALJ found that Mr. Chase, as owner and operator of Service Station VI, failed to have either an annual line tightness test conducted in accordance with 40 C.F.R. § 280.44(b) or monthly monitoring conducted in accordance with 40 C.F.R. § 280.44(c) for the underground piping for three USTs at that station from August 24, 2009, to December 15, 2010, in violation of 40 C.F.R. § 280.41(b)(1)(ii).[12] Partial Accel. Dec. at 26; *see also* Init. Dec. at 51; Compl.

[11] The ALJ assessed a penalty for the first period (from May 2006 until April 22, 2009) but did not assess a penalty for the second (from April 22, 2010, until September 7, 2010). Init. Dec. at 23. The Region challenges the ALJ's penalty assessment for this second period. The Board addresses that issue below in Part IV.A.2.

[12] The Region phrased this violation differently than it did Count 1, apparently because the evidence slightly differed for the two counts. Some Station VI records indicated that Mr. Chase attempted to use "interstitial monitoring," one of the acceptable

¶¶ 273-76 (Count 19). Similarly to Count 1, the ALJ determined that Mr. Chase failed to meet "Requirement B." Partial Accel. Dec. at 26. Respondents challenge the ALJ's conclusion, arguing that a contractor had performed "leak detector testing" at Service Station VI in 2011. Appeal Br. at 3 (referring to the fourth test listed above). As the ALJ pointed out, this 2011 test is a *leak detector test*, i.e., a "Requirement A" test, not a monthly monitoring test. *See* Partial Accel. Dec. at 26. Moreover, it was performed after the period of violation. The Board therefore concludes that Mr. Chase failed to conduct either an annual line tightness test in accordance with 40 C.F.R. § 280.44(b) or monthly monitoring in accordance with 40 C.F.R. § 280.44(c) for the underground piping for three tanks at that station from August 24, 2009, to December 15, 2010.

2. *An "Annual" Test Conducted in the Following Calendar Year But Not Within 12 Months of the Previous Test Was Untimely*

In its cross-appeal, the Region challenges the ALJ's interpretation of the regulatory term "annual" as used in 40 C.F.R. § 280.44(a), which she relied on when she declined to assess a penalty for the second period of violation the Region had alleged in Count 2. Cross-Appeal Br. at 66. As explained in the previous section, the ALJ found that Mr. Chase had violated 40 C.F.R. §§ 280.41(b)(1)(i) and 280.44(a) by failing to conduct an annual test of the operation of the automatic line leak detector for underground piping for two USTs at Service Station I during two periods: from May 2006 until April 22, 2009, and from April 22, 2010, until September 7, 2010.[13] The ALJ did not assess a penalty, however, for the second period. Although she found that Mr. Chase did not conduct the 2010 testing within 12 months of the prior test (i.e., by April 22, 2010), the ALJ concluded that the term "annual" as used in 40 C.F.R. § 280.44(a) should be read to allow for testing beyond 12 months as long as the tests are conducted within two consecutive calendar years. *See* Init. Dec. at 23. The Board concludes that the ALJ erroneously defined "annual," as it is used in 40 C.F.R. § 280.44(a), to refer to a period greater than 12 consecutive months.

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monitoring methods the regulations authorize for underground piping (when done properly), to meet the regulatory requirements. *See* 40 C.F.R. §§ 280.43(g), .44(c). The station's records and EPA's inspections of that station, however, demonstrated that Mr. Chase improperly conducted the monitoring. *See* Partial Accel. Dec. at 26.

[13] Mr. Chase provided evidence that contractors had tested the operation of the automatic line leak detector at Service Station I on April 22, 2009, and then again on September 7, 2010, more than 16 months after the previous test. *See* Part IV.A.1 (listing four tests).

The ALJ provided several reasons for her interpretation of section 280.44(a): (1) the term "annual" was not defined in the regulations, (2) the regulations do not establish a particular date as to when the testing is to be conducted, and (3) the regulations do not specify that testing must be conducted within 12 months of the last due date for testing. *Id*. The ALJ also noted that the Region had not cited any other authority supporting the Region's view that the testing must be conducted within the 12-month period of the last testing date.[14] *Id*. She relied, therefore, on the common dictionary definition of "annual" to determine whether a penalty was appropriate for this period of violation. *Id.* Using the definition "reckoned by the year * * * ; covering the period of one year: based on a year; occurring, appearing, made, done or acted upon every year or once a year," Webster's 3rd New International Dictionary 88 (2002), she concluded that "where an [automatic line leak detector] test was conducted in April 2009 and again in September the next year, there is no basis for assessing a penalty for the time between April 2010 and September 2010 merely on the basis that the test was not conducted within 12 months of the last test." Init. Dec. at 23.

First, the Board notes that the ALJ's determination that a penalty was inappropriate for this violation is inconsistent with her finding that Mr. Chase violated the regulation between April 22, 2010, and September 7, 2010 (i.e., the second period of alleged violation). *See* Partial Accel. Dec. at 25. If, according to the ALJ's regulatory interpretation, Mr. Chase met the "annual" test requirement, then he would not be liable for this count. *See* 40 C.F.R. § 280.44(a).

This inconsistency is unimportant, however, because the Board concludes that the ALJ erred in interpreting the regulatory term "annual." The Board looks to "the ordinary, contemporary, common meaning of a word used in a statute or regulation but not specifically defined therein." *In re Mayes*, 12 E.A.D. 54, 86 (EAB 2005), *aff'd*, No. 3:05-CV-478, slip op. at 37-42 (E.D. Tenn Jan. 4, 2008); *accord In re Veldhuis*, 11 E.A.D. 194, 217 (EAB 2003) (relying on "common sense meaning"); *cf. Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). Although the ALJ correctly consulted the dictionary to determine the common meaning of "annual," she failed to take into account the underlying definition of the term "year" used in the dictionary definition of "annual." The same dictionary upon which the ALJ relied to define "annual" provides the following primary definition for "year": "*[t]he period of about 365¼ solar days*

[14] Apparently, the Region may not have provided the Ziegele Memorandum, discussed in the text below, to the ALJ.

required for one revolution of the earth around the sun and generally indicated by the return of the sun to the same part of the sky or by the recurrence of the seasons." Webster's 3rd New International Dictionary 2648 (emphasis added). Thus, the dictionary definition of "annual" means a period of 365¼ days or 12 consecutive months. It does not refer to a period stretching potentially across two consecutive years (which, depending on start and end dates, could equal nearly 731 days). *See In re Euclid of Va., Inc.*, 13 E.A.D. 616, 661 n.80, 713 (EAB 2008) (finding respondent liable for failure to perform an annual line leak detection test where test was performed 14 months after previous test).

Interpreting "annual" to mean a 12-month period is also consistent with the Agency's longstanding interpretation of the term "annual" as used in two related UST testing provisions, sections 280.41(a)(2) (annual tank testing requirements) and 280.41(b)(1)(ii) (annual line tightness testing for pressurized piping). *See* Memorandum from David W. Ziegele, Dir., Office of Underground Storage Tanks, U.S. EPA, to UST/LUST Reg'l Program Managers, *Regulatory Interpretation; Definition of "Annual" as it Applies to Tightness Tests* 1 (Mar. 7, 1993) [hereinafter Ziegele Memorandum]). The Ziegele Memorandum interprets "annual" as used in those UST regulatory sections to "mean[] on or before the same date of the following year." *Id.* The memorandum emphasizes that "[o]ther interpretations cannot be supported by the letter or intent of the regulations."[15] *Id.* Interpreting the term "annual" consistently among these related UST provisions is also consistent with legal norms of statutory construction. *See, e.g., Dep't of Revenue v. ACF Indus.*, 510 U.S. 332, 342 (1994) (explaining that the "normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning" and interpreting a subsection of a statute to be consistent with another subsection); *Sorensen v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986) (interpreting a statutory term consistently with the same term where it was explicitly defined in another section of the subchapter).

The Board concludes that the ALJ erroneously defined the term "annual" as used in 40 C.F.R. § 280.44(a) to extend beyond a 12-month period and thereby failed to assess a penalty for the April 22, 2010, to September 7, 2010 period of violation. Because Mr. Chase conducted the test more than four months after the

[15] Although the Ziegele Memorandum is only guidance, because it represents a contemporaneous interpretation of the regulation, the Board generally defers to such statements, as do other courts. *In re Deseret Power Elec. Coop.*, 14 E.A.D. 212, 239-41 (EAB 2008); *see also, e.g., Rosette, Inc. v. United States*, 277 F.3d 1222, 1230 (10th Cir. 2002) ("[G]reat deference is given to the interpretation of a statute by the agency charged with its administration, [and] this respect is particularly due where the administrative practice is a contemporaneous construction of the statute * * *.").

due date, he violated the regulations and should pay a penalty. The Board will assess a penalty for this violation below in Part IV.C, following an analysis of the parties' penalty issues.

B. Challenges to the Penalty

1. *Statutory Penalty Criteria and the Agency's UST Penalty Policy*

In the RCRA statute, Congress directed EPA to take into account certain factors in determining penalties for UST violations: "the seriousness of the violation" and "any good faith efforts to comply with the applicable requirements." RCRA § 9006(c), 42 U.S.C. § 6991e(c). EPA developed the UST Penalty Policy to assist Agency personnel in implementing these statutory factors when calculating penalties. *UST Penalty Policy* § 1.1.

EPA's UST Penalty Policy provides for two fundamental components of an assessed penalty: the economic benefit component and the gravity-based component. When added together, these two elements form the final penalty amount. *Id.* ch. 2. The economic benefit component is intended to remove any significant profit a violator may have made from noncompliance. The economic benefit calculation is based on monetary benefits derived from both avoided costs and delayed costs. *Id.* § 2.1. The gravity component of the penalty is intended to penalize current and/or past noncompliance. This latter component consists of four elements: (1) the "initial matrix value;" (2) violator-specific adjustments to the initial matrix value; (3) an environmental sensitivity multiplier ("ESM"); and (4) a days-of-noncompliance multiplier. *Id.* ch. 3. In this case, the parties have challenged only the gravity-based component of certain of the ALJ's penalty calculations.

The first step in calculating the gravity-based component of a penalty is to determine the "initial matrix value." This value is a base dollar amount for a particular violation that is derived from the standard UST penalty chart (or "matrix"). *Id.* § 3.1. The initial matrix value is based on two criteria: (1) the extent to which a violation deviates from the UST statutory or regulatory requirements ("extent of deviation"), and (2) the likelihood that the violation could or did result in harm to human health or the environment and/or has, or had, an adverse effect on the regulatory program ("actual" or "potential harm").[16] *Id.*

[16] In this case, the Region did not allege or present evidence that actual harm occurred, so the Region and the ALJ referred to this criterion solely as "potential for harm" throughout their penalty calculations. The Board does the same in the remainder of this decision.

Each of these criteria may be assigned one of three gravity levels: major, moderate, or minor. *Id*. The penalty chart assigns a different "initial matrix value" for the violation depending on the penalty assessor's selection of gravity level for each of the two criteria. *See id.* Ex. 4.

The UST Penalty Policy provides descriptive definitions for the three gravity levels that the penalty assessor may consider in assessing the potential (or actual) harm from the violation. The potential for harm is considered "major" when "[t]he violation causes 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." *Id*. § 3.1. The potential for harm is considered "moderate" if "[t]he violation causes 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." *Id*. The potential for harm is considered "minor" when "[t]he violation causes or may cause a situation resulting in a relatively low risk to human health and the environment and/or may have a minor adverse effect on the regulatory program." *Id*. The penalty policy also provides an example of a violation that EPA considers to fall within each of the gravity levels. *Id*.

The UST Penalty Policy also contains a number of tables EPA developed as a guide for determining the appropriate gravity level for some specific types of violations. *See id.* app. A. These tables specify the gravity levels that should be used to determine the "extent of deviation" and the "potential for harm" for each listed violations. For these types of violations, EPA personnel may determine the base penalty amount by using these tables, instead of using the standard UST penalty matrix and the general definitions for major, moderate, and minor gravity levels.

One of these UST Penalty Policy tables – "Table D" – contains gravity levels for several types of release detection violations. *See id.* app. A, subpt. D. For the overall "failure to provide *any* release detection for underground piping" in violation of 40 C.F.R. § 280.44, Table D assigns a "major" extent of deviation and a "major" potential for harm. *See id*. (emphasis added). Table D likewise assigns a "major" extent of deviation and a "major" potential for harm for both the "failure to provide [an] adequate line leak detector system for underground piping" and the "failure to provide [an] adequate line tightness testing system for underground piping system" in violation of 40 C.F.R. § 280.44(a) and (b), respectively. *Id*.

Once the penalty assessor determines an initial matrix value, the UST Penalty Policy allows him or her to make certain adjustments. One such adjustment is the "violator-specific adjustment," which allows for upward and downward changes to the matrix value based on case-specific differences in a violator's degree of cooperation or noncooperation, degree of willfulness or negligence, history of noncompliance, and other unique factors. *Id.* § 3.2. The penalty policy also allows for "settlement adjustments," which are "additional adjustments [that] may be made as part of a settlement compromise." *Id*. ch. 4.

Another adjustment to the gravity-based component of the penalty is the environmental sensitivity multiplier ("ESM"), which allows for a "further adjustment to the matrix value based on potential site-specific impacts that could be caused by the violation." *Id.* § 3.3. More particularly, the UST Penalty Policy explains this factor as follows:

> The environmental sensitivity multiplier takes into account the adverse environmental effects that the violation may have had, given the sensitivity of the local area to damage posed by a potential or actual release. This factor differs from the potential-for-harm factor, which takes into account the *probability* that a release or other harmful action *would occur* because of the violation. The environmental sensitivity multiplier addressed here looks at the *actual or potential impact* that such a release, once it *did occur*, would have on the local environmental and public health.

Id. (emphasis in original).

To calculate the ESM, the penalty assessor must determine the "sensitivity of the environment," taking into account factors such as the amount of substance involved (e.g., size and number of tanks), toxicity, potential hazards, geologic features, actual or potential human or environmental receptors (e.g., likelihood of contamination of nearby waterways or drinking water wells). *Id.* The UST Penalty Policy further explains that "the environmental sensitivity will be either low, medium, or high," with corresponding ESM values of 1.0 (low), 1.5 (medium), or 2.0 (high). *Id.*

The last adjustment factor is the days of noncompliance multiplier, which takes into account the number of days of noncompliance. *Id.* § 3.4.

To calculate the final gravity component, the penalty assessor multiplies the initial matrix value derived from the relevant penalty table by the violator-specific adjustments, the ESM, and the days of noncompliance multiplier. *Id.*

The economic benefit component is then added to this value to form the final penalty for a particular violation. *Id*.

2. *The ALJ Did Not Clearly Err or Abuse Her Discretion in Classifying Respondents' Failure to Conduct an Annual Test of the Leak Detector System as Having a Moderate, Rather than a Major, Potential for Harm in This Case*

The Region claims that, in calculating the penalties for Respondents' failure to annually test the automatic line leak detectors at Service Stations II, III, IV, and V (Counts 8, 10, 13, and 15), the ALJ "misapplied the penalty policy and underestimated the potential for harm" by finding the "potential for harm" for the violations to be "moderate" under the UST Penalty Policy rather than "major" as the Region had proposed. Cross-Appeal at 84. The Region claims that the ALJ, in doing so, improperly conflated the protections afforded by automatic line leak detector testing with those underlying the annual line tightness testing or monthly monitoring requirement. As a result, according to the Region, the ALJ underestimated the potential for harm. *Id*. at 84-90. For the following reasons, the Board disagrees.

Under the Consolidated Rules of Practice that govern this proceeding, 40 C.F.R. part 22, a presiding officer is responsible for assessing a penalty based on the evidence in the record and the penalty criteria set forth in the relevant statute. 40 C.F.R. § 22.27(b). The presiding officer must "explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria" set forth in the statute. *Id*. In addition, the Consolidated Rules of Practice require presiding officers to consider any EPA-issued, statute-specific civil penalty guidelines. *Id*. Thus, in cases where a presiding officer has provided a reasonable explanation for the penalty assessment, and the assessed amount falls within the range of penalties provided in the penalty guidelines, the Board generally will not substitute its judgment for that of the presiding officer absent a showing that the presiding officer committed clear error or an abuse of discretion in assessing the penalty. *E.g.*, *Euclid*, 13 E.A.D. at 686-706; *Mayes*, 12 E.A.D. at 95-96; *see also* 40 C.F.R. § 22.27(b) (requiring "specific reasons" for rejecting a region's proposed penalty).

In this case, the Region used the UST Penalty Policy's Table D to determine proposed gravity levels for Respondents' failure to annually test the automatic line leak detectors at all six of the service stations (Counts 2, 8, 10, 13, 15, and 18). *See* Aug. 9, 2012 Sacker Decl. ¶ 46 (referring to *UST Penalty Policy* app. A, subpt. D). According to the Region, Table D classifies a failure to conduct these annual tests as required by 40 C.F.R. § 280.44(a) as constituting a

"major" extent of deviation from the applicable requirements and a "major" potential for harm. *Id*. Thus, for each of the six counts alleging a failure to annually test the automatic line leak detectors, the Region proposed an initial matrix value of $1,500. *Id*.

The ALJ did not follow the Region's approach in calculating the initial matrix value for Respondents' failure to perform the required annual tests. Instead of relying on the "extent of deviation" and "potential for harm" that Table D specifies for a 40 C.F.R. § 280.44(a) violation, she used the general gravity level definitions in section 3.1.1 of the UST Penalty Policy and the standard UST matrix table. *See, e.g.*, Init. Dec. at 23, 32. She pointed out that the Table D values, which the Region used, are for an owner/operator's "[f]ailure to provide [an] adequate line leak detector system for underground piping." *Id*. at 23. The ALJ interpreted the term "adequate" to refer to the two-part regulatory requirement for the underground piping: (1) that it be equipped with an automatic line leak detector meeting certain specifications *and* (2) that an annual test of that detector be conducted. *Id*. Thus, the ALJ read Table D (which assigns a "major" gravity level to both the "extent of deviation" and "potential for harm" factors) to apply only to the more serious situation where an owner/operator fails to meet both regulatory requirements. In this case, Respondents failed to meet only one of the requirements – the annual testing requirement.[17] *See id.* The ALJ therefore concluded that Table D was inapplicable and instead relied on the penalty policy's general gravity definitions (and standard matrix table).

The ALJ also distinguished between two sets of circumstances at the service stations in determining the "potential for harm" for this particular type of violation. For those service stations where she found that Respondents had also failed to conduct tightness testing or monthly monitoring on the piping, the ALJ concluded that Respondents' failure to annually test the automatic line leak detectors should be classified as a "major" potential for harm. *See* Init. Dec. at 23 (Count 2, Service Station I), 51 (Count 18, Service Station VI). She explained that "failure to properly monitor the piping [monthly, in accordance with § 280.44(c),] increases the potential for harm for failure to test the [automatic line

[17] Similarly, the ALJ found the "extent of deviation" for Respondents' failure to annually test the automatic line leak detectors at all the service stations to be "moderate," rather than "major" as the Region had proposed. *See, e.g.*, Init. Dec. at 23, 32 (stating that, because the piping was equipped with automatic line leak detectors and the Region had not provided any evidence that the automatic line leak detectors failed to meet the section 280.44(a) specifications, Respondents had partially complied with the regulations and thus the "extent of deviation" was "moderate"). The Region does not challenge these findings and conclusions.

leak detectors], as leaks could continue, undetected, during all of the time the [automatic line leak detectors] were not tested." *Id*. at 51. In contrast, at those stations where there was "no evidence of any failure to perform tightness testing or monthly monitoring under section 280.44(b) or (c) for the pressurized piping," she found the violations to be "moderate." *Id*. at 32, 36, 42, 46. She analogized the latter situation to the "moderate" potential-for-harm example in the UST Penalty Policy: "installing a tank that fails to meet tank corrosion protection standards (because it could result in a release, although the use of release detection is expected to minimize the potential for continuing harm from the violations)." *Id*. at 32 (quoting *UST Penalty Policy* § 3.1.2).

Upon review of the ALJ's analysis, the Board concludes that she did not clearly err or abuse her discretion in her application of the UST Penalty Policy to the facts and circumstances of this case. As the ALJ correctly pointed out, Table D's list of violations does not clearly or explicitly cover the "failure to perform an annual [automatic line leak detector] test." Thus, the ALJ reasonably used the general gravity definitions rather than Table D to assess the penalties for these leak detector testing violations.

The ALJ also reasonably distinguished between those service stations where some leak detection (monthly monitoring) had been performed and those where no leak detection had been performed in determining the gravity of the "potential for harm" for failing to perform the required annual test at each of the stations. The Board agrees with the Region that the annual testing requirement is aimed at a different leak scenario than is the monthly testing requirement. *See* Cross-Appeal Br. at 86-88. Nevertheless, as a practical matter, the potential for harmful leaks from the underground piping and/or tanks is likely to be greater where no testing of the underground piping has been performed at a site than where monthly, but no annual, testing has been performed. Thus, it is not unreasonable to distinguish between the potential for harm in these two scenarios when assessing penalties, as the ALJ did. *See Euclid*, 13 E.A.D. at 695 (agreeing with Region's decision to differentiate, when assessing a penalty, between locations where some interstitial monitoring was done versus those where no leak detection was performed);[18] *see also In re Ram, Inc.*, 14 E.A.D. 357, 372-75

[18] In *Euclid*, the Region assigned a "major" potential for harm and a "major" extent of deviation to those locations where *no* line leak detection was conducted and a "major" potential for harm and a "moderate" extent of deviation where interstitial monitoring was performed, "despite the fact that at no facility was interstitial monitoring maintained or operated in such a manner as to actually be reliable in detecting releases." 13 E.A.D. at 696. The Board declined to reduce the gravity levels further (e.g., to "moderate-moderate") based on those facts. In the present case, however, the ALJ essentially found that Respondents had properly performed monthly monitoring. Thus,

(EAB 2009) (concluding that respondent's failure to conduct *any* release detection resulted in a "major" rather than "minor" potential for harm under the facts of the case); *cf. In re Carroll Oil Co.*, 10 E.A.D. 635, 669-70 & n.33 (EAB 2002) (concluding that, where respondent failed to comply with UST closure requirements, which include the performance of a mandatory site assessment to detect releases, potential for harm was "moderate" rather than "major" based on the "minimal amount of gasoline" in the USTs at issue). Accordingly, the Board concludes that the ALJ did not clearly err or abuse her discretion in determining that the potential for harm for these violations at these four service stations was "moderate" and assessing a penalty within the UST Penalty Policy's range of penalties.

3. *The ALJ Did Not Clearly Err or Abuse Her Discretion in Departing From the UST Penalty Policy Regarding Use of an "Environmental Sensitivity Multiplier"*

The Region also contends that the ALJ improperly used an ESM (environmental sensitivity multiplier) of 0.5 in calculating a penalty for the violations related to Tank #008 at Service Station I (Counts 3, 4, 5, 6, and 7),[19] which led to a significant reduction of the penalty's gravity component. Cross-Appeal Br. at 79. The Region argues that the UST Penalty Policy only contemplates ESMs of 1.0, 1.5, and 2.0, and does not allow for a downward adjustment. *Id*. at 83. The Region argues that the ALJ effectively amended provisions of the UST Penalty Policy, which the ALJ lacks authority to do.

The Board disagrees with the Region's characterization of the ALJ's decision. Rather than amending the policy, the ALJ, by using an ESM value that is below the UST Penalty Policy's standard ESM values, *departed* from the policy. For the following reasons, the Board finds that the ALJ's departure from

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here, unlike *Euclid*, the gravity level may appropriately be reduced to "moderate-moderate" as the ALJ did.

[19] Tank #008 had been placed temporarily out of service after April 2008 and permanently closed in November 2009. Init. Dec. at 14. The ALJ found Respondents liable for the following violations related to Tank #008: Count 3 – failure to meet overfill protection equipment requirements for the tank, in violation of 40 C.F.R. § 280.20(c)(1)(ii)); Count 4 – failure to continue release detection after temporary closure of the tank, in violation of 40 C.F.R. § 280.70(a); Count 5 – failure to conduct triennial testing of the cathodic protection system for the tank, in violation of 40 C.F.R. § 280.70(a); Count 6 – failure to cap and secure the tank, in violation of 40 C.F.R. § 280.70(b); and Count 7 – failure to either permanently close the tank or have it inspected, in violation of 40 C.F.R. § 280.70(c).

the UST Penalty Policy was adequately explained, sufficiently reasoned, and supported by the record.

The Board has previously explained that, while penalty policies facilitate the application of statutory penalty criteria and serve as guidelines for the Agency, they are guidance. As such, they should not be treated as rules and need not be "rigidly followed." *In re Pac. Refining Co.*, 5 E.A.D. 607, 613 (EAB 1994); *accord In re Chem Lab Prods., Inc.*, 10 E.A.D. 711, 725 (EAB 2002). For this reason among others, the Board has repeatedly stated that an ALJ need not strictly follow the relevant penalty policy and may depart from it as long as he or she adequately explains the reasons for doing so. *In re Capozzi*, 11 E.A.D. 10, 32, 38 (EAB 2003).

Consequently, when an ALJ departs from the Agency's penalty guidelines, the Board reviews the ALJ's rationale to determine whether it is "sufficiently reasoned and supported by the record to constitute an adequate justification" for the departure. *Id*. at 38. The Board nonetheless "reserves the right to closely scrutinize substantial deviations from the penalty policy." *Id*. at 32; *accord Chem Lab*, 10 E.A.D. at 725; *In re M.A. Bruder & Sons*, 10 E.A.D. 598, 613 (EAB 2002). The Board has approved deviations from applicable penalty policies on a number of occasions. *See, e.g.*, *Capozzi*, 11 E.A.D. at 38-39; *In re B&R Oil Co.*, 8 E.A.D. 39, 62-64 (EAB 1998) (downward adjustment); *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124-28 (EAB 1994).

According to the Region, when it considers what ESM classification to assign to a UST violation, it focuses primarily on the location of groundwater supplies in relation to the facility. In this case, the Region determined that Service Station I was not located over a significant groundwater supply and thus assigned an ESM of 1.0 for all violations that had occurred there, including those alleged in Counts 3 through 7. Aug. 9, 2012 Sacker Decl. ¶¶ 33-34.

The ALJ, in determining an ESM for Count 3, considered the Region's proposed classification of 1.0, but then reduced it to 0.5. Init. Dec. at 24-25. She reasoned that, in addition to considering the potential harm to human or environmental receptors as the Region had done, she should take into account Tank #008's capacity and the amount of residue. *Id*. at 24. She noted that Tank #008 had a 550-gallon capacity and contained 31.5 inches of kerosene residue when it was taken out of service. *Id*. She therefore concluded that, "[w]here the ESM is assessed as 1 considering the potential harm to human or environmental receptors, the ESM should be reduced further to account for the size of the tank and volume of petroleum substance in the tank at relevant times. In the

circumstances of this case, the ESM will be assessed as 0.5." *Id*. The ALJ followed the same reasoning for Counts 4 through 7, the other violations involving this same tank. *See id*. at 27-30. In contrast, for the other Service Station I tanks for which she assessed penalties, which were larger and contained more product, she used the Region's proposed ESM value of 1.0. *See, e.g., id.* at 14 (finding that the other two tanks had capacities of 11,000 and 4,000 gallons and routinely contained gasoline), 21 (accepting the proposed ESM of 1.0 for Count 1).

The Board finds nothing unreasonable in the ALJ's decision to deviate from the penalty policy by assessing a lower ESM for the significantly smaller tank containing substantially less product at Station I.[20] As the ALJ correctly pointed out, the ESM allows for consideration of more factors than the Region took into account. *Id*. at 25. In fact, the ESM lists at least six factors that may be considered, but only lists three possible multipliers. *See UST Penalty Policy* § 3.3. In certain cases, these three multipliers may be insufficient to fairly reflect the particular circumstances presented. In this case, the ALJ decided to distinguish between tanks at the same site based on the substantial differences between the sizes of the tanks and the amount of product within them – factors that the penalty policy explicitly cites as relevant in developing an ESM. The ESM, moreover, is intended to capture the "actual or potential impact" that a release would have on the environment should it occur. The amount of product that would be released is plainly a significant factor in making that determination. The Board concludes that the ALJ adequately justified her departure from the UST Penalty Policy under the circumstances presented.

4. The ALJ Did Not Err or Abuse Her Discretion in Excluding Respondents' Financial Information from the Record, Where Respondents Failed to Provide the Information the ALJ Required

Respondents contend on appeal that the ALJ erred by refusing to consider Respondents' financial condition in determining the amount of penalties assessed

[20] Another option for distinguishing between the tanks at the same site could have been to increase the ESM for the other tanks and retain an ESM of 1 for the smallest tank. Both approaches are within the discretion of the ALJ, as long as they are adequately explained. In this case, however, several other sites already had higher ESMs because of their proximity to ground or drinking water. *See, e.g.*, Init. Dec. at 31-35 (noting that Service Stations II and III overlie a primary aquifer and using an ESM of 1.5 for violations at those locations), 39-40 (finding that Station IV overlies a New York State Source Water Protection Area and using an ESM of 2.0 for violations there). Consequently, increasing the ESMs of the other Station I tanks to equal the ESMs at those other sites might have seemed inappropriate and unreasonable.

in this case. Appeal Br. at 3-4. The ALJ excluded all evidence of Respondents' financial condition from the administrative record in this case because Respondents failed to comply with the ALJ's order to produce adequate documentation of their financial condition prior to the scheduled hearing. June 28, 2012 Order at 5. The Board disagrees with Respondents for the following reasons.

a. *Respondents' Claim of Inability to Pay Before the ALJ*

After filing an answer to the complaint, Respondents asserted financial hardship and inability to pay the penalty, and provided some documentation to support those claims.[21] The Region found this documentation to be insufficient to allow an evaluation of Respondents' ability to pay and requested additional financial information. The record shows that the Region made numerous additional attempts to obtain the missing information from Respondents. Between December 15, 2011, and March 7, 2012, the Region sent seven emails to Respondents' attorney seeking additional financial information. By email dated March 22, 2012, apparently in efforts to settle the case, counsel for Respondents sent the Region some limited financial documentation – specifically, 2010 federal tax returns for Mr. Chase and his spouse, one of the named Corporate Respondents, and an entity not named in the complaint (Belmont).

On March 25, 2012, the Region filed a motion with the ALJ seeking to compel Respondents to produce additional financial information in preparation for the hearing on the case. *See generally* Motion to Compel Production of Financial Records/To Preclude/To Draw Adverse Inference From. On May 11, 2012, the ALJ granted the motion and ordered the Respondents to serve on the Region specified financial records for Mr. Chase and the business entities named in the complaint on or before May 30, 2012.[22] Order on Complainant's Motions to Supplement Prehearing Exchange and to Compel Production of Documents and

[21] Respondents' Initial Prehearing Exchange at 3 (Dec. 2, 2011) (cited in Complainant's Rebuttal to Prehearing Exchange at 5 (Dec. 15, 2011)).

[22] The financial records the Region sought were copies of the three most recent years of filed federal tax returns for Mr. Chase and the Corporate Respondents, copies of complete financial statements prepared by an outside accountant for the three most recent fiscal years for each Corporate Respondent, copies of any financial projections for 2012 and 2013 for the Corporate Respondents, copies of the asset ledger for each Corporate Respondent of all assets owned during the three most recent years, copies of any other documents Respondents deem relevant and supportive of the claim of inability to pay/financial hardship, and, for any requested documents that do not exist, Respondents' certified statement to that effect. May 11, 2012 Order at 8.

Order Rescheduling Hearing ("May 11, 2012 Order"). In that order, the ALJ cautioned Respondents that failure to comply with the order could result in sanctions, which could include being deemed to have waived any claim of inability to pay a penalty or financial hardship, being precluded from introducing any documentation or information relevant to such claim into the record in this proceeding, and/or having an inference drawn that any such information would be adverse to their inability-to-pay claim. *Id*. The ALJ also rescheduled the hearing to begin on July 17, 2012. *Id*. at 3.

Respondents failed to submit the documents required by the ALJ's May 11, 2012 Order by the May 30, 2012 deadline. In early June, the Region sent multiple emails to Respondents' counsel, stating that the Region had not received the required documents. On June 14, 2012, Respondents' counsel sent the Region an EPA form entitled "Individual Ability to Pay Claim/Financial Data Request Form," but no other supporting documents.

On June 15, 2012, the Region filed a motion to preclude Respondents from introducing documentation relevant to their inability-to-pay claim at the hearing. Motion to Preclude Respondents from Introducing Documentation Relevant to Claim of Inability to Pay/Financial Hardship, and to Draw Adverse Inferences Thereto. In response to this motion, on June 25, 2012, Respondents filed a declaration of Respondents' counsel, Thomas W. Plimpton, attaching additional financial documents as supporting exhibits.[23] *See* Declaration of Thomas W. Plimpton in Opposition to Preclude Respondents from Introducing Documentation Relevant to Claim of Inability to Pay/Financial Hardship and to Draw Adverse Inferences Thereto ("June 25, 2012 Plimpton Decl.").

[23] The exhibits attached to Mr. Plimpton's declaration were copies of 2010 federal tax returns for Mr. Chase and his spouse, Chase Properties, and Belmont. June 25, 2012 Plimpton Decl. Ex. A. Also attached to the declaration were copies of 2008 and 2009 federal tax returns for Chase Commercial Land Development, Chase Convenience Stores, and Chase Services, a copy of the 2008 federal tax return for Belmont, a copy of a 2009 federal tax return for Chase Properties, a copy of a 2009 federal tax payment notice for Mr. Chase, and a New York State Department of Taxation Notice for Adjustment for Mr. Chase and his spouse for the tax year ending December 31, 2009. According to Mr. Plimpton's declaration, due to the sales and closures of the businesses in 2009, the final filed federal tax returns for Chase Services, Inc., Chase Convenience Stores, and Chase Commercial Land Development were in 2010. Significantly, neither Chase Properties nor Belmont is a named respondent in the complaint, *see* Compl. ¶ 26, and the declaration does not explain the entities' relationships to Mr. Chase and/or the Corporate Respondents and/or why the tax documents for these corporations as opposed to those corporations named as respondents, were submitted. As stated in note 4, Mr. Chase appears to be a principal of Belmont.

On June 28, 2012, the ALJ ruled that the documents Respondents had submitted did not meet the substantive requirements of her May 11, 2012 Order and that Respondents had not justified their failure to timely submit all of the required documents. June 28, 2012 Order at 3, 4. The ALJ noted that Respondents had failed to timely respond to the May 11, 2012 Order, despite the clear warning therein that failure could lead to sanctions. Citing Respondents "disregard for orders issued in this proceeding," the ALJ concluded that "a sanction is clearly warranted." *Id*. at 4. Accordingly, the ALJ precluded Respondents from introducing into evidence any information supporting their claim of inability to pay a penalty or financial hardship. *Id*.

b. *Consideration of ALJ's Decision to Exclude Respondents' Financial Documents*

The record in this case shows that the Region made repeated efforts to obtain financial documentation from Respondents and that Respondents never produced more than a limited set of documents. Respondents then failed to comply with the ALJ's May 11, 2012 Order to produce specified financial documents by May 30, 2012. *Id*. Although they produced some additional documents after this deadline, Respondents provided no explanation for their lateness and still did not produce all of the documents the ALJ required.

Denying Respondents' motion for reconsideration of her June 28, 2012 exclusionary order, the ALJ explained that (1) Respondents had received ample advance warning of the consequences of their failure to comply with the May 11, 2012 Order; (2) the time for Respondents to submit financial information had long passed; (3) Respondents had not identified any errors of fact or law in the June 28, 2012 Order, or any change in relevant law or factual circumstances; and (4) the limited documentation that Respondents had provided to the Region did not support their claim of financial inability to pay the proposed penalty. Init. Dec. at 5-6.

On appeal, Respondents do not identify any specific legal or factual error in the ALJ's June 28, 2012 Order. Instead, they simply repeat their general contention that they are unable to pay the penalty. *See* Appeal Br. at 3-4. This is insufficient to carry Respondents' burden of proof on this issue. In a RCRA UST administrative enforcement action, respondents have the burden of proof (including the burden of presenting evidence and the burden of persuasion) on an affirmative defense of inability to pay the penalty. *Carroll Oil*, 10 E.A.D. at 661-63.

As a result of the lack of any financial information in the record, the Board is unable to consider Respondents' claim of inability to pay. The Board's inability to consider Respondents' financial situation is the direct result of their own choices in the proceedings before the ALJ. Parties to EPA penalty proceedings may not simply disregard the valid orders of an ALJ to produce evidence. Those who choose to do so are subject to sanctions, including dismissal of their claims or defenses. *See In re John A. Biewer of Toledo, Inc.*, 15 E.A.D. 781-85 (EAB 2013) (dismissing EPA's penalty claim due to failure to comply with an ALJ's order to produce evidence); *In re Spitzer Great Lakes Ltd.*, 9 E.A.D. 302, 320-21 (EAB 2000) (concluding that respondent waived its inability-to-pay defense to a TSCA penalty action where it failed to comply with presiding officer's order to produce additional financial documentation).

In any event, it does not appear that the limited financial documents that Respondents belatedly offered to provide the ALJ would have enabled her to determine their financial ability to pay a penalty. Tax returns and self-serving statements alone are insufficient to prove that a respondent is unable to pay a penalty. *Carroll Oil*, 10 E.A.D. at 663-65; *In re Bil-Dry Corp.*, 9 E.A.D. 575, 612-14 (EAB 2001). As the Board noted in *Bil-Dry*, while tax returns may be sufficient to show the amount of a person or company's income that is subject to federal taxation, they are not sufficient to provide a complete financial picture or to demonstrate hardship in paying a penalty. 9 E.A.D. at 614. For example, Respondents might have significant financial assets, such as from the sale of the service stations, that are not reflected in the submitted income tax returns. Or they might have access to undisclosed cash or assets held in other accounts. Financial analysts and ALJs need more complete information on a company's assets and corporate structure, as well as its cash flow, to draw reliable conclusions on a company's financial ability to pay. *See Carroll Oil*, 10 E.A.D. at 664.

Under the circumstances presented in this case, the Board finds no error or abuse of discretion in the ALJ's decision to exclude from the record the untimely and incomplete financial information that Respondent proffered in their opposition to the Region's June 25, 2012 Motion to Preclude.

5. *The ALJ Did Not Clearly Err or Abuse Her Discretion in Declining to Further Reduce the Penalty Amount*

Finally, Respondents assert that the ALJ "erred in not further reducing the amount of the penalties." Appeal Br. at 4. The Region initially proposed a $232,838.63 penalty and later revised that request upwards to $263,052.63. *See* above note 2 and accompanying text. For some of the violations, the ALJ

decreased the gravity levels and/or the environmental sensitivity multiplier the Region had proposed, thereby ultimately assessing a lower penalty of $127,069. *See, e.g.*, Init. Dec. at 23, 32, 54; *see also* discussion Parts IV.B.2 and IV.B.3 above. The ALJ, however, declined Respondent's request for additional reductions. *See* Init. Dec. at 10-11. In contending that the ALJ should have further reduced the penalty amounts, Respondents advance four theories. *See* Appeal Br. at 4-5. The Board does not find any of these theories persuasive.

a. *80% Reduction Argument*

Respondents first argue that the UST Penalty Policy specifically allows for up to an 80% reduction and that such reduction should have been granted in this case. Appeal Br. at 4-5. Respondents do not cite the specific provision of the penalty policy upon which they rely for their argument. *See id*. The only "80% reduction" that the penalty policy authorizes is in connection with settlement compromises.[24] *See UST Penalty Policy* ch. 4.

There is no settlement between the parties in this case; thus, this adjustment does not apply here. Even if there had been a settlement, the UST Penalty Policy itself states that the 80% reduction would only be considered when (1) the owner/operator "successfully demonstrates" an inability to pay *and* (2) the other four payment options listed in the Policy are infeasible.[25] *Id*. As discussed in the previous section, Respondents have been precluded from documenting their inability to pay in this case. Accordingly, the ALJ did not clearly err or abuse her discretion in not applying this 80% adjustment factor.

b. *Lack of Environmental Contamination/Harm Argument*

Respondents next claim that the penalty should be reduced because no environmental contamination occurred as a result of any of the violations. Appeal

[24] Respondents do not appear to be arguing for a series of violator-specific adjustments. Not only do they fail to discuss any of the violator-specific adjustment factors, such as cooperation, willfulness, or other unique factors, the maximum downward adjustment possible using violator-specific adjustments is a 75% decrease to the matrix value, not an 80% decrease (25% for cooperation, 25% for a minimal degree of willfulness or negligence, and 25% for other unique factors). *UST Penalty Policy* § 3.2.

[25] These options are an installment payment plan, a delayed payment schedule, an in-kind mitigation activity by the owner/operator, an environmental auditing program implemented by the owner/operator, and a reduction of up to 80% of the gravity-based component. The Policy emphasizes that the 80% reduction "should be considered *only* after determining that the other four options are not feasible." *UST Penalty Policy* ch. 4.

Br. at 5. As the Board has explained in other UST cases where respondents raised similar arguments, "[t]his violation is serious because of its potential for harm, regardless of whether actual harm occurred. Proof of actual harm to the environment need not be proven to assess a substantial penalty." *In re V-1 Oil Co.*, 8 E.A.D. 729, 755 (EAB 2000); *accord Ram*, 14 E.A.D. at 373.[26] Respondents fail to dispute these principles or explain why they should not apply here. Accordingly, the ALJ did not clearly err or abuse her discretion in not reducing the penalty based on the lack of actual harm.

c. *Argument That Gravity Grossly Exceeds Economic Benefit*

Respondents also argue that the gravity component of the penalty "grossly exceeds" the economic benefit of $5,656.[27] Appeal Br. at 5. Neither law nor policy prohibits assessing a gravity component of a penalty that is substantially larger than the economic benefit component. In fact, the Board has stated that "[n]othing in the applicable penalty policy suggests that [the economic benefit component] depends upon the [gravity-based component] or that the final penalty should be adjusted to reflect proportionality among these two components, let alone that the economic benefit should be used to adjust the gravity-based component downward." *In re Euclid of Va., Inc.*, 13 E.A.D. 616, 704 (EAB 2008) (assessing an economic benefit component of $103,656 and a total penalty of $3,164,555); *see also In re Everwood Treatment Co.*, 6 E.A.D. 589, 594 n.7, 612 (EAB 1996) (assessing no economic benefit component and a total penalty of $273,750), *aff'd*, No. 96-1159-RV-M (S.D. Ala. Jan. 21, 1998). Accordingly, the ALJ did not clearly err or abuse her discretion in declining to further reduce the penalty because the gravity component was substantially larger than the economic benefit component.

[26] Federal courts have similarly held that significant penalties may be imposed where "there is a risk or potential risk of environmental harm, even absent proof or actual deleterious effect." *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 344 (E.D. Va 1997), *aff'd in part, rev'd in part on other grounds*, 191 F.3d 516 (4th Cir. 1999), *cert. denied*, 531 U.S. 813 (2000) (Clean Water Act penalty); *accord United States v. Gulf Water Park Co.*, 14 F. Supp. 2d 854, 861 (S.D. Miss. 1998) (same); *United States v. Municipal Auth.*, 929 F. Supp. 800, 807 (M.D. Pa. 1996) (same).

[27] Respondents state that the gravity-based component of the final penalty is $125,006.63. Appeal Br. at 5. This calculation cannot be correct if the economic benefit is $5,656.00, as the two components add up to a sum greater than $127,069.00.

d. *Inability-to-Pay Argument*

Finally, Respondents claim that the penalty "imposes a devastating financial[] and unmeetable burden" upon them, especially because Respondents sold the service stations prior to the issuance of the complaint and thus have no stations left from which to generate income to make payments. Appeal Br. at 5. As explained in the previous section, there is no evidence in the record to support Respondents' claim of financial inability to pay. Accordingly, the ALJ did not clearly err or abuse her discretion in not further reducing the penalty because of Respondents' alleged inability to pay.

C. *Final Penalty Assessment: Adding Count 2 Penalty*

In Part IV.A.2, the Board concluded that Mr. Chase failed to conduct an annual test of the operation of the automatic line leak detector for underground piping for two USTs at Service Station I from April 22, 2010, to September 7, 2010 as required by 40 C.F.R. §§ 280.41(b)(1)(i) and 280.44(a), reversing the ALJ's decision on this issue. In the interests of administrative efficiency, the Board will assess a penalty for this violation rather than remanding this case for the ALJ to calculate a penalty. *See* 40 C.F.R. § 22.30(f) (providing that Board "may assess a penalty that is higher or lower than the amount recommended" by the ALJ).

The Region's proposed penalty calculation for this violation, for the most part, reasonably applies the UST Penalty Policy. The Region calculated the economic benefit for the second violation to be $75. Aug. 9, 2012 Sacker Decl. ¶ 56. For the gravity-based component, the Region used a matrix value (taking into account inflation) of $2,120 based on a finding of "major" potential for harm and a "major" extent of deviation. *Id*. The Region calculated 139 days of noncompliance, which resulted in a days-of-noncompliance multiplier of 1.5. *Id*. The Region did not make any violator-specific adjustments to the matrix value and assigned an ESM of 1. *Id*. Thus, the resulting gravity-based component was $6,360. The Region then added the economic benefit component, resulting in a total penalty for this violation of $6,435.

The Board agrees with the Region's determination that the potential for harm was "major." The Board agrees with the ALJ, however, that the extent of deviation was "moderate." *See* Init. Dec. at 23; *see also* Part IV.B.2. Accordingly, the Board finds that the initial matrix value, taking into account inflation, should be $1,290 for each line, for a total of $2,580. *See* Revised Matrices Guidance at 1 & attach. C. The Board agrees with the Region's use of an ESM of 1 and a days-of-noncompliance multiplier of 1.5. Aug. 9, 2012 Sacker

Decl. ¶ 56. The Board does not make any violator-specific adjustments to the matrix value. *See id*. Thus, the resulting gravity-based component of the penalty is $3,870.[28] Adding the economic benefit component of $75, the total penalty for this violation is $3,945. This increases the penalty amount assessed against Mr. Chase individually from $82,503 to $86,448.

V. *CONCLUSION AND ORDER*

For the foregoing reasons, the Board modifies the penalty the ALJ assessed in paragraph 1 on page 57 of her Initial Decision by increasing the amount assessed on Respondent Andrew B. Chase individually by $3,945 (for Count 2). Thus, Respondent Andrew B. Chase is hereby assessed an aggregate civil penalty of $86,448 for violating regulations promulgated under the Solid Waste Disposal Act as alleged in Counts 1 through 7, 9-11, and 18, 19, and 21 of the complaint. The Board adopts the remainder of the ALJ's findings of fact and conclusions of law, including paragraphs 2 through 4 on page 57 of the Initial Decision, which assess penalties for the other counts for which the ALJ found Respondents liable. The Board also adopts the ALJ's recommended Compliance Order. *See* Init. Dec. at 55-56; *see also id.* at 57 (¶ 5). The compliance dates imposed by the Compliance Order run from the date of this Final Decision and Order.

Accordingly, Respondents shall pay the full amount of the civil penalty assessed within thirty (30) days of receipt of this final order. Payment should be made by one of the five options provided on pages 57 to 58 in the Initial Decision.

So ordered.

[28] Calculated by multiplying the total initial matrix value by the ESM and by the days-of noncompliance multiplier ($2,580 x 1 x 1.5).