IN RE V–1 OIL COMPANY

RCRA (9006) Appeal No. 99–1

FINAL DECISION AND ORDER

Decided February 25, 2000

Syllabus

V–1 Oil Company ("V–1") appeals from an Initial Decision assessing a civil penalty of $25,000 for violation of 40 C.F.R. § 280.70(c). This regulation requires the permanent closure of underground storage tanks containing petroleum and other regulated substances (USTs) that have been temporarily closed for more than 12 months and do not meet certain performance standards or upgrading requirements for USTs.

The Complaint was filed by U.S. Environmental Protection Agency Region 10 ("the Region") in 1995 after V–1 failed to permanently close two USTs located at V–l's facility in Twin Falls, Idaho. In its Amended Complaint, the Region sought a penalty of $36,674 for the violation, alleging that the USTs were temporarily closed before mid-July 1991, and were not permanently closed within 12 months thereafter. In November 1993, the Idaho Division of Environmental Quality of the Idaho Department of Health and Welfare ("IDEQ") notified V–1 that the two USTs must go through permanent closure. Subsequently, Region 10 also advised V–1 it was in violation of 40 C.F.R. § 280.70(c).

With respect to liability, V–1 argues on appeal that it was exempt from the closure requirements because it had effected a change-in-service of its USTs by emptying the tanks and filling them with water. V–1 claims it had followed the procedure for a change-in-service outlined in an EPA booklet, *Musts for USTs,* which was distributed to members of the regulated community. V–1 also raises the affirmative defenses of equitable estoppel and lack of fair notice, all predicated on its alleged compliance with the *Musts for USTs* guidance. As to the penalty, V–1 argues that no penalty should be assessed; alternatively, if a penalty is assessed it argues that the $25,000 penalty should be substantially reduced.

Held: (1) V–1 is liable for violation of 40 C.F.R. § 280.70(c). V–1 temporarily closed its two USTs in May or June 1991, and did not permanently close the USTs within 12 months thereafter. A change-in-service is an alternative to permanent closure (although it contains requirements substantially the same as permanent closure). Under 40 C.F.R. §§ 280.71 and.72, there are three conditions precedent to effectuating a change-in-service—notifying the regulatory authority 30 days in advance of intent to make a change-in- service, conducting a site assessment, and cleaning and emptying the USTs by removing all liquid and accumulated sludge. V–1 did not perform the first two conditions. (The Presiding Officer did not expressly rule on whether V–1 satisfied the third condition). Accordingly, V–1 did not effectuate a change-in-service; it therefore was required by 40 C.F.R.§ 280.70(c) to implement permanent closure.

(2) V–1's affirmative defenses are rejected. (a) The *Musts for USTs* guidance provides an accurate, plain English summary of the three basic steps to effectuate a change-in-service and directs the reader to the regulations for the specific requirements. Compliance with a guidance document does not substitute for full compliance with the regulatory requirements of 40 C.F.R. §§ 280.70(c), .71, and .72. (b) V–1's defense of equitable estoppel is rejected, as V–1 has failed to establish an essential element of estoppel against the government—affirmative misconduct. (It is accordingly unnecessary to reach V–1's arguments regarding the other elements of estoppel.) (c) V–1's fair notice defense is not meritorious. The applicable regulations are clear and unambiguous and thus meet the principles for establishing fair notice. In addition, V–1 was given pre-enforcement notice of the Region's interpretation.

(3) The penalty assessment of $25,000 is affirmed. (a) Although EPA has the discretion to choose not to impose a penalty, the Region appropriately exercised its discretion here to seek one. The tanks were not removed from the ground until October 1997, more than five years after V–1 was obliged to implement permanent closure and almost four years after V–1 had unmistakably been put on notice of its regulatory obligation. (b) As to the amount of the penalty, both because of the importance of the permanent closure requirements to the UST regulatory program and because of the potential for harm to the environment, there is ample support for the Presiding Officer's conclusion that the violation is serious. The Board agrees with the Presiding Officer's finding that V–1 did not act in good faith after being notified by IDEQ in late 1993 and subsequently by EPA that it was in violation of the UST regulations.

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

Opinion of the Board by Judge Stein:

I. *INTRODUCTION*

This case presents issues of first impression for the Environmental Appeals Board (the "Board") concerning the regulatory requirements at 40 C.F.R. part 280, subpart G, for permanent closure of underground storage tanks ("USTs"). The underlying regulations were issued pursuant to section 9003(c)(5) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6991b(c)(5), and are part of a comprehensive regulatory program for USTs that contain petroleum or other regulated substances. *See* 40 C.F.R. pt. 280; *see also In re B&R Oil Co.,* 8 E.A.D 39, 42 (EAB 1998). At issue are regulations, designed to minimize future environmental harm, which generally require the permanent closure of USTs that have been temporarily closed for more than a year. The parties do not dispute that effectuation of a change-in-service from a regulated to a non-regulated use of the USTs would be a defense to the allegations in the complaint of failure to permanently close the USTs. Accordingly, we must also consider what steps are necessary to effectuate a change-in-service from a regulated to a non-regulated use, and whether these steps were followed in this case. In addition, we consider whether a tank owner or operator may be deemed to have effected a change-in-service

because it allegedly followed the procedure set forth in an EPA booklet that summarizes the applicable regulatory requirements, and assumed that by following that procedure that it would be in compliance with the actual regulations.

V–1 Oil Company ("V–1" or "the company") has appealed an Initial Decision issued February 1, 1999, in which the Presiding Officer assessed a civil penalty of $25,000 and issued a compliance order to the company for one violation of RCRA section 9006, 42 U.S.C. § 6991e, and 40 C.F.R. §280.70(c). The underlying complaint was filed by U.S. EPA Region 10 ("the Region"). Section 280.70(c) provides that owners and operators of certain USTs that have been temporarily closed for more than 12 months must permanently close the USTs at the end of the 12-month period in accordance with regulatory requirements set forth at 40 C.F.R. §§ 280.71–.74.[1] The Presiding Officer held that V–1 had violated section 280.70(c) by maintaining two USTs that formerly held gasoline in temporary closure status for more than 12 months without then implementing permanent closure.[2] Initial Decision at 6. V–1 acknowledges that its gasoline-containing USTs were taken out of service in May or June 1991,[3] and that it did not implement permanent closure procedures within 12 months thereafter.[4] However, V–1 argues that it was not required to implement permanent closure under section 280.70(c) because it effected a change-in-service of the USTs by removing the gasoline and filling the USTs with water, a non-regulated substance. It asserts that USTs that have undergone a change-in-service are exempt from regulatory permanent closure requirements, V–1's Appeal Brief ("Appeal Brief") at 6, a point the Region does not dispute. Tr. at 34. V–1 does not claim that it followed the specific procedures for effecting a change-in-service set forth in sections 280.71 and .72. Instead, it contends that it should be deemed to have satisfied the regulatory requirements because it complied with a summary of the regulations set forth in a booklet that the U.S. Environmental Protection Agency ("EPA") published and distributed, titled *Musts for USTs*

---

[1] The regulations allow for an extension to be granted under certain circumstances. 40 C.F.R. § 280.70(c).

[2] The complaint treats V–1's alleged failure to close the two USTs as a single "facility" violation rather than treating each failure to close an UST as a separate violation. *See* Complaint ¶ 15; Hearing Transcript ("Tr.") at 164–65; Initial Decision at 11 n.12.

[3] Answer to Amended Complaint ¶ 5; Tr. at 242–44.

[4] *See* Answer to Amended Complaint ¶ 13, admitting the allegation that, as of June 24, 1997, when the Amended Complaint was filed, "neither EPA nor IDEQ has received any documentation that respondent has complied with the permanent tank closure requirements at this facility." *See* Amended Complaint ¶ 13.

(EPA/530/UST–88–008, Sept. 1988). Appeal Brief at 2–4. *See* Court Exhibit ("Ct. Ex") 2, quoted *infra* in parts II.A and III.A.

V–1 also raises two other affirmative defenses. First, it claims that EPA is equitably estopped from charging it with the regulatory violation because V–1 relied on the *Musts for USTs* to its detriment, and that the requisite elements to establish equitable estoppel against the government are present. Appeal Brief at 9–11. Second, V–1 contends that it was denied due process of law because it did not have "fair notice" of the conduct the regulations prohibited. *Id.* at 12. Finally, V–1 argues that, even if it violated section 280.70(c), it should not be assessed a civil penalty, or it should be assessed a substantially reduced penalty, because it acted in good faith. *Id.* at 15.

For the reasons set forth below, we conclude that V–1 did not effect a change-in-service but rather violated 40 C.F.R. § 280.70(c) as alleged. We also find its affirmative defenses lack merit. With respect to the penalty assessment, we have independently reviewed it and conclude that a civil penalty of $25,000 is appropriate.

II. *BACKGROUND*

A. *Statutory and Regulatory Background*

RCRA section 9006(d)(2), 42 U.S.C. § 6991e(d)(2), provides that "[a]ny owner or operator of an underground storage tank who fails to comply with—(A) any requirement or standard promulgated by the Administrator under section 6991b [RCRA § 9003 release detection, prevention, and correction regulations] * * * shall be subject to a civil penalty not to exceed $10,000 for each tank for each day of violation." Pursuant to RCRA section 9003, EPA has issued regulations at 40 C.F.R. part 280, subpart G, that establish permanent closure procedures for USTs that have been taken out of service.

As explained in the preamble to the regulations, "the principal objective of the UST system closure requirements is to identify and contain existing contamination and *to prevent future releases from UST systems no longer in service."* Underground Storage Tanks; Technical Requirements and State Program Approval; Final Rules ("Final Rules for Underground Storage Tanks"), 53 Fed. Reg. 37,082, 37,181 (Sept. 23, 1988) (emphasis added). The preamble adds that "[a]vailable information suggested that UST systems improperly closed in the past have had undetected releases that later required corrective action," and that "it is particularly important

to require proper management procedures for out-of-service UST systems so that contamination due to improperly closed UST systems can be prevented from posing a threat of additional releases in the future." *Id*. To that end, section 280.70(c) provides in relevant part 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 § 280.20 for new UST systems or the upgrading requirements in § 280.21 * * *. Owners and operators must permanently close the substandard UST systems at the end of this 12-month period in accordance with §§ 280.71–280.74, *unless* the implementing agency provides an extension of the 12-month temporary closure period.

Section 280.71(b) in turn prescribes two methods for permanently closing an UST that has been temporarily closed for 12 months. Pursuant to that regulation, after all liquids and accumulated sludges have been removed from the UST, the UST may either be removed from the ground or it may be closed in place and filled with an insert solid substance. Although not expressly referenced in section 280.70(c), section 280.71(c) provides a third option to owners and operators, termed a "change-in-service," as an alternative to permanent closure. Section 280.71(c) provides: "Continued use of an UST system to store a non-regulated substance is considered a change-in-service. Before a change-in-service, owners and operators must empty and clean the tank by removing all liquid and accumulated sludge and conduct a site assessment in accordance with § 280.72."

This option of effecting a change-in-service was not made available in the proposed regulations but was added to the regulations in response to public comments. *See* Final Rules for Underground Storage Tanks, 53 Fed. Reg. at 37,183. EPA explained in the preamble to the regulations that it added language allowing a change-in-service so that UST owners were not forced to dispose of USTs that were intact and could be put to an alternative use. It stated that:

> [T]he permanent closure requirements set forth in the proposed rule precluded the reuse of UST systems for unregulated substances. As a result, sound tanks could be forceably discarded even though this would serve no environmental purpose. Therefore, final § 280.71(c) gives

> owners or operators *a third method of closing an UST system*.[5] This method allows the owner or operator to complete a change-in-service, which will allow the tank to be used to store non-regulated substances.

53 Fed. Reg. at 37,183 (emphasis added).

A tank owner or operator wishing to effect a change-in-service must comply with three requirements. First, "[a]t least 30 days before beginning * * * a change-in-service under paragraph[] * * * (c) of this section, * * * owners and operators must notify the implementing agency of their intent to * * * make the change-in-service * * *." 40 C.F.R. § 280.71(a). Second and third, as quoted previously, "[b]efore a change-in-service, owners and operators must empty and clean the tank by removing all liquid and accumulated sludge and conduct a site assessment in accordance with § 280.72." *Id.* § 280.71(c). The regulation further specifies that "the required assessment of the excavation zone under § 280.72 must be performed after notifying the implementing agency but before completion of * * * a change-in-service." *Id.* § 280.71(a). These requirements are substantially the same as the requirements for implementing permanent closure, with the exception that the tank can be used for non-regulated uses after a change-in-service has been effectuated.[6] Both sets of requirements are designed to protect human health and the environment by preventing future releases from those USTs that do not meet current environmental standards.

At the time EPA issued the UST regulations, it published a booklet titled *Musts for USTs,* which was distributed to owners and operators of USTs, including V–1, as a means of bringing the regulatory requirements to their attention.[7] The title page of *Musts for USTs* states, "[a] Summary of

---

[5] Although the preamble refers to a change-in-service as a third method of closure, based on our review of the text of the regulations, we think that this option is best described as an alternative to permanent closure, albeit one with substantially similar requirements. *See infra* n.32.

[6] *See* 40 C.F.R. § 280.71(a) (providing that owners and operators of USTs undergoing permanent closure must notify the implementing agency at least 30 days before beginning permanent closure); *id.* § 280.71(b) (providing that, to permanently close a tank, owners and operators of USTs undergoing permanent closure must "remov[e] all liquids and accumulated sludges" from it); *id.* § 280.71(c) (providing that the required assessment of the excavation zone under section 280.72 must be performed before completing permanent closure).

[7] *See,* e.g., Tr. at 312 (testimony of Mr. Robert Clayton, vice-president of V–1, describing a meeting held by the Idaho Division of Environmental Quality of the Idaho

Continued

the New Regulations for Underground Storage Tank Systems." The first page of the booklet contains the statement that *Musts for USTs* "briefly describes the new technical requirements" for USTs and the statement that "the complete regulations" are published in the Federal Register. *Musts for USTs* at 1. In addition, *Musts for USTs* contains a summary of the requirements, including a summary of the procedure for effecting a change-in-service.

B. *Factual Background*

V–1 is a regional oil company that sells propane and/or gasoline in six states. Initial Decision at 2. The company has approximately 250 employees. *Id.* V–1 sold both propane and gasoline at its gas station in Twin Falls, Idaho ("the Facility") from 1978 to "approximately June 1991," when it discontinued gasoline sales at that location. *Id.* V–1 stored gasoline at the Facility in two USTs, one holding 12,000 gallons and the other holding 6,000 gallons.[8] *Id.* Both USTs were at least 14 years old at the time they were taken out of service.[9] Neither met EPA's performance standards for new tanks and neither met EPA's upgrading requirements.[10] *Id.* at 6.

V–1 stopped pumping gasoline at the Facility in May or June 1991, leaving open the possibility of starting up the pumps again if market conditions improved. *Id.* at 2. *See also* Respondent's Proposed Alternative Findings of Fact ¶ 5, at 2 (Mar. 26, 1999). It removed "as much material from the tanks as was practical at the time,"[11] and filled the tanks with

---

Department of Health and Welfare and the Petroleum Storage Tank Fund "to familiarize * * * the industry with what was going to be expected of them" under new UST regulations. *Musts for USTs* was distributed at the meeting.) .

EPA re-issued the booklet in July 1990. The information about UST closures in the July 1990 version of the *Musts for USTs* is identical to the information in the September 1988 booklet. However, the later booklet refers the reader to the September 23, 1988 Federal Register for the complete text of the UST regulations. Tr. at 221. The parties disagree as to whether V–1 had received both the 1988 and 1990 versions, or only the 1988 version, at the time it ceased gasoline operations at its facility in Twin Falls, Idaho. *See* Tr. at 221, 237.

[8] V–1 filed a Notification for Underground Storage Tanks, dated December 18, 1985, on which it provided information about the USTs. The Region's ("Complainant's") Exhibit ("C Ex") 2.

[9] *See* Notification for Underground Storage Tanks, dated July 12, 1991. C Ex 3 and Respondent's Exhibit ("R Ex") 2; *see also infra* n. 16.

[10] The USTs were constructed of steel and were not lined, double-walled, or cathodically protected. Initial Decision at 3, 12.

[11] C Ex 10 (Letter from Kent W. Gauchay, V–1's attorney, to Ellen Van Duzee, EPA's UST Coordinator for Idaho, Mar. 7, 1994).

"city water."[12] V–1 does not claim that it intended to use the water for a specific purpose but explains that it had followed that procedure to comply with *Musts for USTs,* which "suggested we * * * put water in" the tanks to effect a change-in-service. Tr. at 281.

On July 12, 1991, V–1 filed an amended Notification for Underground Storage Tanks (EPA form 7530–1) ("Amended Notification") (C Ex 3, R Ex 2), with the Idaho Division of Environmental Quality of the Idaho Department of Health and Welfare ("IDEQ"),[13] notifying IDEQ that certain information that it had previously filed had changed.[14] Initial Decision at 3. V–1 checked the boxes on the Amended Notification indicating that the two USTs were "temporarily out of use,"[15] and it also checked the boxes on the same form indicating that the same two USTs had each undergone a change-in-service.[16] Initial Decision at 3. In

---

[12] According to V–1's President, Mr. Gary Huskinson:

> [W]e sold the gasoline off as much as the retail pumps would pump out. Then we * * * pumped down to about a quarter of an inch of the product out of the tank, then we filled them with a hose with city water and there was a little sludge on the top * * * and we took that off * * * and filled the tanks so clear water was showing * * * in the tops of the fill pipes.

Tr. at 247–48.

[13] RCRA section 9002, 42 U.S.C. § 6991a, requires owners of USTs that store regulated substances to notify duly designated State or local agencies of the existence of the tanks. In Idaho, IDEQ is authorized to receive notification of the existence of USTs or a change in the status of an UST. *See* Tr. at 134.

[14] *See supra* n.8.

[15] The other two categories for "Status of Tank" on the form were "currently in use" and "permanently out of use."

[16] We note that the record contains copies of two different versions of the Amended Notification, identified as R Ex 2 and C Ex 3. On a copy provided by V–1 to the Region as part of its prehearing exchange (C Ex 3), the "change-in-service" boxes are not checked. Tr. at 96–97. However, the "change-in-service" boxes are checked on a copy produced by V–1 for the first time at the hearing (R Ex 2). *See* Tr. at 42, 94–97. The original form filed with IDEQ was not available for inspection at the hearing. To resolve questions relating to the inconsistency between the two copies of the Amended Notification, counsel for the parties telephoned IDEQ during a break in the hearing to inquire about the appearance of the original form. They informed the Presiding Officer that IDEQ had stated during that telephone conversation that "white out" had been applied to the "change-in-service" boxes on the original form. Tr. at 101. The Region then stipulated that, if there had been check marks in the "change-in-service" box on the original, they had been "whited out" before the copy identified as C Ex 3 was made. *See* Tr. at 129. The Region's attorney declined to stipulate that V–1 had intended to check the change-in-service boxes because he "didn't know who whited it out or when it was whited out." *Id.* at 129–30. There is no evidence in the record as to who changed the form or when the change occurred.

Continued

response to questions on the form whether it had performed a site assessment for either tank, V–1 circled "no" for both tanks.

On November 29, 1993, IDEQ sent a letter to V–1 that notified V–1 that the two USTs must be permanently closed pursuant to 40 C.F.R. § 280.70(c) because they had been temporarily out of use for more than 12 months. C Ex 4. The letter quotes from the regulations. On December 12, 1993, V–1 replied to IDEQ's letter, acknowledging that the USTs had been "placed out of use," and asking IDEQ "to allow excavation to occur in more favorable weather conditions." C Ex 6 (Letter from Robert E. Clayton, vice-president and safety director of V–1, to IDEQ (Dec. 12, 1993)). IDEQ subsequently referred the matter to EPA. Tr. at 135.

On February 2, 1994, Ms. Ellen Van Duzee, EPA's UST Coordinator for Idaho, inspected the two USTs (Tr. at 37) and found petroleum product floating in the fill tubes of both tanks. Tr. at 105–08. Ms. Van Duzee issued an "Expedited Enforcement Compliance Order and Settlement Agreement" (commonly referred to as a "field citation") on February 4, 1994, seeking permanent closure of the two USTs in accordance with 40 C.F.R. § 280.70(c), and a $300 penalty. C Ex 7. *See* Initial Decision at 4–5. On that occasion, she discussed the UST regulations with Mr. Huskinson and explained the UST closure requirements to him. Tr. at 61–62. According to Ms. Van Duzee, Mr. Huskinson "never raised a change-in-service as a defense" during that conversation. *Id*. at 64; Initial Decision at 7. V–1's attorney responded to the field citation by letter of March 7, 1994, in which he stated that V–1 had "filled the tanks with an unregulated substance-water," and that, although the "applicable regulations are cumbersome and unclear," V–1 "believes it acted within the scope of the applicable regulations." C Ex 10 at 2.

Ms. Van Duzee then referred the matter to Mr. Todd Bender, UST Coordinator for Region 10. Tr. at 70. Mr. Bender explained to Mr. Huskinson in a telephone conversation that took place some time in July 1994 that V–1 was in violation of EPA regulations. Tr. at 138–39. Mr. Bender then sent V–1 a letter on July 12, 1994, with the words "Attention: Last Chance" in large letters on the first page. C Ex 8. The letter stated that the Region would bring an enforcement action if V–1 did not sign the Compliance Order and Settlement Agreement, and thereby resolve the matter by the informal field citation procedure. A copy of the UST

The Presiding Officer found that V–1 had filed an Amended Notification form with check marks in both "change-in-service" boxes. Initial Decision at 3. The Region has not challenged that finding on appeal. We will assume, therefore, for purposes of this decision, that the change-in-service boxes were checked.

regulations was enclosed. *Id.* V–1's attorney responded to the letter on V–1's behalf on July 21, 1994, asking for "additional time to make a final decision" concerning what to do with its tanks. C Ex 9 at 2 (Letter from Kent W. Gauchay to Todd Bender, Region 10 (July 21, 1994)). Among other issues, he questioned Mr. Bender's statement that V–1 was required to conduct a site assessment, stating that he had "read 40 CFR 280.71(c) and 280.72" and that he had a "different interpretation" from Mr. Bender's. *Id.* at 1.

After V–1 refused to accept Region 10's proposed settlement offer, the Region withdrew it,[17] and issued an administrative complaint ("Complaint") on June 3, 1995. The Complaint, as subsequently amended ("Amended Complaint"), alleges that V–1 is the owner and/or operator of two USTs that have been used to store regulated substances within the meaning of section 9001 of RCRA, 42 U.S.C. § 6991, and EPA regulations at 40 C.F.R. § 280.12;[18] that neither tank meets the performance standards at 40 C.F.R. § 280.20 or the upgrading requirements at 40 C.F.R. § 280.21;[19] that the tanks have been in temporary closure status for more than 12 months;[20] and that V–1 has failed to comply with the regulatory permanent closure requirements for both tanks.[21] The Amended Complaint seeks a civil penalty of $36,674.[22] Amended Complaint ¶ 19.

V–1 filed an answer on August 9, 1995, asserting that it was not subject to the regulatory requirements at 40 C.F.R. § 280.70 because its USTs were filled with an unregulated substance (water) "in compliance with the * * * *Musts for USTs."* Answer ¶ 6; *see also* Answer ¶¶ 11, 16. V–1 also alleges that EPA is equitably estopped from charging it with the violation. Answer ¶ 16.

The Presiding Officer conducted a hearing on October 15 and 16, 1997. V–1 maintained during the hearing and in its posthearing brief that

---

[17] C Ex 11 (Notice of Withdrawal) (Aug. 4, 1994).

[18] Amended Complaint ¶ 4.

[19] *Id.* ¶ 5.

[20] *Id.* ¶ 6.

[21] *Id.*

[22] The initial Complaint sought a civil penalty of $23,334. EPA moved to amend the Complaint on May 21, 1997, to increase the penalty amount to $36,674, "to reflect almost 2 years of continued non-compliance since the filing of the original complaint." Letter from Region 10 to Presiding Officer, May 21, 1997. The Presiding Officer granted the motion on June 12, 1997. Order (ALJ, June 12, 1997).

it was not required to comply with the permanent closure requirements of 40 C.F.R. § 280.70 because it had effected a change-in-service of its tanks, following the procedure described in *Musts for USTs*. It maintained, therefore, that its tanks were no longer subject to regulation by EPA. V–1 further argued that EPA was equitably estopped from charging it with the violation, and that it did not have "fair notice" of the prohibited conduct. Finally V–1 contended that it should not be assessed a civil penalty, or that any penalty assessed should be substantially smaller, because it had acted in good faith.

C. *The Initial Decision*

The Presiding Officer issued an Initial Decision on February 1, 1999, holding that V–1 had violated 40 C.F.R. § 280.70(c) when it temporarily closed its USTs in May or June 1991, and failed to implement permanent closure of the USTs within 12 months thereafter. Initial Decision at 6. The Presiding Officer stated that "[t]here is no dispute here that the two [USTs] were not used to store gasoline for more than 12 months" and that the USTs did not meet upgrading requirements. *Id.* at 6. He said that the dispute "centers on" whether V–1 had temporarily closed the USTs or had effected a change-in-service. *Id.* The Presiding Officer concluded that V–1 had temporarily closed the USTs, citing four reasons for that conclusion. *Id.* at 6–8. First, he stated that the testimony by V–1's officials "shows that [V–1] intended the UST closure to be temporary only," and was "in direct conflict with the notion that the company sought to engage in a change-in-service" when it drained the USTs and filled them with water. *Id.* at 7. Second, the Presiding Officer noted that neither V–1' s president nor its vice-president had "offered the explanation that the tanks had undergone a change-in-service," when faced with enforcement efforts by IDEQ and EPA. *Id.* He found it particularly "telling" that Mr. Huskinson had not mentioned that a change-in-service had occurred when an EPA representative visited the company on February 4, 1994. *Id.* Third, the Presiding Officer stated that V–1 did not suggest any purpose (other than compliance with *Musts for USTs*) for filling the tanks with water. *Id.* at 7–8. Fourth, the Presiding Officer noted, as further "evidence that the USTs did not undergo a change-in-service," that V–1 had not performed a site assessment. He stated, "[r]espondent cannot now argue that its USTs had undergone a change-in-service when it failed to follow the clearly prescribed regulatory steps for effecting such a change." *Id.* at 8.

The Presiding Officer then rejected V–1's three defenses: (1) that V–1 should not be held liable for violating the regulations because it had complied with *Musts for USTs;* (2) that EPA was equitably estopped from charging V–1 with the violations because it had misled V–1 into believing that

compliance with *Musts for USTs* satisfied its legal obligations; and (3) that V–1 did not have "fair notice" of the prohibited conduct. *Id.* at 9. The Presiding Officer stated that: "[a] fatal flaw common to all three defenses is that respondent equates compliance with *Musts for USTs*, a general guidance document, as compliance with Section 280.70(c), a promulgated regulation. This is not so." *Id.* He added that V–1 is charged with knowledge of section 280.71(c), commenting that even V–1 admits it is "highly regulated," and therefore it should not be surprised that it is subject to regulation. *Id.* at 10. Moreover, he noted that "V–1 was directed to those regulations by the EPA general guidance document that it relied upon." *Id.* at 11. He added that IDEQ had notified V–1 on November 29, 1993, that it had not effected a change-in-service, and had called V–1's attention to the applicable regulations. *Id.*

The Presiding Officer assessed a civil penalty of $25,000 for the violation of 40 C.F.R. § 280.70(c), stating that "a substantial penalty is warranted here because of the serious nature of the violation and V–1's lack of good faith, as evidenced by its failure to promptly close the tanks after being informed by the IDEQ, on November 29, 1993, that the provisions of Section 280.70(c) applied to its operation."[23] *Id.* at 11. He stated that he had also taken into account Region's 10's financial analysis regarding the economic benefit derived by V–1 for its non-compliance. *Id.* at 14 n.16.

The Presiding Officer explained that V–1's violation was serious because "failure to comply with the closure provisions of Section 280.70(c) poses significant health and environmental risks." *Id.* at 12. He emphasized that these risks are "well illustrated in this case" because V–1's USTs were located in a residential area with wells close by, and because the tanks were 20 years old,[24] "asphalt coated or constructed of bare steel, and were not lined, double-walled, or cathodically protected." *Id.* He concluded that the "condition of these aging tanks, therefore, increased the likelihood that corrosion would cause the gasoline-contaminated water [in the tanks] to be released into the environment."[25] *Id.*

The Presiding Officer concluded that "V–1 did not act in good faith once notified by the IDEQ and EPA that it was in violation of Section

---

[23] V–1 removed the USTs on October 1, 1997. Initial Decision at 5.

[24] According to evidence in the record, the USTs were approximately 14 years old at the time they were taken out of service and therefore were approximately 20 years old at the time of the Initial Decision.

[25] He referred to testimony by the Region's UST program enforcement coordinator that "gasoline-contaminated water contained in V–1's USTs posed a threat to the environment." *Id.* at 13.

280.70(c)." *Id.* at 13. He concluded that V–1's initial belief that it had effected a change-in-service, based on its reliance on *Musts for USTs*, was not "that unreasonable," but that V–1's failure to comply with the regulations after it received IDEQ's November 29, 1993, letter, and after its contacts with EPA personnel "evidences a lack of good faith." *Id.* The Presiding Officer stated that the refusal of Mr. Huskinson to accept the July 12, 1994 "last chance" letter from Mr. Bender provided "[a]dditional evidence of V–1's lack of good faith."[26] *Id.* at 13 n.14. The Presiding Officer added that V–1's only efforts to monitor the USTs for leakage after it filled the tanks with water in 1991 was to "check the water level in the tanks on a quarterly basis," and that these efforts were not sufficient to warrant a penalty reduction. *Id.* at 14. The Presiding Officer directed V–1 to satisfy the terms of the Compliance Order set forth in the Region's Amended Complaint. *Id.* at 14–15.

D. *The Appeal*

V–1 filed this appeal with the Board on February 25, 1999, reiterating that it did not violate 40 C.F.R. § 280.70(c). V–1 contends that its USTs "had undergone a change-in-service" when V–1 filled them with water, an unregulated substance, and that, because a change-in-service was effected, the USTs are no longer subject to regulation by EPA.[27] Appeal Brief at 6. V–1 states that it had followed the procedure for effecting a change-in-service of its two USTs that was described in *Musts for USTs,*[28] and that, pursuant to *Musts for USTs,* EPA has no authority to regulate USTs "[o]nce it is determined that the tank is filled with an unregulated substance." *Id.* at 7. It contends that V–1 effected a change-in-service when it "removed the gasoline from the tanks, quit filling the tanks with gasoline, quit selling gasoline * * *, cleaned the tanks of all gasoline and sludge and filled the tanks with water, all consistent with an EPA publication." *Id.* at 8. V–1 argues that the evidentiary record supports a conclusion that it effected a change-in-service. V–1 further argues that the

[26] According to Mr. Bender, he sent the letter to Mr. Huskinson by certified mail, and the letter was returned to him "as unaccepted." Tr. at 140.

[27] V–1 asserts on page 4 of its Appeal Brief that "the tanks were temporarily closed" and had undergone a change-in-service. It asserts on page 5 that "the tanks were still in use, were filled with water, and were not closed, either temporarily or permanently." It argues on page 6 that its tanks could be temporarily closed and also have undergone a change-in-service because it could "make a change-in-service to a non-regulated substance" of an UST it had temporarily closed, and then make another change-in-service "back to a regulated use" at some future time.

[28] The pertinent text of *Musts for USTs* is quoted *infra* in part III.A.2.a.

Presiding Officer had erred when he rejected V–1's affirmative defenses of equitable estoppel and lack of fair notice. *Id.* at 9. It maintains that, for "nearly two-and-a half (2 ½) years after filling the tanks with water," V–1 was not informed that *Musts for USTs* "was inaccurate, and could not be relied upon." *Id.* at 4. Finally, V–1 maintains that no civil penalty should be assessed even if it had violated the regulations, because V–1 had acted in good faith, and that, if any civil penalty is assessed, a $25,000 civil penalty is too high. *Id.* at 15. It contends that compliance with *Musts for USTs* represents "substantial, if not complete compliance with the applicable regulations." *Id.*

The Region responds that the Presiding Officer's liability holding and penalty assessment should be upheld, arguing that:

> *Musts for USTs* is not the law. The regulations govern, not the pamphlet, and Respondent's appeal makes no mention of how it complied with either 40 C.F.R. §§ 280.70(c) or 280.71. While *Musts for USTs* accurately summarizes the law applicable to UST owners, it is merely a summary, and cannot supersede the applicable regulations it summarizes.

Complainant's Reply Brief ("Region's Brief") at 2. The Region maintains that the "Presiding Officer's view of the evidence was right," and that "[o]ther than the disputed checked-off box [on the Amended Notification],[29] there is no credible evidence in the record that V–1 ever contemplated a change in service under § 280.71(c)." *Id.* at 3, 4. The Region urges the Board to uphold the $25,000 civil penalty amount, agreeing with the Presiding Officer that "V–1's violations were serious, and V–1's actions lacked good faith." *Id* at 2. It argues that "V–1 stalled for years and refused to comply with the law." *Id.* The Region notes that the $25,000 penalty amount is "substantially less than the penalty requested by the Region under the UST penalty policy,"[30] but it does not challenge the penalty amount. *Id.*

---

[29] *See supra n.16.*

[30] Todd Bender of the Region calculated the $36,674 penalty amount in accordance with the U.S. EPA Penalty Guidance for Violations of UST Regulations. Ct. Ex.1; *see* Tr. at 153, 157. He testified that he calculated a gravity-based penalty component, based on the potential for harm of the violation and the extent of deviation from the regulatory requirements, and then added to the gravity-based penalty amount an additional sum to reflect the economic benefit to V–1 of its non-compliance. Tr. at 156, 163–64. *See* C Ex 11 (UST Penalty Computation Worksheet). Mr. Bender calculated a total gravity-based penalty of

Continued

III. *DISCUSSION*

We hold V–1 liable for violating 40 C.F.R. § 280.70(c), as charged in the Amended Complaint, because it failed to permanently close two USTs that did not meet updated performance standards within 12 months following the temporary closure of the USTs.[31] As explained below, we find that V–1 temporarily closed its USTs in May or June 1991 and did not at that time or thereafter effect a change-in-service of the USTs. We reject V–1's other affirmative defenses. Finally, we affirm the Presiding Officer's assessment of a $25,000 civil penalty.

A. *Liability*

1. *Violation of Section 280.70(c)*

The 40 C.F.R. part 280, subpart G regulations that govern "Out-of-Service UST Systems and Closure" provide at section 280.70(c) that, if an UST system has been temporarily closed for more than 12 months and does not meet certain regulatory performance standards or upgrading requirements for USTs, it must be "permanently closed in accordance with §§ 280.71–.74." As an alternative to implementing permanent closure of an out-of-service UST, the subpart G regulations allow UST owners and operators to effect a change-in-service of the UST. *See* Final Rules for Underground Storage Tanks, 53 Fed. Reg. at 37,183.[32] Sections 280.71(c) and .72 collectively require that the UST owner or operator must comply

---

$32,288, based on 1,846 days of noncompliance (the number of days from July 12, 1992 (12 months and 1 day after V–1 filed its Amended Notification) to August 1, 1997, an estimated date on which V–1 would achieve compliance). Tr. at 156, 173. (The actual date of compliance did not occur until October 1, 1997). He calculated the economic benefit of noncompliance as $4,836 and added that amount to the gravity-based penalty figure. Tr. at 157.

[31] Although we are affirming the Presiding Officer's holding, we are not adopting in full the Presiding Officer's reasoning, but are instead setting forth our own rationale. *See* 40 C.F.R. § 22.31(a). "The Board reviews the Presiding Officer's factual and legal conclusions on a *de novo* basis," and may "adopt, modify, or set aside" the Presiding Officer's findings and conclusions. *In re H.E.L.P.E.R., Inc.,* 8 E.A.D 437, 447 (EAB 1999).

[32] Although the Preamble refers to a change-in-service as a third method of closing an UST, a change-in-service is better described as an alternative to permanent closure, but one with requirements that are substantially the same as those required for permanent closure. The regulations in several places refer separately to permanent closure and changes-in-service, thus reinforcing the view that a change-in-service is not a method of permanent closure. *See,* e.g., 40 C.F.R. § 280.71 (titled "Permanent closure and changes-in-service"); *id.* § 280.72 ("assessing the site at closure or change-in-service").

with three regulatory requirements before a change-in-service can be effected. As previously described *supra* n. 6, these requirements are substantially the same as the requirements imposed on a tank owner or operator undertaking permanent closure of an UST, and allow owners and operators of USTs to effect a change-in-service only after undertaking action designed to assure that the USTs will not pose an environmental risk in the future.

V–1 concedes that it "temporarily closed" its USTs in May or June 1991. Appeal Brief at 4, Respondent's Proposed Alternative Findings of Fact (Mar. 26, 1999) ¶ 5. In any event, the record amply supports the Presiding Officer's finding that V–1 temporarily closed its tanks in May or June 1991. Initial Decision at 6; *see* Tr. at 243–44, 255, 323; C Ex 10. Mr. Huskinson testified that V–1's decision to close its gasoline operation in mid-1991 was not a permanent decision and that the company would reenter the gasoline market if economic conditions changed. *Id.* at 244. Mr. Robert Clayton, V–1's Vice President, testified that "at the time we closed these [tanks] down it was a decision by the company to close them down temporarily." Tr. at 323.

As discussed below, the company did not effect a change-in-service of its USTs, a regulatory alternative to permanent closure, because it did not comply with the regulatory conditions precedent to effecting a change-in-service. Since it did not effect a change-in-service of its USTs, it was required to implement permanent closure of the tanks by the end of the 12-month temporary closure period. The regulatory requirements for effecting a change-in-service are discussed below.

The first requirement is that, "[a]t least 30 days before beginning * * * a change-in-service * * * owners and operators must notify the implementing agency of their intent to * * * make the change-in-service * * *." 40 C.F.R. § 280.71(a). V–1 did not satisfy that requirement. As the Region argues, there is no evidence in the record that V–1 notified either IDEQ or EPA of its intent to effect a change-in-service prior to draining the USTs of gasoline and filling them with water in May or June 1991. Region's Brief at 7. Assuming that V–1's Amended Notification was intended to provide notice to IDEQ of V–1's intent to effect a change-in-service,[33] V–1 did not submit the Amended Notification until July 12, 1991, after V–1 had already filled its USTs with water. *See* R Ex 2; C Ex 3; Tr. at 284–86.

The second requirement is that, "before a change-in-service," owners and operators must "conduct a site assessment in accordance with

[33] *See supra* n. 16.

§ 280.72." 40 C.F.R. § 280.71(c). Section 280.72 contains detailed regulatory requirements for the type of site assessment that must precede a change-in-service. Specifically, it provides that:

> Before * * * a change-in-service is completed, owners and operators must measure for the presence of a release where contamination is most likely to be present at the UST site. In selecting sample types, sample locations, and measurement methods, owners and operators must consider the method of closure, 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. The requirements of this section are satisfied if one of the external release detection methods allowed in § 280.43 (e) and (f) is operating in accordance with the requirements in § 280.43 at the time of closure, and indicates no release has occurred.

The regulations are clear that "the required assessment of the excavation zone under § 280.72 must be performed after notifying the implementing agency but before completion of * * * a change-in-service." 40 C.F.R. § 280.71(a).[34]

The Presiding Officer found that V–1 did not comply with the site assessment requirements. Initial Decision at 8. His findings are fully supported by the evidence in the record. V–1 circled "no" in response to the questions on the Amended Notification as to whether it had conducted a site assessment for either UST. *See* R Ex 2; C Ex 3. Moreover, Mr. Huskinson testified that he was "not sure what a site assessment is." Tr. at 285. Therefore, by its own admission, as well as the Presiding Officer's finding, it failed to satisfy that requirement.

V–1 argues on appeal that it substantially satisfied the regulatory requirement because it made "a determination that its' [sic] tanks had caused no damage to the environment." Appeal Brief at 8. V–1 contends that it "conducted tank and line tightness tests," and that it made a "visual inspection of the property" which revealed no contamination. *Id.* These procedures do not constitute a site assessment performed in accordance with the requirements of section 280.72. As Todd Bender stated at the hearing,"the regulations require an external monitoring method, as

[34] Section 280.74 contains the further requirement that owners and operators prepare and maintain records that demonstrate compliance with the requirements set forth at section 280.72.

opposed to an internal monitoring method," to determine whether a release has occurred, and the tank tightness testing and inventory control methods V–1 used are both considered "internal" methods. Tr. at 142–43. He stated that EPA had expressly noted in the preamble to the regulations that it had rejected suggestions that it allow internal release detection monitoring methods for the reason that these methods do not assess the condition of the environment outside the tank. Tr. at 146. V–1's visual inspection of the property does not satisfy the regulatory requirement that it "measure for the presence of a release where contamination is most likely to be present at the UST site." *See* 40 C.F.R. § 280.72(a).

The third regulatory requirement is that, "[b]efore a change-in-service, owners and operators must empty and clean the tank by removing *all* liquid and accumulated sludge." 40 C.F.R. § 280.71(c) (emphasis added). The parties dispute whether that requirement was met. V–1 claims that it "cleaned the tanks of all gasoline and sludge." Appeal Brief at 8. The Region disagrees, argues that "V–1 did not remove *all* liquid and accumulated sludge as required by the regulations." Region's Brief at 7. The Presiding Officer does not expressly rule on whether V–1 removed all accumulated liquid and sludge from these USTs, although he does observe that the water was not pure, noting in particular evidence adduced at the hearing that the tanks were so contaminated from petroleum that V–1 had a difficult time disposing of the water it had placed in the tanks. Initial Decision at 4 n.3, 7 n.9. Since we have concluded that V–1 did not satisfy two other conditions precedent to a change-in-service, we need not resolve that issue in this appeal.

For the foregoing reasons, we have concluded that V–1's tanks were temporarily closed and that the tanks did not undergo a change-in-service. Therefore, V–1 had a regulatory duty under section 280.70(c) to implement permanent closure of the tanks within 12 months of their temporary closure. Since it is uncontroverted that V–1 failed to implement permanent closure within 12 months, we hold V–1 liable for violating section 280.70(c).

2. *Affirmative Defenses*

All of V–1's three affirmative defenses hinge upon its alleged compliance with the *Musts for USTs* guidance. As explained in pt. III.B.2.a below, V–1 did not even satisfy all the steps outlined in the *Musts for USTs* guidance. More significantly, none of its affirmative defenses are meritorious on the facts of this case.

a. *Compliance with the Musts for USTs Guidance*

V–1 argues, as its first of three affirmative defenses, that it did not violate 40 C.F.R. § 280.70(c) because it effected a change-in-service of its USTs as described in *Musts for USTs*. Appeal Brief at 6. *Musts for USTs* states that:

> **Closing Permanently**
>
> If your tank is not protected from corrosion and it remains closed for **more than 12 months** * * * you must follow requirements for **permanent closure**:
>
> Three Exceptions to Permanent Closure:
>
> The requirements for permanent closure may not apply to your UST if it meets one of the following conditions:
>
> * * * * * * *
>
> You can change the contents of your UST to an unregulated substance, such as water. Before you make this change, you must notify the regulatory authority, clean and empty the UST, and determine if any damage to the environment was caused while the UST held regulated substances * * *.

Ct. Ex 2 at 23.

According to V–1:

> V–1 sold off as much gasoline as possible from the two tanks. Then the company * * * removed additional gasoline and sludge from the tank[s]. V–1 then filled the tanks with water. V–1 then monitored the tanks on a regular basis. At no time did it appear that any of product leaked from the tanks.

Appeal Brief at 3. V–1 argues that "once it is determined that the tank is filled with a non-regulated substance [water], then EPA has no authority to regulate the UST." *Id.* at 7. It contends that the Presiding Officer's holding that V–1 was required to conduct a site assessment is erroneous because *"Musts for USTs* makes no mention of the requirement of a site assessment." *Id.* at 8.

We note, preliminarily, that V–1 did not, in fact, comply with *Musts for USTs,* as it asserts. *Musts for USTs,* quoted *supra*, clearly states that "[b]efore you make this change, you must notify the regulatory authority." The record contains no evidence that V–1 gave prior notice either to IDEQ or EPA that it intended to take its gasoline tanks out of service, and V–1 does not claim to have given such notice. *See supra* part II.B. This omission is not insignificant, as such advance notice alerts the regulatory agency to the fact that a tank may be undergoing a change-in-service and enables the agency to verify whether a change-in-service has been properly effectuated (e.g., whether a site assessment has been conducted).

Moreover, V–1's argument that *Musts for USTs* made no mention of a site assessment requirement is disingenuous. *Musts for USTs* advises the reader it must determine if any damage was caused to the environment. If in fact, as V–1 testified, it did not know what a site assessment was, *see supra* part III.A.1, or was uncertain what was meant by the reference in the guidance to the need to determine if any damage was caused to the environment, surely it was obligated to consult the regulations or the regulatory authority to complete its understanding. In fact, the General Instructions to the Amended Notification that V–1 filled out in July 1991 specifically advised V–1 of the requirement for a site assessment and where to get information about site assessment requirements. *See* R Ex 2 at 6 ("If this [change-in-service] has occurred you must complete a site assessment because this change is considered the same as closing a tank. * * * A site assessment is required for all tanks closed since December 22, 1988. Site assessment requirements can be obtained from the Idaho Division of Environmental Quality at the address provided in page 1 of this form.").

In any event, we reject V–1's argument that compliance with *Musts for USTs* constitutes compliance with the regulations. An EPA guidance document does not have the force of law, *In re Steeltech, Ltd.,* 8 E.A.D. 577, 584–85 (EAB 1999); *In re Ash Grove Cement Co.,* 7 E.A.D. 387, 402 (EAB 1997), quoting from *In re Environmental Waste Control, Inc.,* 5 E.A.D. 264, 273 (EAB 1994) ("[T]he Agency's proposed regulations and guidance document do not have the force of law * * *."). Therefore, even if V–1 had followed the procedure summarized in *Musts for USTs,* it would not substitute for full compliance with all of the regulatory requirements.

b. *Equitable Estoppel*

V–1 argues, as a second affirmative defense, that EPA is equitably estopped from charging it with a violation of 40 C.F.R. § 280.70(c). Appeal Brief at 9. The company contends that it has established the five requi-

site elements for estopping a government agency from bringing an action, as set forth in *U.S. v. Arkwright,* 690 F. Supp. 1133 (D.N.H. 1988). It asserts that: (1) EPA knew "the facts" in that it was aware of the existence of V–1's USTs and it was also aware of the information contained in *Musts for USTs* with respect to a change-in-service; (2) EPA intended that *Musts for USTs* would be relied on by the public, including V–1; (3) V–1 was "ignorant to the fact that following the publication would be incomplete compliance;" (4) V–1 relied on EPA's conduct to its injury, in that it has been assessed a civil penalty; and (5) the writing, publishing and distributing of *Musts for USTs* constituted affirmative misconduct on the part of EPA. Appeal Brief at 10–12. V–1 adds that "the harm caused by reliance on the EPA publication is greater than a public interest in strict compliance when no environmental damage has been done," and therefore, that it is entitled to equitable relief. *Id.* at 12. The Region responds that, although V–1 has accurately enumerated the traditional elements of an equitable estoppel against the government, it has not demonstrated that they apply here. Region's Brief at 11. The Region argues that, "[n]ot only has V–1 failed to prove the traditional elements of estoppel, it has not cited facts to support a finding of affirmative misconduct." *Id.*

As explained below, we reject V–1's allegation that EPA is equitably estopped from charging it with a violation of section 280.70(c) on the ground that V–1 has not demonstrated any affirmative misconduct on the part of EPA. Our reasons are set forth below. Since V–1 has failed to establish an essential element for an equitable estoppel against the government, we need not reach V–1's arguments regarding the other elements of estoppel.

"Courts have applied estoppel to the federal government only in the narrowest of circumstances. In order to establish estoppel against the government, a party must prove *affirmative misconduct* by the government in addition to the four traditional elements of the [equitable estoppel] doctrine," *In re Newell Recycling Co.,* 8 E.A.D. 598, 631 (EAB 1999) (emphasis added), quoting *In re Linkous v. United States,* 142 F.3d 271, 277 (5th Cir. 1998); *In re B.J. Carney Indus., Inc.,* 7 E.A.D. 171, 196 (EAB 1997) ("A party seeking to estop the government bears a heavy burden of demonstrating the traditional elements of estoppel and some 'affirmative misconduct' on the part of the government."). Affirmative misconduct, in this context, refers to "an affirmative misrepresentation or affirmative concealment of a material fact by the government," *Linkous,* 142 F.3d at 278.

There are strong public policy reasons for strictly limiting claims of equitable estoppel against the government. "When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." *Heckler v. Community Health Services,* 467 U.S. 51, 60 (1984), quoted in *B.J. Carney,* 7 E.A.D. at 196. The public interest in restricting the availability of equitable estoppel claims against the government is particularly compelling where the protection of public health and/or the environment is at issue. *See B.J. Carney,* 7 E.A.D. at 202, n.39.

V–1 claims, without elaboration, that EPA's "writing, publishing and distribution" of *Musts for USTs* "all constitute affirmative misconduct" because these acts were "intentionally done and is more than mere negligence." Appeal Brief at 11. As best we can discern from its brief, V–1's argument is based on the fact that *Musts for USTs* advises owners they can effect a change-in-service by filling an UST with an unregulated substance and does not specifically state that an actual site assessment is required. *See id.* at 10–11. V–1's argument is without merit.[35] We do not find the summary of the regulations that appears in *Musts for USTs* to be misleading, let alone to meet the more demanding standard necessary to constitute affirmative misconduct. The booklet states that, before effecting a change-in-service, the tank owner and/or operator must: (1) "notify the regulatory authority," (2) "clean and empty the UST,"and (3) "determine if any damage to the environment was caused by the UST when it held regulated substances." *See Musts for USTs* at 23. In our view, these brief descriptive phrases in *Musts for USTs* provide an accurate, plain English summary of the three basic steps one must take to effect a change-in-service, appropriate for its purpose of alerting its readers to the new UST requirements. It does not purport to be a comprehensive recitation of the regulatory requirements; rather, the reader is directed to the regulations for specific details.[36]

---

[35] Although we recognize that it would have been helpful to readers of *Musts for USTs* if the original booklet had contained a citation to the volume and pages of the Federal Register where the complete regulations appear, *Musts for USTs* specifically states that it is a summary of the regulations and advises readers that "[y]ou can find the complete regulations in the Federal Register." Ct. Ex 2 at 1.

[36] In any event, the Amended Notification which V–1 filled out in July 1991 specifically advised V–1 of the requirement for a site assessment and where to get information about site assessment requirements. *See supra* part III.A.1.a. In these circumstances, it would not be reasonable for V–1 to claim either it lacked knowledge of the facts or that it detrimentally relied on the lack of a site assessment requirement in *Musts for USTs.*

c. *Fair Notice*

We also reject V–1's third affirmative defense, that it did not have "fair notice" of the prohibited conduct. In support of that defense, V–1 argues that the "regulations are not clear on the face," and therefore "V–1 followed *Musts for USTs* * * * and for 2½ years thought it was in full compliance." Appeal Brief at 14. V–1 quotes from *U.S. v. Hoechst Celanese Corp.,* 964 F. Supp. 967, 979 (D.S.C. 1996), *aff'd in part, rev'd in part,* 128 F.3d 216 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 2367 (1998), which articulates the fair notice doctrine as follows:

> Fair notice is not provided unless a regulated party acting in good faith is able to identify with 'ascertainable certainty,' on the face of regulations and other public statements issued by the agency, the standard to which the regulating agency expects it to conform. * * * Unclear or ambiguous regulations do not provide the requisite notice. * * * [However, a] regulated party may also be found to have been given fair notice of the agency's interpretation in those situations where, prior to the commencement of enforcement efforts, the regulated party was given actual notice of the interpretation.

Id. at 12. V–1 argues that "the regulations are not clear on the face," and that "V–1 was given no agency interpretation at all, prior to the enforcement procedure by EPA, other than what was found in the *Musts for USTs* publication." *Id.* at 13–14. The Region responds that the record does not support V–1's fair notice argument because V–1 has not pointed to any ambiguities in the regulation, and because the evidence does not support V–1's assertion that it received no interpretation of the regulation by EPA before EPA initiated the enforcement proceeding. Region's Brief at 13–14.

We have considered fair notice questions, which implicate due process concerns, in several prior cases. *See,* e.g., *B.J. Carney Indus., Inc.,* 7 E.A.D. at 193–96 (rejecting due process claim because regulations provided reasonable warning of the conduct they prohibit and because company was given pre-enforcement notice of agency interpretation); *In re Richard Rogness and Presto-X Co.,* 7 E.A.D. 235 (EAB 1997) (expressing serious doubts about a theory of liability based on fair notice concerns but concluding that liability ultimately turned on a different theory); *In re CWM Chem. Serv., Inc.,* 6 E.A.D. 1 (EAB 1995) (due process precludes finding of violation based on failure to conduct dry weight measurements where regulations were silent and failed to provide notice of how to measure PCB concentrations). Our recent cases have relied on

the standards set forth in *General Elect. v. EPA,* , 53 F.3d 1324, 1328–29 (D.C. Cir. 1995):

> If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with "ascertainable certainty" the standards with the which the agency expects the parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation.

53 F.3d at 1329. The D.C. Circuit also held that the agency's pre-enforcement contact may provide notice for due process purposes. *Id.* As explained below, measured against the principles which guide us in reviewing fair notice challenges, V–1's claim does not withstand scrutiny.

In this case, the Presiding Officer held that "[t]here is no ambiguity in this regulation." Initial Decision at 10. He characterized the closure provision at section 280.70(c), in particular, as "plainly worded." *Id.* The Presiding Officer added that, even if V–1 had mistakenly believed that it had effected a change-in-service of its USTs prior to November 29, 1993, the company was informed by IDEQ on that date that it had not done so, and that it was required to implement permanent closure. *Id.* at 11.

V–1 has not demonstrated any error in the Presiding Officer's analysis or conclusion. Although V–1 claims that the regulations are not clear, its appeal brief does not cite any particular regulatory language that V–1 found either confusing or ambiguous. We find not only section 280.70(c) to be clear and unambiguous but also the provisions of section 280.71, which spell out the procedure for effecting a change-in-service. V–1's contention that it was not advised of EPA's interpretation of the regulation before the Region initiated the enforcement action is not supported by the record. As described *supra* in part II.B, the Region made repeated efforts to advise V–1 of EPA's interpretation of section 280.70(c) as applied to V–1 both in writing and in person before it commenced this enforcement proceeding. *See,* e.g., Region 10's July 12, 1994 letter to V–1 (C Ex 8); Tr. at 61–63. Mr. Huskinson concedes that, at the conferences he attended where *Musts for USTs* was discussed and distributed, the regulations were "probably brought up" as well. Tr. at 289. Additionally, with particular regard to the requirement for a site assessment, the Amended Notification that V–1 signed in July 1991 specifically states that, if you

mark the "change-in-service" block on the form, "you must complete a site assessment."[37] *Id.* at 6.

Moreover, the *Hoechst* decision does not support V–1's lack of fair notice defense. In that case, Hoechst argued that it should not be held liable for a regulatory violation because the regulation was unclear and because Hoechst did not have fair notice of EPA's interpretation of the regulation prior to the enforcement action against it. The Federal District Court agreed. On appeal, the Fourth Circuit Court of Appeals reversed the lower court decision in part, holding that, although Hoechst initially lacked fair notice of EPA's interpretation of the regulation, it was subsequently informed by EPA Region 4 officials of EPA's interpretation of the regulations, and could not rely on a fair notice defense for violations that occurred after the time of such notice. *U.S. v. Hoechst Celanese Corp.,* 128 F.3d 216, 229–30 (4th Cir. 1997). Based on the *Hoechst* decision, even were we to agree with V–1 that the subpart G regulations were unclear (a conclusion we do not reach), we would conclude that V–1 cannot avail itself of the fair notice doctrine because it received actual notice of EPA's interpretation of the regulations prior to this enforcement action.

B. *Civil Penalty Assessment*

The Region's Amended Complaint sought a $36,674 civil penalty against V–1 for violating 40 C.F.R. § 280.70(c) as well as issuance of a Compliance Order. The Presiding Officer assessed a civil penalty of $25,000, and issued the Compliance Order as requested.

The Presiding Officer based his penalty assessment solely on the statutory criteria of RCRA section 9006(c), rather than on the EPA penalty policy implementing the statute on which the Region relied in proposing the penalty. *See* Ct. Ex. 1 ("UST Penalty Policy"). Initial Decision

---

[37] V–1 relies on *U.S. v. Hoechst Celanese Corp.,* 964 F.Supp. 967, 979 (D.S.C. 1996), *aff'd in part, rev'd in part,* 128 F.3d 216 (4th Cir. 1997), quoting the following language from that opinion:

> [F]air notice requires that as long as an agency has not given any pre-enforcement warning of what its interpretation of a given regulation is, then the issue for the court is * * * whether the regulated party received, or should have received, notice of the agency's interpretation in the most obvious way of all: by reading the regulations.

The quoted language does not help V–1. First of all, V–1 has given us no reason to conclude that the regulatory language is unclear, and therefore, that it does not give adequate notice of the regulatory requirements. Second, V–1 did receive pre-enforcement warning of EPA's interpretation of the regulations.

at 12. Under section 9006(c), 42 U.S.C. § 6991e(c), the Presiding Officer is charged with "assess[ing] a civil penalty, if any, which [he or she] determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements."[38] The Presiding Officer stated that "[a] substantial penalty is warranted here because of the serious nature of the violation and V–1's lack of good faith, as evidenced by its failure to promptly close the tanks after being informed by the IDEQ, after November 29, 1993, that the provisions of Section 280.70(c) applied to its operation." *Id.* He also stated that he took into account the testimony of Charlotte Resseguie, an economic benefit analyst, who analyzed the economic benefit to V–1 as a result of its noncompliance.[39] *Id.* at 14 n.16; *see also* Tr. at 225–35; *supra* part II.C.

V–1 argues on appeal that "the imposition of any penalty is inappropriate" since V–1's behavior constituted "substantial, if not complete compliance with the applicable regulations." Appeal Brief at 15. It also contends that if a penalty is imposed, a $25,000 penalty amount is inappropriate. *Id.* V–1 maintains that, although the Presiding Officer was required by statute to take V–1's good faith into account, he "discussed only the seriousness of the alleged violation" and did not take into account V–1's "good faith effort" to comply with applicable regulations. *Id.* The Region responds that the Presiding Officer considered both factors the statute requires to be considered and that his "finding of lack of good faith by V–1, along with the seriousness of the violation, justified the penalty he assessed." Region's Brief at 16.

V–1's argument that no penalty should be imposed requires little discussion. Although EPA has the discretion to choose not to impose a penalty, we believe that EPA appropriately exercised its discretion here to seek one. As discussed *supra* part II.A, we reject any suggestion that V–1's conduct constituted "substantial, if not complete compliance" with the regulations. Moreover, the violation is serious, as discussed *infra,* and V–1 stalled for years in complying with its regulatory obligations. Indeed, the tanks were not removed from the ground until October 1997, just

---

[38] Section 9006(c) vests authority to issue compliance orders and assess penalties in the Administrator. The Administrator's authority to issue such compliance orders and assess penalties under RCRA section 9006 has been delegated to the Board. 40 C.F.R. §§ 22.01(a)(4), 22.04(a). The Presiding Officer conducts the administrative hearing on such matters and issues an Initial Decision. *Id.* § 22.03.

[39] "The economic benefit component represents the economic advantage that a violator has gained by delaying [and] * * * avoiding costs associated with compliance." UST Penalty Policy at 8. Its purpose is to "remov[e] any significant economic benefit that the violator may have gained from noncompliance." *Id.* at 4.

prior to the administrative hearing in this matter, more than five years after V–1 was obligated to implement permanent closure, and almost four years after V–1 had unmistakably been put on notice of its regulatory obligation.

We now turn to V–1's challenges to the amount of the penalty. After considering the statutory factors of RCRA section 9006(c), the applicable penalty guidelines which we consider pursuant to 40 C.F.R. § 22.27(b),[40] the Presiding Officer's penalty analysis, and the record, we uphold the assessment of a $25,000 civil penalty.[41]

First, we agree with the Presiding Officer that the violation is serious (*see supra* part II.C.). V–1 does not challenge the Presiding Officer's conclusion that the violation was "serious" in its Appeal Brief. However, it asserts in its Proposed Alternative Findings of Fact that there is no evidence in the record indicating that its USTs caused environmental harm. Respondent's Proposed Alternative Findings of Fact ¶ 13, at 4 (Mar. 26, 1999). This 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. *See In re Everwood Treatment Co.,* 6 E.A.D. 589, 602–03 (EAB 1996), *aff'd, Everwood Treatment Co. v. EPA,* No. 96–1159–RV–M (S.D. Ala., Jan. 21, 1998).

As EPA stated in the Preamble to the UST regulations, "the principal objective of the UST system closure requirements is to identify and contain existing contamination and to prevent releases from UST systems no longer in service." 53 Fed. Reg. at 37,181. "Given the large size of the

---

[40] Section 22.27(b) of title 40 of the Code of Federal Regulations requires consideration of any civil penalty guidelines issued by EPA under the statute.

[41] The Presiding Officer stated as a rationale for using the statutory criteria of RCRA section 9006, rather than the UST Penalty Policy, that "[w]hile use of this [the UST] Penalty Policy may provide for a more consistent national approach by EPA, and in some cases may even be helpful to the judge in determining the appropriate penalty to be assessed (*see* 40 C.F.R. § 22.27(b)), the Environmental Appeals Board is correct in stating that ultimately it is the statutory penalty criteria against which the judge is to measure the facts adduced at hearing and assess a civil penalty." Initial Decision at 11–12. He cited as authority *In re Employers Ins. of Wausau,* 6 E.A.D. 735, 759 (EAB 1997). In *Wausau,* after a detailed discussion of a Presiding Officer's obligations with respect to penalty assessment, we concluded that "the Presiding Officer's penalty assessment decision is ultimately constrained only by the statutory penalty criteria and by any statutory cap limiting the size of the assessable penalty, by the Agency's regulatory requirement (40 C.F.R. § 22.27(b)) to provide 'specific reasons' for rejecting the complainant's penalty proposal, and by the general Administrative Procedure Act requirement that a sanction be rationally related to the offense committed (i.e., that the choice of sanction not be an 'abuse of discretion' or otherwise arbitrary and capricious.)." 6 E.A.D. at 758–59.

existing universe and the proportion of these UST systems that have leaked or are presently leaking, there is a need to * * * alleviate this important threat to the nation's groundwater resources." *Id.* at 37,097. EPA noted in *Musts for USTs* that "[s]everal million underground storage tank systems in the United States contain petroleum or hazardous chemicals. Tens of thousands of these USTs, including their piping, are currently leaking. Many more are expected to leak in the future," and that leaking USTs can cause fires or explosions and can contaminate ground water. *Musts for USTs* at 1.

Furthermore, in this case, as the Presiding Officer observed, "the condition of these aging tanks * * * increased the likelihood that corrosion would cause the gasoline-contaminated water to be released into the environment." Initial Decision at 12. Morever, any release of gasoline-contaminated water has the potential to cause "significant environmental harm" because of the residential character of the area where the tanks were located and the fact that wells were located nearby. *Id.* at 13. Both because of the importance of the permanent closure requirements to the UST regulatory program and because of the potential for harm, we believe there is ample support for the Presiding Officer's conclusion that the violation is serious.

Second, we agree with the Presiding Officer that V–1 did not act in good faith after it was notified in late 1993 initially by IDEQ and subsequently by the Region that it was in violation of the UST regulations. As the Presiding Officer states, "V–1 has not offered a sufficient explanation as to why it took so long to comply with the UST regulation," after being advised by the Region that it was not in compliance. *Id.* at 13.

Moreover, we regard the Presiding Officer's observation that V–1 acted in good faith prior to November 1993 as charitable at best. *See* Initial Decision at 13. In truth, as noted *supra*, V–1 did not even satisfy all of the steps outlined in *Musts for USTs* (for example, it did not notify the regulatory authority before purporting to effect a change-in-service). Furthermore, the Musts for USTs guidance advised V–1 to consult the regulations to ascertain the specific requirements with which it must comply. *Musts for USTs* at 1. The fact that the *Musts for USTs* guidance did not specifically state that a "site assessment" is required to effect a change-in-service is immaterial—*Musts for USTs* provides notice of a site assessment requirement by advising the reader it must determine if any damage to the environment was caused while the USTs held regulated substances. Moreover, the site assessment requirement is highlighted in the General Instructions to the Amended Notification that V–1 filed with IDEQ in 1991. R Ex 2, at 6. *See supra* part III.A.2. Thus, by no later than July 1991,

V–1 had received actual notice of the site assessment requirement. Nevertheless, since we have concluded that the seriousness of the violation, coupled with V–1's lack of good faith after November 1993, amply supports the assessment of a civil penalty of $25,000, we are not basing our penalty assessment on any lack of good faith V–1 may have demonstrated before November 1993.

We recognize that this penalty amount is substantially above the $300.00 amount contained in the field citation the Region issued to V–1 in 1994. We nonetheless find it to be reasonable, particularly in light of the company's continued non-compliance after the field citation was issued. The amount assessed is substantially below that which could have been assessed given the years of non-compliance,[42] and, in our view, is fully warranted. We thus affirm the $25,000 penalty assessment.[43]

IV. *CONCLUSION*

The Presiding Officer's finding that V–1 Oil Company is liable for violation of 40 C.F.R. § 280.70(c) is affirmed. A civil penalty of $25,000 is assessed. V–1 shall pay the full amount of the civil penalty within sixty (60) days of receipt of this final order, unless otherwise agreed by the parties. Payment shall be made by forwarding a cashier's check or certified check in the full amount payable to the Treasurer, United States of America, at the following address:

Mellon Bank
EPA Region 10 (Regional Hearing Clerk)
P.O. Box 360903M
Pittsburgh, PA 15251

---

[42] As noted *supra* part II.A, RCRA section 9006, 42 U.S.C. § 6991e(d)(2), authorizes the assessment of a civil penalty of up to $10,000 *per day per tank* for violations of any regulatory requirement or standard imposed pursuant to RCRA section 9003 (release detection, prevention, and correction regulations). The Debt Collection Improvement Act of 1996 directs EPA to make periodic adjustments of maximum civil penalties to take into account inflation. *See* 31 U.S.C. § 3701. Inflation adjusted penalty amounts have been published at 40 C.F.R. § 19.1 *et seq.,* and apply to violations occurring after January 30, 1997. For any such violations, a penalty of up to $11,000 per day per tank may be assessed. V–1 was in violation of the permanent closure requirements from May or June 1992 until at least October 1997. Indeed, it is not even clear that it has presently complied with all of the site assessment requirements for permanent closure of the USTs.

[43] The Region has not appealed the Presiding Officer's decision to decrease the recommended penalty from $36,674 to $25,000. Although we believe the Presiding Officer could have provided a more detailed rationale for his departure from the penalty proposed by the Region, *see supra* n.22, we decline to disturb the penalty on this basis in the absence of such an appeal.

V–1 is required to comply with the terms of the Compliance Order set forth at pages 14 and 15 of the Initial Decision to the extent that it has not already done so.

So ordered.