UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
U.S. ARMY, FORT WAINWRIGHT	)	**Docket No. CAA-10-99-0121**
CENTRAL HEATING & POWER PLANT	)	
	)	
Respondent	)	

ACCELERATED DECISION AS TO APPLICATION OF ECONOMIC BENEFIT OF NONCOMPLIANCE AND SIZE OF BUSINESS PENALTY FACTORS

I. PROCEDURAL BACKGROUND

The Complaint initiating this proceeding was filed on December 30, 1999, by the Director of the Office of Air Quality, United States Environmental Protection Agency, Region 10 (EPA or Complainant), against Respondent, the United States Army Alaska Garrison (USARAK),[1] concerning the Fort Wainwright Central Heating and Power Plant, located in Fairbanks, Alaska. The Complaint alleges in nine counts that Respondent violated various provisions of its Air Quality Control Permit to Operate, and of the State Implementation Plan approved under the Clean Air Act (CAA or "the Act") for the State of Alaska, and thereby violated Section 113(a) of the CAA, 42 U.S.C. § 7413(a). The total penalty proposed for the alleged violations is $16,000,000, most of which is based upon an alleged "economic benefit of noncompliance" and "size of the business," which are two penalty assessment criteria listed in Section 113(e) of the CAA.[2]

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[1] The parties agreed that the "United States Army Alaska Garrison" (USARAK) is the proper Respondent in this matter. *See*, Order on Complainant's Motion for Accelerated Decision and on Other Motions, dated July 3, 2001, at 5. Neither party has moved to amend the Complaint to change the name of the Respondent, however.

[2] EPA initially proposed a penalty of $27,020,049 in this matter, which included a penalty of $12,152,853 for "economic benefit of noncompliance," and $12,834,243 for "size of violator." However, the total proposed penalty was subsequently reduced by EPA to $16 million based on the statutory criterion, "other factors as justice may require." Complainant's Prehearing Exchange Exhibit 33. EPA did not provide any explanation of how it arrived at the $16 million figure. It merely stated that this is the first case of this magnitude against a Federal

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Respondent filed an Answer to the Complaint, denying the alleged violations, requesting a hearing, and setting forth affirmative defenses. The parties subsequently engaged in Alternative Dispute Resolution, but were unable to reach an amicable settlement. On August 29, 2000, the undersigned was designated to preside over this matter. The parties filed prehearing exchange documents thereafter.

On January 8, 2001, Complainant filed a Motion for Accelerated Decision and memorandum in support (Motion) as to the liability of Respondent for the nine counts alleged in the Complaint, and as to questions of law raised by Respondent's eleven affirmative defenses. Respondent filed an Opposition to the Motion on February 8, 2001, to which Complainant filed a Reply on March 6, 2001.

An Order on Complainant's Motion for Accelerated Decision was issued on July 3, 2001 (Order), granting judgment as a matter of law in favor of Complainant on Respondent's liability as to eight of the nine counts alleged in the Complaint. Specifically, Respondent was found liable in Count 1 for its failure to install, maintain and operate continuous opacity monitors (COMS) at the Fort Wainwright Central Heating and Power Plant (CHPP); in Count 2 for its failure to install, maintain and operate continuous emission monitors (CEMS); in Count 3 for its failure to install, maintain, and operate emission control devices that provide optimum control of air contaminant emissions during all operating periods on its six coal-fired boilers; in Count 4 for its failure to test the COMS for compliance with certain regulatory procedures and submit a timely Comparison Report; in Count 5 for its failure to test the CEMS for compliance with certain regulatory procedures and submit a timely Comparison Report; in Count 6 for its failure to monitor, quarterly, the flue gas opacity from each exhaust stack; in Count 7 for its failure to monitor quarterly the carbon monoxide and oxygen concentrations from each exhaust stack; and in Count 9 for its failure to comply with the 20% opacity standard. As to Count 8, alleging that Respondent failed to control fugitive dust from certain areas at the facility, genuine issues of material fact were found to exist and, therefore, a decision on Respondent's liability for Count 8 was reserved for decision after further proceedings.

In their submissions on the Motion, the parties addressed the following "affirmative defense" stated in Paragraph 71 of Respondent's Answer:

> Complainant lacks the authority under the Clean Air Act to recover any civil penalty purporting to recoup an alleged economic benefit or based upon a "size of business" factor. Respondent further avers that "the size of Respondent's business," and "the economic benefit of noncompliance" are inapplicable factors

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[2](...continued)
facility under the CAA, that "Respondent may not have realized the full extent of its potential financial liability for failing to comply," and that the litigation team determined that it was appropriate to reduce the penalty to $16 million "based on the litigation team's overall assessment of the facts specific to this case." *Id.* at 11.

to be considered in determining the amount of any assessed penalty because Respondent is a federal facility.

Complainant in its Motion argued that all of the CAA section 113(e) statutory penalty assessment criteria, including "economic benefit of noncompliance" and "size of the business," must be considered in determining a penalty against Respondent, even though it is a Federal facility. In its Opposition, Respondent set forth several arguments in support of its "affirmative defense."

Resolution of those arguments was not necessary to a disposition of Respondent's liability for the violations alleged in the Complaint. Consequently, these issues were not ruled upon in the Order but were also reserved for further proceedings.

Pursuant to Respondent's request, on October 4, 2001, in Washington, D.C., oral argument was held on whether "economic benefit of noncompliance" and "size of the business" are to be considered in the calculation of a penalty against the Respondent under the CAA.[3] It is these questions, briefed in Complainant's Motion for Accelerated Decision, Respondent's Opposition, and Complainant's Reply, and argued orally on October 4, 2001, which are being addressed at this time. An evidentiary hearing has not yet been held or scheduled in this proceeding.

II. STANDARDS FOR ACCELERATED DECISION

The Consolidated Rules of Practice, codified at 40 C.F.R. Part 22, apply to this proceeding. Section 22.20(a) of those Rules provide that:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a).

Thus, the questions of whether "economic benefit of noncompliance" and "size of the business" are to be considered in determining a penalty against Respondent may be decided without an oral evidentiary hearing if there are no genuine issues of fact which are material to those questions.

Accelerated decision under the Consolidated Rules is analogous to summary judgment,

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[3] The transcript of the oral argument was received on October 18, 2001, and will be cited herein as "Tr. "

and summary judgment law under Federal Rule of Civil Procedure 56 is applicable to accelerated decision. *Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 600 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995); *CWM Chemical Services, Inc.*, 6 E.A.D. 1, 1995 TSCA LEXIS 10 (EAB 1995). The party moving for summary judgment has the initial burden to show the absence of any genuine issues of material fact, "identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)(quoting Fed. R. Civ. Proc. 56(c)). Upon such showing, the opponent of the motion "may not rest upon the mere allegations or denials of [its] pleading, but [its] response . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Proc. 56(e). A factual issue is "*material* where, under the governing law, it might affect the outcome of the proceeding," and is "*genuine* if the evidence is such that a reasonable finder of fact could return a verdict in either party's favor." *Clarksburg Casket Company*, 8 E.A.D. 496, 502 (EAB 1999).

Complainant asserts that there are no genuine issues of material fact on the legal question of whether all of the statutory penalty factors must be considered in assessing a penalty against Respondent, and that "economic benefit" and "size of business" are appropriate factors to consider in determining an appropriate penalty against Respondent, and requests accelerated decision in its favor thereon. Motion at 45-49; Reply at 10-17. Respondent contends that, as a matter of law, EPA is not entitled to recover penalties from USARAK for economic benefit and size of business, and does not raise any genuine issues of material fact in opposition to Complainant's position. Opposition at 106. Complainant, however, asserts that some of Respondent's arguments are relevant only to the *amount* of penalty, and may involve issues of fact as to the amount of penalty warranted by the factors of economic benefit and size of the business, but do not preclude accelerated decision on the issue of whether as a matter of law those factors are to be considered in determining the penalty to be imposed in this case. Reply at 10, 14, 16.

III. RELEVANT PROVISIONS OF THE CLEAN AIR ACT

The criteria for assessing a penalty for CAA violations are set forth in Section 113(e)(1) of the Act, which provides:

> **In determining the amount of any civil penalty to be assessed under this section or section 7604(a) of this title, the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence . . . payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.** * * * *

42 U.S.C. § 7413(e)(1). The term "person" is defined in the general definitions of the CAA, Section 302, as including "any agency, department, or instrumentality of the United States."

As to violations by Federal facilities, Section 118(a) of the CAA provides as follows:

> **Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirements, any requirements respecting permits and any other requirement whatsoever), (B) to any requirement to pay a fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program, (C) to the exercise of any Federal, State, or local administrative authority, and (D) to any process and sanction, whether enforced in Federal, State, or local courts, or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. * * * ***

42 U.S.C. § 7418(a).

IV. RELEVANT EPA POLICIES AND GUIDANCE DOCUMENTS

Neither CAA Section 113(e) nor Section 118(a) have been interpreted by EPA pursuant to formal rulemaking procedures under the Administrative Procedure Act. However, EPA has interpreted the penalty assessment criteria of Section 113(e), and their applicability to Federal facilities referred to in Section 118(a), in various policy and guidance documents.

Specifically, EPA has interpreted the penalty factors of Section 113(e) in its CAA Stationary Source Civil Penalty Policy, revised October 25, 1991 (CAA Penalty Policy). Complainant's Prehearing Exchange Exhibit ("CX") 37; Respondent's Prehearing Exchange Exhibit ("RX") 22. The stated purpose of the CAA Penalty Policy is to provide "consistent application of the Agency's penalty authority" by "[t]reating similar situations in a similar fashion" which the Agency deems "central to the credibility of EPA's enforcement effort and to the success of achieving the goal of equitable treatment." The Policy is issued by the Agency to guide its enforcement staff, spread among ten Regions as well as in EPA Headquarters, through the calculation of penalties to be proposed in administrative actions for alleged CAA violations.

Id.

The CAA Penalty Policy directs first the calculation of two basic components of a penalty, one of which represents the "economic benefit of noncompliance," and the other of which represents the "gravity" of the violation, and then the adjustment of this calculation to account for other factors. The economic benefit component represents the benefit from costs which are delayed and costs which are avoided from noncompliance, and/or any profits from illegal activities. CX 37 at 4-6. The gravity component reflects the statutory factors "size of the business," "duration of the violation," and "seriousness of the violation." The gravity component is comprised of the sum of dollar amounts that the CAA Penalty Policy assigns for different levels of each of the following factors: amount of pollutant emitted above the standard, toxicity of the pollutant, sensitivity of the environment, number of months of violation, importance to the regulatory scheme, and size of the violator. *Id.* at 8-14. Thus, an additional dollar amount is to be added to a penalty to represent the "size of violator": for violators with a net worth or net current assets of under $100,000, the policy provides that an additional $2,000 is added to the penalty, and incrementally larger amounts are prescribed for incrementally larger businesses, up to $70,000 for violators with a net worth or net current assets of over $100 million, with an additional penalty of $25,000 added for every additional $30 million in net worth or assets. *Id.* at 14. The CAA Penalty Policy provides, however, that where the dollar amount assigned to the size of violator represents over 50% of the total gravity and economic benefit penalty components, EPA may reduce the figure to 50% of those components ("50% formula"). *Id.* at 15. The CAA Penalty Policy does not specify that it applies to the calculation of proposed penalties in actions brought against Federal facilities. *Id.*

However, the application of CAA penalty factors to Federal facilities is addressed in two guidance memoranda issued by Steven Herman, then-Assistant Administrator for the EPA's Office of Enforcement and Compliance Assurance, to Agency enforcement staff. One of the memoranda is entitled "Guidance on Implementation of EPA's Penalty/Compliance Order Authority Against Federal Agencies Under the Clean Air Act," dated October 9, 1998 (1998 Herman Memo) (CX 39), and the other is entitled, "Guidance on Calculating the Economic Benefit of Noncompliance by Federal Agencies," dated September 30, 1999 (1999 Herman Memo)(CX 40; RX 6).

The 1998 Herman Memo states that "Regions should consider the size of violator when determining the appropriate penalty against a Federal agency" and that "[i]n many instances, Federal agencies would be considered large violators," in which case EPA "should apply the 50% formula." CX 39 at 7. As to economic benefit, the 1998 Herman Memo states in pertinent part, "[i]n determining an appropriate penalty, EPA will apply its penalty policies, the October 25, 1991, CAA Stationary Source Civil Penalty Policy . . . including capturing economic benefit for avoidance of costs, against a Federal agency for violations of the CAA in the same manner and to the same extent as against any private party." CX 39 at 7-8. The 1999 Herman Memo states that "in the case of Federal agencies, [EPA] will characterize [economic benefit of noncompliance] as *cost savings* rather than *economic benefit*," and that "the BEN computer model is an appropriate tool to use to calculate the [Federal agency] violator's cost savings." CX

40 at 1-2; RX 6 at 1-2. These Memos in essence interpret the "size" and "economic benefit" penalty factors of Section 113(e) as applying to Federal facilities, and set forth EPA's policy as to how it will apply those factors.

The "BEN computer model" which both the 1998 Herman Memo and the CAA Penalty Policy direct be utilized in calculating economic benefit penalties (CX 37 at 5, 6; CX 40), is a computer software program created by the Agency in 1984 which calculates the economic benefit a violator derives from its delay and/or avoidance of monetary expenditures required to comply with environmental laws. RX 48, 49. In that several environmental statutes include the penalty criterion of "economic benefit of noncompliance," the BEN computer model has been used for calculating penalties under several environmental statutes. EPA has prepared and revised a document referred to as the "BEN User's Manual" which provides an explanation of the model and guidance for using it. RX 43-49.

V. STANDARDS FOR ANALYSIS OF STATUTES AND EPA POLICIES

As a backdrop to the standards for analyzing relevant statutes and EPA policies, a brief explanation of the role of the Administrative Law Judge (ALJ) is appropriate, particularly in light of Congress' comments with regard to EPA's *proposed* penalty in this matter,[4] and Respondent's reference to EPA's "own administrative law judges." Opposition at 85. Federal ALJs, while employed by individual Federal executive agencies, are certified for appointment after competitive examination by the Office of Personnel Management, appointed for indefinite terms in accordance with 5 U.S.C. § 3105, and have decisional independence pursuant to Section 557 of the Administrative Procedure Act, 5 U.S.C. § 557, which ensures the fair and impartial resolution of adjudicatory proceedings. Their salaries are set by Congress, their performance is not rated by the agencies which employ them, and the agencies for which they work may not alter the terms and conditions of their employment based upon the substance of their rulings. Therefore, administrative law judges at EPA are institutionally insulated from any bias in favor of EPA's positions in litigation.[5]

In filing a complaint under the CAA and the Rules, an EPA litigation team *proposes* the amount of a penalty, utilizing the EPA's CAA Penalty Policy and other Agency guidance memoranda and documents. CX 37 n. 2. In that regard, the Agency is directed by the CAA Penalty Policy as follows: "[i]n calculating the penalty amount which should be sought in an administrative complaint, the economic benefit of noncompliance and a gravity component

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[4] A Senate report, dated May 12, 2000, erroneously states in reference to this case that there was "a significant fine *imposed* at Fort Wainwright, Alaska." RX 3 (S. Rep. No. 292, 106th Cong. 2nd Sess. at 265 (emphasis added)).

[5] It should also be noted that none of EPA's current ALJs worked for the Agency or any state environmental entity prior to their judicial appointment.

should be calculated under this penalty policy *using the most aggressive assumptions supportable*. . . [w]here key financial or cost figures are not available . . . *the highest figures supportable* should be used." CX 37 at 1-2 (emphasis added). The $16 million penalty figure was merely Complainant's *proposal* as to the appropriate penalty; it was not a determination of the penalty. *See*, 40 C.F.R. §§ 22.14(a)(4)(i).

The ALJ, on the other hand, independently *determines* the amount of a penalty "based on the evidence in the record and in accordance with any penalty criteria set forth *in the Act*" and "shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth *in the Act*." 40 C.F.R. § 22.27(b)(emphasis added). In doing so, the ALJ is required to "*consider* any civil penalty guidelines issued under the Act," but is in no way bound by those policy guidelines, as discussed below.

With this backdrop, the standards to apply in analyzing statutes are now addressed. The ALJ begins the analysis of a statute by determining "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). The ALJ must "give effect to the unambiguously expressed intent of Congress." *Id.* at 843. To determine Congress' intent as to the question at issue, the ALJ "must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000)("the meaning- or ambiguity - of certain words or phrases may only become evident when placed in context"; statute must be interpreted "as a symmetrical and coherent regulatory scheme, . . .fit[ting] if possible all parts into a harmonious whole").

Next, if Congress has not directly addressed the precise question at issue, then the ALJ, as the EPA Administrator's delegatee, "must make a reasoned determination consistent with the purposes of the statute." *Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 542 (EAB 1998)(citing to *Chevron*, 467 U.S. at 843). While in construing statutes *the courts* defer to agency interpretations, in the form of regulations (under formal rulemaking procedures) and adjudications (*United States v. Mead Corporation*, 121 S.Ct. 2164, 150 L.Ed.2d 292, 305 n. 12 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)),[6] the Environmental Appeals Board (EAB), which reviews ALJ decisions, *does not* defer because the EAB's decision *is* the Agency interpretation, constituting final

[6] The rule of deference, set forth in *Chevron*, for courts to follow in reviewing an executive agency's interpretation of a statute states that where "the statute is silent or ambiguous with respect to the specific issue, the question for the [reviewing] court is whether the agency's answer is based on a permissible construction of the statute," and that such construction is entitled to deference. *Chevron*, 467 U.S. at 843-44.

Agency action.[7] *Ocean State*, 7 E.A.D. n. 22 ("[b]ecause we serve as final decision maker for the Agency in [an] adjudication, this aspect of *Chevron* deference does not apply in our review; instead, we perform our own 'independent review and analysis of the issue'"(citations omitted)); *Lazarus, Inc.*, 7 E.A.D. 318 n. 55 (1997)("[p]arties in cases before the [EAB] may not ordinarily raise the doctrine of administrative deference as grounds for requiring the [EAB] to defer to an interpretation of statutory or regulatory requirements advanced by any individual component of the EPA"); *Mobil Oil Co.*, 5 E.A.D. 490 n. 30 (EAB 1994)(EAB, declining to apply a deferential standard of review to EPA's interpretations in Notices of Proposed Rulemaking, stated that deference under *Chevron* or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) does not apply to its deliberations.);[8] 40 C.F.R. § 22.31(a). Similarly, the ALJ *does not defer* to statutory interpretations issued by the Agency, because the ALJ's initial decision constitutes final Agency action if not appealed or reviewed on the EAB's own initiative. 40 C.F.R. § 22.27(c). The ALJ "is part of the decisionmaking unit of the Agency, whereas a court is not," and "the statutory and constitutional restrictions which apply to a court and which prevent it from substituting its judgment for that of the Agency do not apply to the [ALJ]." *Louisville Gas & Electric Co., Trimble County Power Plant*, 1 E.A.D. 687, 690-691 (JO 1981). Agency adjudication, like rulemaking, is an adversarial process involving statutory interpretation. Adjudication in the courts, on the other hand, involves the Constitutional principle of separation of powers. *Lazarus*, 7 E.A.D. 318 n. 54. The Supreme Court's rationale for deference in *Skidmore*, that agency interpretations "are based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case," does not necessarily apply to administrative law judges, who have specialized experience interpreting and applying the statutes administered by the agency for which they adjudicate cases. 323 U.S. at 139.

Consequently, EPA's interpretations of the CAA as expressed in its policy and guidance documents, such as the Herman Memos, are not entitled to deference in this proceeding.

On the other hand, those EPA statements of policy which are not interpretations of statutes, and which are not expressed in regulations, express the "agency's intended course of action." *American Hospital Association v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987). They "genuinely leave[] the agency and its decision makers free to exercise discretion." *Id.*

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[7] As to regulations, the EAB applies a presumption of nonreviewability. *Echevarria*, 5 E.A.D. 626, 634 (EAB 1994). Regulations typically involve technical and policy matters, and "it is in the rulemaking context that [such] issues are appropriately presented to the Agency," which receives the input of Agency experts and representatives of affected industries. *Woodkiln, Inc.*, 7 E.A.D. 254, 269 (EAB 1997).

[8] Under *Skidmore*, "courts and litigants may properly resort for guidance" to an agency interpretation contained in a policy statement, guidance document, or informal ruling or opinion, according it weight depending on the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." 323 U.S. at 140.

Accordingly, as to penalty policies, the Rules provide that the ALJ need only "*consider* any civil penalty guidelines issued under the Act," and "set forth in the initial decision the specific reasons for the increase or decrease" of the penalty amount the ALJ assesses from the amount the Complainant proposed. 40 C.F.R. § 22.27(b)(emphasis added). As stated by the Environmental Appeals Board (EAB), "the ALJ has significant discretion to assess a penalty other than that calculated pursuant to the particular penalty policy . . . [and] is free to depart from the penalty policy so long as he or she adequately explains his or her rationale." *Lyon County Landfill*, CAA Appeal No. 00-5, slip op. at 46 (EAB, April 1, 2002); *see also, DIC Americas, Inc.*, 6 E.A.D. 184, 189 (EAB 1995); *Employer's Insurance of Wausau*, 6 E.A.D. 735, 759, 761 (EAB 1997); *Great Lakes Division of National Steel Corp.*, 5 E.A.D. 355, 374 (EAB 1994)(EPA issues penalty policies to create a framework to facilitate the uniform application of the statutory penalty factors).[9] Where the policy itself is challenged, the ALJ must "'re-examine the basic propositions' on which the [p]olicy is based" where "those 'basic propositions' are genuinely placed at issue." *Wausau*, 6 E.A.D. at 761 (quoting *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988)).

Here, Respondent does not challenge the CAA Penalty Policy on its face, or the basic propositions on which it is based, but merely challenges the application of certain provisions of the CAA Penalty Policy to Respondent. In fact, Respondent relies on language within the CAA Penalty Policy to support its position that those provisions do not apply to USARAK. Opposition at 41, 43-44, 84-85, 87; Tr. 22. Similarly, Respondent does not challenge the BEN User's Manuals, but asserts that EPA therein limited the application of "economic benefit of noncompliance" such that it does not apply to Respondent. Opposition at 28-32, 35, 84; Tr. 9-10, 19. That is, Respondent asserts that EPA *itself*, in its own policy and guidance documents, has admitted that the CAA's statutory factors of "economic benefit" and "size of business" are inapplicable to Federal facilities. Accordingly, to the extent that *Respondent* relies on EPA's policies and statutory interpretations set forth in policy documents, such as the CAA Penalty Policy and in BEN computer model guidance, these policies and interpretations are not evaluated herein in terms of deference, but are analyzed to determine whether EPA as a matter of policy had limited the application of the "economic benefit of noncompliance" and "size of business" penalty factors. *See, Bollman Hat Co.*, 8 E.A.D. 177 (EAB 1999)(EPA cannot apply an EPA policy in the litigation context where the policy states that its application is limited to the settlement context); *Birnbaum v. United States*, 588 F.2d 319, 332 (2nd Cir. 1978)(in holding that a Federal agency acted beyond its authority, court considered the agency's internal memorandum admitting that the agency had no legal basis for its conduct); *Edison Electric Institute v. U.S. EPA*, 996 F.2d 326, 332 (D.C. Cir. 1993)(court held that contrary to EPA's argument, EPA did

[9] Even a cursory review of administrative decisions issued by EPA ALJs evidences significant departures in the penalties *imposed* from those *proposed* by the Agency where warranted by circumstances. *See e.g., Bollman Hat Co.*, 8 E.A.D. 177 (EAB 1999)(upholding ALJ determination of appropriate penalty of $8,166 in lieu of $39,716 proposed for EPCRA violations); *CDT Landfill*, EPA Docket No. CAA-5-99-047 (ALJ, April 5, 2002)(assessing no penalty for CAA violations in case involving proposed penalty of $72,380).

not reach a final position on an issue of statutory interpretation, as admitted in EPA's rule preambles and policy statement).

VI. WHETHER "ECONOMIC BENEFIT OF NONCOMPLIANCE" APPLIES IN ASSESSING PENALTIES AGAINST RESPONDENT

EPA interprets Sections 113(e) and 118(a) of the CAA as authorizing it to assess a penalty against Federal facilities, such as Respondent, based upon the economic benefit of noncompliance, citing to the 1998 and 1999 Herman Memos.

In further support of its position, Complainant also presents a document entitled "Expert Report on Economic Benefit," prepared by Jonathan S. Sheffitz of Industrial Economics, Inc. (Sheffitz Report), which explains Complainant's calculation of the economic benefit of noncompliance in this matter. CX 34. The calculation represents the economic benefit that Respondent allegedly gained as a result of its delay in purchasing and installing COMS, CEMS, and baghouses on the six boilers, and its avoidance of operating costs of this pollution control and monitoring equipment over the period of noncompliance. *Id.* The Sheffitz Report notes that the "calculations are the same – but in a different format – as the BEN computer model." *Id.* n. 2.

Respondent's position is that EPA cannot assess against USARAK penalties ostensibly representing the economic benefit of noncompliance because to do so would be inconsistent with: (A) EPA's market-based concepts of economic benefit recapture; Federal fiscal law; and Section 118(a) of the CAA; as well as (B) the balance of power between the executive and legislative branches of the Federal Government; and (C) due process.[10]

Complainant's response to the issues raised by Respondent is that, while those arguments may be relevant to the *amount* of the penalty, they are not relevant to the question of whether or not economic benefit penalties can ever be assessed at all against Federal facilities. EPA further argues that Section 113(e) of the CAA applies to Federal agencies, requires consideration of *all* statutory penalty assessment factors, and that the phrase "economic benefit" therein is not limited to commercial economic benefit. Complainant emphasizes that consideration of economic benefit of noncompliance in this case is consistent with the requirement of Section 118(a) to treat Federal agencies the same as non-governmental entities, and is consistent with long-standing Agency policy.

[10] Respondent also argues that the 1998 and 1999 Herman Memos violate requirements for rulemaking under the Administrative Procedure Act and are not persuasive under factors set forth by the Supreme Court in *Skidmore* for weighing a Federal agency's interpretation of a statute. These arguments were addressed in the preceding sections herein.

The parties' arguments are set out in further detail and analyzed below.

A. Concepts of Economic Benefit, Fiscal Law, and CAA Section 118(a)

1. Respondent's Arguments

Respondent's primary argument is that imposing a penalty on Federal facilities for the "economic benefit" which accrued to them as a result of their violations of environmental laws cannot be factually reconciled with the premises underlying the imposition of such penalties on violators. Respondent asserts that EPA's economic benefit penalties are premised on the ability of the violator to otherwise invest funds that were not spent on environmental compliance. In support, Respondent refers to EPA documents concerning the BEN computer model. The User's Manual for the BEN computer model states, "[f]unds not spent on environmental compliance are available for other profit-making activities . . ." RX 48. EPA also published an explanation of this computer model, which states in part:

> If these financial resources are not used for compliance, then they presumably are invested in projects with an expected direct economic benefit to the organization. This concept of alternative investment – that is, the amount the violator would normally expect to make by not investing in pollution control – is the basis for calculating economic benefit of noncompliance. . . . In the absence of enforcement and appropriate penalties, it is usually in an organization's best economic interest to delay the commitment of funds for compliance . . . and to avoid certain associated costs, such as operation and maintenance expenses.

64 Fed. Reg. 32948, 32949 (June 18, 1999)(RX 18); 61 Fed. Reg. 53026, 53027 (Oct. 9, 1996)(RX 17). Federal facilities are not mentioned in these documents, Respondent notes.

While applicable to commercial businesses or individuals, this "alternative investment" concept, Respondent argues, does not apply to USARAK because under fiscal law, it "has no legal authority to hold, invest or expend [Military Construction] funds for other purposes." Tr. 12. Respondent states the Army "does not have discretionary funds with which to make investment decisions." Its funds consist only of what Congress has appropriated to it and under the Purpose Statute, USARAK cannot spend its funds until they are appropriated and allocated. Further, it can apply appropriations only to the object for which the appropriation was made. 31 U.S.C. § 1301(a). The Anti-Deficiency Act prohibits Respondent from incurring obligations in advance, expending unappropriated funds or diverting appropriated funds. 31 U.S.C. §§ 1341, 1342, 1350, 1351, 1511-1519. Respondent "earns no return on the funds appropriated to it by Congress." RX 75 (Economic Benefit Analysis by Kenneth T. Wise, Ph.D. (Wise Report)) at 5. Further, funds may be obligated only during the period for which they were authorized, which is typically one year, after which the appropriation lapses, and funds may be released up to five years later only to pay for previously incurred obligations. 31 U.S.C. §§ 1502, 1552, 1553; RX 71 at 2, 4. Any remaining unexpended balances are canceled and revert to the Treasury. 31

U.S.C. §§ 1502, 1552. Thus, USARAK notes that it cannot spend funds for purposes other than what Congress has appropriated them for, or otherwise keep or invest the funds for profit. Therefore, Respondent argues that legally it "could not spend money on the baghouse project until the . . . Military Construction funds were authorized, appropriated and allocated." Tr. at 12.

In terms of Respondent's financial resources, there are two types which are implicated in this case. "Operation and Maintenance" (O&M) funds are generally used for repairs, routine operations and purchases, and military construction projects costing up to $500,000. 10 U.S.C. § 2805. "Military construction" (MILCON) funds are used for larger construction projects. There are two primary types of military construction projects: "specified," which cost more than $1.5 million, and "unspecified," which cost less. *Id.* The installation of baghouses, which was required to bring the CHPP into compliance, was a specified MILCON project which cost $16 million. CX 46 at 3 and n. 2; *see*, 10 U.S.C. §§ 2801, 2802. Such specified MILCON projects require a specific line-item Congressional appropriation. 10 U.S.C. §§ 2802, 2805(a). Respondent therefore argues that until it received from Congress, through a line-item appropriation, the MILCON funding, it did not have any funds which it could have spent on the baghouse project, to invest or spend for other purposes. Tr. 12; RX 75 at 9, 12. As to Operations and Maintenance (O&M) appropriations, if they were not spent on Respondent's environmental compliance, they would be expended on other operation and maintenance activities, or would lapse. Therefore, according to the Wise Report, Respondent "would not have been able to gain any financial benefit by saving and investing funds that would have been spent for the operation and maintenance of the compliance equipment." RX 75 at 9.

In further support of its position, Respondent presents a report prepared by Dr. Gilbert E. Metcalf, Professor of Economics at Tufts University, entitled "Expert Report on Federal Budget Process and Economic Benefit" (Metcalf Report), which explains the Federal budget and management process and EPA's concept of economic benefit. RX 71. The Metcalf Report states that "the budget process provides incentives for USARAK to spend money it receives rather than delay, and budget rules limit its ability to divert appropriations to alternative activities." *Id.* at 6. The Metcalf Report states further that "USARAK's ability to spend [appropriated] money on other goods and services is restricted by Congressional limitations on transfers and reprogrammings," and that any transfer or reprogramming of funds appropriated for military construction "would come under the scrutiny of OMB at the minimum and quite likely the scrutiny of the House and Senate Armed Services Committees." *Id.*

A second premise of economic benefit penalties, Respondent asserts, is that the entity which realizes the economic benefit is the entity from which the economic benefit is recaptured through the penalty, so that the financial incentive for delayed compliance is removed. RX 75 at 10-11. Respondent argues that any economic benefit that theoretically exists, as a result of the delay in the baghouse construction project and other compliance activities, resides with the United States Treasury or the Congress, not with USARAK. Respondent explains that a failure to appropriate $16 million for the baghouse project would give *Congress* increased budget flexibility, or a delay in Respondent's request for such appropriation would result in a reduction of the *U.S. Treasury's* interest payments, from not having to borrow the money that would have

been used to finance the project. RX 71 at 8, 9. Respondent asserts that it has no authority, practical means or access to the money that EPA uses as a basis for economic benefit calculations. Respondent points out that EPA, in the 1999 Herman Memo, in the present economic benefit analysis, and in a discussion with Department of Defense representatives, refers to the Federal Government's, rather than the facility's, savings and avoidance of costs. Tr. 17-18; RX 70 (Statement of Maureen Sullivan) at 3; RX 75 at 11; CX 40 at 2, 4; CX 34 at 2.

As to any non-monetary benefit of funds being spent on projects other than the baghouses, considering the military budget cap, the Metcalf Report states that if USARAK fails to request military construction funding for the CHPP, and instead requests funding for different purposes, "there is no assurance that the funds not requested for the . . . CHPP would be made available to USARAK for other purposes," as "Congress could choose to allocate the funds for other purposes within the U.S. Army or could allocate the funds to different branches of the military . . . ." RX 71 at 6. Thus, "[t]he increased flexibility under the budget cap that arises from the lack of an appropriation for baghouses . . . benefits Congress." *Id.* The Metcalf Report concludes that "even if one assumes that it is appropriate to employ the concept of economic benefit in this case and further assumes that the economic benefits could be identified and quantified . . . USARAK and the U.S. Army are not the recipients of economic benefits arising from the delay in the installation of pollution abatement equipment at Fort Wainwright, Alaska." RX 71 at 11. Therefore, Respondent argues, the concept of removal of economic benefit from the violator is transformed, as applied to Federal facilities, into vicarious liability of cost savings realized by another entity, the Treasury Department or Congress. Moreover, Respondent argues, the Treasury Department not only would realize any cost savings from Respondent's non-compliance, but also would receive the economic benefit penalty paid by the Federal facility. RX 75 at 11. Thus, the Treasury would recover twice. Tr. 21.

Conceding that EPA's economic benefit policies explicitly apply not only to private entities but also to municipalities, Respondent distinguishes Federal agencies from municipal service organizations by noting, for example, that municipalities, but not Federal facilities, can issue bonds, charge fees for services, compete with other municipalities and private industry for business, and can pay economic benefit penalties by borrowing, selling assets and raising fees. R's Opposition at 35-37. Although the principles of EPA's economic benefit methodology may apply to municipalities as well as private businesses, Respondent argues, the unique characteristics of Federal facilities preclude application of those principles to Respondent.

A third premise of economic benefit, Respondent points out, is that it "is necessary both for deterrence purposes and to prevent violators from benefitting economically relative to parties which have timely complied with the Act and returns a violator to the economic position it would have been in had it complied on time." CX 33 (CAA Penalty Calculation by Kory Tonouchi) at 7. However, Respondent argues, the deterrence value of economic benefit penalties applies to businesses, whose goal is profit maximization, and does not apply to the Army, whose mission is to provide national security. RX 71 at 9-10. Taking away the private company's profit is a deterrent because it takes away their capital and opportunities to earn a return on investments and gain market share as against their competitors. Tr. 40. Taking away

funds that the Federal facility violator never had available for compliance, takes away from mission operating funds, effects a reallocation of mission-related financial resources, degrading an essential purpose, and passes them on to the Treasury. Opposition at 37, RX 71 at 11. Thus, the concept of equalizing those who gained economic benefit from violating environmental laws with those who complied with the laws, is transformed, as applied to Federal facilities, to a punitive penalty factor. Tr. 20.

In regard to future deterrence, Respondent claims that without any additional upward adjustment for economic benefit, a gravity-based penalty that is "strong enough," is sufficient to "send a very strong message up the chain of command," and is "going to be a black mark on the record of any officer that has made a decision," regarding noncompliance. Tr. 42-43. On the other hand, "overloading a federal facility with a large penalty inherently interferes with some aspect of a congressional mission that the President has attempted to manage within the funds allocated by Congress." Opposition at 51. Respondent asserts that "[t]here is no economic disincentive for the Secretary of Defense not to comply with the law." Tr. 43.

Respondent also contests EPA's authority to penalize a delay in compliance -- the time period from initiating the construction funding process through the award of the appropriation -- which is rendered necessary by fiscal law. Respondent asserts that it takes four to five years from a military department's formal request of construction funds until issuance of the appropriation. RX 74 (Statement of Stanley L. Nickell) ¶ 5; *see also,* CX 46 p. 4; RX 71 at 5. In this case the command decision to commence the formal request for installing the baghouses was executed on October 7, 1996 and the formal request, Form 1391, was submitted on June 5, 1997. RX 64, 125. Thereafter, the funding request proceeded through reviews, analyses and approvals by USARAK, the major Army command, Office of the Secretary of the Army, Office of the Secretary of Defense, Office of Management and Budget, and Congress. Congress did not authorize the appropriation for the baghouse project until 1999, in the appropriation authorizations for Fiscal Year 2000. RX 50; RX 74 ¶ 8. Moreover, Respondent states even after the appropriation is approved, the funds must be committed, certified and obligated as provided in financial management regulations, and then the construction contract process ensues, pursuant to Federal Acquisition Regulations. Furthermore, Respondent points out that funds to operate and maintain the baghouses can only be spent once the baghouses have been built. Tr. 88, 90.

Thus, Respondent urges, based upon the foregoing, that EPA's interpretation of the Clean Air Act, authorizing economic benefit penalties to be assessed against Federal facilities, is in conflict with Federal fiscal law and must be rejected, under the principle that statutes should be interpreted to avoid unreasonable or absurd results and to avoid rendering either statute ineffective. *See, Griffen v. Ocean Contractors, Inc.*, 458 U.S. 564, 575 (1982). Respondent also applies the precept that specific language prevails over general language, characterizing Sections 113(e) and 118(a) of the CAA as general language compared with the specific, detailed statutes and regulations comprising Federal fiscal law.

Additionally, Respondent argues, EPA's application of economic benefit penalties to Federal facilities violates the requirement in Section 118(a) of the CAA for EPA to impose

sanctions against Federal facilities "in the same manner, and to the same extent" as private entities. By redefining economic benefit as "cost savings" as applied to Federal facilities, the 1999 Herman Memo requires EPA to change the manner of applying economic benefit to Federal facilities, thereby treating them differently from the private sector. While the CAA Penalty Policy allows economic benefit to be waived for "public concerns" such as plant closings, bankruptcy, or municipalities' and utilities' disruption of essential public services, EPA does not give Federal facilities an equal consideration; EPA fails to mention degradation of Federal agencies' services. RX 22, § A-3-b. Also, by allowing Federal facilities –but not other entities -- to pay economic benefit penalties in Supplemental Environmental Projects (SEPs), the 1999 Herman Memo acknowledges that EPA is treating Federal facilities differently from other entities, and recognizes that they do not really benefit economically from noncompliance.

2. Complainant's Arguments

Complainant's position is that *all* of the penalty determination factors in Section 113(e) of the CAA are applicable to *all* "persons," which is defined in Section 302(e) of the CAA as including "any agency, department or instrumentality of the United States." Complainant emphasizes the phrase in Section 118 of the CAA that Federal facilities shall be subject to sanctions "in the same manner and to the same extent" as private entities. The penalty criterion of economic benefit in CAA § 113(e) is not limited to commercial economic benefit only, Complainant asserts. Conceding that profits are not relevant in this case (tr. 52), Complainant argues that assessing economic benefit penalties against Federal facilities removes any incentive to delay or avoid compliance and its associated costs, and the deterrent effect of penalties will result only if the economic advantage of non-compliance is removed.

When determining a penalty against USARAK, Complainant urges that the focus be on what Respondent should have done to comply on time, that is, what it would have cost Respondent to comply in a timely manner. Tr. 46-47, 51. Complainant explains that economic benefit of non-compliance can include, among other things, compliance costs saved, compliance costs delayed, and compliance costs avoided. Tr. 47. Complainant argues, contrary to Respondent's assertions, that Respondent *does* compete with other entities, because if Respondent did not generate its own power and heat from the CHPP, it would have to buy it from another supplier. Like any other entity, Respondent has to make operational decisions which include cost and budget considerations, and how to comply with the law. Tr. 52-53. Indeed, Respondent has compared its costs to those of purchasing heat and power from another entity. Tr. 53; Complainant's Prehearing Exhibit (CX) 47C. Complainant submits that Respondent's costs to produce power and heat are lower than that of other plants because it is out of compliance. Tr. 53, 58. Complainant asserts that Respondent has been out of compliance for 10 years, and is still out of compliance, and that the incentive to comply was not achieved even when Respondent considered the potential ramifications of paying a penalty. Tr. 56-57; RX 64. Consequently, Complainant urges, cost savings must be considered in assessing penalties against Federal facilities, in order to be consistent with penalties EPA imposes against other non-profit entities. Tr. 55.

Complainant further points out that consideration of economic benefit is consistent with long-standing Agency policy - EPA articulated the concept of economic benefit penalties as an integral part of enforcement authority as early as 1984, in its general penalty policies "GM-21" and GM-22," prior to the listing of economic benefit as a penalty factor in the environmental statutes. Tr. 55; CX 43, 44; RX 20, 21. Both parties discuss the following statement in GM-21:

> Much of the rationale supporting this policy generally applies to non-profit institutions, including government entities. In applying this policy to such entities, EPA must exercise judgment case by case in deciding, for example, how to apply the economic benefit and ability to pay sanctions, if at all.

CX 43; RX 20; Tr. 25-26, 56. Whereas Respondent focuses on the words "case by case" and "if at all," advocating against blind application of economic benefit penalties, Complainant argues that economic benefit must be *considered* in regard to *all* entities, including government entities, even if, in the end, EPA decides in its prosecutorial discretion, or decides on the facts, not to increase penalties in light of that factor.

EPA argues that it need not show commercial economic benefits or that funds were used by Respondent for other income-producing activities, because the undisputed standard of proof is merely to establish a reasonable approximation of the economic benefit. Furthermore, Complainant argues, the issue of whether there was investment in income-producing activities is relevant only to the calculation of the penalty, and not to the question of law presented here, of whether economic benefit of noncompliance can apply to Respondent.

Complainant categorizes Respondent's fiscal law and military appropriations arguments as an "impossibility" defense. Impossibility of compliance is not a defense to liability under the CAA, a strict liability statute, but is relevant only to the amount of penalty, Complainant points out.

3. Analysis

Respondent's arguments that it is unable to save or invest funds, that it cannot realize any interest or financial return on its appropriated funds, and that for purposes of penalty assessment, any economic benefit must accrue to the named respondent rather than generally to the Federal government, United States Treasury, or Congress, are well taken. USARAK could not have realized any economic benefit from interest or profits earned on funds which could have been, but were not, timely spent on environmental compliance. These arguments are not, however, dispositive as to whether the statutory penalty criterion of "economic benefit of noncompliance" is to be considered in regard to determining an appropriate penalty with regard to Respondent's violations.

a. Whether Congress has expressed an intent with regard to considering the factor of

"economic benefit of noncompliance" in cases involving violations by Federal Facilities

First, it must be determined "whether Congress has directly spoken to the precise question at issue" (*Chevron*, 467 U.S. at 842), by "look[ing] to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

Section 113 of the CAA provides that the EPA Administrator "may issue an administrative order against any person assessing a civil administrative penalty," and that "[i]n determining the amount of any penalty . . . the Administrator . . . shall take into consideration . . . the economic benefit of noncompliance." The term "person" is defined in Section 302(e) of the CAA as including "any agency, department, or instrumentality of the United States." Section 118(a) requires that any such Federal government entity "shall be subject to, and comply with, all Federal . . . process and sanctions respecting . . . air pollution in the same manner and to the same extent as any nongovernmental entity . . . whether enforced in . . . courts, or in any other manner." The term "economic benefit of noncompliance" is not defined in the CAA. However, there is no indication in the CAA that "economic benefit of noncompliance" is limited to private business or other entities which are in a competitive market, and that the factor is wholly inapplicable to Federal entities. Rather, the language of the CAA is clear that "economic benefit" must be "taken into consideration" in assessing penalties against Federal facilities.[11]

Although the ALJ must *take into consideration* the factor of economic benefit in determining an appropriate penalty against Federal facilities, taking a factor into consideration does not necessarily result in the upward adjustment of the penalty amount based upon that factor. If, upon consideration of a particular penalty criterion, facts particular to the violator show that the factor does not apply, then the ALJ can conclude that no penalty adjustment is appropriate for that criterion. For example, if a violator has never paid any penalties in the past for the same violation, the criterion "payment by the violator of penalties previously assessed" would be considered and found not to apply. Respondent concedes that there may be some Federal government entities to which "economic benefit" may apply, although it argues that "economic benefit" does not apply to USARAK or other "traditional" Federal agencies which rely on Congressional appropriations and authorizations, because such application contravenes fiscal laws. Tr. 30-32. Thus, the precise question at issue is whether "economic benefit of noncompliance" applies to, and may be used as a factor to adjust a penalty against, a Federal entity such as USARAK, which is solely reliant upon Congressional appropriations and

[11] The brief statement in the legislative history of section 113(e) in the 1990 CAA amendments, that "[v]iolators should not be able to obtain an economic benefit vis a vis their competitors as a result of their noncompliance with environmental laws" (RX 5), does not suggest that Congress intended to limit the application of economic benefit to those entities which have competitors. Moreover, resort to legislative history is unnecessary when interpreting a statutory term which has a plain meaning. *Mallard v. U.S. District Court*, 490 U.S. 295, 296, 300 (1989).

authorizations.

Congress has not directly spoken on this precise question. Consequently, and because Respondent argues that application of "economic benefit of noncompliance" to a Federal agency conflicts with fiscal laws and with EPA's own concepts of economic benefit, further analysis is warranted.

b. Whether the term "economic benefit" is limited to monetary profit

Absent a definition in the CAA, the term "economic benefit of noncompliance" must be interpreted according to its ordinarily understood meaning, for which it is appropriate to consult a dictionary. *Huffman v. Office of Personnel Management,* 263 F.3d 1341, 1349 (Fed. Cir. 2001). The dictionary definition of the word "economic" is "of, relating to or based on the production, distribution, and consumption of goods and services," and "having practical or industrial significance or uses: affecting material resources," in addition to "profitable." Webster's Ninth New Collegiate Dictionary at 395 (1990). Thus, the common meaning of economic benefit is broader than potential or actual financial profit.

Federal courts recognize that the term "economic benefit" can include non-monetary benefits, and benefits which cannot be invested in any profit-making activities. *Holdeen v. United States*, 297 F.2d 886, 890 (2nd Cir. 1962)("The term 'economic benefit' of course includes not only income, or a possibility thereof, but also loans on an advantageous basis, power to decide who shall be enriched and who shall go without, [and] discharge of obligations of the grantor . . . ."); *Estate of O'Daniel v. United States*, 6 F.3d 321, 325 (5th Cir. 1993)(economic benefits of owning an insurance policy, under 26 C.F.R. § 20.2042-1(c)(2), include power to change the beneficiary, to surrender or cancel the policy, to assign the policy or revoke an assignment, to pledge the policy for a loan, or to obtain a loan from the insurer for the surrender value of the policy); *California Dental Ass'n v. FTC*, 526 U.S. 756, 767 (1999) (economic benefits provided by non-profit dental association include insurance and financing arrangements, lobbying, litigation, marketing, and public relations); *McCann v. United States*, 696 F.2d 1386 (Fed. Cir. 1983)(trips paid for by taxpayer's employer were an economic benefit to taxpayer and thus constitute gross income); *United States v. Bridell*, 180 F. Supp. 268, 274 (N.D. Ill. 1960)(services to taxpayer of childcare and home maintenance constitute an economic benefit to taxpayer and thus constitute income).

If economic benefit can include such services, resources, and power to assign, exchange, expend and allocate funds, then *a fortiori,* economic benefit can include funds and the power to expend and allocate them on goods, services or resources that do not generate any income, interest or profit. In fact, Congress has explicitly referenced economic benefits to Fort Wainwright. Department of Defense Appropriation Bill, S. Rep. No. 408, 102nd Congress (September 17, 1992)("The Committee directs the Army to commence a study of the long term economic, reliability, and operational benefits of upgrading existing electric transmission service between military installations in Alaska. The study should evaluate benefits to DOD facilities

including . . . Fort Wainwright . . . .").

There is no gainsaying that a Federal facility receives an economic benefit when its budget is increased. Additional funds in the budget may be expended on additional items -- programs, training, equipment, personnel, maintenance, repairs, furniture, or supplies, for example -- depending on the particular appropriation. These expenditures do not result in any profit or income to the Federal entity. Similarly, when funds in a Federal facility's budget are saved or freed up by not being spent on an expected obligation, these funds are of economic benefit to the entity, in the form of budgetary flexibility, to be expended on other items, provided the items are consistent with the purpose of the particular appropriation. Even Respondent concedes that increased budgetary flexibility "might be, at least theoretically, a source of economic gain." Tr. 16.

Thus, even if compliance costs are merely deferred, a Federal entity, funded through appropriations, may realize an economic benefit, namely budgetary flexibility to spend on other projects of its choice the amount that timely compliance would have cost. By avoiding the costs of compliance for a period of time, the facility avoids the displacement of other O&M activities during that time period, and avoids the costs of operating and maintaining the facility or equipment that would be required for compliance during that period.

c. Whether EPA has limited the concept of "economic benefit of noncompliance" to monetary profit as a matter of policy

Because Respondent has cited as support for its position EPA's own concepts of "economic benefit" as expressed in policy and guidance documents, these documents are analyzed. Since 1984 EPA has had a policy, expressed in the general penalty policies GM 21 and GM-22, of including as an integral part of a penalty for violating environmental laws the recouping of any "economic benefit of noncompliance."[12] CX 43; CX 44. GM-22 provides that economic benefit encompasses savings from avoided costs and/or delayed costs of compliance, and benefits from competitive advantage. CX 44 at 6-10. The terms "economic benefit" and "savings" are not defined or limited therein as investment in profit-making activities or cost of debt. Indeed, benefits from avoided costs are defined as "the expenses avoided until the date compliance is achieved less any tax savings." *Id.* at 9.

[12] EPA in the accompanying 1984 General Enforcement Policy, GM 21, suggested caution, but did not preclude, calculating economic benefit of noncompliance by non-profit institutions and government entities, in requiring EPA to "exercise judgment case-by-case in deciding . . . how to apply economic benefit . . . sanctions, if at all." RX 20, CX 43. EPA made clear in the BEN User Manuals since 1985, however, that non-profit organizations and government entities are subject to economic benefit penalties. RX 49. The present proceeding is a "case-by-case" determination as to whether, and if so, how, to apply economic benefit penalties to a Federal facility.

In 1984, the BEN computer model was developed, and it was based on the assumption that financial resources not spent on compliance are available for alternative investments which yield financial returns. RX 49 pp. I-5, A-I-3, A-II-1. It considered economic benefits to corporations, not-for profit organizations, and "governmental entities" such as municipalities. RX 49 p. I-3 and Appendix B. Not-for profit organizations and "governmental entities" were assumed to raise capital from sources that have alternative opportunities for investing. RX 49 p. B-3. As to Federal governmental entities, on July 16, 1997, the Department of Justice Office of Legal Counsel issued an opinion holding that EPA has authority under the CAA to assess penalties against Federal agencies. CX 41. Prior to that time, EPA apparently did not publically express or suggest any intent to consider economic benefit to Federal agencies. 61 Fed. Reg. 53026 (October 9, 1996)("The [BEN] model can estimate economic benefit for many types of organizations: corporations, partnerships, sole proprietorships, not-for-profit organizations and municipalities"); CX 42 (Memorandum dated April 14, 1995 from Joan K. Meyer, Industrial Economics Incorporated, to Jonathan D. Libber, EPA, responding to a "question . . . about the application of the BEN model to a case in which the entity in question is a Federal Facility" by recommending that the appropriate discount rate to use is a Treasury-bond rate).

Over the years, the Agency never inserted into its BEN computer model any reference to Federal governmental entities or change the assumptions in regard thereto. 64 Fed. Reg. 32948, 32949 (June 18, 1999)("[t]he BEN Model can estimate economic benefit for many types of organizations: corporations, partnerships, sole proprietorships, not-for-profit organizations, and municipalities"); RX 48 p. 3-4. In the BEN User's Manuals, EPA maintained that funds not spent on compliance are available for other profit-making activities, or alternatively, that costs associated with obtaining additional funds are avoided with non-compliance. RX 48 p. 1-2, A-1; RX 46 p. 1-3, 1-5; RX 47. Although the BEN User's Manuals and associated Federal Register notices broadly state that these assumptions are the basis for calculating the economic benefit of noncompliance, the assumptions are merely the basis for calculations using a "discount rate." RX 48 p. 1-3, RX 46 p. 1-5; 61 Fed. Reg. 61026, 53027 (October 9, 1996). The BEN computer model calculates the financial gain from avoided and/or delayed costs of compliance based upon a standard discount rate which reflects the violator's "time value of money." RX 48 pp. 1-3, 3-14; RX 46 p. A-3. The discount rate for companies is a weighted-average cost of capital for a typical company, "reflecting the cost of debt and equity capital weighted by the value of each financing source." RX 48 p. 3-14. The discount rate for not-for-profit entities is a typical municipality's cost of debt based on interest rates for general obligation bonds. *Id.* p. 3-15. The BEN computer model cannot calculate other economic benefits such as those from competitive advantage or illegal profits. RX 48 pp. 1-3, 3-5; CX 37 at 6 (CAA Penalty Policy).

Referring to this model for violations by Federal facilities, the 1999 Herman Memo states that EPA's BEN computer model "should be used" and "is an appropriate tool to use to calculate the violator's cost savings." RX 6 at 2. The Memo discusses a Federal agency's benefit from delay in compliance based on a discount rate as follows: "One of the main sources of economic benefit is that the government's delay in funding compliance will allow it to borrow less money than it would have if it had complied in a timely manner. . . [f]or example, the Federal Treasury note interest rate is essentially the Federal Government's cost of capital, or discount rate," and

"[i]f a Federal agency delays for two years the installation of required pollution control equipment . . . then the benefit from that delay is based on the discount rate. . . ." RX 6 at 4. However, the Memo does not indicate that EPA intended to limit the concept of economic benefit to the discount rate methodology for all Federal facility violations; EPA only suggested it as "an appropriate tool" and "[o]ne of the . . . sources of economic benefit," but not the only one.[13]

The discount rate methodology is not the sole method for calculating "economic benefit." The CAA Penalty Policy states, "[t]here are instances in which the BEN methodology either cannot compute or will fail to capture the actual economic benefit of noncompliance," in which instances "it will be appropriate for the Agency to include in its penalty analysis a calculation of the economic benefit in a manner other than that provided for in the BEN methodology" which may include calculating profits from illegal activities. CX 37 at 6. The 1999 Herman Memo also acknowledges, as does the BEN computer model, that economic benefit of noncompliance may include benefits which are not dependent on a discount rate, namely competitive advantage. RX 6 at 3. Moreover, the BEN computer model calculates avoided costs in two parts, only one of which involves the discount rate: first, the cost estimates for avoided capital and/or annual costs, adjusted for inflation and tax deductibility; and second, the expected return on the avoided costs, based on the discount rate. RX 6 at 2-3; RX 48 pp. 1-3, 3-9, 3-11; RX 46 pp. 1-5, 1-6; 64 Fed. Reg. 32948, 32950 (June 18, 1999). The BEN model provides that cost savings may be calculated with a modified discount rate if there is "reliable information to substantiate the change." RX 48 p. 3-13; *see also,* RX 46 p. 4-34 ("If you want to modify this standard value [discount rate], you should enter the cost of debt most applicable to the violator. This is particularly important when the violator is not a municipality"). It follows that cost savings may be calculated with a zero discount rate if circumstances warrant, *i.e.*, if there is no applicable cost of debt. In those circumstances, the avoided costs are not based on "the time value of money" or expected returns on alternative investments. Instead, the avoided costs include only the first part of the calculation: the cost estimates for avoided capital and/or annual costs. Therefore, the assumptions underlying the discount rate methodology and the associated policies embodied in the BEN computer model do not preclude the application of "economic benefit of noncompliance" to Federal facilities.

The Shefftz Report calculates an economic benefit based upon the BEN computer model, in reliance on, *inter alia*, the 1999 Herman Memo. CX 34 n. 2. It does not explain the theory of USARAK's receipt of any economic benefit, but simply adopts the concept of the "time value of money" and the discount rate methodology referenced in the 1999 Herman Memo and applies them to Respondent. Specifically, the calculation consists of the difference in costs for on-time and delayed investment in equipment and for the expected delayed investment in replacement equipment, multiplied by a present value factor based on average interest rate on U.S. Treasury

[13] It is noted that the Memo does not address how any particular Federal installation would borrow less money from delaying compliance and thereby receive any cost savings.

five-year notes, plus the avoided annual costs multiplied by the present value factor.[14] CX 34 at 3. The Shefftz Report merely represents EPA's litigation position on the calculation of economic benefit in this proceeding, but does not constitute an agency policy on the application of economic benefit to a Federal facility.

It is concluded EPA's policy and guidance documents do not limit the term "economic benefit of noncompliance" such that it cannot apply to Federal facilities.

d. Whether economic benefit could accrue to Respondent consistent with fiscal law

To give some context to the following discussion, the following factual background is provided. The installation of COMS and CEMS are O&M projects which were funded from the Army's O&M appropriations. CX 46 at 3-4; *see also,* RX 157, 158, 161 (Army Pamphlet 420-11, dated October 7, 1994, Sections 1-6, 1-7). Respondent's response to an EPA request for information shows that the purchase, installation, certification and operation and maintenance of the COMS cost $686,666 and of the CEMS cost $1,136,910. CX 46 at 6, 7, 9; *see also,* RX 157 at 7; RX 158.

Respondent's delay in spending its O&M funds on the COMS and CEMS would result in increased flexibility in its O&M expenditures during the years of noncompliance, allowing USARAK to spend on other O&M projects or activities of its choice the amount it would have cost to purchase, install, certify, operate and maintain the COMS and CEMS. Respondent concedes that USARAK does have flexibility to spend its allotment of O&M funds, "at least up to a certain amount," and for military construction projects, up to 1.5 million. Tr. 36-37; *see also,* RX 73 ¶ 7 (the O&M appropriation "can normally accommodate small-dollar equipment expenses [up to $100 thousand] and minor construction items within current fiscal year resources," but higher expenses "follow a more protracted budget timeline.").

However, as to the Respondent's delay in the *purchase, installation and certification* of the COMS and CEMS, the net result of the delay may be simply a tradeoff of budgetary flexibility in O&M funds from the year Respondent installed the COMS and CEMS to the years Respondent delayed the installation. This is because USARAK cannot save or earn interest on its allocation of annually appropriated O&M funds. 31 U.S.C. § 1502 ("The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability . . . "); 31 U.S.C. § 1552(a)("On September 30th of the 5th fiscal year after the period of availability for obligation of a fixed appropriation account ends, the account shall be closed and any remaining balance . . . in the account shall be canceled and thereafter shall not be available for obligation or expenditure for any purpose.") In addition, Respondent cannot borrow to obtain O&M funds; expenditures and obligations must be made from an available O&M appropriation. 31 U.S.C. § 1341 ("An officer

[14] The costs are adjusted for inflation. CX 34 at 3.

or employee of the United States Government . . . may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; . . . [or] involve [the] [G]overnment in a contract or obligation for the payment of money before an appropriation is made unless authorized by law . . . ."). The Shefftz Report states that "the Federal Government avoids the costs associated with borrowing additional funds for environmental compliance." CX 34 at 2. As concluded above, the economic benefit must accrue to the named respondent, not to the Federal government as a whole. USARAK could not have borrowed funds and therefore could not have avoided any costs of borrowing additional funds by delaying installation of the equipment.

On the other hand, there is a clear economic benefit from avoided costs of *operating and maintaining* the COMS and CEMS during the years Respondent deferred their purchase and installation. The Wise Report acknowledges, "If the [Respondent's] O&M budget would have been fixed regardless of the installation of the equipment, then it is true that the operating costs for compliance would displace other activities that were funded by this budget." RX 75 at 9. The Wise Report hypothesizes that if, on the other hand, Respondent's O&M budget would have been increased for additional costs of maintaining the baghouse equipment, then Respondent's O&M expenditures would have been the same, "except that . . . additional O&M funds would have been appropriated and expended for operation of the compliance equipment." RX 75 at 8. This hypothesis appears to be merely academic, as Lucinda M. Custer, Chief of Budget Formulation Division for the Office of the Assistant Secretary of the Army, who develops the Army's O&M budget, states that "any increase in maintenance and sustainment costs resulting from the installation of new construction or the acquisition of more-expensive-to-operate equipment associated with environmental compliance will compete aggressively for funding with other operation and maintenance requirements at all Army levels." RX 73 (Custer Affidavit) ¶ 6. In addition, Dr. Metcalf concedes that budget caps indicate that a reduction in spending frees up money in the budget, although he emphasizes that budget caps are routinely exceeded, usually by emergency appropriations. RX 71 at 2.[15]

While Respondent may have some impediments to spending its O&M funds, Respondent has not shown any prohibition on its ability to choose between spending O&M funds on compliance or on other activities. First, Respondent argues that budget rules, such as those for transfers and reprogrammings, limit its ability to divert appropriations to alternative activities, goods or services. However, that argument is directed toward specified military construction appropriations. RX 71 n. 11 (Metcalf Report "focuses on military construction spending," in regard to the installation of baghouses). O&M appropriations can be used for a wide variety of projects, activities, repairs, and operations, and can also be used for unspecified military construction projects costing up to $500,000. 10 U.S.C. § 2805(c). Second, according to Ms. Custer, "equipment acquisitions exceeding $100 thousand . . . fall into the investment category

[15] Not specifically addressed by Respondent is whether an increase in its O&M budget for compliance could have resulted in a reduction in other accounts, such as unspecified military construction, due to budget caps.

and must follow a more protracted budget timeline." RX 73 ¶ 7. While this may be a hurdle for USARAK, it does not preclude expenditures of such funds on other O&M activities. Third, Ms. Custer states that environmental compliance and pollution control and prevention issues "are considered 'must fund' issues and are included among the first items resourced in budget development." RX 75 ¶ 3. This statement does not negate flexibility in spending O&M funds, and does not mean that O&M funds that are not spent on a particular environmental compliance project must be spent on another environmental compliance, pollution control or pollution prevention project. Fourth, in a response to EPA's May 17, 1999 Request for Information, Respondent stated that the Army's O&M utility modernization funds are "fenced" by the Army and "cannot be used by U.S. Army, Alaska for any other purpose without Department of Army Authorization." CX 46 at 4. Assuming that these funds could have been or were spent on the COMS and CEMS, expenditures of those funds on other activities are not prohibited, but merely require authorization. Thus, Respondent has not raised any genuine issue of material fact as to its ability to spend on other items the O&M funds that could have been spent on the COMS and CEMS.

It is concluded that neither fiscal laws nor EPA's concepts of economic benefit, embodied in its policy and guidance documents, preclude the imposition of penalties representing the economic benefit to Respondent, in the form of costs avoided and resultant budgetary flexibility, as a result of its failure to install timely, test, maintain and operate the COMS and CEMS.

As to the installation of the baghouses, there is no dispute that the baghouse construction project "qualifies and must be funded as a military construction ('MILCON') project." Respondent's Opposition at 70-71. A budget request had to be made for a specified military construction appropriation, because the baghouse project cost more than $1.5 million. 31 U.S.C. § 1108; 10 U.S.C. §§ 2802, 2805(a). Yet, Complainant assumes, as stated in the Shefftz Report, that "[f]unds not spent on environmental compliance are available for other projects . . . ." CX 34 at 2. Respondent's general point is well taken, that it cannot expend specified military construction funds on anything outside of Congress' stated purpose, except in accordance with the limitations on transfers and reprogrammings. RX 71 at 3-4, 6; 31 U.S.C. §§ 1301(a), 1532 (transfer of funds between appropriations is prohibited without statutory authority).

Respondent's more particular argument, that it "cannot spend MILCON Baghouse project funds for any other purposes," and it "can't take those funds and buy tanks, weapons, or what have you" (tr. 12), requires further examination. Congress did not specify in the relevant authorization act that the MILCON appropriations for Fort Wainwright were for a baghouse project, or for CHPP construction. For Fiscal Year 2000, Congress authorized a $34,800,000 MILCON lump sum appropriation for Fort Wainwright, to wit: "the Secretary of the Army may acquire real property and carry out military construction projects for the installations . . . and in the amounts, set forth in the following table: . . .Alaska . . . Fort Wainwright . . . $34,800,000." National Defense Authorization Act for FY 2000, Pub. Law No. 106-65 § 2101(a), 113 Stat. 512, 825 (1999). Documents presented by Respondent indicate that this appropriation authorization was based upon Congress' approval of a $15.5 million request for the baghouse project,

denominated the "Emission Reduction Facility." RX 74 ¶ 8 (Affidavit of Stanley Nickell); RX 50, RX 64; *see also*, H. Rep. No. 221, 106th Cong., 1st Sess. (1999). Similarly, for Fiscal Year 1999, Congress authorized a $22,600,000 MILCON lump sum appropriation for Fort Wainwright: "the Secretary of the Army may acquire real property and carry out military construction projects for the installations . . . and in the amounts, set forth in the following table: . . .Alaska . . . Fort Wainwright . . . $22,600,000." Strom Thurmond National Defense Authorization Act for FY99, Pub. Law No. 105-261 § 2101(a), 112 Stat. 1920 (1998).

Where Congress authorizes appropriations for military construction projects at a particular installation in a lump sum without naming or describing a particular project, the installation is not legally bound to spend the funds on a particular project. As the Supreme Court has stated,

> [T]he very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way. . . . For this reason, a fundamental principle of appropriations law is that where "Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on" the agency. . . . Put another way, a lump-sum appropriation reflects a congressional recognition that an agency must be allowed "flexibility to shift . . . funds within a particular . . . appropriation account so that" the agency "can make necessary adjustments for 'unforeseen developments'" and "'changing requirements.'"

Lincoln v. Vigil, 508 U.S. 182, 192 (1993)(quoting *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 318, 319 (1975)). Thus, although its MILCON appropriations may have been authorized based upon budget requests, and may have been directed in Congressional committee reports to be spent on particular projects, USARAK was not legally bound to expend them on any particular projects, but as a legal matter, had flexibility to spend them on any military construction projects at Fort Wainwright, including those which could bring it into compliance with the CAA.[16]

Thus, in any years in which Congress authorized a military construction appropriation for Fort Wainwright of at least $16 million, without specifying the particular project in the authorization act, Respondent may have had a choice of spending it on the baghouse project or on other military construction projects and/or for land acquisition. Furthermore, in any years in which Congress authorized lump sum appropriations totaling at least $16 million to the Army and/or Department of Defense, from which USARAK legally could have requested funding for

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[16] As a practical matter, it is noted that "an agency's decision to ignore congressional expectations may expose it to grave political consequences." *Lincoln*, 508 U.S. at 193.

the baghouse construction project, the Army or the Department of Defense may have had the ability, consistent with fiscal law, to spend it on the baghouse project.

If any such appropriations were authorized and, consistent with fiscal law, could have been spent on constructing the baghouses, then Respondent avoided the costs of operating and maintaining the baghouses from the earliest time that the baghouses could have been constructed until the time they were in fact constructed. Respondent's response to EPA's request for information shows that the operation and maintenance of the baghouses was estimated to cost $374,820 annually. CX 46 at 11. Any such avoided costs, like any avoided costs of operating and maintaining the COMS and CEMS, would increase Respondent's budgetary flexibility in O&M appropriations, so Respondent would avoid displacing other activities and projects funded by that budget, and thereby realize an economic benefit. Thus, even assuming *arguendo* that Respondent could not have requested any earlier the MILCON appropriation for constructing the baghouses, Respondent nevertheless may have realized an economic benefit from avoided costs of operating and maintaining the baghouses.[17]

If, however, Respondent could not have requested the MILCON funds early enough to construct the baghouses in a timely manner, and if no appropriated funds existed which legally could have been spent on timely construction of the baghouses, Respondent may have had other viable options for complying with the requirements at issue in the Complaint. For example, USARAK could have operated the CHPP to provide part of its needed heat and/or electricity and purchased the other part from another power producer, or could have purchased all of its needed heat and electricity from other power producers. RX 123 and CX 47C at 36-37. According to an August 1996 report by Raytheon Engineers and Constructors, entitled "Determination of Practical Options For Providing Heat & Electrical Power to Fort Wainwright" (Raytheon Options Report), the costs of implementing these options could exceed the costs of operating the CHPP without the baghouses. CX 47C; RX 123. For example, the Raytheon Options Report estimates Respondent's annual costs for purchasing heat and electricity from the Golden Valley

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[17] A few related issues arise from the discussion above, but are not necessary to decide at this point in the proceeding. One, which appears to be a disputed issue of fact, is whether Respondent could have requested earlier the MILCON funds to construct the baghouses. Another issue is whether delays involved in the appropriation process for constructing the baghouses are relevant to calculating any economic benefit from avoided costs of operating and maintaining the baghouses.

A third issue is whether there is any economic benefit to Respondent from the construction at USARAK of any projects which were funded from appropriations that, consistent with fiscal law, could have been spent instead on constructing the baghouses. This issue may generate questions to be addressed at the hearing, such as whether the use and enjoyment of such projects, during the time the baghouses were delayed, constitutes an economic benefit; whether the projects were essential to Respondent's mission; and the likelihood that Congress would have authorized the other projects in the future if Respondent had instead spent the funds on the baghouse project.

Electric Association (GVEA) at $18.6 million, suggesting a cost savings to Respondent from operating its noncompliant plant to obtain power and heat. *Id.* at 28.

The recapture of all costs Respondent would have incurred for obtaining power and heat from another source in compliance with the CAA, from the time the violations at issue commenced through the time Respondent came into full compliance, "places the violator in the same position as [it] would have been if compliance had been achieved on time," which is the intended effect of economic benefit penalties, in the words of EPA's 1984 general civil penalty policy. CX 43 at 3. If timely compliance was not possible for the CHPP, then the costs for obtaining power and heat from an alternative source are "the minimum amount by which the violator must be penalized so as to return it to the position it would have been had it complied on time." RX 48 p. 1-2. It may be appropriate to offset those costs by the costs Respondent did incur on the CHPP's operation, maintenance and compliance. *See*, RX 48 p. 4-3 (economic benefit may be offset by violator's expenditures on a system that did not result in compliance if violator had reasonable basis for selecting the system); CX 34 (Shefftz Report offset the economic benefit calculation by Respondent's expenditures to install new gas analyzers and move existing opacity monitors, which did not result in compliance). Recapture of the costs for obtaining heat and power from another source, with any appropriate offsets, may fairly represent the cost savings, and thus the economic benefit, to Respondent of its noncompliance with the requirements at issue in the Complaint, Counts 1 through 7 and 9.

The concept of economic benefit based on a violator's cost savings from operating out of compliance rather than purchasing the service from another entity is not new. It was discussed in 1987, in *A.Y. McDonald Industries, Inc.*, 1 E.A.D. 402, 424 (CJO 1987). In that case, attempting to mitigate the economic benefit penalty, the respondent argued that it could have complied with hazardous waste regulations and avoided groundwater monitoring costs through off-site disposal, instead of disposing of hazardous waste on its own site. The Chief Judicial Officer accepted the argument that costs for alternative means of compliance may constitute the economic benefit, stating that "the economic benefit component should include only the cost of the cheapest mode of compliance," but that the respondent had the burden to produce evidence to that effect. *Id. But see*, RX 48 p. 3-9 ("The best evidence of what the violator should have done to prevent the violations is what it eventually did (or will do) to achieve compliance" as the "violator often will have sound business reasons to install a more expensive compliance system (e.g. it may be more reliable, easier to maintain . . . .)"). In the case at hand, purchase of heat and electricity from GVEA may not have been the least expensive means of compliance possible for USARAK, but Respondent may produce evidence as to any cheaper means which would have met its needs and would have been in compliance with the CAA and Alaska State Implementation Plan.

The idea of cost savings to a violator from providing its own service rather than purchasing it from another entity was not only discussed in *McDonald*, but was also contemplated in regard to Federal agencies in the 1999 Herman Memo, which states, in pertinent part:

> Just as with private violators, when an agency fails to comply on time, the government obtains a cost savings from the delay and a competitive advantage where there are private parties competing to provide the same services the government provides.
>
> In cases where the government competes in the open market with private companies, the issue of unfair competitive advantage may be a factor. . . . Some Federal installations operate their own water treatment plants, sewage treatment plants, or *produce their own electricity*. . . . These are all functions in which Federal agencies compete, actually or potentially, with private companies. While a violating Federal facility in these situations would not be making a true profit, it very clearly would be obtaining a significant competitive advantage over private companies providing similar services.
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> The costs savings associated with noncompliance have three major components: (1) the savings from *delaying* pollution control costs; (2) the savings from *avoiding* pollution control costs; and (3) the benefit from obtaining an illegal competitive advantage.
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> * * * *
>
> If a Federal entity does not comply with all requirements it can save money on its environmental budget. This could provide an *unfair competitive advantage* over a private party managing those same functions which is complying.

RX 6 at 3 and Question and Answer No. 3 (emphasis added). The Memo does not define the "unfair competitive advantage" or provide a methodology for determining such an economic benefit. Reference to EPA's general discussions of illegal competitive advantage are not relevant here because they assume that profits accrue to the violator from selling goods or services. CX 44 at 10; RX 18 (64 Fed. Reg. 32948, 32951-32953 (June 18, 1999); RX 48 pp. 3-6, 3-7. The case file does not indicate that Respondent sold any of its electricity and heat.

In any event, the statutory term "economic benefit of noncompliance," as well as EPA's policies on economic benefit, clearly contemplates annual costs avoided by delaying compliance. The costs avoided by Respondent may be determined from the amount of funds Respondent legally could have expended either on timely bringing the CHPP into and maintaining compliance, or on purchasing power and heat from another source in compliance with the CAA and Alaska SIP, offset, if appropriate, by the funds that Respondent actually expended on the CHPP's operation, maintenance, and compliance. Thus, generally it can be seen and anticipated that there may be circumstances where economic benefit clearly accrues to traditionally funded Federal facilities such as Respondent and to hold that economic benefit penalties could never apply in such instances would be inappropriate. Therefore, it is concluded that neither fiscal laws nor EPA's concepts of economic benefit expressed in its policy and guidance documents bar the assessment of penalties representing Respondent's economic benefit from its noncompliance with the 20% opacity standard, its failure to install emission control devices that provide optimum control of air contaminant emissions on its coal-fired boilers, or its failure to

install timely, test, maintain and operate the COMS and CEMS.

e. Whether assessment of economic benefit penalties against Respondent is inconsistent with Section 118 of the CAA

Assessing penalties in the manner outlined above for Respondent's economic benefit of noncompliance is consistent with the requirement of Section 118(a) of the CAA for each Federal department, agency and instrumentality to be "subject to . . . all Federal . . . process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity." It may not be possible to calculate penalties for economic benefit in precisely the same manner for Federal facilities as for private business. The portion of economic benefit representing the cost of debt or financial return on alternative investment does not apply to an individual Federal facility such as Respondent. Nevertheless, assessment of the remaining portion of economic benefit, representing avoided capital and/or annual costs, subjects a Federal facility to at least a portion of economic benefit sanctions in the same manner as, and to the same extent as, a nongovernmental entity. To completely omit the assessment of an economic benefit penalty against a Federal facility merely because a portion of EPA's economic benefit methodology does not apply is illogical and contrary to Section 118(a) of the CAA. As stated by the EAB, "[g]iven the importance of recovering economic benefit, where at least part of the economic benefit can be approximated, courts have routinely opted to recover the partial benefit rather than ignore it merely because the entire benefit cannot be approximated." *B.J. Carney Industries, Inc.*, 7 E.A.D. 171, 219 (EAB 1997).

To omit assessment of an economic benefit penalty on the basis that it increases the magnitude of the total penalties also is unwarranted and inconsistent with Section 118(a) of the CAA. Respondent's attempt to distinguish the effect of increased penalties on Federal facilities from the effect on other entities on the basis that the former are mission-driven and the latter are profit-driven is unavailing. Other entities, such as non-profit organizations and municipalities, are not driven by profit. Municipalities, corporations and non-profit organizations have a common interest in lowering their costs in order to free up money to better accomplish their respective missions; Federal facilities may also have an interest in lowering some costs drawn from a given annual O&M appropriation in order to free up funds to better accomplish its mission. *But see*, RX 17 at 3 (DoD states that its "objective . . . is to accomplish its mission . . . without regard to cost" and "it is in the interest of federal facility commanders and managers to maximize expenditures to demonstrate their needs, thereby preserving their funding levels in the future."). The effect on an entity of imposing a penalty, that it "takes away their capital," and among other things, "takes away the money they would otherwise be able to spend" (tr. 40), does not only apply to the private sector. Imposing a penalty on a Federal facility may take away its appropriated funds, such as operations and maintenance funds, which is money it otherwise would be able to spend. *See, e.g.*, H.R. 5408, 106th Cong. 2nd Sess. § 315 (October 6, 2000) (authorizing Secretary of the Army to pay from O&M appropriations for supplemental environmental projects in satisfaction of penalties for environmental violations); RX 17 at 4 (DoD comments that "a fine . . . would have to be paid from . . . O&M funds," but it may have

an adverse effect on other environmental compliance projects).

Opinions of the Department of Justice's Office of Legal Counsel (OLC) as to EPA's authority to assess penalties against Federal facilities have not prohibited or limited the magnitude of penalties on grounds that they are paid from appropriated funds. *See*, CX 41; RX 13; Memorandum from Randolph D. Moss, Acting Assistant Attorney General, United States Department of Justice, Office of Legal Counsel, *EPA Assessment of Penalties Against Federal Agencies for Violation of the Underground Storage Tank Requirements of the Resource Conservation and Recovery Act*, __ Op. Off. Legal Counsel, slip op. at 7 (June 14, 2000)(OLC UST Opinion). When the Department of Defense (DoD) presented an argument to the OLC that Section 113(e) of the CAA speaks to economic factors, including economic benefit, which are not relevant to Federal facilities, OLC did not indicate that EPA's authority to assess penalties under the CAA should be limited. RX 11 at 8; CX 41, RX 13. When DoD argued that its appropriated funds may not lawfully be used for payment of penalties, the OLC disagreed, holding that agency appropriations are available, absent a statutory limitation, to pay penalties pursuant to the "necessary expense" principle of appropriations law. OLC UST Opinion at 7. The fact that funds used may reduce or reallocate mission-related financial resources did not affect the OLC's decision that EPA has authority to assess penalties against Federal facilities, including military facilities. OLC stated that "the payment of administrative expenses . . . such as statutorily-authorized administrative penalties assessed by another federal agency, constitutes a cost of doing business and therefore 'bears a logical relationship to the objectives of [the assessed agency's] general appropriation, and will make a direct contribution to the agency's mission.'" OLC UST Opinion at 7 (quoting *Indemnification of Department of Justice Employees*, 10 Op. Off. Legal Counsel 6, 8 (1986).

Furthermore, Section 118(a) of the CAA directs equality between private and government entities in being subject to process and sanctions rather than equality in the effect of process and sanctions on the entities. A penalty may affect different private, municipal or Federal facilities in different ways, and Section 118 does not include any limitation or exemption for Federal facilities on the basis of the effect of penalties on appropriations. Indeed, Section 118(b) of the CAA provides for an exemption based on lack of appropriation in only one very limited circumstance: an exemption from compliance with air pollution control requirements due to lack of appropriation may be granted only if a budget request was made and Congress did not make appropriations available. EPA's policy not to offset economic benefit penalties with Supplemental Environmental Projects in settlement agreements (RX 26, 27, 28) may be waived, in EPA's discretion, where the respondent is a Federal facility. RX 6, Question and Answer no. 4. EPA in its discretion may mitigate economic benefit penalties against "non-profit public entities . . . where assessment threatens to disrupt continued provision of essential public services." CX 37 at 8. EPA's choice to exercise or not to exercise this discretion in regard to a particular Federal facility based on the circumstances of the case does not as a general matter subject Federal facilities to process or sanctions in a different manner or to a different extent than nongovernmental entities.

It is concluded that the assessment of penalties for a Federal facility's economic benefit

of noncompliance is not inconsistent with Section 118(a) of the CAA.

B. Balance of Power Between Legislative and Executive Branches

1. Respondent's Arguments

Respondent argues that assessment of economic benefit penalties interferes with the balance of power between the executive and legislative branches of the Government, and that Congress has already "expressed concerns as to Complainant's overreaching" in this case. Opposition at 45. In support of this argument, Respondent points to Section 314 of the Defense Authorization Act for Fiscal Year 2001 which capped penalties for settlement of this case at $2 million, and the history of that provision. RX 1 (Pub. L. No. 106-398, 114 Stat. 1654 (2000), enacting H.R. 5408, 106th Cong. 2nd Sess. § 314 (October 6, 2000)). In 1999, Congress added a rider in the Defense Appropriations Act for FY 2000, HR 2561, 106th Cong. § 8149 (1999) requiring Congressional review of penalties assessed against the military in environmental enforcement actions: "None of the funds appropriated in this Act may be used for the payment of a fine or penalty that is imposed against the Department of Defense or a military department arising from an environmental violation at a military installation or facility unless the payment of the fine or penalty has been specifically authorized by law." After the ensuing "firestorm of controversy" over that provision, the Senate Armed Services Committee's defense authorization bill for Fiscal Year 2001 limited the applicability of that rider to fines of $1.5 million or more or those based on economic benefit or size-of-business criteria. RX 4 (S. 2549, 106th Cong. 2nd Sess. § 342 (May 12, 2000)); Opposition at 47. The provision was recommended "as a result of concerns that stem from a significant fine imposed at Fort Wainwright, Alaska, a related policy established by . . . (EPA), and an apparent need for further congressional oversight in this area." RX 3 (S. Rep. No. 292, 106th Cong. 2nd Sess. at 265 (May 12, 2000)). The Senate Armed Services Committee "concluded that DoD payment of fines or penalties based on economic benefit or size of business criteria would interfere with the management power of the Federal Executive Branch and upset the balance of power between the Federal Executive and Legislative Branches, exceeding the immediate objective of compliance." *Id.* Respondent urges that this report language is the basis for the statute that was passed, and as such should be "accorded great weight." Opposition at 49.

2. Analysis

It is concluded that Section 314 of the Defense Authorization Act for Fiscal Year 2001 and the legislative history leading to its enactment do not bear significant weight on the questions of law presented here. First, Section 314 only addresses the settlement of this matter, not the question of whether penalties for economic benefit of noncompliance or size of business may be assessed pursuant to administrative adjudication.

Second, the Senate Armed Services Committee Report language may constitute legislative history of Section 314 of the Defense Authorization Act for Fiscal Year 2001, but it

does not constitute legislative history of the statutory provisions at issue in this proceeding, Sections 113(e) and 118(a) of the CAA, and does not express Congress' intent in enacting those provisions. As stated by the Supreme Court, "the view of a later Congress cannot control the interpretation of an earlier enacted statute." *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996). *See also, United States v. Price*, 361 U.S. 304, 313 (1960)("The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.").

Third, the Senate Armed Services Committee's stated premise for its conclusion was that all of the DoD's operations must be funded with Congressional appropriations and "the expenditure of federal funds must be consistent with authorization and appropriation acts," explaining that "Congress and the Office of Management and Budget oversee apportionment of funds to agencies during the fiscal year to avoid overspending" and "DoD allocates funds to the military departments, which in turn issue allotments to command and staff organizations." RX 3. These concerns were addressed in the discussion above, as to fiscal law and appropriations issues, the costs Respondent avoided from its noncompliance, and the effect of penalty assessments on Federal facilities.

Fourth, the legislative history relating to Congress' limitation of the penalty to settle this matter was not one-sided; the issues were vigorously contested in Congress, as Respondent acknowledges. 146 Cong. Rec. S 6538 (daily ed., July 12, 2000). Section 314 of the Defense Authorization Act for Fiscal Year 2001 was the result of compromises between the differing views.

Finally, and perhaps most importantly, an administrative adjudication is "invalid if based in whole or in part on [congressional] pressures." *District of Columbia Federation of Civil Ass'ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir.), *cert. denied*, 405 U.S. 1030 (1972); *Kiewit v. United States army Corps of Engineers*, 714 F.2d 163, 169 (D.C. Cir. 1983); *Pillsbury Company v. FTC*, 354 F.2d 952, 964 (5th Cir. 1966((intervention of Congress in a judicial function of a federal executive agency created a concern with the right of litigants to a fair trial). Thus, it would be improper for the ALJ to consider what Congress has expressed or implied as to an appropriate outcome in a pending adjudication.

Consequently, neither Section 314 of the Defense Authorization Act for Fiscal Year 2001 nor its legislative history, including the Senate Armed Services Committee report, are accorded any weight in resolving the question of whether penalties for economic benefit or size of business may be assessed in the adjudication of this matter.

C. Due Process

1. Arguments of the Parties

Respondent asserts that "the BEN Model and EPA's related policies provided no notice that EPA considered federal agencies subject to massive BEN-model calculated economic

benefit penalties." Opposition at 78. Respondent points out that the BEN Model and policies do not specifically refer to Federal facilities. Therefore, Respondent argues, applying economic benefit of noncompliance to USARAK violates due process. In support, Respondent asserts that the Constitutional guarantee of due process requires that persons receive adequate notice of the nature and severity of the penalty that the government seeks to impose, citing *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 574 and n. 22 (1996)("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the severity of a penalty that a State may impose"; while "strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases, . . . the basic protection against 'judgments without notice' afforded by the Due Process Clause . . . is implicated by civil penalties.").

Complainant counters that Federal agencies are not protected by the Due Process clause of the Fifth Amendment to the Constitution, because they are not "persons" for due process purposes, citing, *inter alia*, *Richmond v. United States,* 172 F.3d 1099, 1103 (9th Cir. 1999).

Respondent replies that due process rights do apply to Respondent as a "person" because it is not, in this proceeding, functioning in a governmental or sovereign capacity, but is in a position more akin to a private defendant. Respondent points out EPA's inconsistency in considering Respondent a "person" under the CAA but not for due process purposes.

2. Analysis

Setting aside the question of whether a Federal facility is entitled to Fifth Amendment due process protections,[18] or whether assessment of penalties against a Federal facility can constitute a deprivation of "property" within the meaning of the Fifth Amendment, it is concluded that due process concerns do not preclude assessment of penalties against Respondent for economic benefit of noncompliance.

In analyzing Respondent's argument, it is first noted that in 1997, two years before this action was initiated, pursuant to Executive Order 12146,[19] the Department of Justice's Office of

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[18] The Fifth Amendment of the U.S. Constitution prohibits the Federal government from depriving a person of life, liberty or property without due process of law.

[19] Executive Order 12146 provides, in pertinent part:

> 1-401: Whenever two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular problem or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.

(continued...)

Legal Counsel confirmed to the military, EPA's authority to assess monetary penalties against Federal facilities under the CAA. That opinion specifically concluded that EPA had authority to assess civil penalties against Federal agencies pursuant to Section 113(d) of the CAA, which authorizes EPA to issue administrative orders assessing civil penalties against any "person," and the definition of "person," in Section 302(e) of the CAA, includes "any agency, department, or instrumentality of the United States." CX 41 at 5-7. Moreover, Respondent acknowledges that the Army had actual notice since at least 1996 that EPA had in some instances included economic benefit as part of its penalty calculations against Federal facilities. Opposition n. 30; RX 17. What Respondent emphasizes here is its lack of notice as to the *magnitude* of potential penalties.

Yet, in regard to the magnitude of penalties that could be assessed in this proceeding, Respondent admittedly was aware of the *numerous* ongoing violations of its permit requirements, including the opacity requirements, *over several years*. RX 104, 105, 110, 134, 141. Section 113(d) of the CAA provides that EPA may assess penalties "of up to $25,000 per day of violation." Respondent surely was not unaware of potential penalties under that provision. [20] Thus, even without considering the penalty factors of size of business or economic benefit of noncompliance, Respondent had fair notice that the magnitude of the penalties that could potentially be assessed against it for its CAA violations could reach the millions of dollars. *See*, *Hampton v. Dillard Department Stores, Inc.*, 247 F.3d 1091 (10th Cir. 2001)(where party challenged severity of punitive damages award as violating due process, statutory language gave fair notice that defendant could be subject to punitive damages); *Neibel v. Trans World Assurance Company*, 108 F.3d 1123, 1131 (9th Cir. 1997).[21]

In the case cited by Respondent in this regard, *BMW of North America, Inc., v. Gore*, the Supreme Court set forth three guideposts for determining whether a punitive damages award is grossly excessive: (1) the degree of reprehensibility of the person's conduct; (2) the disparity between the harm or potential for harm suffered by the victim; and (3) the difference between the award and penalties assessed in comparable cases. 517 U.S. at 574. Any claim by Respondent

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[19](...continued)
1-402: Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is a specific statutory vesting of responsibility for a resolution elsewhere.

[20] Respondent also was aware that the State of Alaska could assess penalties of $10,000 per day, including economic benefit penalties, for noncompliance. RX 64.

[21] It is noted, however, that Complainant reduced the penalty it proposed in this action from approximately $27 million to $16 million based upon the fact that "Respondent may not have realized the full extent of its potential financial liability for failing to comply." Complainant's Prehearing Exchange Exhibit 33, at 11.

that a penalty assessed in this case is grossly excessive is premature at this point in the proceeding, since that claim is relevant to the factual issue of the amount of a penalty assessment.

D. Conclusions Regarding the Penalty Factor of Economic Benefit of Noncompliance

Based upon the foregoing, it is concluded that "economic benefit of noncompliance" applies in determining the appropriate penalty to be imposed on Respondent, a Federal facility, for its violations of the Clean Air Act, and that adjustment of a penalty on account of that factor is not precluded by concepts of economic benefit, fiscal law, CAA Section 118(a), the balance of power between the legislative and executive branches or due process.[22]

VII. WHETHER "SIZE OF THE BUSINESS" APPLIES IN ASSESSING PENALTIES AGAINST RESPONDENT

A. Arguments of the Parties

Utilizing its CAA Penalty Policy, Complainant has calculated the penalty proposed against Respondent in this action to include a significant increased adjustment to take into account the "size of violator." This factor, according to Complainant, corresponds to the statutory factors "seriousness of the violation" as well as "size of business," and relates to "other factors as justice may require." CX 33 at 5; Tr. 74. Complainant asserts that the purpose of the "size of violator" factor is to take into account the size, resources and environmental expertise available to Respondent, relative to others, in meeting environmental obligations and to ensure that an adequate deterrent effect for the particular violator is achieved in assessing a penalty. C's Reply at 15; CX 33 at 6; Tr. 76. The factor is premised on the equitable notion that a small business should not face the same penalty as an entity with great financial and professional resources. C's Reply at 15-16.

Respondent challenges this increase, for the same reasons as presented on the issue of "economic benefit of noncompliance," and for the following additional reasons. First, Respondent points out that CAA § 113(e)(1) uses the term "size of *business*" rather than the phrase "size of *violator*" used in the penalty policy. By recharacterizing this penalty factor, Respondent argues, EPA has impermissibly expanded the scope of the criterion. Respondent urges that the plain meaning of the statute governs, and if Congress intended EPA to adjust penalties against Federal facilities based on their size, it could have used the term to "size of violator." Opposition at 83-84.

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[22] No final decision is made herein as to the appropriate methodology to be applied to quantifying such economic benefit. Complainant may, consistent with this decision, propose such a methodology and Respondent may state any concerns or objections it may have regarding whether the proposed methodology correctly captures the economic benefit.

Second, Respondent points to the explanation of "size of violator" in the CAA Penalty Policy, contending that "its business nature is clear," as the explanation refers exclusively to corporations, partnerships and sole proprietorships and terms relevant thereto. Opposition at 84.

Third, Respondent asserts that the assumption underlying the size of business criterion, that larger fines are necessary to effect deterrence for corporations with large financial assets, and to reflect their ability to comply earlier or more effectively, is irrelevant with regard to Federal facilities, whose assets are not freely alienable such that they can be used to raise money for compliance or to pay penalties. Opposition at 85-86.

Fourth, Respondent argues that application of penalties for size of the business violates Section 118 of the CAA by not treating Federal facilities just like other entities. Equating economics of Federal agencies with finances of private industry ignores the statutory and constitutional differences between them. EPA treats Federal facilities differently from private entities -- "doubling the fines" against Federal entities, based solely upon the 1998 Herman Memo's presumption that "[i]n many instances, Federal agencies would be considered large violators" and directive to "apply the 50% formula" with the CAA. CX 39 at 7; RX 15; Opposition at 87. Further, Respondent notes that EPA calculated the size of business penalty factor in this proceeding based upon the assets of the entire U.S. Army rather than of Respondent (USARAK), even though the CAA Penalty Policy states "[w]ith regard to parent and subsidiary corporations, only the size of the entity sued should be considered," determined from "net worth or current assets." CX 37 at 10, 14-15; RX 22.

In Reply, Complainant asserts that in the 1990 Amendments to the CAA, Congress used the word "business" interchangeably with "violator" in Section 113(e), such as "economic impact on the violator," and in the legislative history of Section 113(e). Tr. 69; RX 5. Complainant asserts that the plain definition of "business" includes one's work, occupation or profession. Tr. 68. Further, Complainant points out the Department of Defense's own reference to itself as a "business" on an Internet website, by claiming to be "America's oldest, largest, busiest and most successful company." CX 51; Tr. 70-71. Complainant asserts that the Army makes business decisions all the time, for example, when considering its environmental compliance issues, it hired a contractor to determine its options for obtaining heat and electricity. CX 47C; RX 123; RX 64.

The difference between the statutory term "size of business" and the CAA Penalty Policy term "size of violator," Complainant explains, is that the CAA Penalty Policy considers "size of violator" to reflect the statutory factors of "seriousness" of the violation and "other factors as justice may require" as well as "size of business." Tr. 74. CX 33 at 5.

Complainant argues that if "size of business" is not appropriate to consider in regard to Federal facilities, then the CAA Penalty Policy factor "size of violator" should be considered. Tr. 74. Complainant admits that it has not cited to any documents which state that "size of violator" accounts for available resources or expertise, but emphasizes that an adequate deterrent effect has to consider the available resources. Tr. 78-79. As to Complainant's consideration of

the Army's resources rather than USARAK's resources as "net worth," Complainant asserts that the Army decides what projects to request funding for, and that the CAA Penalty Policy directs that the "size of violator" assessment should consider the violator's entire operations. Tr. 83-84.

In response, Respondent asserts that EPA is not treating it the same as non-governmental entities, because EPA has not followed its own protocol in calculating the size of business penalty with regard to it. Respondent alleges EPA has followed in this regard a "Goldilocks approach," considering USARAK's budget too small and DoD's budget too big, and finding the U.S. Army Budget as "just right" for its size of business calculation. Tr. 93-94. Respondent explains its study of other options for heat and electricity were only undertaken as prerequisites to establishing to Congress the need for MILCON funding for the CHPP. Tr. 96, 97.

B. Analysis

1. Whether Congress has expressed an intent with regard to applying "size of the business" to Federal facilities

The CAA provides that in determining the amount of a penalty under Section 113, "the Administrator or the court, as appropriate, shall take into consideration . . . the size of the business . . . ." CAA § 113(e). On the same basis as stated above with regard to the penalty factor of economic benefit, it appears that Congress intended that the factor of "size of business" be *taken into consideration* in assessing a penalty under the CAA against *all* persons. Again, however, merely taking into consideration the factor of "size of business" does not mean that a penalty must be adjusted, upward or downward, to account for this factor. Rather, it means no more than the issue of its applicability in the specific case must explicitly be considered and decided. Thus, the issue to be first determined here is whether Congress has directly spoken on the issue of whether a penalty may be adjusted to account for the size of a Federal facility, such as USARAK, by virtue of the statutory penalty assessment factor "size of the business." Considering Congress' choice of the term "business," it must be determined whether Congress expressed an intent to preclude its application to Federal facilities.

"The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Marshak v. Treadwell*, 240 F.3d 184, 192 (3rd Cir. 2001)(internal quotation marks omitted).

The term "business" is not defined in the CAA or its implementing regulations. As to the context of the term in Section 113(e), which also refers to "violator, " the rule of statutory construction that different terms used in a statute are presumed to mean different

things[23] is not controlling here. Also to be considered is the intent of Congress as evidenced by the context of the statutory language and the statute's purpose. *McCarthy v. Bronson*, 114 L. Ed. 2d 194, 111 S.Ct. 1737, 1740 (1991) (statutory language must always be read in its proper context); *Shell Oil Co. v. Iowa Dept. of Revenue*, 109 S.Ct. 278 (1988) (same); *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344 (1943) (read text in light of context so as to carry out in particular cases the generally expressed legislative policy); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) ("canons of constructions need not be conclusive," "and are often countered . . . by some maxim pointing in a different direction."). In addition, the enactment history of the relevant provisions of the CAA may provide some insight as to Congress' intent.

Section § 118(a) of the CAA, regarding control of air pollution from Federal facilities, has existed, essentially in its present form, since the late 1970s. 42 U.S.C. § 7418. In the 1990 Amendments to the CAA, Congress authorized EPA to assess administrative penalties. Beforehand, EPA could only issue a compliance order or bring a civil enforcement action for penalties in Federal district court. The Federal court, in assessing civil penalties, was required to consider "the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." Congress apparently inserted those factors into the new provision for administrative penalties in Section 113(e), and then added the factors "the violator's full compliance history and good faith efforts to comply, the duration of the violation . . .payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance" and "other factors as justice may require." These were factors that the Agency had previously set forth to be used in administrative penalty assessments in its General Enforcement Policies. Thus, in 1990, the pre-existing provision of Section 118(a), that Federal facilities shall be subject to process and sanctions respecting air pollution control in the same manner and to the same extent as any nongovernmental entity, became applicable to the assessment of administrative penalties. The fact that Congress in the 1990 Amendments did not change the existing "size of the business" factor to "size of the violator" is not particularly significant with regard to administrative penalties imposed on Federal facilities.[24]

This fact also seems insignificant in this context in light of the appearance of "size of the business" as a penalty factor in several other statutes, which has been interpreted and applied in

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[23] *See*, 2A Sutherland Statutory Construction § 46.06 (4th ed. 1984) ("When the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.")

[24] It is noted that had Congress specifically intended to exclude government facilities from having their size factored into penalties, it could have used the phrase "size of organization" in CAA § 113(e), on the basis that the term "organization" is defined in Section 113 of the CAA as "a legal entity, *other than a government*, established or organized for any purpose . . . ." This is the term which Congress used in regard to criminal penalties in Section 113(c)(5)(E).

connection therewith. Respondent has not cited to any authority or legislative history that would suggest that in any other context it has been interpreted as applying only to private entities, such that Congress understood the term to be limited to such entities in choosing such a phrase in regard to administrative penalties. *See, United States v. Complex Mach. Works Co.*, 83 F. Supp. 2d 1307 (CIT 1999); *United States v. Vista Paint Corp*., No. EDCV 94-0127 RT, U.S. Dist. LEXIS 22129 (C. D. Cal.1996). *See also e.g.,* the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. § 30165(c) (1994) (requiring court to consider "the size of the business of the person charged and the gravity of the violation"); Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 820(i)) (the statutory criteria includes "the appropriateness of such penalty to the size of the business of the operator charged"); Federal Water Pollution Control Act, 33 U. S. C. §1321 (b)(6) (provided for the imposition of a "civil penalty" to take into account "the appropriateness of such penalty to the size of the business or of the owner or operator charged"); Occupational Safety and Health Act of 1970, 29 U.S.C. § 666(i) (giving due consideration in his penalty assessment to "the size of the business of the employer"). The very fact that this phrase is used in numerous other statutes, and has an established line of case law interpreting it, suggests a rationale why Congress would choose *not* to alter it when it amended Section 113 in 1990 and thereby open the door to questions as to the newly revised term meaning something different from that in the other statutes. As in *United States v. Padilla*, 374 F.2d 782, 788 (2nd Cir. 1967) (Friendly, J., concurring), this case seems but another example of "how draftsmen and revisers can create problems as to the meaning of statutes without busy legislators having any notion what is occurring." *See also United States v. Crum*, 404 F. Supp. 1161, 1163 (W.D. Pa. 1975) ("Were the court to apply the principle of statutory construction -- and of logic -- that different wording should be construed to mean different things and the corollary to that principle that if Congress intended different statutes to mean the same thing, it would have used identical language, the court would then be asked to distinguish five different statutes that obviously mean the same thing. The only logical conclusion to be drawn from these many different formulations is that the statutes were drafted on separate occasions, probably by different people, with no attempt to reconcile their wording by putting them through a computer to flush out these variations as might be done today.").

Considering the foregoing, it is concluded that Congress has not expressed any clear intent to preclude application of the "size of the business: penalty factor to Federal facilities generally. Therefore, further analysis is warranted as to the issue of whether a penalty may be adjusted to account for the size of a Federal facility such as USARAK.

2. Whether EPA as a matter of policy has either limited "size of the business" to private business entities, or expanded it to encompass Federal facilities

As stated above, *infra* at 6, the CAA Penalty Policy provides that penalties are comprised of two main components: economic benefit and gravity, which are then adjusted to account for other factors. CX 37 at 4. The gravity component considers the factors of the amount and toxicity of the pollutant involved, sensitivity of the environment, duration of the violation, importance to the regulatory scheme, and the size of the violator. *Id.* at 9-10. For each factor, an

additional penalty increment is assessed, the amount of which depends on the magnitude under each factor. For size of the violator, where the net worth or net current assets are under $100,000, the additional penalty increment is $2,000; the additional penalty increment increases concomitantly with increased net worth or net current assets.[25]

The fact that the CAA Penalty Policy utilizes the term "size of violator" rather than "size of business" does not alone suggest that EPA impermissibly expanded the statutory factor "size of the business." The difference in words appears to be merely a reflection of the General Enforcement Policy, GM-22, which refers to "size of violator," and which was the framework for the CAA Penalty Policy and the source of some of the text. CX 37 at 4, 8; CX 44 at 14-15.

Moreover, as pointed out by Respondent, the text in the CAA Penalty Policy as to "size of violator" refers exclusively to business enterprises, and does not include terms applicable to government entities:

> The gravity component should be increased, in proportion to the size of the violator's business.
>
> * * * *
>
> A corporation's size is indicated by its stockholders' equity or "net worth." This value, which is calculated by adding the value of capital stock, capital surplus, and accumulated retained earnings, corresponds to the entry for "worth" in the Dun and Bradstreet reports for publicly traded corporations. The simpler bookkeeping methods employed by sole proprietorships and partnerships allow determination of their size on the basis of net current assets. Net current assets are calculated by subtracting current liabilities from current assets.
>
> * * * *
>
> Net worth (corporations); or net current assets (partnerships and sole proprietorships):
> Under $100,000 $2000
> $100,001-$1,000,000 5,000
>
> * * * *
>
> In the case of a company with more than one facility, the size of the violator is

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[25] It is noted that the CAA's Penalty Policy provisions increasing the penalty for "size of violator" against every violator is not consistent with the policy in GM-22 that "[i]n *some cases*, the gravity component should be increased [for size of violator] where it is clear that the resultant penalty will otherwise have little impact on the violator in light of the risk of harm posed by the violation" and that size of violator "is only relevant to the extent it is not taken into account by other factors." CX 44 at 3, 14, 15 (emphasis added). Arguably, the considerations Complainant cites for increasing the penalty for size of violator– available expertise and resources such as money, staff and experience– may be covered under the factor "degree of willfulness or negligence," which considers the "level of sophistication within the industry in dealing with compliance issues or the accessibility of appropriate control technology" and the "extent to which the violator in fact knew of the legal requirement which was violated." CX 37 at 16.

> determined based on the company's entire operation, not just the violating facility. With regard to parent and subsidiary corporations, only the size of the entity sued should be considered. Where the size of the violator figure represents over 50% of the total preliminary deterrence amount, the litigation team may reduce the size of the violator figure to 50% of the preliminary deterrence amount.

CX 37 at 9, 10, 14, 15. However, the Penalty Policy expressly applies to "nonprofit public entities, such as municipalities and publicly-owned utilities." CX 37 at 8. This suggests two things. One, it suggests that EPA did not, in fact, *expand* the "size of the business" statutory criteria in its Policy. Two, it suggests that EPA did not contemplate, in drafting the Policy, that "size of violator" applies to government entities. It is noteworthy that EPA never amended the CAA Penalty Policy to add language and provisions expressly indicating the application of the "size of violator" factor to governmental entities.

As a result, not surprisingly, in an administrative penalty assessment proceeding against a municipality, an Administrative Law Judge, upon consideration of the factor, assessed no additional penalty increment for size of the business. *Lake County, Montana*, EPA Docket No. CAA-8-99-11, 2001 EPA ALJ LEXIS 132, * 64 (ALJ, July 24, 2001)(The County is a municipality under the Act. . . and no adjustments for the size of business or impact of the penalty on the business are warranted.").

Moreover, while suggesting that size be taken into account with regard to Federal facilities, even the 1998 Herman Memo does not clearly support the specific application of the CAA Penalty Policy's "size of violator" methodology to Federal facilities. It merely directs that "Regions should *consider* the size of violator when determining the appropriate penalty against a Federal agency" and that "[i]n many instances, Federal agencies would be *considered* large violators," in which case EPA "should apply the 50% formula," increasing the penalty by 50%. CX 39 at 7(emphasis added). The statement does not imply that a penalty against every Federal facility should be increased for "size of violator" in accordance with the CAA Penalty Policy.[26]

Yet in this proceeding, Complainant relies on the methodology in the CAA Penalty Policy and 1998 Herman Memo to support its proposal for imposing a large increase in the penalty for the "size of violator." Such an increase is based on Complainant's assertions that Respondent, as part of the Department of Defense, has "a great deal of expertise and resources at its disposal," and that the policy of increasing the gravity of the violation for "size of violator" is "based on the assumption that a large business has greater resources (e.g. money, staff, and experience) available than a smaller business to understand and comply with environmental laws." CX 33 at 5-6; Tr. 76. Complainant has not pointed to any policy document stating that assumption. Tr. 78.

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[26] Interestingly, the 1998 Herman Memo's general directive for EPA to apply the CAA Penalty Policy against Federal agencies "in the same manner and to the same extent as against any private party," appears in the paragraph subsequent to that referring to size of violator, and specifically refers to economic benefit, but not to size of violator.

EPA has not clearly set forth any policy of adjusting penalties against Federal facilities for "size of violator" under the CAA Penalty Policy. EPA's failure to do so does not mean, however, that as a matter of policy, EPA has limited application of the *statutory* criterion "size of the business" to private business entities.

Furthermore, it is noted that "size of the business" has been considered in assessing penalties against government entities under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) Section 14(a)(4), 7 U.S.C. § 136*l*, which similarly includes the penalty assessment criterion "size of the business of the person charged." However, in EPA's Enforcement Response Policy for FIFRA, "size of business" is not an additional incremental penalty, but is considered as one of two factors comprising the gravity-based penalty. Violators in the smallest size-of-business category, with the lowest category of potential for harm from the violation, receive the lowest gravity-based penalty in the penalty matrix. Accordingly, in penalty assessment proceedings before Administrative Law Judges, violators which were local government entities were assigned the lowest size-of-business category, and such assignment was not challenged. *Arapahoe County*, EPA Docket No. I.F. & R.-VIII-96-07, 1998 EPA ALJ LEXIS 31 (ALJ, June 9, 1998), *aff'd*, FIFRA App. 98-3 (EAB June 14, 1999); *Converse County Weed & Pest Control District*, EPA Docket No. I. F. & R .VIII-95-382C, 1997 EPA ALJ LEXIS 169 (ALJ, Aug. 22, 1997)(penalty assessed using smallest size of business category "because it is a division of the county government which relies on taxes to a great degree for its support"). While this does not support a finding that a penalty must be increased for "size of the business," it suggests that EPA did not as a matter of policy limit the application of "size of the business" to private business entities, in the FIFRA context. Moreover, it suggests that "size of the business" should not be simply ignored in assessing penalties against governmental entities.

3. Whether any other considerations bar the application of the "size of the business" penalty factor to Respondent

As Congress has not spoken to the precise question at issue, and EPA has not as a matter of policy limited the statutory penalty criterion "size of the business," a determination must be made as to whether, as a matter of law, a penalty against a Federal facility such as Respondent may be adjusted to account for the "size of the business." First, it is concluded that, for the same reasons discussed above with respect to economic benefit of noncompliance, neither fiscal law, Section 118(a) of the CAA, due process nor the balance of power between the legislative and executive branches of the Government bar the adjustment of penalties for "size of the business."

Because the term "business" is not defined in the CAA or its implementing regulations, the ordinarily understood meaning of the term, as provided in a dictionary, is appropriate guidance. *Huffman v. OPM*, 263 F.3d 1341, 1349 (Fed. Cir. 2001). The dictionary defines "business" as a "role, function . . . an immediate task or objective: mission . . . a particular field of endeavor" as well as "a usually commercial or mercantile activity engaged in as a means of livelihood: trade, line . . . a commercial or sometimes an industrial enterprise." Webster's Ninth New Collegiate Dictionary (1990) at 190. This definition does not strongly suggest that a

Federal facility is included or excluded from the term, but in any event does not preclude application of that term to a Federal government entity.

Next to be considered is the effect of not applying the factor of "size of the business" to Federal facilities under various penalty assessment methodologies that potentially could be used in determining a penalty.

Under the CAA Penalty Policy, if "size of the business" is not applied to a Federal facility, then any Federal government entity would be assessed a penalty $2,000 lower than the smallest business for the same violation, assuming all other facts were equal. CX 37 at 14.

If, on the other hand, a different methodology is used,[27] then the effect would be different. Federal courts often assess penalties by starting with the statutory maximum and adjusting it downward for statutory criteria warranting mitigation of the statutory maximum ("top down" method), or by starting with the economic benefit of noncompliance and adjusting upward (or downward) based on the other statutory factors ("bottom up" method). *See e.g., United States v. Dell' Aquilla*, 150 F.3d 329, 338 (3rd Cir. 1998); *United States v. Smithfield Foods, Inc.*, 191 F.3d 516 n. 7 (4th Cir. 1999), cert denied, 531 U.S. 813 (2000). Using the "top down" method, the size of business factor operates only to decrease the penalty for smaller businesses. If under the "top down" penalty methodology the "size of the business" criterion was disregarded in cases involving Federal facilities, it would mean that Federal facilities, regardless of size, would be sanctioned the same as the largest of businesses for the same violations. Conversely, if the "bottom-up" method is used, ignoring the "size of the business" criterion would put any Federal government entity of any size on equal footing with the smallest businesses for the same violations.

Thus, the effect of not applying the "size of the business" criterion at all to a Federal facility would be to equate all Federal entities with either the largest commercial businesses or with the smallest businesses depending on the particular penalty assessment methodology utilized, which effect would be arbitrary and unreasonable. *See, De Korwin v. First National Bank*, 156 F.2d 858, 862 (7th Cir.), cert. denied, 329 U.S. 795 (1946)(declining to accept the defendants' argument that the phrase "citizens of a State" meant that the "parties opposed to the alien must all be citizens of the same state" because "[s]uch a holding would lead to harsh and unreasonable results." *See also, Jaffe v. Boyles*, 616 F. Supp. 1371, 1374 (W.D.N.Y. 1985).

Instead of simply disregarding "size of the business" with respect to Federal facilities, there are policy questions that must be addressed in the particular circumstances of the case, such as whether a particular Federal facility should be compared to a particular size of commercial business, what criteria should be evaluated in making such comparison, and whether to consider criteria such as the amount of the facility's entire budget, the amount of the military

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[27] If application of the penalty policy, in whole or in part, does not yield an appropriate penalty, or if another penalty assessment methodology is used, the penalty policy, in whole or in part, need not be followed. *Wausau*, 6 E.A.D. at 759.

Department's budget, the amount of a facility's particular fund, the available technical expertise, or other resources. [28] These questions, being related to disputed factual issues, are appropriate to consider at a hearing, and cannot be decided herein. Complainant has the burden of presentation and persuasion at hearing that the relief sought, including a penalty adjustment for "size of the business," is appropriate, and the parties can address these questions at hearing as they relate to the particular facts of this case. 40 C.F.R. § 22.24(a).

As a matter of law, however, based upon the foregoing, it is concluded that "size of the business" applies in determining the appropriate penalty to be imposed on Respondent, a Federal facility, for its violations of the Clean Air Act, and that adjustment of a penalty on account of that factor is not precluded by fiscal law, CAA Section 118(a), due process, EPA's policies, or any other reason presented by Respondent.

VIII. CONCLUSION

There are no genuine issues of material fact as to whether "economic benefit of noncompliance" or "size of the business" are applicable to the assessment of civil penalties against Respondent under Section 113 of the Clean Air Act. It is concluded that Complainant is entitled to judgment as a matter of law that the CAA Section 113(e) penalty assessment criteria of "economic benefit of noncompliance" and "size of the business" apply to Respondent and may be taken into account in adjusting the penalties for Respondent's violations.

Issues as to liability for Count 8 of the Complaint, as to the amount of any penalties to be assessed on Counts 1 through 7 and 9, and, if appropriate, as to any penalties to be assessed on Count 8, are reserved for further proceedings.

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[28] While it is noted that the legislative history of the 1990 Amendments does not provide much illumination on the specific question at issue here, in Senate debates discussing, *inter alia*, the penalty criteria of Section 113(e) in the 1990 Amendments to the CAA, Congress was concerned that small businesses would be overwhelmed, without technical or scientific experts on staff, by the new CAA requirements being imposed by the Amendments. 101st Cong., 2nd Sess., 136 Cong. Rec. S 2762, S2765 (daily ed., March 20, 1990). This concern does not appear to apply to Federal facilities.

ORDER

1. Complainant's Motion for Accelerated Decision is **GRANTED** as to whether the penalty assessment criteria "economic benefit of noncompliance" and "size of the business" must be taken into account in determining a penalty for Respondent's violations**.**

2. In light of this decision, the parties shall in good faith renew their efforts to settle this matter. Complainant shall file a status report on the progress of settlement efforts on **Friday, May 25, 2002.**

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Susan L. Biro
Chief Administrative Law Judge

Dated: April 30, 2002
Washington, D.C.