IN RE NEW WATERBURY, LTD.

TSCA Appeal No. 93-2

REMAND ORDER

Decided October 20, 1994

Syllabus

U.S. EPA, Region I, appeals the decision of a presiding officer to reopen a hearing and rescind a $35,750 penalty assessed against New Waterbury, Ltd. ("New Waterbury"), for undisputed violations arising under § 6(e) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2605(e). The presiding officer had originally assessed a $35,750 penalty but rescinded the penalty after reopening the hearing on the grounds that the Region had not rebutted New Waterbury's "showing" that it did not have the resources or ability to pay *any* penalty. The Region argues that the presiding officer's decision to rescind the entire penalty is flawed in three respects. First, the Region asserts that the presiding officer erred in placing the burden of proof on New Waterbury's ability to pay a civil penalty on the Region. Second, the Region asserts that the presiding officer erred in reopening the hearing to allow for more fact-finding into New Waterbury's ability to pay the assessed penalty. Finally, the Region argues, the presiding officer erred in rescinding the penalty because even if the Region bears the burden of proof on "ability to pay," the Region met its burden by demonstrating that New Waterbury could obtain the funds necessary to pay a penalty from other entities related to and involved in New Waterbury's enterprise.

Held: The Board concludes that:

1.The presiding officer properly concluded that the Region bears the burden of proof regarding the "appropriateness" of a penalty considering all of the listed factors under TSCA, including a respondent's ability to pay.

2.The presiding officer did not err in reopening the hearing to allow for more evidence on New Waterbury's ability to pay.

3.The presiding officer did err in rescinding the entire penalty based upon New Waterbury's ability to pay. The Board finds based upon its review of the entire record that the Region met its burden of persuasion regarding the appropriateness of a penalty and the Board assesses a penalty of $24,000 for New Waterbury's undisputed TSCA violations.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Firestone:

U.S. EPA, Region I, appeals the decision of a presiding officer to reopen a hearing and rescind a $35,750 penalty assessed against New

Waterbury, Ltd., ("New Waterbury") for violations arising under § 6(e) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2605(e). Section 16(a)(2)(B) of TSCA provides that in determining the amount of a civil penalty:

> [T]he Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations, and *with respect to the violator, ability to pay, effect on ability to continue to do business,* and history of prior such violations, the degree of culpability, and such other matters as justice may require.

15 U.S.C. § 2615(a)(2)(B) (emphasis added).[1] Here, the presiding officer rescinded the $35,750 penalty on the basis that the Region had not rebutted New Waterbury's "showing" that it did not have the resources or ability to pay *any* penalty. *See* Decision After Reopened Hearing at 75. The sole question on appeal is whether the presiding officer erred in rescinding the penalty.[2] The Region argues that the presiding officer's decision is flawed in three respects. First, the Region asserts that the presiding officer erred in placing the burden of proof on New Waterbury's ability to pay a civil penalty on the Region. Second, the Region asserts that the presiding officer erred in reopening the hearing to allow for more fact-finding into New Waterbury's ability to pay the assessed penalty. Finally, the Region argues, the presiding officer erred in rescinding the penalty because even if the Region bears the burden of proof on "ability to pay," the Region met its burden by demonstrating that New Waterbury could obtain the funds necessary to pay a penalty from other entities related to and involved in New Waterbury's enterprise.

For the reasons set forth below, we conclude that the presiding officer properly concluded that the Region bears the burden of proof regarding the "appropriateness" of a penalty considering, among other things, a respondent's ability to pay, and that the presiding officer did not err in reopening the hearing to allow for more evidence on New Waterbury's ability to pay. However, we further find that the presiding officer did err in rescinding the entire penalty based upon New

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[1] Although the statute lists ability to pay and the ability to continue in business as separate factors, the Agency has construed them as a single factor that must be considered in assessing a penalty. *See* "Guidelines for the Assessment of Civil Penalties under Section 16 of TSCA; PCB Penalty Policy (1980 Penalty Policy), 45 Fed. Reg. 59,770 at 59,775 (Sept. 10, 1980), and n.19 *infra*.

[2] The Region has not appealed the presiding officer's decision to dismiss six of the twelve counts in the complaint. New Waterbury has not appealed from the liability determination on the remaining counts.

Waterbury's ability to pay. For the reasons described in this opinion, we hereby assess a penalty of $24,000 for New Waterbury's undisputed TSCA violations.

I. *BACKGROUND*

New Waterbury is a California limited partnership established in 1987 to acquire property from Century Brass Products, Inc. ("Century Brass"). The property, located in Waterbury, Connecticut, consists of approximately 100 acres, and includes approximately 100 buildings. The property has been used for copper, brass and other metal product manufacturing since 1802. New Waterbury is in the real estate business, and purchased the property intending to rehabilitate and lease the buildings.[3]

New Waterbury's activities at the facility are managed by Winston Management and Investment, Inc. ("Winston Management"). Winston Management owns a subsidiary corporation, Vanta, Inc. ("Vanta"), which is New Waterbury's general partner. Winston Management is solely owned by Trevor C. Roberts, who is also the president of Vanta, New Waterbury's general partner. In addition, Roberts is also a limited partner in New Waterbury, and individually owns 50.9% of the partnership.[4]

Soon after New Waterbury purchased the Century Brass facility, the Connecticut Department of Environmental Protection, on behalf of Region I, conducted a TSCA inspection at the facility to examine compliance with TSCA's PCB regulations. *See* 40 C.F.R. Part 761. Following this inspection, Region I issued a twelve-count complaint against New Waterbury on September 1, 1988, alleging various violations of TSCA's PCB regulations and proposing a penalty of $153,000.[5] New Waterbury answered the complaint, denying liability, and asserting that the proposed penalty is inappropriate for failing to take into account, among other things, New Waterbury's ability to pay the proposed amount.

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[3] It is not disputed that New Waterbury has not been successful in its plan to lease the property. According to the Region, by the end of March 1991, New Waterbury had leased only 268,621 of the available 1,987,457 square feet of space at the property. Complainant's Proposed Findings of Fact and Conclusions of Law at 15; Resp. Ex. 9K. According to New Waterbury, it had leased only 14% of the facility. Respondent's Motion to Strike and Proposed Findings of Fact and Conclusions of Law at 19.

[4] Joint Exs. 3C-1, 3C-1A.

[5] As noted above, New Waterbury does not challenge its liability for the violations alleged in six counts of the complaint, and the Region has not appealed from the presiding officer's dismissal of the violations alleged in the other six counts. *See supra* n.1.

In preparation for the hearing on the complaint, the parties exchanged the materials upon which they intended to rely at the hearing.[6] In this pre-hearing exchange, the Region indicated that it calculated the proposed penalty in accordance with EPA's "Guidelines for the Assessment of Civil Penalties Under Section 16 of TSCA; PCB Penalty Policy," 45 Fed. Reg. 59,770 (Sept. 10, 1980) (the "1980 Penalty Policy"). The Region also provided its penalty calculation worksheets. New Waterbury's pre-hearing exchange indicated that New Waterbury would provide testimony at the hearing to show that it would not be able to pay the proposed penalty. To support this contention, New Waterbury provided numerous documents, including, *inter alia*, New Waterbury's cash flow reports, balance sheets, income tax returns from 1987 through 1989, and rent summaries.

The hearing on the allegations in the complaint was held on April 2 and 3, 1991, in Hartford, Connecticut. At the conclusion of the hearing, each party submitted proposed findings of fact and conclusions of law to the presiding officer.[7] In its submission, New Waterbury described itself as a "business at the brink of insolvency and collapse." Respondent's Motion to Strike and Proposed Findings of Fact and Conclusions of Law at 52.[8] According to New Waterbury, Winston Management "expends all of the funds to pay for essential services * * * needed to keep New Waterbury operating." *Id.* at 20.

The Region did not disagree with the financial information submitted by New Waterbury. Instead, the Region argued for the first time, after the hearing, that New Waterbury had failed to prove that it could not pay a penalty because New Waterbury did not show that it could not secure the funds to pay the penalty from its general partner, Vanta. *See* Complainant's Proposed Findings of Fact and Conclusions of Law at 30-33. Relying upon the legal rule that a general partner is liable for

[6] This exchange took place in the summer of 1990 pursuant to a directive issued by the presiding officer under 40 C.F.R. § 22.19(b). With respect to "ability to pay," the presiding officer directed the Region to provide "civil penalty computation worksheets explain[ing] in detail the manner of computing the penalty." The presiding officer directed New Waterbury to provide "financial statements or other data to support" any contention that the proposed penalty exceeds its ability to pay.

[7] In accordance with 40 C.F.R. § 22.26, each party also submitted a reply to its opponent's proposed findings of fact and conclusions of law.

[8] According to New Waterbury, the evidence showed that at the time of the hearing it owed approximately $21 million on the four mortgages used to obtain the property. New Waterbury also owed approximately $1.1 million in construction-related debt, and almost $1 million on non-construction account receivables. New Waterbury owed the City of Waterbury over $3 million for past due taxes and water bills. Lastly, New Waterbury owed Winston Management $4.4 million for an unsecured loan. New Waterbury indicated that it had a monthly income of approximately $40,000, from rental of the property and the sale of scrap copper and brass.

the unpaid debts of a limited partnership, the Region argued that in the absence of any evidence about Vanta's financial condition, Vanta, the general partner, "must be assumed able to pay the penalty." *Id.* at 33. Therefore, the Region argued, since Vanta is presumably available to pay the penalty, New Waterbury has not demonstrated an inability to pay the penalty.

In an initial decision issued on July 8, 1992, the presiding officer found New Waterbury liable for the violations alleged in six counts of the complaint. The presiding officer assessed a gravity-based penalty for those violations of $35,750.[9] The presiding officer refused to reduce the penalty because of New Waterbury's financial condition. Instead, noting that New Waterbury had not refuted the Region's arguments as to the responsibility of Vanta (the general partner) to pay, the presiding officer concluded that New Waterbury "hasn't shown that the penalty should be further reduced because of inability to pay." Initial Decision at 51.

On August 3, 1992, New Waterbury filed a timely motion to reopen the hearing to introduce evidence on Vanta's ability to pay the assessed penalty.[10] In support of its motion, New Waterbury argued that evidence regarding Vanta's financial condition was not introduced at the hearing because, *inter alia,* New Waterbury was misled, albeit unintentionally, as to the relevance of Vanta's financial condition. The Region opposed New Waterbury's motion to reopen the hearing, arguing that it did not mislead New Waterbury and that New Waterbury, represented by experienced counsel, should be charged with notice of the well-settled legal principle that a general partner is liable for unpaid debts of a limited partnership, and thus it should not have been surprised by the relevance of this principle to the penalty assessment proceedings.

The presiding officer granted New Waterbury's motion to reopen the hearing on October 8, 1992. The presiding officer explained that despite the well-settled status of the legal principle regarding the liability of general partners, the Region should have informed New Waterbury in advance of the hearing that it intended to assert that

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[9] Although the Region sought a penalty over $70,000 for these violations, the Region has not appealed this aspect of the penalty assessment.

[10] In addition, New Waterbury sought to introduce evidence regarding an enforcement action filed in federal district court and initiated after the hearing in this matter closed in which the Agency is seeking to recover the cost of removing certain PCB items at the Century Brass facility from New Waterbury, Vanta and Winston Management. New Waterbury argued that the cost of complying with any order arising from the Agency's civil judicial action was further grounds for not assessing a penalty.

Vanta's assets, or the absence of evidence on Vanta's assets, would support a finding that a penalty against New Waterbury was appropriate.[11]

The Region's request for certification for interlocutory appeal of the presiding officer's order granting New Waterbury's motion to reopen the hearing was denied on November 4, 1992. Thereafter, the parties stipulated as to the evidence to be submitted during the reopened hearing.[12] In addition, each party submitted supplemental proposed findings of fact and conclusions of law. New Waterbury argued in its supplemental proposed findings of fact and conclusions of law that the penalty should be reduced to zero because New Waterbury has a negative net worth and Vanta has no cash or cash flow. The Region argued in its supplemental proposed findings of fact and conclusions of law that New Waterbury had the burden of proving that it cannot pay a penalty, and that New Waterbury failed to meet its burden here. The Region agreed that Vanta did not have sufficient assets to pay the penalty, but argued that the evidence demonstrated a "confused intermingling of identities" between New Waterbury, Vanta, Winston Management and Trevor C. Roberts. Complainant's Proposed Supplemental Findings of Fact and Conclusions of Law on Ability to Pay at 7. The Region argued, based upon its application of the 1980 Penalty Policy, that New Waterbury has the ability to pay the penalty because it can procure funds from other related entities that are involved in New Waterbury's business and which are all under the con-

[11] The presiding officer also determined that the above-noted (n.10) federal court enforcement action was relevant to a final penalty assessment in this administrative matter.

[12] This evidence included the complaint filed in federal district court by the United States against New Waterbury, Vanta, and Winston Management for the removal of various PCB items, including transformers, abandoned by Century Brass, and New Waterbury's answer thereto. The evidence also included New Waterbury's responses to several discovery requests in the federal district court case, including deposition testimony by Trevor C. Roberts, cost estimates for removal of the PCB items, and financial data pertaining to New Waterbury, Vanta and Winston Management. Lastly, the evidence also included Vanta, Inc.'s balance sheet, and a option and purchase sale agreement between Homart Development Co. and New Waterbury for the Century Brass facility in the amount of $18 million.

trol of Trevor C. Roberts.[13] To support its claim, the Region pointed to Winston Management's history of loaning or advancing millions of dollars to New Waterbury for operating expenses, and in effect, subsidizing New Waterbury. In addition, the Region pointed to the undisputed evidence to show that Winston Management claimed an income of $1.6 million on its 1990 tax return. The Region asserted that in such circumstances there is no reason to believe that Winston Management could not advance New Waterbury the funds necessary to pay the $35,750 penalty.[14] *Id.* at 2-4, 7.

The presiding officer issued a decision on May 7, 1993, rescinding the entire $35,750 penalty previously assessed on the basis that the Region had not rebutted New Waterbury's showing that New Waterbury lacks the funds or ability to pay *any* penalty. The presiding officer clarified his earlier decision, stating that under § 16(a)(2)(B) of TSCA and the Agency's regulations, 40 C.F.R. § 22.24, the Region bears the burden of proof with regard to the "appropriateness" of a proposed penalty in light of all the relevant factors, including ability to pay. The presiding officer found that the Region had not met its burden because the undisputed evidence showed that not only New Waterbury, but also Vanta, New Waterbury's general partner, had no assets. In addition, the presiding officer rejected the Region's position that New Waterbury could borrow money from Winston Management to pay the penalty, stating that "the mere fact that it has loaned New Waterbury several million dollars in the past does not mean Winston has either the ability or the incentive to loan New Waterbury further sums, least of all for the purpose of paying penalties." Decision After Reopened Hearing at 73. In such circumstances, the presiding officer determined

[13] Specifically, the 1980 Penalty Policy, in pertinent part, provides:

> The second point to keep in mind in examining tax returns is that small, privately-owned plants often have several corporations set up to handle various aspects of the business. If one or more of these corporations is culpable for some part of the TSCA violation, the tax return for all involved corporations should be examined and a combined cash flow prepared. Once the firm's historical cash flows have been assembled, the analyst must make some assessment of the likely future path of the company. In so doing, the analyst must consider the firm's ability to liquidate assets to meet penalty amounts (and still remain in business), and its ability to raise additional cash from lenders and its owners.

45 Fed. Reg. at 59,775 n.5.

[14] The Region also argued that New Waterbury could procure funds to pay the penalty through liquidation. To support this claim, the Region referred the presiding officer to the $18 million option/purchase contract between New Waterbury and Homart Development Co. This argument was rejected by the presiding officer, and the Region has not appealed this issue.

that a penalty was not appropriate and thus he rescinded the entire penalty. This appeal by the Region followed.[15]

II. *ISSUES ON APPEAL*

In this appeal, both the Region and New Waterbury have focused on the primary question of who bears the burden of proof regarding a respondent's ability to pay a proposed penalty under TSCA § 16. The primary issue, both parties contend, is: whether the presiding officer erred in allocating the burden of proof, *i.e.*, the burden of production and the burden of persuasion, as to a respondent's "ability to pay" on the Region. The Region argues that the presiding officer's allocation of the burden on the Region was erroneous and New Waterbury argues that the presiding officer correctly placed the burden of proof on the Region. For the reasons set forth below, we find that the formulation of the issue by the parties is not correct, and that this case does not turn on who bears the burden of proof on a respondent's ability to pay a penalty. Rather, this case turns on the following three questions: 1) whether the presiding officer properly concluded that the Region bears the burden of proof as to the *appropriateness* of the penalty under TSCA § 16; 2) whether the presiding officer erred in reopening the hearing to allow for additional evidence on the question of New Waterbury's ability to pay a penalty; and 3) whether the presiding officer, after considering the evidence presented, erred in concluding that no penalty should be assessed. Each of the issues identified above will be discussed in turn.

III. *ANALYSIS*

A. *Burden of Proof*

The presiding officer properly concluded that the Region bears the burden of proof[16] on the issue of whether a proposed penalty is "appropriate" under TSCA § 16. *See* Hearing Transcript ("Tr.") at 6 (Region "has the burden of establishing the violations alleged and the

[15] Oral argument was held in this matter on September 28, 1993.

[16] The term "burden of proof" in this context encompasses two concepts: the burden of production, and the burden of persuasion. 4 Stein, *et al.*, *Administrative Law* 24-2 (1994). The first of these to come into play is the burden of production—that is, the "duty of going forward with the introduction of evidence." *Id.* at 24-9. This burden may shift during the course of litigation; if a complainant satisfies its burden of production, the burden then shifts to the respondent to produce, or go forward with the introduction of, rebuttal evidence. *Id.* The burden of persuasion comes into play only "if the parties have sustainedtheir burdens of producing evidence and only when all of the evidence has been introduced." 2 *McCormick on Evidence* at 426 (Strong, ed. 1992). This burden

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appropriateness of the proposed penalty"); Initial Decision at 49 ("Complainant has the burden of establishing the appropriateness of the proposed penalty"); Decision After Reopened Hearing at 69-70 ("Complainant [bears] both the burden of production and the burden of persuasion that [the] penalty proposed is reasonable in the light of all the statutory factors including ability to pay."). As discussed below, this conclusion is compelled by the Administrative Procedure Act, the Agency rules governing this proceeding (Part 22), and established Agency precedent.

Under the terms of TSCA § 16(a)(2)(A), 15 U.S.C. § 2615(a)(2)(A), the present proceeding is governed by the Administrative Procedure Act ("APA"). The APA provides that "except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." APA § 7(c), 5 U.S.C. § 556(d). The Supreme Court has recently held that under the APA the "burden of proof" expressly places "the burden of persuasion" on the proponent of the order. *Director, Office of Workers' Compensation Programs, Dep't of Labor v. Greenwich Collieries*, 62 U.S.L.W. 4543 (June 20, 1994). Because TSCA simply provides that the APA is controlling, TSCA does not "otherwise provide[] by statute" that a contrary allocation of the burden of proof shall apply.[17] Thus, the Region, as the party seeking to impose civil penalties, is the proponent of the order assessing such penalties, and therefore under the APA bears the burden of proof. *See Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 366 (D.C. Cir. 1989) ("the proponent of a rule or order [is] usually the agency in proceedings charging statutory violations").

Consistent with the APA, the procedural rules governing this proceeding squarely place the burden of proof on the *appropriateness* of the penalty on the Region. In pertinent part, 40 C.F.R. § 22.24 provides that:

> The complainant has the burden of *going forward with and of proving* that the violation occurred as set forth in

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refers to what a "litigating proponent must establish in order to persuade the trier of facts of the validity of his claim." *Administrative Law* at 24-5. Importantly, this burden does not shift between the parties during the course of litigation. *Id.* at 24-8.

[17] The Region agrees that TSCA § 16 is "entirely silent on the burden of proof." Complainant's Appellate Brief at 13. In this connection, we note that in *Merritt v. U.S.*, 960 F.2d 15 (2d Cir. 1992), the court concluded that section 13(c) of the Shipping Act of 1984, 46 U.S.C. § 1712(c), which contains language remarkably similar to TSCA § 16, places the burden of proof on the Agency proposing the penalty order. Section 13(c) of the Shipping Act requires that the Commission: "shall take into account the nature, circumstances, extent, and gravity of the violations committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require."

> the complaint *and that the proposed civil penalty, * * * is appropriate.*

(Emphasis added). Thus, under the express terms of this regulation, the complainant bears both the burden of going forward and the burden of persuasion with respect to the *appropriateness* of the proposed penalty. In the context of this proceeding the appropriateness of the penalty under 40 C.F.R. § 22.24 is to be determined in light of the statutory factors detailed in TSCA § 16(a)(2)(B), which, as noted above, includes ability to pay as one of several factors requiring consideration:

> In determining the amount of a civil penalty, the Administrator shall *take into account* the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, *ability to pay*, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

(Emphasis added. *See* n.1 *supra.*).

In this connection, although the Region bears the burden of proof as to the appropriateness of the penalty it does not bear a separate burden on each of the TSCA § 16 factors. More specifically, the burden of proof goes to the appropriateness of the penalty taking *all* factors into account. Thus, for the Region to make a prima facie case on the appropriateness of its recommended penalty, the Region must come forward with evidence to show that it, in fact, considered each factor identified in Section 16 and that its recommended penalty is supported by its analysis of those factors.[18] The depth of consideration will vary in each case, but so long as each factor is touched upon and the penalty is supported by the analysis a prima facie case can be made. Once this is accomplished, the burden of going forward shifts to the respondent. To rebut the Region's case, a respondent is required to show (1) through the introduction of evidence that the penalty is not

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[18] It is the Board's understanding that this type of analysis is routinely performed in enforcement cases and is required under the Agency's general penalty policy and the program - specific penalty guidelines. As the EPA, February 16, 1984 General Enforcement Policy - *A Framework for Statute - Specific Approaches to Penalty Assessments - Implementing EPA's Policy on Civil Penalties,* provides at page 27:

> [I]t is essential that each case file contain a complete description of how each penalty was developed. This description should cover how the preliminary deterrence amount [economic benefit component and gravity component] was calculated and any adjustments [including consideration of ability to pay] made to the * * * amount.

appropriate because the Region had, in fact, failed to consider all of the statutory factors or (2) through the introduction of additional evidence that despite consideration of all of the factors the recommended penalty calculation is not supported and thus is not "appropriate." Thereafter, in order to prevail on its burden of persuasion the Region must address the respondent's evidence either through the introduction of additional evidence to rebut the respondent's evidence or through cross-examination that will discredit the respondent's contentions.

This description of the Region's burden of proof is fully consistent with Agency precedent. For example, in the recent *In re Ray Birnbaum Scrap Yard*, TSCA Appeal No. 92-5, at 7 n.4 (EAB, Mar. 7, 1994) the Board reiterated that the Agency bears the burden of proof with regard to "appropriateness" of a penalty, which must include some consideration of each of the statutory factors, including, the respondent's ability to pay. Similarly, in *In re Kay Dee Veterinary Division of Kay Dee Feed Company*, FIFRA Appeal No. 86-1, at 10 (CJO, Oct. 27, 1988), in which the Chief Judicial Officer ("CJO") construed an analogous provision of FIFRA, the CJO concluded that the Agency bears the burden of proving that the proposed penalty is appropriate in light of the FIFRA statutory factors, which includes *inter alia*, the financial impact on a respondent. For all of these reasons, we find that the presiding officer correctly determined, contrary to the Region's contention, that the Region has the burden of proof (both of going forward and of persuasion) with regard to the *appropriateness* of a penalty and thus, it must show that it has taken into account each of the factors identified in TSCA § 16 in assessing a proposed penalty and that its proposed penalty is supported by its analysis. As discussed, this does not mean that there is any specific burden of proof with respect to any individual factor; rather the burden of proof goes to the Region's consideration of all of the factors.

In view of the foregoing, New Waterbury's contention that the Region must specifically and separately prove that a respondent has the funds necessary to pay a proposed penalty before a penalty can be assessed is erroneous and must be rejected. The issue as just described is not whether the respondent can, in fact, pay a penalty, but whether a penalty is *appropriate*. In fact, New Waterbury's contention that the Region must prove that a respondent has the funds to pay a proposed penalty was previously rejected in the context of a penalty assessment proceeding under FIFRA § 14(a)(4), which, as noted above, imposes virtually an identical burden of proof on the Agency. In *Kay Dee Veterinary Division*, the CJO declined to interpret FIFRA § 14(a)(4) as imposing a burden of proof as to the respondent's specific ability to remain in business notwithstanding the penalty, and therefore rejected

the argument that the Region may only impose a penalty if it can affirmatively prove each one of the several statutory factors to be considered in the assessment. We see no reason to interpret TSCA § 16 differently. Indeed, contrary to New Waterbury's assertions, TSCA § 16 requires only that a respondent's ability to pay be *considered* in assessing a penalty. There is simply no basis for suggesting that "ability to pay" is a special factor which if not established (as opposed to not considered) precludes imposition of *any* penalty. Theoretically, a penalty that forces a respondent into bankruptcy is not precluded under TSCA § 16 where the penalty is justified under the totality of the relevant statutory considerations.[19]

It is for these reasons, as well, that we also reject the Region's contention that "inability to pay" is an affirmative defense for which the respondent bears the burden of proof. "A true affirmative defense, which is avoiding in nature, raises matters *outside* the scope of the plaintiff's prima facie case." 2A *Moore's Federal Practice Manual* 8-17a (2d ed. 1994) (emphasis added). Inability to pay a proposed penalty is, by statute, simply one of several factors the Agency must take into account in establishing the appropriateness of the proposed civil penalty. Since the Agency must prove the appropriateness of the penalty, it necessarily follows that "ability to pay" is a matter that the Agency takes into consideration as part of its prima facie case. As such, it is a matter that falls *within* the scope of the Agency's case, and, therefore, by definition, cannot be a matter for the respondent to raise as an affirmative defense. Moreover, inability to pay does not by itself preclude imposition of a penalty.[20] A successful demonstration of inability

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[19] 1980 Penalty Policy, 45 Fed. Reg. at 59,775 n.3 ("Technically, a firm would often be able to pay even if imposing a penalty would cause it to file for bankruptcy, since a reorganization might still leave the business in operation.").

[20] Had Congress wanted to make "inability to pay" an affirmative defense, it surely could have. The TSCA provision at issue here is, as noted above (n.17), strikingly similar to the provision of the Shipping Act of 1984 at issue in *Merritt v. U.S.*, 960 F.2d 15. The *Merritt* court concluded that under that statute, "ability to pay" was not an affirmative defense, stating:

> If Congress had intended a different result when a defendant's lack of resources is an issue, it could have written inability to pay a fine into the statute as an affirmative defense * * *. Congress did not do that.

Id. at 18. This same reasoning applies here under TSCA § 16, where Congress has directed the Agency to take into account a respondent's "ability to pay." In TSCA § 16, as in the Shipping Act, Congress did not identify a respondent's inability to pay a penalty as a statutorily created exception to the assessment of a penalty. Instead, Congress made "ability to pay" one factor among many to be considered in assessing a penalty.

to pay a proposed penalty would not automatically justify the non-assessment of a penalty. Oral Argument Transcript at 7-8 ("a penalty may still be appropriate, even though there's a demonstrated inability to pay"). In such circumstances it would be an exaggeration to characterize inability to pay as a "defense," *i.e.*, that which defeats recovery of the proposed civil penalty. Rather, inability to pay is more accurately conceptualized as a potential mitigating consideration in assessing a civil penalty.

While we find that inability to pay is not an affirmative defense, we nonetheless recognize that the Region's ability to obtain much information about a respondent's ability to pay is likely to be limited when a complaint is filed. Accordingly, consistent with Agency policy and prior Agency decisions, we recognize that a respondent's ability to pay may be *presumed* until it is put at issue by a respondent. *See* 1980 Penalty Policy, 45 Fed. Reg. at 59,775.[21] We note that while New Waterbury does not object to the Agency's use of a presumption that a respondent has an ability to pay a proposed penalty upon issuance of a complaint, it argues that evidence of ability to pay must be part of the Region's prima facie case at any hearing on the penalty. Oral Arg. Tr. at 44. New Waterbury further contends that at any *hearing* on the penalty assessment, the Agency must introduce *specific* evidence to show that a respondent has the ability to pay a penalty. For the reasons set forth below we disagree.

In our view, a Region, at a penalty *hearing*, must as part of its prima facie case produce some evidence regarding the respondent's *general* financial status from which it can be *inferred* that the respondent's ability to pay should not affect the penalty amount. *See Helena Chemical Co.* (record contains evidence that respondent's gross sales exceeded $300 million, thus supporting conclusion that respondent had ability to pay $117,400 penalty). Thus, if this part of the Region's prima facie case is not rebutted, there will be evidence in the

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[21] *See In re Helena Chemical Co.*, FIFRA Appeal No. 87-3, at 16 (CJO, Nov. 16, 1989) (in FIFRA penalty assessment proceedings, Agency's burden of production as to the appropriateness of the penalty in light of a respondent's ability to pay can be shifted to a respondent by presuming the respondent has the ability to pay); 1980 Penalty Policy, 45 Fed. Reg. at 59,775 (respondent "should be presumed to have the ability to pay at the time the complaint is issued"); "Polychlorinated Biphenyls (PCB) Penalty Policy" at 17 (EPA, 1990) ("The agency will assume that the respondent has the ability to pay at the time the complaint is issued if information concerning the alleged violator's ability to pay is not readily available."). Although *Helena* used the term "affirmative defense" to describe a respondent's ability to pay, it is clear from the context that the phrase was used only to suggest that a respondent's ability to pay can be presumed until it is put in issue by a respondent. *Helena Chemical Co.* at 13.

record to show that the Agency *considered* a respondent's ability to pay in assessing the penalty.[22]

As a practical matter, the Region will know after an answer has been filed and well before any hearing whether ability to pay will be in issue. Indeed, in any case where ability to pay is put in issue, the Region must be given access to the respondent's financial records before the start of such hearing. The rules governing penalty assessment proceedings require a respondent to indicate whether it intends to make an issue of its ability to pay, and if so, to submit evidence to support its claim as part of the pre-hearing exchange.[23] In this connection, where a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, the Region may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived under the Agency's procedural rules[24] and thus this factor does not warrant a reduction of the proposed penalty.

Where ability to pay is at issue going into a hearing, the Region will need to present some evidence to show that it considered the respondent's ability to pay a penalty. The Region need not present any *specific* evidence to show that the respondent *can pay* or obtain funds to pay the assessed penalty, but can simply rely on some *general* financial information regarding the respondent's financial status which can support the *inference* that the penalty assessment need not be

[22] *See Helena Chemical Co.* at 16 (no reduction warranted where, among other things, "[r]espondent did not come forward with any evidence that the penalty initially proposed by the Region * * * would impair its ability to remain in business.").

[23] *See* 40 C.F.R. § 22.19(b). Here, as noted above, *see supra* n.5, at the time of the hearing, the Region had copies of the following by virtue of New Waterbury's pre-hearing exchange: cash flow reports, balance sheets, 1987 - 1989 tax returns, summaries of construction vendor totals, outstanding invoice summaries, rent summaries, official notice of liens, and official notice of outstanding taxes.

[24] Under Agency rules governing the "Answer to the Complaint," 40 C.F.R. § 22.15(d),:

> Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.

In addition, the rule governing prehearing exchanges, 40 C.F.R. § 22.19(f)(4) provides:

> (4) When the information sought to be obtained is within the control of one of the parties, failure to comply with an order issued pursuant to this paragraph may lead to (i) the inference that the information to be discovered would be adverse to the party from whom the information was sought, or (ii) the issuance of a default order under § 22.17(a).

reduced. Once the respondent has presented *specific* evidence to show that despite its sales volume or apparent solvency it cannot pay any penalty, the Region as part of its burden of proof in demonstrating the "appropriateness" of the penalty must respond either with the introduction of additional evidence to rebut the respondent's claim or through cross examination it must discredit the respondent's contentions. *See Kay Dee Veterinary Division* at 10-11, *see* n.26 *infra*.

For all of these reasons, we conclude that the presiding officer correctly determined that the Region bears the burden of proof on establishing the appropriateness of the penalty after considering all of the statutory factors, including evidence bearing on a respondent's ability to pay, whether produced by the Region or the respondent. In this case, the Region's efforts to meet that burden by showing that a proposed penalty was appropriate, given New Waterbury's history of obtaining necessary funds from its related business entities, such as Winston Management, was proper. Moreover, as we discuss below, we conclude that this evidence was sufficient to support the imposition of a penalty.

B. *Reopening the Hearing*

In our opinion, the presiding officer did not err in reopening the hearing to allow New Waterbury to present evidence on the financial condition of its general partner, Vanta.[25] Specifically, we conclude that the hearing was properly reopened to allow New Waterbury the opportunity to produce evidence on Vanta's financial condition because the Region's basis for asserting that the penalty was appropriate was based on an erroneous, unfounded assumption that Vanta was financially sound, and because New Waterbury did not have any reason to know before the hearing closed that such an assumption would be used to support a penalty assessment.

The record of the proceedings before the presiding officer reveals that at the initial hearing in this matter, New Waterbury presented evidence to show that it could not pay any penalty out of its own resources. Given that the Region bears the burden of proof on the question of the appropriateness of the penalty, the Region needed to show that the proposed penalty was nevertheless appropriate. To make that showing, the Region did not present any of its own evidence, or

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[25] As noted above in the Background section, New Waterbury also sought to reopen the hearing to produce evidence as to the costs involved in a clean-up of other PCB items unrelated to the transformers involved here, resulting from an enforcement action initiated in federal court after the hearing in this matter closed. Because we conclude that the presiding officer properly reopened the hearing to receive other evidence, we need not address this particular issue.

point to any of New Waterbury's evidence, to show that as a matter of fact New Waterbury could pay the proposed penalty. Instead, the Region relied upon a principle of partnership law to suggest that New Waterbury's general partner, Vanta, could perhaps pay the proposed penalty. Specifically, the Region reasoned that because there was no evidence in the record as to the financial condition of Vanta, the presiding officer could assume that Vanta's financial condition was sound. Based on that assumption, the Region asserted, the presiding officer could conclude that New Waterbury could pay the penalty through Vanta's assets, given the legal principle that a general partner is liable for the unpaid debts of a limited partnership. The presiding officer initially accepted this reasoning.

In these circumstances, New Waterbury properly asked the presiding officer to reopen the hearing to allow it to demonstrate that the Region's assumption was not supported by any evidence and that in fact, Vanta did not have the financial resources to pay the proposed penalty. Under 40 C.F.R. § 22.28, a motion to reopen a hearing "shall (1) state the specific grounds upon which relief is sought, (2), state briefly the nature and purpose of the evidence to be adduced, (3) show that such evidence is not cumulative, and (4) show good cause why such evidence was not adduced at the hearing." With respect to the evidence concerning Vanta's financial condition, only one of these requirements is at issue, and that is whether New Waterbury had good cause for its failure to adduce this evidence at the hearing. We conclude that it did.

At the close of the hearing, the Region argued that based upon the *lack of evidence in the record* as to Vanta's financial condition, the presiding officer could infer that as a matter of fact Vanta was financially sound, and thus conclude, based upon the legal principle that a general partner is liable for unpaid partnership debts, that New Waterbury has the ability to pay the penalty in light of the inferred soundness of Vanta. The Region's position is faulty because it relies upon an inference of fact that is not supported by any evidence in the record, namely, that Vanta is financially sound. Indeed, the Region explicitly argued that this inference be drawn from a lack of evidence in the record as to Vanta's financial condition. An inference, however, must rest upon a factual basis in the record. 29 *Am. Jur. 2d* Evidence § 182 (*citing Computer Identics Corp. v. Southern Pacific Co.*, 756 F.2d 200 (1st Cir. 1985)); *cf. In re Samsonite Corp.*, TSCA Appeal No. 87-6, at 5 n.6 (CJO, Dec. 26, 1989) (argument that fluid on surface of transformer may be sealant not supported by any evidence that sealant had been used on transformer). If an unwarranted inference receives the blessing of the presiding officer, as it did here, grounds exist for reopening the hearing on the question of whether the fact inferred is true. 66 C.J.S. New Trial § 36 (1950).

We have no problem concluding that New Waterbury had good cause for its failure to introduce evidence about Vanta's financial condition at the hearing, and that the hearing was properly reopened to receive evidence on this question. There is no merit to the Region's claim that in reopening the hearing, the presiding officer erroneously concluded that the Region failed to make a prima facie case by failing to produce evidence of Vanta's financial condition. At that point in time, the question of whether the Region failed to make a prima facie case was irrelevant in light of New Waterbury's presentation of its case.[26] We believe the presiding officer made the more narrow observation that the Region's prima facie case did not include evidence to support the inference advocated by the Region. Because the prima facie case did not contain such evidence, New Waterbury simply could not have seen the need to produce evidence on Vanta's financial condition. New Waterbury did not know until *after* the hearing that the Region intended to rely on the fact that Vanta's financial condition was sound, and at that time, it was too late for New Waterbury to produce evidence to rebut this claim—the only procedural device available to New Waterbury to solve this problem was a motion to reopen the hearing. In our opinion, these circumstances amount to good cause for the failure of New Waterbury to adduce evidence at the hearing as to Vanta's financial condition.

The Region asserts that New Waterbury should have known to produce evidence about Vanta in its rebuttal case in light of the well-settled legal rule that a general partner is liable for the unpaid debts of a limited partnership. We disagree, on the grounds that this rule is not relevant to the assessment of a penalty against a limited partnership in the first instance. A general partner is liable only if a limited partnership defaults. In other words, Vanta would be liable for this penalty only if, at some point in the future after the penalty is assessed, New Waterbury failed to pay it. Thus, Vanta's liability will occur, if at all, in the future. Vanta's potential future liability is purely speculative at this point in time.[27] Hence, it was not unreasonable for New Waterbury to decide not to present evidence on Vanta's financial condition, given that Vanta's potential future liability

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[26] *See In re Kay Dee Veterinary Division of Kay Dee Feed Company*, FIFRA Appeal No. 86-1, at 10 n.15 (CJO, Oct. 27, 1988) ("Once the respondent has presented his case, it is no longer relevant whether complainant established a prima facie case," *citing U.S. Postal Service v. Aikens*, 460 U.S. 711 (1983)).

[27] The presiding officer belatedly recognized this when he stated in his order denying certification that his acceptance of the Region's legal reasoning was in error, but was nevertheless the law of the case. Order Denying Motion for Certification of Interlocutory Appeal at 2. This is not to say, however, that Vanta's financial status would not have been relevant in determining whether New Waterbury had access to resources to pay a penalty based upon an application of the portion of the 1980 Penalty Policy, which allows the Agency to look at related enterprises in evaluating ability to pay (*see infra* n.32). The Region did not, however, assert that this as the basis for its argument.

(as opposed to Vanta's ability to provide New Waterbury with funds to pay a penalty) is not relevant to determining a penalty, and given that New Waterbury had no reason to believe that the Region would rely upon a lack of evidence on Vanta to urge an inference that Vanta could pay the penalty, instead of New Waterbury.

C. *Penalty Assessment*

Lastly, we must determine whether the presiding officer erred in concluding that New Waterbury did not have the ability to pay *any* penalty and therefore no penalty should be assessed for these violations. We conclude that the presiding officer erred in rescinding the entire $35,750 gravity-based penalty assessment. The parties do not dispute the presiding officer's calculation of the $35,750 gravity-based penalty.[28] The only dispute in this case is whether, and to what extent, that penalty should be reduced in light of New Waterbury's financial condition.

Under the 1980 Penalty Policy, when a respondent raises an issue as to its ability to pay a penalty, "a year's net income, as determined by a fixed percentage of total sales, will generally yield an amount which the firm can afford to pay." 45 Fed. Reg. at 59,775. For small respondents, the 1980 Penalty Policy suggests that four percent of the respondent's sales or income will represent a payable amount by the respondent without risk to its ability to continue in business. *Id.* According to the 1980 Penalty Policy, when a respondent challenges its ability to pay an amount based on the four percent formula, a further reduction in the penalty amount may be appropriate. *Id.* Although the 1980 Penalty Policy does not bind the presiding officer, he is obliged to consider its guidelines. 40 C.F.R. § 22.27(b). In addition, when a penalty substantially deviates from the amount that is recommended by application of the penalty guidelines the Board will give "closer scrutiny of the presiding officer's rationale." *Ray Birnbaum Scrap Yard* at 5. Here, we conclude that the presiding officer's conclusion that New Waterbury should not have to pay *any* penalty, based on its financial condition, deviates substantially from what the 1980 Penalty Policy would require. As such, the presiding officer's conclusion is subject to close scrutiny. *Id.* at 5. For the reasons set forth below, we find that the Presiding Officer's decision does not withstand such scrutiny.

Under the terms of the 1980 Penalty Policy, the first step in adjusting a penalty based upon a respondent's ability to pay is to determine

[28] The gravity-based penalty is the first step in a penalty calculation. 1980 Penalty Policy, 45 Fed. Reg. at 59,770. This part of the penalty calculation reflects the nature of the violation, the extent of the environmental harm that could result from the violation, and the circumstances of the violation. *Id.*

the amount equal to four percent of a respondent's income, which, under the 1980 Penalty Policy, generally represents an amount payable by a respondent. In this case, New Waterbury's income statement, Joint Ex. 3C-1D, indicates that New Waterbury's net income for 1989, 1990, and 1991 was negative. However, the 1980 Penalty Policy states that "[e]ven where the net income is negative, four percent of gross sales should still be used as the 'ability to pay' guideline, since companies with high sales will be presumed to have sufficient cash to pay penalties even where there have been net losses." 45 Fed. Reg. at 59,775. Applying the policy here, we construe New Waterbury's rental income to be the equivalent of its "sales" income and we read New Waterbury's income statement to suggest that New Waterbury received annual rental incomes in the range of $526,411 to $860,319 for the period of 1987 to 1989, with an average rental income figure of approximately $602,000 for that three year period. If we then apply the 1980 Penalty Policy's guidelines, four percent of New Waterbury's average rental income would be $24,000.[29] Thus, under the 1980 Penalty Policy the gravity-based penalty should have been reduced and a $24,000 penalty should have been proposed based upon consideration of New Waterbury's ability to pay.

The Penalty Policy next provides that if a respondent continues to assert an inability to pay the reduced amount, the Region should make further inquiries into its financial status. In particular, the 1980 Penalty Policy suggests that in deciding whether to make further reductions from the amount recommended by the four percent formula, the Region examine whether the respondent is part of a complex arrangement of interrelated small companies. In such circumstances, the policy recommends that the Region examine those corporate relationships to establish the respondent's cash flow and likely future course, including the respondent's ability to obtain resources or borrow funds from those related corporate entities.[30]

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[29] The 1980 Penalty Policy provides that in calculating the respondent's ability to pay, "figures for the current year and the prior three years should be averaged." 45 Fed. Reg. at 59,775. Here, however, we have only the data for three years.

[30] As noted above (*see supra* n.12), the 1980 Penalty Policy, in pertinent part, provides:

> If one or more of * * * [related] corporations is culpable for some part of the TSCA violation, the tax return for all involved corporations should be examined and a combined cash flow prepared. Once the firm's historical cash flows have been assembled, the analyst must make some assessment of the likely future path of the company. In so doing, the analyst must consider the firm's ability to * * * raise additional cash from lenders and its owners.

45 Fed. Reg. at 59,775 n.5.

Here, the record demonstrates that New Waterbury is a small business closely entwined with Winston Management and Trevor C. Roberts. It is not disputed that Roberts owns the majority interest in New Waterbury, and solely owns Winston Management, which in turn solely owns Vanta, New Waterbury's general partner.[31] It is also not disputed that Roberts, as president of Vanta, sole owner of Winston Management and majority owner of New Waterbury, controls the activities of New Waterbury. Therefore, whether New Waterbury's $24,000 penalty should be further reduced, based upon New Waterbury's ability to pay, requires an examination of New Waterbury's related business enterprises to determine New Waterbury's cash flow and likely future path.

In this regard, it is clear that New Waterbury is still in operation largely due to the support it receives from Winston Management. As noted above, Winston Management "expends all of the funds to pay for essential services * * * needed to keep New Waterbury operating." Respondent's Motion to Strike and Proposed Findings of Fact and Conclusions of Law at 20. For example, Winston Management pays New Waterbury's payroll. Tr. at 315; Joint Ex. 7 (Roberts' Dep.) at 17. Currently, New Waterbury has one and one-half employees—a site manager and a part-time secretary. Joint Ex. 7 (Roberts' Dep.) at 51. New Waterbury's balance sheet indicates that its most recent payroll expense for the 1991 year was over $430,000. (For the previous two years, it was $499,316 and $894,233). In addition, New Waterbury's balance sheet shows that it has spent over $500,000 a year on travel, professional fees, and other administrative expenses, which were also presumably paid by Winston Management. Paying New Waterbury's expenses has not interfered with Winston Management's financial health. To the contrary, Winston Management's 1990 tax return shows reported income of $1.6 million and assets of $2.25 million. Joint Ex. 3C-2A.

Further, both New Waterbury and Winston Management are clearly controlled by Trevor Roberts. For example, Roberts, the sole owner of Winston Management and the largest partner in New Waterbury, is the only person authorized to obligate funds greater than petty cash expenses on behalf of Winston Management. Joint Ex. 7 (Roberts' Dep. at 105). Accordingly, Roberts must have approved all of Winston Management's payments to New Waterbury. In addition, Roberts appears to be in sound financial health. Roberts is paid an annual salary of $120,000 from Winston Management, and uses an Alpha Romeo leased by Winston Management for $450 per month. Joint Ex. 7 (Roberts' Dep. at 35-38). Roberts has also personally guaranteed approximately $15 million in mortgages. Joint Ex. 7 (Roberts' Dep. at 38).

[31] The parties agree that other than its interest in New Waterbury, Vanta has no assets.

In these circumstances, the record clearly supports the Region's reliance on Roberts' and Winston Management's financial status to show that inability to pay should not bar imposition of a penalty.[32] The relatively easy flow of cash into New Waterbury from a financially sound business, Winston Management, and New Waterbury's apparent ability to come up with large sums of money from Winston Management to meet large expenses, such as payroll, travel and professional fees, suggest to us that New Waterbury does have the ability to pay a penalty.[33] Consequently, we see no reason to further reduce the penalty from $24,000, an amount the 1980 Penalty Policy indicates is within New Waterbury's ability to pay.

Accordingly, we reverse the decision of the presiding officer not to assess a penalty against New Waterbury. We hereby assess in accordance with our authority under 40 C.F.R. § 22.31 ("The Environmental Appeals Board may * * * increase the assessed penalty * * *."), a penalty of $24,000 against New Waterbury for the undisputed violations established in this proceeding. However, given New Waterbury's financial status, the complicated business relationships involved here, and the amount of time that has passed since the reopened hearing, we recognize that a payment schedule may be appropriate in this case. Therefore, we are remanding

[32] We emphasize that we are not concluding that Winston Management, Vanta, or Roberts is liable for the penalty assessed herein. Such liability cannot be determined here, where New Waterbury is the only named respondent. Instead, we have determined only that New Waterbury has the ability to pay a penalty in light of its financial relationship with Winston Management and Trevor Roberts, and therefore a penalty will be assessed against New Waterbury. The evaluation of ability to pay is separate from the question of liability. Where, as here, there are several interrelated business entities all involved in the business of the liable party, the Agency may properly look into the assets of those other entities to determine whether a penalty is appropriate when the liable party claims that it does not have the resources to pay the penalty on its own. *See* 1980 Penalty Policy, 45 Fed. Reg. at 59, 775 n.5.

[33] In this connection, we find that the Presiding Officer incorrectly assumed that Winston Management had no reason to loan to New Waterbury the funds necessary to pay a penalty. It should be recognized that Winston Management is not New Waterbury's banker. Rather, Winston Management has been responsible, throughout New Waterbury's existence, for keeping New Waterbury in business by paying its outstanding obligations. In these circumstances, it is perfectly reasonable to assume that Winston Management will provide New Waterbury with the modest funds it needs to meet its TSCA penalty obligation as part of its efforts to maintain New Waterbury's financial viability.

this matter to the presiding officer for the adoption of a reasonable payment schedule after consultation with the parties.[34]

IV. *CONCLUSION*

For the reasons set forth above, a civil penalty of $24,000 is assessed against the respondent, New Waterbury, Ltd. pursuant to TSCA § 16, for violations of the regulations pertaining to PCB transformers. This matter is remanded to the presiding officer for the establishment of a schedule for the payment of this penalty.

So ordered.

[34] *See, e.g., In re Leonard Strandley,* TSCA Appeal No. 89-4, at 10 (CJO, Nov. 25, 1991) (establishing a payment schedule is within the presiding officer's discretion).