IN RE BRITTON CONSTRUCTION CO., BIC INVESTMENTS, INC., AND WILLIAM AND MARY HAMMOND

CWA Appeal Nos. 97–5 & 97–8

FINAL DECISION

Decided March 30, 1999

Syllabus

William and Mary Hammond purchased eight lots on Chincoteague Island, Virginia, in the mid-1960s. Twenty-five years later, the Hammonds entered into an agreement with Raymond Britton, Jr., the president of Britton Construction Company, to develop housing on the lots. At that time, at least two of the lots—Lots 9 and 11—contained wetlands protected by section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, which prohibits the filling of such areas without a permit issued by the U.S. Army Corps of Engineers ("Corps").

Sometime between late November 1989 and early February 1990, Raymond Britton filled or oversaw the filling of approximately 31,000 square feet of Lots 9 and 11 (nearly three-quarters of an acre). He did so in furtherance of his and the Hammonds' joint venture, and he did so without the benefit of a Corps permit. The Corps issued a cease-and-desist order, and the Hammonds and Raymond Britton agreed to mitigate the impacts of the fill by restoring and creating wetlands on the Hammonds' property. The Corps did not require full restoration of the filled lots but rather allowed the Hammonds and Raymond Britton to follow through on their plan to build houses there.

In 1991–1992, BIC Investments, Inc., a company owned by David Britton, Raymond Britton's son, constructed three townhouses on Lot 9, which were later sold to other parties. Raymond Britton began work on the mitigation site, proceeding at a slow pace. In February 1994, Gerald Tracy of the Corps and William Hoffman of EPA Region III inspected the mitigation site and found that 3,000 square feet had been filled with sand. As a consequence, Region III requested from the Corps lead enforcement authority over this case.

The Region filed a complaint on November 28, 1994, alleging that Respondents had violated the CWA and seeking $125,000 in administrative penalties. Administrative Law Judge Andrew S. Pearlstein ("Presiding Officer") held a hearing on this matter and subsequently found Respondents liable for filling wetlands without a permit. He assessed a $2,000 penalty, and both Region III and Respondents filed timely appeals.

Region III challenges the Presiding Officer's penalty assessment on several grounds. According to the Region, the Presiding Officer abused his discretion by: (1) failing to articulate the nature and extent of specific reductions made in decreasing the Region's proposed $125,000 penalty to $2,000; (2) improperly reducing the penalty based on the timing and circumstances of EPA's enforcement and Respondents' mitigation; (3) failing to consider "increased property value" as a measure of economic benefit; and (4) calculating Respondents' "wrongful profits" improperly. The Region also contends that the Presiding Officer committed reversible error by admitting Respondents' tax returns after the hearing and then reducing the penalty based on those returns.

Respondents, for their part, assert that the Presiding Officer erred by: (1) assessing a penalty they cannot pay; (2) assessing penalties for violations that are barred by the statute of limitations; (3) failing to hold that Respondents were not provided "fair notice" of EPA's regulatory standards, which purportedly differ from the Corps' standards, and thus finding that the agencies' dual enforcement activities were not arbitrary and capricious and did not violate due process; and (4) failing to hold that the Region's decision to request the maximum statutory penalty violated due process.

Held: The Presiding Officer's assessment of a $2,000 administrative penalty is affirmed. Neither the Region nor Respondents have persuaded the Environmental Appeals Board ("Board") that the Presiding Officer committed an abuse of discretion or a clear error in assessing the penalty. First, as to the Region's arguments, the Presiding Officer sufficiently explained the reasons why he reduced the penalty, even though he did not quantify each of his reductions to reflect the various components of the penalty calculus. The Presiding Officer also permissibly considered the timing and circumstances of EPA's enforcement activities and Respondents' mitigation efforts. He understandably did not consider "increased property value" as a measure of economic benefit because the Region did not adequately raise the issue before him and request that he calculate economic benefit in this way. His assessment of the "wrongful profits" earned by Respondents from their fill-and-develop venture contained errors, but those errors are irrelevant in light of the fact that a wrongful profits measure of economic benefit is inappropriate in this case, given the Corps' tacit approval of Respondents' construction activities. Finally, the Presiding Officer may have erred by admitting and considering Respondents' tax returns after the hearing, but, given that the Presiding Officer's penalty assessment appears to have been driven primarily by other considerations, the error was harmless. Moreover, the Board's limited examination of the returns indicates that their closer scrutiny by experts would reveal little more pertinent information than Respondents already disclosed in their financial affidavits. Thus, the tax returns' admission and use do not comprise sufficient grounds for remanding this case. Because it finds no reversible error or abuse of discretion on these issues, the Board declines to substitute its own penalty calculus for that of the Presiding Officer.

Second, as to Respondents' arguments on appeal, none have merit. The preponderance of the evidence in this case indicates that Lots 9 and 11 were filled some time just prior to February 6, 1990, within the five-year statutory period, so Respondents' statute of limitations argument fails. Respondents did not raise the purported lack of "fair notice" of regulatory standards below, so their argument that the Corps and EPA's dual enforcement activities violated due process will not be considered. The CWA provides EPA with discretionary authority to seek administrative penalties up to a certain maximum amount, and Respondents were given an opportunity to present evidence and arguments regarding the proposed penalty at a hearing, in accordance with the CWA and the Administrative Procedure Act. In light of these facts, the Region's decision to seek the maximum penalty did not violate Respondents' due process rights. Finally, Respondents' financial affidavits and business records indicate that they have sufficient resources to pay, on a joint and several basis, a $2,000 penalty.

In accordance with these findings, the Board affirms the Presiding Officer's assessment of a $2,000 penalty against Respondents, to be paid on a joint and several basis.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge McCallum:

Chincoteague Island is a small barrier island off the coast of Virginia. It is approximately eight miles long by a mile wide and is flanked to the east by its larger sibling, Assateague Island. Assateague is unpopulated, but Chincoteague has traditionally sheltered fishermen, farmers, and horsemen on its shores. The Island is perhaps most famous as the home of Misty, a wild pony immortalized by Marguerite Henry in the children's book "Misty of Chincoteague." In recent years, Chincoteague has been subject to increasing development pressures as vacationers stay on to build weekend and retirement homes.

This case involves one development story among many on Chincoteague. It is before the Environmental Appeals Board ("Board") on appeal from both sides below: Complainant Region III of the Environmental Protection Agency ("EPA" or "Agency") and Respondents Britton Construction Company, BIC Investments, Inc., and William and Mary Hammond. It involves the alleged illegal filling of wetlands on Chincoteague and the appropriate penalty therefor.

On November 28, 1994, Region III filed an administrative complaint alleging that Respondents violated section 301(a) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1311(a), by discharging fill material into wetlands on Chincoteague without a permit. The Region sought an administrative penalty of $125,000, the maximum amount provided for at that time under section 309(g)(2)(B) of the Act.[1] Respondents filed an amended answer to the complaint on February 29, 1996. On August 6–7, 1996, Administrative Law Judge Andrew S. Pearlstein ("Presiding Officer") conducted a hearing on this matter. A week later, Respondents filed a motion to hold open the hearing record so that they could submit into evidence copies of their tax returns. Region III opposed the motion. On May 21, 1997, the Presiding Officer issued his opinion and received Respondents' tax returns into evidence. The Presiding Officer held that Respondents had violated CWA section 301(a) and assessed a $2,000 penalty. These appeals followed.

[1] Subsequent to the violations at issue in this case, Congress enacted the Debt Collection Improvement Act of 1996. The Act directs EPA (and other federal agencies) to adjust maximum civil penalties on a periodic basis to reflect inflation. *See* 61 Fed. Reg. 69,360 (Dec. 31, 1996).

On appeal, Region III challenges the Presiding Officer's penalty assessment on several grounds. According to the Region, the Presiding Officer abused his discretion by: (1) failing to articulate the nature and extent of specific reductions made in decreasing the Region's proposed $125,000 penalty to $2,000; (2) improperly reducing the penalty based on the timing and circumstances of EPA's enforcement and Respondents' mitigation; (3) failing to consider "increased property value" as a measure of economic benefit; and (4) calculating Respondents' "wrongful profits" improperly. The Region also contends that the Presiding Officer committed reversible error by admitting Respondents' tax returns after the hearing and then reducing the penalty based on those returns.

Respondents, for their part, assert that the Presiding Officer erred by: (1) assessing a penalty they cannot pay; (2) assessing penalties for violations that are barred by the statute of limitations; (3) holding that the Corps and EPA's dual enforcement activities were not arbitrary and capricious and did not violate due process; and (4) failing to hold that the Region's decision to request the maximum statutory penalty violated due process.

For the reasons stated below, the Board affirms the Presiding Officer's assessment of a $2,000 administrative penalty for Respondents' violation of CWA section 301(a) on Chincoteague Island.

I. *BACKGROUND*

A. *Statute, Regulations, and Enforcement MOA*

Under the CWA, it is unlawful for any person to discharge dredged or fill material from a point source into waters of the United States unless that person has a permit authorizing the discharge. CWA §§ 301(a), 404, 33 U.S.C. §§ 1311(a), 1344. The U.S. Army Corps of Engineers ("Corps") and EPA are jointly charged with administering section 404 of the Act, which governs discharges of dredged or fill material. The Corps is responsible for issuing permits authorizing such discharges, CWA § 404(a), 33 U.S.C. § 1344(a), while EPA may veto Corps permits in certain circumstances. *See* CWA § 404(c), 33 U.S.C. § 1344(c). In determining whether to issue a section 404 permit, the Corps considers, among other things: (a) guidelines developed by EPA regarding project alternatives and mitigation of project impacts; (b) the Corps' public interest review regulations; and (c) other statutory authorities, such as the National Environmental Policy Act and the Endangered Species Act. *See* CWA § 404(b)(1), 33 U.S.C. § 1344(b)(1); 40 C.F.R. pt. 230; 33 C.F.R. § 320.4.

The Corps and EPA signed a memorandum of agreement in January 1989 regarding enforcement of the section 404 program. The primary objective of the memorandum "is to strengthen the section 404 enforcement program by using the expertise, resources and initiative of both agencies in a manner [that] is effective and efficient in achieving the goals of the CWA." *Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act* 1 (Jan. 19, 1989) ("*Enforcement MOA*"). In general, the Corps acts as the lead enforcement agency for all violations of Corps-issued permits and for unpermitted discharges. EPA takes the lead over unpermitted discharges involving repeat or flagrant violators and over any other cases or classes of cases it requests. *Id.* at 3–4. According to the MOA, "[i]n the majority of enforcement cases the Corps, because it has more field resources, will conduct initial investigations." *Id.* at 1. Finally, the MOA specifies that its terms create no rights in third parties and that deviation from those terms cannot be used as a defense by violators.[2]

B. *Overview of Alleged Violations and Respondents' Arguments on Appeal*

In the complaint, Region III focused on two separate fill episodes involving Lots 9 and 11 of a subdivided parcel of land on Chincoteague Island owned by William and Mary Hammond of Falls Church, Virginia.

1. *First Alleged Violation*

First, the Region alleged that:

> During 1989 and/or 1990, at times best known to Respondents, Respondents, or persons acting on behalf of Respondents, operated equipment [that] discharged fill material generally associated with the construction of residential structures (dirt, stone, concrete, wood, etc[.]) into wetlands on the [Hammonds' property] * * * for the

[2] The MOA states:

> The policy and procedures contained within this MOA do not create any rights, either substantive or procedural, enforceable by any party regarding an enforcement action brought by either agency or by the U.S. Deviation or variance from these MOA procedures will not constitute a defense for violators or others concerned with any Section 404 enforcement action.

Enforcement MOA at 5.

> purpose of constructing a driveway, parking area and three housing units on the Site.

Administrative Complaint and Notice of Opportunity to Request Hearing ¶ 19 (Nov. 28, 1994) ("Complaint"). The Region based its allegations on information provided by Gerald Tracy, an environmental scientist with the Corps' Accomack County, Virginia field office, who had observed the Hammonds' property over a period of several years. On February 6, 1990, Mr. Tracy noticed that fresh fill had been placed on approximately 31,000 square feet of Lots 9 and 11. When Mr. Tracy called William Hammond to inform him that wetlands on those lots had been filled without a permit, Mr. Hammond said that Raymond L. Britton Jr. (a local contractor and owner of Britton Construction Company) was doing work on the site and that he would tell him to stop the work.

Shortly thereafter, the Corps ordered Respondents to cease and desist all filling of wetlands on Lots 9 and 11. Respondents subsequently agreed to mitigate the impacts of the fill by restoring and creating wetlands along the front of the Hammonds' property. On several occasions, the Corps asked Respondents to put into writing their development and mitigation plans for the site. Despite a warning that lack of compliance could cause the Corps to refer the case to the Department of Justice for further action, Respondents never complied with these requests. Throughout this time, the Corps kept Region III apprised of its activities by sending the Region copies of the cease and desist order and all other correspondence with Respondents. For several years, however, the Region took no action on this case.

2. *Second Alleged Violation*

Second, the Region alleged that "[o]n February 8, 1994, members of the Norfolk District Corps of Engineers and the U.S. [EPA] inspected the Site and determined that portions of the mitigation area had once again been filled." Complaint ¶ 24. Mr. Tracy of the Corps and William Hoffman, an environmental protection specialist in Region III's enforcement office, visited the site in 1994 to inspect Respondents' mitigation progress. The two men observed that a roughly 3,000-square-foot area in the northern part of the mitigation site had been filled with sand. A day after the site visit, Region III asked for and received lead enforcement authority over this and several other wetlands cases on Chincoteague. As described in Part I.C below, it was primarily this second episode, combined with the slow pace of mitigation, that precipitated EPA's active involvement in this case.

3. *Overview of Respondents' Arguments on Appeal*

Respondents assert that the fill Mr. Tracy observed on February 6, 1990 "was the result of an alleged violation [that took] place before November 28, 1989," more than five years prior to the filing of the complaint. Accordingly, Respondents claim that "any penalty proceeding for that alleged violation is barred by the statute of limitations." Respondents-Appellants' Notice of Appeal at 5. In addition, Respondents argue that the alleged 1994 fill episode was merely storm water runoff and did not constitute a regulated "discharge" from a "point source." Brief of Respondents-Appellants in Support of Notice of Appeal at 11–13 ("Respondents' Appeal Brief"). Respondents claim the Presiding Officer erroneously held against them on these points.

Respondents also assert that they complied for four years with the Corps' mitigation requirements, at which point EPA suddenly assumed lead enforcement authority and changed the rules of the game. They believe that EPA's mitigation standards differ from those of the Corps and allege that EPA's late entry into this case resulted in their being subjected to inconsistent and unfair mitigation requirements. According to Respondents, "[t]he dilatory and redundant enforcement efforts of the EPA and the [Corps] are arbitrary and capricious because they denied [Respondents] fair notice of the standards governing resolution of the alleged violation." Respondents-Appellants' Notice of Appeal at 4. They argue that the Presiding Officer erred by finding otherwise. Respondents' Appeal Brief at 4–5.

In a similar vein, Respondents argue that "by seeking extraordinarily harsh penalties for a minor violation, which has been completely cured, the EPA has acted so unfairly that its actions are arbitrary, capricious, and a violation of due process." Respondents-Appellants' Notice of Appeal at 4. They contend that the Presiding Officer erred by failing to so find. Respondents' Appeal Brief at 7–9. Finally, Respondents claim that they lack the ability to pay any monetary penalty whatsoever. *Id.* at 14.

C. *Factual Background*

1. *The Hammond Lots*

In 1965–1966, William and Mary Hammond purchased eight half-acre lots on the southern end of Chincoteague Island. Half of the lots (Lots 9, 11, 13, and 15) border the east side of South Main Street and half (Lots 10, 12, 14, and 16) border the west side, adjacent to Chincoteague

Channel. A tidal ditch runs along the east side of South Main Street, across the fronts of the Hammonds' lots. The ditch has a direct surface water connection to Fowling Gut, a tidal inlet that bisects the southern portion of Chincoteague Island. Fowling Gut has a direct surface water connection to Chincoteague Channel and Chincoteague Bay. Hearing Transcript ("Tr.") at 30; Hearing Exhibit ("Ex.") 3. In the early 1970s, local authorities diverted tidal flows on parts of the Island to protect oyster beds. The diverted water flowed at least in part into the tidal ditch on the Hammonds' property. Mr. Hammond noticed in 1973 or 1974 that the diversion had raised the water table on Lots 9, 11, 13, and 15. Tr. at 281; Ex. 34; *see also* Tr. at 315, 320, 327.

2. *The Advanced Identification Study*

In the early 1980s, EPA and the Corps conducted an "Advanced Identification Study" of Chincoteague to alert the public to the existence of regulated waters on the Island. The study designated waters of the United States, including wetlands, as either generally suitable or unsuitable for the disposal of dredged or fill material. Tr. at 21; Ex. 2. People were expected to use the study as a development planning tool and to consult the Corps if their property appeared to be in or near an area marked unsuitable for filling. Tr. at 21, 68–70. Most of the Hammonds' Lots 9 and 11 were designated in the study as areas unsuitable for filling without CWA section 404 permits. Tr. at 151–54; Exs. 2, 17. The agencies published their study report in 1986 and discussed its findings at a well-attended public hearing on October 1, 1986. Tr. at 27, 183; Ex. 2. The agencies had originally scheduled the hearing to be held at the Chincoteague Volunteer Fire Department, but so many people attended they had to move the hearing to the Chincoteague High School. Tr. at 183–84; Ex. 2. The agencies later posted maps showing the study results at various public places on the Island for reference by developers and other interested parties.

3. *Gerald Tracy's Early Knowledge of the Hammonds' Property*

In March 1987, Mr. Tracy, the Corps' environmental scientist, inspected the Hammond property as part of his review of an adjacent parcel. He was already familiar with the area's ecosystem because of his involvement in litigation over other property to the south of the Hammond lots. Tr. at 29. Mr. Tracy observed that the Hammond site supported a predominance of hydrophytic vegetation (plants adapted to saturated soil conditions), including salt marsh cord grass (*Spartina alterniflora*), salt meadow hay (*Spartina patens*), salt bush (*Iva frutescens*), salt grass

(*Distichlis spicata*), salt marsh elder, bayberry, and common reed (*Phragmites phragmites*). Loblolly pine grew on slightly higher ground on the eastern portion of the site. Mr. Tracy also found hydric soils (i.e., soils inundated or saturated with water for a specified number of days during the growing season) on the Hammond site. Tr. at 35; Ex. 31. According to the Accomack County soil survey, these soils covered approximately 60 percent of Lots 9 and 11. Finally, Mr. Tracy observed soil saturation to the surface during his visit and tidal waters in the ditch on the site. Tr. at 30, 37, 39.

4. *Garbage Dumping and the Clearing of Lots 9 and 11*

In the 1980s (or earlier), people began to dump large appliances, furniture, building materials, and other debris into the bushes on Lot 9. Tr. at 265–67; Exs. 5A, 5B, 32, 34. Mr. Hammond spoke to his friend, Raymond L. Britton, Jr., about the problem. Mr. Britton, the president of Britton Construction Company and a resident of Chincoteague since 1960, removed the garbage on several occasions. Tr. at 268; Ex. 34. The dumping continued, and the local sanitary department ordered the Hammonds to clean off the site. Tr. at 266; Ex. 34. Mr. Britton introduced Mr. Hammond to James Ballard, who agreed to clean up the trash and remove the shrubs so that any dumping on the site would be clearly visible from South Main Street. Tr. at 268–69. In July 1988, James Ballard (who is now deceased) cleared Lots 9 and 11. He removed the garbage and bulldozed the brush and upper layer of soil in the front portions of the lots. He then scraped soil from the back (easternmost) part of the lots and deposited it in the front portions to fill in where he had pulled up scrub. Tr. at 272, 274, 305.

5. *William Hammond and Raymond Britton's Agreement to Develop the Hammond Lots*

Approximately three months after James Ballard cleared the lots, Mr. Hammond visited Chincoteague and noticed that dumping had resumed despite the fact that the site's surface was now visible from the street. Tr. at 269, 273; Ex. 34. Mr. Hammond discussed the property with Raymond Britton and, frustrated with the ongoing problem, suggested that he was going to deed the property to the county because the land did not have septic service and thus had little value. Tr. at 272–73; Ex. 34. Mr. Britton told him the site would be useful for construction. Tr. at 273, 315–16; Ex. 34. At that time (approximately October 1988), the two men entered into an oral agreement to build residential housing on the property. Tr. at 273; Ex. 34. The men agreed that Mr. Britton would construct the housing at his cost and obtain all necessary permits in exchange for one-third of any

profits. Mr. Hammond would provide the property and take two-thirds of any profits and possibly the last housing unit. Tr. at 276, 295–96; Ex. 34.

6. *Gerald Tracy's Continued Visits to the Hammond Parcel and Discovery of Illegal Fill*

On May 22, 1989, Mr. Tracy of the Corps visited the Hammond site after receiving complaints about continued garbage dumping in the area. Tr. at 39, 41–42, 47. He observed that Lots 9 and 11 had been bulldozed (albeit not recently) and both soils and vegetation disturbed. Tr. at 40. The wetter vegetation along the tidal ditch, and the tidal ditch itself, were still present, but the elevation of the property was slightly lower than it had been on his prior visit in March 1987. Portions of the site had been invaded by *Phragmites,* a hydrophytic species that does well in disturbed areas. Mr. Tracy noticed that saturated soil conditions were still present on the lots and that a thin veneer of organic matter had begun to form on the soil surface as a result of the high water table. Tr. at 47.

Mr. Tracy's next visit to the Hammond site occurred on February 6, 1990. At that time, the center portions of Lots 9 and 11 were covered with yellowish sandy material, typical of the sand fill trucked from the mainland to Chincoteague. Tr. at 50. Mr. Tracy estimated the size of the filled area to be 31,000 square feet. All vegetation had been removed from the site except the plants growing along the tidal ditch and the loblolly pines on the high ground to the east. Fresh vehicle tracks criss-crossed the fill surface. Tr. at 51; Ex. 6. Mr. Tracy took aerial photographs of the site on February 21, 1990. Tr. at 52; Ex. 6. He telephoned the Hammonds on February 28, 1990, to inform them that fill had been placed in wetlands without a permit. As noted earlier, he spoke with Mr. Hammond, who said that Raymond Britton was doing work on the site and that he would tell him to stop the work. Tr. at 53. Mr. Tracy then wrote a memorandum to the file recording his findings. The memorandum, dated February 28, 1990, and signed by Mr. Tracy's supervisor on May 5, 1990, stated in part:

> I called Raymond Britton Jr. who's [sic] trucks were reported at the site. He said the owner had hired him to remove the trash * * *. I called Mr. Hammond[, who] said Raymond Britton Jr. did the work and he will contact him to tell him not to do any more work.

Ex. 31.

7. *The Corps' Initial Enforcement Attempts*

On May 15, 1990, the Corps sent a cease-and-desist letter to the Hammonds, with a copy to EPA Region III, ordering the Hammonds to stop all unauthorized filling activities in waters of the United States on Lots 9 and 11. The letter also ordered the Hammonds to submit within 30 days any development plans for the area. Ex. 7. The Hammonds never responded in writing to the Corps' cease-and-desist letter. Instead, Mr. Hammond authorized Raymond Britton to negotiate with the Corps on the Hammonds' behalf.

A year later, on June 4, 1991, Raymond Britton met Mr. Tracy on site. Raymond Britton said he would take responsibility for mitigating the alleged wetlands violation. Tr. at 55. Mr. Tracy decided to allow partial restoration and partial creation of wetlands, as opposed to requiring full restoration of the filled area, because Raymond Britton said he and Mr. Hammond planned to build houses on Lots 9 and 11. Tr. at 56–57, 98, 105, 339.

On August 29, 1991, the Corps sent another letter to the Hammonds, with copies to Raymond Britton and Region III. Tr. at 58–59; Ex. 8. The letter referenced the Corps' May 15, 1990 cease-and-desist letter and noted that the Corps had not yet received a written response. During the June 4, 1991 on-site meeting between Mr. Tracy and Raymond Britton, Raymond Britton had offered to lower an area along South Main Street — 515 feet long by 60 feet wide (the fronts of Lots 11, 13, and 15, approximately 31,000 square feet in size)—to the adjacent vegetated wetlands elevation. This latest letter expressed the Corps' opinion that the offered restoration was "suitable." Ex. 8. The letter directed the Hammonds to submit a written development plan with the mitigation proposal within 30 days. It specified that the proposal should include certain requirements for the planting and fertilizing of *Spartina patens,* improvement of the tidal flow, and placement of deed restrictions on the mitigation area. It also specified that the elevation should be lowered "immediately." Finally, the letter noted that "[f]ailure to comply with our directive will result in referral of this matter to our Office of Counsel and the Department of Justice for the appropriate legal action." *Id.*

8. *Respondents' Efforts to Fulfill the Corps' Mitigation Requirements*

BIC Investments, Inc., Raymond Britton's son David's construction company, began building three townhouses on Lot 9 in late October 1991 and completed them in 1992. Tr. at 339. Raymond Britton, who not only

ran Britton Construction but also was in charge of obtaining permits for his son's company, was initially reluctant to construct the planned mitigation site near the townhouses because he thought wetlands in that area would be unsightly and attract mosquitos. Tr. at 345, 411. Nonetheless, he began excavating the site to wetlands elevations. Mr. Tracy met frequently with Raymond Britton on site and gradually became frustrated at the slow pace of the mitigation effort. In his judgment, the mitigation site had to be lowered six inches. Raymond Britton would only lower it one inch and then go back and lower it another inch. Mr. Tracy characterized the mitigation pace as "like pulling teeth." Tr. at 61.

By May 4, 1993, nearly two years after the Corps had ordered "immediate" lowering of the site's elevation, Mr. Tracy determined that the proper elevation had been reached and that the site was becoming naturally revegetated with hydrophytic plants. Tr. at 114; Ex. 13. Pursuant to Raymond Britton's request, Mr. Tracy agreed to allow natural revegetation in lieu of the agreed marsh planting. Tr. at 59–60, 114–15. However, Mr. Tracy specified that the site would have to be monitored until Spring 1994. If at that time the site were less than 80 percent revegetated, the Corps would require Raymond Britton to plant hydrophytic vegetation. On May 13, 1993, the Corps sent Mr. Hammond and Raymond Britton a letter memorializing these requirements and confirming that the proper elevation had been reached. Tr. at 116; Ex. 13. The letter concluded that "[d]ue to your *completed restoration and mitigation actions* we are reactivating" certain unrelated permit applications that had been placed on hold due to this and other wetlands violations. Ex. 13 (emphasis added). A sketch of the mitigation area drawn by Mr. Tracy was attached to the letter. Tr. at 117; Ex. 13.

9. *EPA's Inspection and Subsequent Assumption of Lead Enforcement Status*

On February 8, 1994, Mr. Tracy and William Hoffman, Region III's environmental protection specialist, inspected the mitigation site. They observed that a roughly 3,000-square-foot area in the northern part of the site had been filled with sand. Mr. Britton had traded a tire to a friend for a load of road fill. The fill had been dumped on the road next to the mitigation site, and rainfall had carried some of the fill into the wetland. Tr. at 60, 110–12, 362–63. One day after the two men's visit, on February 9, 1994, Region III sent a letter to the Corps requesting lead status under the Enforcement MOA for seven cases on Chincoteague, including the case involving the Hammonds' Lots 9 and 11. Ex. 30. The Region took this step partly because it believed the large number of CWA violations on the Island, combined with several of the alleged violators' knowledge of

section 404, indicated a disregard for the permit process that warranted EPA enforcement. *Id.*

Region III subsequently sent letters to each of the Respondents on March 17, 1994, notifying them that it had assumed enforcement authority over the case. These letters stated that the mitigation plan had not been successful and asked Respondents to implement an amended mitigation plan. The Region also requested that Respondents inform EPA within fourteen days of their intentions. Exs. 21–A, 21–B, 21–C. Two months later, on May 19, 1994, the Region sent Respondents an administrative compliance order. This document ordered them to cease all filling activity and submit a written mitigation plan to EPA, for EPA's approval, within thirty days. Ex. 22.

10. *Respondents' Attempts to Fulfill EPA's Mitigation Requirements*

On May 27, 1994, Raymond Britton responded to the compliance order on behalf of himself, Mr. Hammond, and his son David Britton. Raymond Britton explained his efforts to mitigate the filled area and his ongoing, years-long contacts with Gerald Tracy of the Corps. Ex. 23. Region III responded by letter dated June 16, 1994, acknowledging Raymond Britton's efforts but expressing concern over his attempt to remedy the violation without a written mitigation plan approved by EPA. Ex. 24. Meanwhile, Mr. Tracy decided the natural revegetation of the mitigation site was only partially successful and needed supplemental plantings of hydrophytic vegetation. Raymond Britton planted *Spartina patens* and other grasses and shrubs, removed the 3,000 square feet of fill that had washed into the mitigation area, placed straw bales around the area, and jacked open a crushed culvert to ensure tidal inundation. Tr. at 360–61. Raymond Britton sent Mr. Hoffman of Region III another letter on July 13, 1994, explaining these mitigation efforts and attaching a hand-drawn sketch of the mitigation site. Exs. 25, 29.

11. *Administrative Complaint and Subsequent Developments*

Region III filed the administrative complaint in this matter on November 28, 1994, seeking $125,000 in civil penalties for the two alleged illegal fills (i.e., 31,000 square feet in 1990 and 3,000 square feet in 1994). Nearly a year later, Mr. Tracy wrote a memorandum to counsel for EPA stating that, based on his inspection of the mitigation site on September 7, 1995, the site finally satisfied the Corps' requirements of 85 percent revegetation, wetlands grade, and tidal inundation. Ex. 10. The

Presiding Officer subsequently issued his Initial Decision, in which he found Respondents jointly and severally liable for violating CWA section 301(a) and assessed a $2,000 penalty.

II. *DISCUSSION*

The Board reviews the Presiding Officer's factual and legal conclusions on a *de novo* basis. 40 C.F.R. § 22.31(a) (Board empowered to "adopt, modify, or set aside" the presiding officer's findings and conclusions). Matters in controversy must be established by a preponderance of the evidence. 40 C.F.R. § 22.24; *see In re B.J. Carney Indus., Inc.,* 7 E.A.D. 171, 217 (EAB 1997). In the pages below, we begin by evaluating the Respondents' statute of limitations and due process arguments. After briefly reviewing the Presiding Officer's penalty assessment, we next address the Region's arguments regarding that assessment. We conclude by examining Respondents' argument that they are unable to pay any penalty.

A. *Respondents' Statute of Limitations and Due Process Arguments*

As mentioned above, Respondents contend on appeal that the Presiding Officer erred in his analysis of the statute of limitations. Respondents also argue that their due process rights were violated when EPA failed to provide them with fair notice of regulatory requirements, and that the Presiding Officer erred by finding otherwise. Finally, Respondents argue that the Presiding Officer erroneously found no due process violation in this case, despite EPA's allegedly arbitrary and abusive attempt to assess the maximum penalty allowed under the CWA. Each of these arguments is analyzed, and ultimately rejected, below.

1. *Statute of Limitations*

The five-year general federal statute of limitations at 28 U.S.C. § 2462 is applicable to administrative actions for civil penalties under the CWA.[3] *United States v. Reaves,* 923 F. Supp. 1530, 1533–34 (M.D. Fla. 1996); *see*

[3] The statute of limitations provides, in relevant part:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued.

28 U.S.C. § 2462.

3M Co. v. Browner, 17 F.3d 1453, 1455–59 (D.C. Cir. 1994). Respondents raised this defense below, arguing that no regulated fill activities occurred on the site after November 28, 1989, five years prior to the date Region III filed the complaint (November 28, 1994). In light of the fact that the statute of limitations is an affirmative defense, *B.J. Carney,* 7 E.A.D. at 223 n.69, Respondents must prove, by a preponderance of the evidence, that filling did not occur after November 28, 1989. *See* 40 C.F.R. § 22.24.

In the proceedings below, the Presiding Officer held that the statute of limitations did not bar the government's claims. Initial Decision ("Init. Dec.") at 9–10. The Presiding Officer based his holding on three grounds. First, he found that in February 1994, less than one year prior to the filing of the complaint, road fill had washed into the mitigation site from a pile dumped nearby, in violation of the CWA. Second, he concluded on the basis of the evidence that fill had been placed on Lots 9 and 11 shortly before February 6, 1990, within the five-year statutory period. Third, irrespective of the other two findings, the Presiding Officer found that "prevailing authority" holds wetlands violations to be continuing, so that the statute of limitations is tolled as long as the fill remains in place. He concluded that in this case, the violation had continued at least until excavation of the mitigation site began in 1991 and thus fell within the statutory period. Init. Dec. at 9–10.

On appeal, Respondents contend that the Presiding Officer erred on all three grounds. In our view, Respondents failed to meet their burden of proving that their fill activities occurred before November 28, 1989; indeed, the evidence leads to the contrary conclusion that Respondents placed fill material into wetlands on Lots 9 and 11 just shortly before February 6, 1990. Consequently, we do not reach the questions whether Respondents' activities constituted a continuing CWA violation for statute of limitations purposes, or whether the 1994 fill episode was a "discharge" from a "point source" and thus qualified as a CWA violation (which Respondents deny, *see* Respondents' Appeal Brief at 11–13).[4]

As for the Presiding Officer's finding that fill had been placed on Lots 9 and 11 shortly before February 6, 1990, Respondents take the position that the violation discovered on that date actually stemmed from James Ballard's July 1988 activities on Lots 9 and 11, well outside the five-year limitations period, and that, apparently, no other activity had occurred there until Raymond Britton removed garbage from the site on Memorial Day weekend in 1990. *See,* e.g., Respondents' Appeal Brief at 9–13; Tr. at

[4] The two alleged violations were not set forth as separate counts in the Complaint. *See infra* n.22.

334–35, 426. This timeline is untenable. As explained in Part I.C.6 above, Mr. Tracy observed saturated soil conditions, hydrophytic vegetation, and a thin layer of organic matter forming on the surface of the site on May 22, 1989, nearly one year after James Ballard had cleared it. Tr. at 47. Common sense would indicate that organic matter would continue to form, and vegetation to grow, in the absence of further disturbance of the site. When Mr. Tracy observed the site in February 1990, however, it was completely denuded of vegetation, and the layer of organic matter on the soil surface was covered with fresh sand fill. Tr. at 50–53; Ex. 6. Mr. Tracy testified that the filled area bore fresh, uneroded vehicle tracks, indicating that the fill had been placed shortly before his visit. Tr. at 50–52.

We give substantial weight to Mr. Tracy's judgment that fill is "fresh" and vehicle tracks are "fresh" in light of his years of experience with Chincoteague wetlands. In addition, an aerial photograph taken by Mr. Tracy on February 21, 1990, shows the filled area in vivid color, including the fill and tracks, and corroborates his findings. *See* Ex. 31. We conclude, on the basis of this evidence, that fill was discharged into Lots 9 and 11 shortly before February 6, 1990, i.e., some time after November 28, 1989. The fact that the fill was spread over a 31,000-square-foot area, nearly three-quarters of an acre, effectively rules out vandalism and littering: the fill was obviously placed there to improve the property, most likely by someone with a proprietary or other economic interest in the lots.

The preponderance of the evidence further indicates that it was Raymond Britton, or someone working under the direction of Raymond Britton, who discharged the fill. As noted earlier, Mr. Tracy wrote a memorandum to the file on February 28, 1990, the day he called Mr. Hammond to report the violation. Ex. 31. He wrote, just after he had spoken with Mr. Hammond, that Mr. Hammond had told him Raymond Britton was doing work on the site and he would tell him to stop. *Id.* Mr. Tracy also noted in the memo that Raymond Britton's trucks had been reported on the site and that he had called Mr. Britton, who told him Mr. Hammond had hired him to remove garbage from the property. The memo does not make clear when Mr. Britton's trucks were seen or when Mr. Tracy telephoned Mr. Britton, but the narrative implies that these events occurred before February 6, 1990. *See id.* Mr. Tracy testified at the hearing that based on his conversation with Mr. Hammond on February 28, 1990, he believed Raymond Britton was responsible for the fill as either the party who had performed the work or as one who had overseen a subcontractor who performed the work. Tr. at 53. In the face of this evidence, Respondents nevertheless assert that Raymond Britton did not do any work on the site until May 1990. Tr. at 334. Mr. Britton also testified that he never "owned" any dump trucks. Tr. at 337.

Mr. Tracy's contemporaneous memo, signed by his supervisor in 1990 (well before the initiation of this proceeding), is very persuasive evidence that Raymond Britton was working on the site in the relevant time frame. The fact that work would be proceeding is also consistent with the agreement Mr. Hammond and Raymond Britton had made in Fall 1988 regarding the development of the property. *See supra* Part I.C.5. Arrayed against these points is Respondents' assertion that Raymond Britton did no work on the site before May 1990. *See* Tr. at 426. That assertion is not credible. It is contradicted by Mr. Hammond's own statements that in the 1980s, Raymond Britton removed, or arranged for the removal of, garbage from the property. *See* Tr. at 268; Ex. 34. It is also contradicted by the statement Raymond Britton made prior to February 1990 (as recounted in Mr. Tracy's memo) that Mr. Hammond had hired him to remove the trash. Finally, it is contradicted by Mr. Hammond's statement that Raymond Britton was working on the site in early 1990. *See* Ex. 31. We conclude that the fill placed in Lots 9 and 11 prior to February 6, 1990, was of recent origin and was discharged by Raymond Britton, or by a contractor working for Raymond Britton, in furtherance of Raymond Britton and Mr. Hammond's agreement to construct residential housing on the lots.

As stated above, the statute of limitations is an affirmative defense. *B.J. Carney,* 7 E.A.D. at 223 n.69. The record contains substantial credible evidence that a discharge of fill material took place shortly before February 6, 1990. Therefore, in light of this evidence, Respondents must carry the burden of proving, by a preponderance of the evidence, that filling did *not* occur after November 28, 1989, i.e., five years prior to the filing of the Complaint. They did not do so here. As a result, their defense fails.

2. *Fair Notice of Regulatory Requirements*

Respondents also argue that EPA did not give them "fair notice" of the regulatory requirements the Region seeks to enforce against them. Respondents' Appeal Brief at 4–5. In their view, the Corps and EPA have "conflicting standards for remediating or curing" wetlands violations. They believe the Presiding Officer erred by failing to hold that EPA acted arbitrarily and capriciously when it applied its purportedly different standards to a case already subject to the Corps' standards. *See id.*

Respondents did not raise this "fair notice" argument below. *See* Respondents' Post-Hearing Brief; Respondents' Reply to Complainant's Proposed Findings of Fact and Conclusions of Law and Supporting Memorandum. Under the Consolidated Rules of Practice, 40 C.F.R.

§ 22.30(a), parties may only appeal adverse rulings or orders; they may not appeal issues that were not raised before the presiding officer. *See,* e.g., *In re Lin,* 5 E.A.D. 595, 598 (EAB 1994); *In re Genicom Corp.,* 4 E.A.D. 426, 439–40 (EAB 1992). As a result, arguments raised for the first time on appeal—such as this one—are deemed waived.[5] *See In re Woodcrest Mfg, Inc.,* 7 E.A.D. 757, 764 (EAB 1998).

3. *Maximum Penalty as a Violation of Due Process*

Respondents attack the size of the proposed penalty, arguing that EPA's decision to seek the maximum administrative sanction of $125,000 provided by the CWA is arbitrary, abusive, and violates Respondents' due process rights. They urge the Board to overturn the Presiding Officer's findings on this ground. *See* Respondents' Appeal Brief at 7–9. In their words, "the [Presiding Officer] erred in not holding that [Respondents'] right to due process have [*sic*] been infringed and precludes the assessment of any penalty in this case." *Id.* at 9.

There is no error on the Presiding Officer's part here. The CWA authorizes EPA to assess administrative penalties up to a certain maximum dollar amount. *See* CWA § 309(g)(2), 33 U.S.C. § 1319(g)(2). The statute requires EPA to take into account a number of factors in assessing penalties, such as the extent of the violation and the violator's culpability, CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3), but it prescribes no precise formula by which these factors must be computed. *See Tull v. United States,* 481 U.S. 412, 426–27 (1987) ("highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the [CWA]"). By evaluating each of the factors specified in section

[5] Even if Respondents had not waived the fair notice argument, they failed explicitly to identify the "standards" they believe are "conflicting" or how they were prejudiced thereby. Their argument, on balance, appears to be a variation on their theme that the agencies' treatment of Respondents was not fair and did not comport with due process. In response to that argument, the Presiding Officer found that the CWA specifically provides for dual enforcement by the Corps and EPA, and that EPA's late entrance into the enforcement action begun by the Corps did not deprive Respondents of due process. Init. Dec. at 14–15. To the extent that Respondents' fair notice argument raises fairness/due process issues addressed by the Presiding Officer, we affirm his holding for the reasons expressed in the Initial Decision. Moreover, we note that the Enforcement MOA neither creates rights in third parties nor, should the agencies deviate in any instance from the MOA's terms, gives rise to defenses for violators. *See supra* note 2; *Enforcement MOA* at 5.

309(g)(3), *see* Tr. at 196–206, Region III acted within its statutory discretion in computing the proposed maximum penalty in this case.[6]

Moreover, Respondents participated in an administrative hearing, provided for by the CWA specifically to comport with principles of due process, at which evidence and arguments regarding the penalty were advanced by both sides. *See* CWA § 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B) (class II administrative penalty may be assessed and collected after EPA provides to Respondents notice and opportunity for a hearing on the record in accordance with the Administrative Procedure Act). After the hearing, and in accordance with the evidence and arguments presented therein (as well as subsequently, in the case of the tax returns), the Presiding Officer reduced the penalty from $125,000 to $2,000. Respondents plainly received all the process due them under the statute. The Presiding Officer did not err by holding that Respondents were not deprived of due process in this case.

B. *Administrative Penalties*

1. *Overview*

Section 309(g)(2)(B) of the CWA authorizes EPA to assess an administrative penalty of no more than $10,000 for each day of each violation of the CWA or regulations, up to a maximum of $125,000.[7] In determining an appropriate penalty, a presiding officer must examine nine statutory factors: four relating to the violation and five to the violator. In particular, a presiding officer must:

> take into account the nature, circumstances, extent and gravity of the violation, or violations, and with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

[6] To the extent that Respondents' argument could be construed as a challenge to the constitutionality of the CWA, we have no jurisdiction to review it. *See,* e.g., *Johnson v. Robison,* 415 U.S. 361, 368 (1974) ("It is generally considered that the constitutionality of congressional enactments is beyond the jurisdiction of administrative agencies.").

[7] As noted above, *see supra* note 1, Congress has directed that the statutory penalty figures be increased to account for inflation. The figures cited in the text here were in effect at the time the violations in this case occurred and at the time Region III filed the complaint.

CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3). The presiding officer must also "consider any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.27(b). EPA has not issued penalty guidelines tailored specifically for use in section 404 litigation; the only existing 404 guidelines are settlement guidelines. *See U.S. EPA, Final Clean Water Act Section 404 Civil Administrative Penalty Settlement Guidance and Appendices* (Dec. 14, 1990) ("*404 Settlement Policy*").

2. *Presiding Officer's Penalty Calculation*

In the decision below, the Presiding Officer used evidence in the record to analyze the nine factors of section 309(g)(3) and concluded that a nominal penalty of $2,000 was appropriate. He began with the "circumstances" of the violation and found that Respondents' successful completion of the mitigation plan, as agreed upon with the Corps, warranted a "great[] reduc[tion]" in the penalty. Init. Dec. at 16–17. The "dilatory" or "late" intervention of EPA into a Corps enforcement matter that was well in hand — as he characterized it — also played a role in the Presiding Officer's assessment of circumstances. *See,* e.g.*, id.* at 16–17, 20. As to the violation's "nature" and "extent," the Presiding Officer found that the filled area was a relatively small, low-value wetland. *Id.* at 17–18. Given that "virtually all" lost wetlands functions and values had been successfully mitigated, the Presiding Officer determined that the "gravity of the violation" was "relatively low." *Id.* at 18.

As to the violators, the Presiding Officer found that Raymond Britton, a long-time resident of Chincoteague engaged in the construction business, "should have known that the Hammond site contained regulated wetlands." *Id.* at 18. He also found, however, that a "sufficient basis" did not exist "to impute different levels of culpability to the three Respondents, who were essentially jointly responsible for the violations." Nonetheless, the Presiding Officer held that Respondents' culpability was ameliorated by their cooperation in implementing the mitigation plan. *Id.* On the issue of ability to pay, the Presiding Officer noted that the record lacked substantial evidence to contradict Respondents' position that they were unable to pay the proposed penalty. *Id.* at 19. Accordingly, this factor "buttress[ed]" his determination that a relatively small penalty should be assessed. As to compliance history, the Presiding Officer noted that only Britton Construction had a record of possible past violations, but because Region III had not used this factor in calculating the proposed penalty, the Presiding Officer did not consider it in his analysis. *Id.* at 19–20. Finally, as to the "economic benefit" allegedly derived by the Respondents from their noncompliance with the permitting requirements of the CWA, the Presiding Officer followed established Agency policy in

seeking to determine whether there was any such economic benefit derived from the violation. Agency policy requires recoupment of any economic benefit even if the nature and gravity of the offense do not otherwise warrant a substantial penalty.[8] *See* EPA General Enforcement Policy #GM–21, *Policy on Civil Penalties* 3–4 (Feb. 16, 1984). In the present case, the Presiding Officer ultimately was unable to find a sufficient basis in the record for recouping any economic benefit. *See,* e.g., Init. Dec. at 20 ("[t]he parties were not shown to have benefitted economically from the violation").

In light of his consideration of the nine statutory factors, the Presiding Officer concluded that a "small penalty, [$2,000,] combined with mitigation, would sufficiently serve the purpose of deterring similar violations in Chincoteague." *Id.* at 20.

3. *Complainant's Arguments Regarding the Presiding Officer's Penalty Calculation*

Region III argues on appeal that the Presiding Officer abused his discretion and committed reversible error in his determination of the appropriate penalty under section 309(g)(3). The Region raises five separate points related to the Presiding Officer's penalty analysis and asks us to impose the $125,000 penalty requested in the complaint.

a. *Failure to Articulate Nature and Extent of Specific Penalty Reductions*

The Region contends that the Presiding Officer abused his discretion by failing to enunciate specific penalty reductions for successful mitigation, "dilatory" enforcement, lack of economic benefit, inability to pay, and the other factors affecting his analysis. Brief of Complainant-Appellant in Support of Notice of Appeal at 12–16 ("Complainant's Appeal Brief"). The rules governing these proceedings provide that "[i]f the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the *specific reasons* for the increase or decrease." 40 C.F.R. § 22.27(b) (emphasis added). The Region concedes that, on some level, the Presiding Officer provided "specific reasons" for reducing the penalty, but it nonetheless claims that his failure to assign dollar figures to each penalty factor led to inconsistencies

[8] In this way, any incentive to violate the law now and, if caught, pay a penalty later, is reduced. The policy also levels the playing field for law-abiding competitors who comply with the law from the outset.

in the decision, possible improper double consideration of certain penalty factors, and an erroneous result. Complainant's Appeal Brief at 14–15. The Region also asserts, without citation, that in cases "where, as here, there exist no statute-specific penalty guidelines, the presiding officer must more fully articulate on the record the rationale of the penalty 'calculation.'" *Id.* at 15.

EPA's Consolidated Rules of Practice mandate that presiding officers give specific reasons for altering proposed penalties in order to "help[] ensure that the [presiding officer's] reasons for the penalty assessment can be properly reviewed on appeal." *In re Millipore Corp.,* 2 E.A.D. 472, 473 (CJO 1987) (citing 40 C.F.R. § 22.27(b)). The Rules do not dictate the ways in which sufficient specificity is to be achieved. One way is, of course, to apply a statute-specific penalty policy, if one is available.[9] Here, none was available. However, the Presiding Officer dutifully analyzed each of the statutory factors set forth in section 309(g)(3) and explained why he thought the penalty should be reduced on the basis of each factor. He did not quantify his specific reductions by assigning, for example, dollar figures to each penalty factor,[10] but instead simply chose a nominal figure for the overall penalty.

We do not hold that the Presiding Officer's approach, on the facts of this case, *per se* lacks the requisite specificity for assessment of a penalty in an initial decision. Consistent with the CWA, the Presiding Officer made a good faith effort to evaluate all the statutory factors. *See Atlantic States Legal Found. v. Tyson Foods, Inc.,* 897 F.2d 1128, 1142 (11th Cir. 1990) (statutory penalty language should be court's primary focus, though penalty policies may be helpful). While he did not assign specific reduction figures to any of the nine statutory penalty factors, the Presiding Officer made clear that the circumstances of the violation—which included EPA's purportedly "dilatory" enforcement and Respondents' ultimately successful mitigation—were the major factors in his decision to reduce the penalty. *See* Init. Dec. at 16–17, 20. In the Presiding Officer's words, "the chief circumstance in this case that drives consideration of all penalty factors is that Respondents did, in fact, successfully complete the mitigation

[9] It is well established that in assessing penalties, presiding officers must consider penalty policies issued under the relevant statute, 40 C.F.R. § 22.27(b), but need not rigidly follow—or even apply—the policies in any particular case. *See,* e.g., *In re DIC Americas, Inc.,* 6 E.A.D. 184, 189–91 (EAB 1995); *In re Pacific Ref. Co.,* 5 E.A.D. 607, 613 (EAB 1994); *In re Ray Birnbaum Scrap Yard,* 5 E.A.D. 120, 124 (EAB 1994).

[10] In light of the evidence in the record, this is not entirely surprising. The record indicates that the Region itself quantified only the proposed economic benefit factor ($51,000) and no others. *See* Tr. at 196–206, 246–49.

plan in accord with the original agreement reached with the [Corps]." *Id.* at 16. Moreover, "none of the Respondents have the ability to pay a large civil penalty." *Id.* These statements and the related discussions give the reader a sufficient sense of the Presiding Officer's reasons for reducing the penalty and thereby comport with 40 C.F.R. § 22.27(b). Thus, the Region's appeal on grounds of lack of specificity in enunciating factor-by-factor numeric reductions fails. Region III did not cite, nor have we found, anything in the statute, regulations, case law, or guidance documents making mandatory the degree of specificity the Region advocates.

b. *Improper Consideration of Timing and Circumstances of EPA's Enforcement and Respondents' Mitigation*

Region III argues that the Presiding Officer abused his discretion by considering the timing and circumstances of EPA's enforcement effort, and the status of Respondents' mitigation, in reducing the penalty. Complainant's Appeal Brief at 16–22. We do not agree that it is inappropriate to factor these elements into the penalty calculus. As the Board has stated, "nothing in the Part 22 regulations expressly limits or restricts what the Presiding Officer may consider" in determining whether to adopt or modify a penalty proposal. *In re Employers Ins. of Wausau,* 6 E.A.D. 735, 758 (EAB 1997). In fact, the Board and many courts have specifically found that in assessing penalties, consideration of governmental action is entirely appropriate.[11] The same can be said of a respondent's mitigation efforts. As EPA's general penalty assessment framework notes, "the earlier the violator instituted corrective action after discovery of the violation and the more complete the corrective action instituted, the larger the penalty reduction EPA will consider." EPA General Enforcement Policy #GM–22, *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties* 20 (Feb. 16, 1984) ("*Penalty Framework*"). Indeed, the Region's own witness, William

[11] *See,* e.g., *United States v. Marine Shale Processors,* 81 F.3d 1329, 1349 n.11 (5th Cir. 1996) (in its penalty calculation, district court properly considered erroneous state agency representation that a facility was an interim status storage facility); *Buxton v. EPA,* 961 F. Supp. 6, 10 (D.D.C. 1997) (in assessing penalty, Regional Administrator properly considered conflicting government orders regarding wetland restoration and four-year delay in achieving restoration), *aff'd,* 132 F.3d 1480 (D.C. Cir. 1998); *In re B.J. Carney Indus., Inc.,* 7 E.A.D. at 171, 196–204. (EPA failure to initiate enforcement action until five years after learning of pretreatment violations may be considered as factor in assessing penalty, as can conflicting signals sent to violator from EPA and city sewage treatment works that regulated violator's discharges); *In re Millipore Corp.,* 2 E.A.D. 472, 477 (CJO 1987) (reducing penalty by 40% due to state agency's failure to review respondent's closure plan within 90 days as required by regulation); *see also In re Carsten,* 211 Bankr. 719, 725–29 (D. Mont. 1997) (criticizing EPA and Corps for giving landowner conflicting instructions in wake of wetlands violation).

Hoffman, conceded at the hearing that successful completion of mitigation could reduce the gravity component of the penalty. Tr. at 247–48. Thus, consideration of a respondent's mitigation efforts is appropriate as well. *Cf.,* e.g., *In re Sandoz, Inc.,* 2 E.A.D. 324, 335–36 (CJO 1987) (upholding presiding officer's consideration of respondent's good faith attempts to comply with regulations after violation was identified). Region III's appeal on this ground therefore fails.

c. *Erroneous Admission of Tax Returns After Hearing*

As its third argument on appeal, Region III contends that the Presiding Officer committed reversible error by admitting new evidence after the hearing and by reducing the penalty based on that evidence. Complainant's Appeal Brief at 23–32. In an attempt to bolster their ability-to-pay argument, Respondents moved after the hearing to submit into evidence the 1993–1995 tax returns of the Hammonds, Raymond Britton, and BIC Investments, Inc., as well as the 1987–1990 returns of Britton Construction Company. Region III opposed the motion, moved to strike the evidence, and suggested that reopening the hearing would resolve the matter. The Presiding Officer accepted the tax returns for purposes of post-hearing briefs and later admitted them into evidence as part of his Initial Decision. In addition, he relied on the returns in his analysis of Respondents' ability to pay the penalty, explaining that the Region had not cited "any specific prejudice due to receipt of the tax returns, or raise[d] any proposed avenues of cross-examination." Init. Dec. at 2; *see id.* at 7–8, 19.

> Under the Consolidated Rules of Practice:
>
> > Documents that have not been exchanged and witnesses whose names have not been exchanged shall not be introduced into evidence or allowed to testify without permission of the Presiding Officer. The Presiding Officer shall allow the parties *reasonable opportunity to review new evidence.*

40 C.F.R. § 22.19(b) (emphasis added). Region III argues that the Presiding Officer's decision to admit and rely on the tax returns denied it the requisite "reasonable opportunity" to review new evidence.

We agree with the Region in principle that, because the information contained in the tax returns was at all times within the control of Respondents and could not be obtained by other means by the Region,

the tax returns were properly excludable from the record.[12] The Presiding Officer had specifically directed Respondents to submit "financial statements or tax returns" prior to the hearing if they intended to raise the ability to pay issue. *See* Prehearing Scheduling Order at 1 (ALJ, Jan. 23, 1996). Moreover, during settlement negotiations, Region III repeatedly requested Respondents' tax returns or other specific financial data substantiating their claimed inability to pay. *See* Complainant's Motion to Strike and Opposition to Respondents' Motion to Hold Record Open for Submission of Tax Returns Showing Respondents' Inability to Pay at 2. Despite these requests, Respondents simply submitted uncorroborated affidavits.[13] The Region argues that it should have been given an opportunity to hire experts to scrutinize Respondents' tax returns or to take other reasonable steps to find the truth regarding Respondents' ability to pay. *See,* e.g., Complainant's Appeal Brief at 24–25.

Despite our agreement in principle with the Region's position, we do not think that denying the Region an opportunity to hire experts, for example, amounted to reversible error warranting a remand on this issue. Instead, we uphold the Presiding Officer's decision for two reasons. First, we do not believe the tax returns' admission was material to the Presiding Officer's assessment of a $2,000 penalty. Indeed, the penalty assessment appears to have been driven not so much by ability-to-pay concerns as by the Presiding Officer's conclusion that "the Respondents here filled a small area of wetland, and, when notified of the violation, reasonably promptly completed a successful mitigation plan on the site and adjacent

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[12] As the Board has stated:

> [I]n any case where ability to pay is put in issue, the Region must be given access to 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.

In re New Waterbury, Ltd., 5 E.A.D. 529, 542 (EAB 1994) (emphasis added) (citing 40 C.F.R. § 22.19(b)).

[13] Respondents admitted that they "resisted supplying the personal detailed financial data contained in tax returns throughout the course of settlement discussions with Complainant, since the information necessary to allow Complainant to evaluate Respondents' financial situations and inability to pay was provided by the affidavits." Respondents' Motion to Hold Record Open for Submission of Tax Returns Showing Respondents' Inability to Pay at 2. At least one affidavit, however, did *not* provide such information. In that affidavit, David Britton, president of BIC Investments, Inc., asserted that his company had never made a profit or had taxable income but had only served to provide him and his employees with salaries. Ex. 43. This unsupported, uncorroborated document cannot stand as probative evidence of inability to pay when tax returns, balance sheets, statements of operations, salary and benefit statements, loan applications, and other information of this kind are readily available for submission by Respondents.

lots." Init. Dec. at 18. The Presiding Officer treated ability to pay as *reinforcing* his judgment that a relatively small penalty should be assessed. *See id.* at 19 ("while the major factors in reducing the penalty are the nature and circumstances [of the violation], the Respondents' limited ability to pay a penalty is a *buttressing* additional consideration that militates toward assessment of a relatively small penalty") (emphasis added). Viewed in this light, the Presiding Officer's admission of the tax returns was harmless error.

Second, assuming *arguendo* that the penalty assessment was influenced by ability-to-pay concerns, practical considerations support upholding the Presiding Officer's decision. We examined the tax returns for the limited purpose of comparing them with the affidavits in order to ascertain any significant inconsistencies between the two.[14] Based on that comparison, we found the documents to be generally consistent with each other in terms of the bottom line. The affidavits and tax returns both make clear that the Hammonds have limited income (in addition to their nonliquid real estate assets). *See* Exs. 35–36, 48. The tax returns, and the affidavits to a very limited extent, also show that the construction companies are modest in size and experience substantial fluctuations in income generated from year to year, as is typical of small construction companies. *See* Exs. 43, 48; Respondents' Supplemental Prehearing Exchange, Ex. A, Affidavit of Raymond L. Britton, Jr.

Based on our review of these documents, we do not believe the record would be markedly enhanced by subjecting Respondents' finances to the level of scrutiny the Region seeks. This is not to say that Respondents have shown an inability to pay a penalty of $2,000 or more. However, the magnitude of the corporate Respondents' income and salaries paid out do not suggest that further examination of the returns by experts would be especially illuminating in terms of our assessment of Respondents' ability to pay. No material prejudice and, hence, no reversible error resulted from denying the Region an opportunity to have

[14] In the federal courts, a "practice of admitting evidence for a limited purpose" exists. Fed. R. Evid. 105 advisory committee's note. The Board, of course, is not bound by the Federal Rules of Evidence but rather has greater flexibility in how and for what purpose evidence is employed. *See,* e.g.*, In re Green Thumb Nursery, Inc.,* 6 E.A.D. 782, 795 n.26 (EAB 1997) ("Federal Rules of Evidence are more restrictive than our administrative rules"); 40 C.F.R. § 22.22(a) ("Presiding Officer shall admit all evidence [that] is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value"). However, those rules and related practice can nonetheless be used to inform our analysis of relevant issues.

experts analyze these particular tax returns. *See Yaffe Iron & Metal Co. v. EPA,* 774 F.2d 1008, 1016 (10th Cir. 1985) (some discretion exists in deciding whether to admit expert evidence). Thus, while we agree in many respects with the Region and find much to criticize in the Presiding Officer's handling of this issue, we will not disturb the ultimate holding—assessment of a $2,000 penalty—on this ground.

d. *Failure to Consider Increased Property Value as Economic Benefit*

The Region argues that the Presiding Officer abused his discretion by failing to consider "increased property value" as a measure of economic benefit. Complainant's Appeal Brief at 33–38. Economic benefit, of course, is typically calculated in terms of (1) "delayed costs," such as the savings from failing to timely obtain necessary permits or install pollution control equipment; (2) "avoided costs," such as the savings from not having to operate or maintain treatment systems; and (3) benefit from competitive advantage gained through noncompliance.[15] In the context of section 404 violations, where property use rather than pollution control equipment is the central focus, EPA has stated that the economic benefit calculation may include "[t]he increased property value directly resulting from an unlawful discharge of dredged or fill material."[16] *404 Settlement Policy* at 4. According to the Region, the Presiding Officer should have calculated the increased property value of the Hammond lots by subtracting the amount the Hammonds paid for the lots in 1965 from a realtor's estimate of the lots' value in 1996. Complainant's Appeal Brief at 34–36.

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[15] *See In re B.J. Carney Indus., Inc.,* 7 E.A.D. at 208–211 (EAB, June 9, 1997); *Penalty Framework* at 6–11.

In this case, there is no evidence in the record as to what it might have cost Respondents to apply for a section 404 permit or whether such a permit likely would have been issued or denied. (Of course, Gerald Tracy testified that the Hammonds' neighbors to the north were denied a section 404 permit to install a septic system in wetlands on their property. *See* Tr. at 29, 87–88, 140–41. This testimony does not provide dispositive evidence as to whether or not Respondents would have been issued a permit to fill Lots 9 and 11, and the Region did not present it as such.) Thus, we are unable to estimate, in any traditional sense, Respondents' delayed costs, avoided costs, or competitive advantage.

[16] Although settlement policies as a general rule should not be used outside the settlement context, *cf.* U.S. EPA, *Interim Clean Water Act Settlement Penalty Policy* 22 (Mar. 1, 1995) (in administrative hearing or at trial, EPA should seek higher penalty than that for which Agency would settle case), there is nothing to prevent our looking to relevant portions thereof when logic and common sense so indicate. For example, the Board has authorized use of settlement materials as an aid in understanding economic benefit if not as a formula for an exact computation. *See,* e.g., *B.J. Carney,* 7 E.A.D. at 209 and n.46.

This argument will not be considered by the Board because the Region did not adequately raise it before the Presiding Officer, thereby preserving it for appeal. As noted earlier, arguments raised for the first time on appeal are generally deemed waived. *See In re Woodcrest Mfg, Inc.,* 8 E.A.D. 757, 764 (EAB 1998). The Region claims that it did raise the issue, asserting that "*[a]s argued below,* Respondents' own testimony and evidence reveals [sic] that a substantial increase in property value was achieved by virtue of the illegal fill, rendering the water-view property capable of septic and thus developable." Complainant's Appeal Brief at 35 (emphasis added). Our review of the record, however, brought to light only one very short and passing reference to this issue. In its post-hearing brief before the Presiding Officer, the Region noted that "[e]ven using current comparable real estate values, the property's value is increased." Complainant's Memorandum of Law in Support of Proposed Findings of Fact and Conclusions of Law at 17. The Region did not provide any specific numbers or analysis to support this bald statement, and Respondents, not surprisingly, did not address it in their reply brief. Moreover, the Presiding Officer did not address the issue in his Initial Decision. The Region now argues that the Presiding Officer abused his discretion by not evaluating the evidence regarding increased property value. Complainant's Appeal Brief at 33–38. The Presiding Officer, however, cannot be faulted for failing to decide an issue that neither side had briefed.

e. *Miscalculation of Wrongful Profits*

In the proceedings below, the Region initially advanced a "wrongful profits"-centered approach to measuring the economic benefit that Respondents allegedly derived from their wrongdoing.[17] Although the Region largely (but not completely) abandoned that approach on appeal in favor of the increased property value approach mentioned in the preceding section, the Presiding Officer applied a wrongful-profits analysis in his Initial Decision, which the Region now charges is riddled with computational and conceptual errors. The Presiding Officer analyzed economic benefit by comparing townhouse construction costs to sales prices to determine whether Respondents earned any profit from their fill-and-develop venture. *See* Init. Dec. at 7, 19. After evaluating the evidence adduced on this point, the Presiding Officer held that the record

[17] *See* Complainant's Memorandum of Law in Support of Proposed Findings of Fact and Conclusions of Law at 17–18 (economic benefit estimate is 10% of list prices of townhouses, or $51,000 (i.e., 10% profit margin assumed); alternatively, townhouse sales prices of $479,000 less $2,500 original purchase price yields a property value increase of $476,500); Tr. at 202–06 (William Hoffman's testimony regarding Region III's original $51,000 computation of economic benefit).

"provides no basis to contradict Respondent's [*sic*] evidence that the construction of the townhouses did not produce a significant profit." *Id.* at 19. In the absence of contrary evidence, the Presiding Officer accepted Respondents' estimate that their development expenditures totaled $455,000 and that townhouse sales brought $479,000 less realtor commissions and closing costs. *Id.* at 7, 19; *see* Ex. 37. As noted earlier, the Presiding Officer concluded that the economic benefit amounted to zero.

The Region argues that "under a wrongful profit analysis, there is evidence on the record that, contrary to the Presiding Officer's finding, Respondents did obtain some limited economic benefit in the form of profit." Complainant's Appeal Brief at 36. The Region then points out several ways in which Respondents' cost estimate is overstated. *See id.* at 36–37.

We agree that there are significant errors in the Presiding Officer's analysis of Respondents' cost figures.[18] However, a more fundamental error is the notion, advanced originally by the Region, that wrongful profits could serve as an appropriate approximation of economic benefit in the circumstances presented in this case. Plainly put, justice will not bear a wrongful profits calculus on the facts of this case. This is because the

[18] As the Region correctly points out, the Presiding Officer accepted Mr. Hammond's estimate that he had spent $34,252.69 for the eight lots' purchase, taxes, and interest from 1965 through June 1991, without considering whether that figure should be divided by eight to reach a "reasonable approximation" of outlays for Lot 9 alone. *See* S. Rep. No. 99–50, at 25 (1985) ("The determination of economic benefit * * * will not require an elaborate or burdensome evidentiary showing. Reasonable approximations of economic benefit will suffice."). The Presiding Officer also did not question whether certain payments by the Hammonds to "BIC, Inc." — which were presented by Respondents as part of their approximately $455,000 in total development costs — might actually be income to one or both of the corporate Respondents. *See* Ex. 37.

Moreover, the record shows that Respondents purchased a separate parcel of land and prepared sewer leaching fields thereon, purportedly to service each of Lots 9, 11, 13, and 15. Tr. at 291, 298. Part of the developable value of Lots 9 and 11 is traceable to septic service expenditures because, as Respondents themselves indicated, lots on Chincoteague without septic have little-to-no economic value. Tr. at 272–73, 315, 419. The Hammonds allegedly spent $60,000 to purchase the extra parcel and claimed to have paid "BIC Inc." $48,700.62 for preparation of the sewer leaching fields, for total expenditures of $108,700.62. *See* Ex. 37. The Presiding Officer did not divide the $108,700.62 figure by four to account for the provision of sewage service to Lots 9, 11, 13, and 15—four lots, not one.

In addition, the Presiding Officer wrongly concluded that "[a]ny future construction would take place on lots further removed from the area that was filled on lots 9 and 11." Init. Dec. at 19. In fact, Lot 11 was made developable as a result of the fill. *See* Tr. at 296. Indeed, William Hoffman of the Region testified that other structures were being built in the once-wetland areas "adjacent to" the three townhouses on Lot 9 and that, as a consequence, the Region's economic benefit calculation may have been underestimated. Tr. at 248.

Corps essentially authorized Respondents to construct houses on the illegally filled lots when it agreed, in Summer 1991, to allow Respondents to pursue a mitigation remedy for their filling activities rather than fully restore the site. At the time of the Corps and Respondents' original mitigation agreement, in June through August of 1991, no structures had yet been built on Lots 9 or 11. The Corps could have chosen to require full restoration of Lots 9 and 11 to their wetlands state, but it decided instead to allow mitigation because it believed Respondents would litigate a requirement to perform full restoration. *See* Tr. at 56–57. In the Corps' estimation, it would be "easier" and/or "less costly" for both sides, in light of the perceived litigation threat, if the Corps were to allow Respondents simply to mitigate the filled lots. *See id.*

Having tacitly given Respondents a green light to construct houses on the lots (subject, of course, to the requirement that Respondents successfully mitigate for their impacts), the federal government cannot now seek to collect supposed "wrongful" profits from that construction. Respondents largely held up their end of the bargain, achieving successful mitigation in accordance with the Corps' terms by September 1995. Accordingly, it would be neither fair nor appropriate, on these facts, to extract Respondents' profits as a measure of their economic benefit from filling wetlands.

4. *Respondents' Argument Regarding the Presiding Officer's Penalty Calculation—Inability to Pay*

For their part, Respondents claim the $2,000 penalty—and indeed any penalty—is erroneous because it is beyond their ability to pay. Respondents' Appeal Brief at 13–14. In our view, the Region met its initial burden of proof regarding Respondents' ability to pay, but Respondents did not meet their rebuttal burden; therefore, the Presiding Officer did not err in determining that Respondents have the ability to pay a penalty of at least $2,000.

To establish a *prima facie* case that a proposed penalty is appropriate, an EPA regional office must, among other things,

> 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 reduced.

In re New Waterbury, Ltd., 5 E.A.D. 529, 542–43 (EAB 1994). In this case, William Hoffman of Region III testified that he considered Respondents' ability to pay in computing the proposed penalty. As he said, he "had nothing to prove or disprove whether there was an ability to pay," but he took notice of the facts that the Hammonds owned property both on and off Chincoteague and that Raymond Britton's construction business seemed to be flourishing, given the numerous permit applications Mr. Britton had submitted on behalf of other people. Tr. at 203–04.

In rebuttal, Respondents submitted affidavits asserting their inability to pay any penalty, as well as copies of tax returns. Mr. and Mrs. Hammond's affidavits explain their income sources, provide their taxable income from 1994 and 1995, and list some of their real estate holdings. Exs. 35–36. David Britton's affidavit, however, reveals virtually nothing about BIC Investments, Inc. The affidavit states only that BIC has "never earned a profit since it started doing business and has never generated enough income to incur any tax liability." Ex. 43. Apparently, BIC has only generated enough income to provide David Britton (and presumably his employees) a salary.[19] *See id.*

Despite Respondents' protestations to the contrary, *see* Respondents' Appeal Brief at 13–14, the evidence in the record indicates that they do have the ability to pay a penalty of some kind. The Hammonds' affidavits stress their fixed income, *see* Exs. 35–36, but the Hammonds in fact possess considerable assets in the form of investment real estate (e.g., Lots 11, 12, 13, 14, 15, and 16). This real estate comprises a source of monies (albeit nonliquid monies) to pay a civil penalty. Moreover, even if their tax returns are considered, they do not negate an ability to pay a $2,000 penalty.[20]

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[19] Raymond Britton's affidavit (which is not in the hearing record but was included in the prehearing exchange) is equally uninformative. *See* Respondents' Supplemental Prehearing Exchange, Ex. A, Affidavit of Raymond L. Britton, Jr. (stating that Britton Construction Co. "never earned a profit and therefore never incurred any income tax liability" during the eight years, ending July 1990, in which it conducted business).

[20] Having earlier given limited consideration to Respondents' tax returns in our discussion of the Region's assertion of error when the Presiding Officer admitted the tax returns into the record over the Region's objections, we consider it only fair to take note of the tax returns in the context of Respondents' ability-to-pay defense.

The ability to pay of the two corporate Respondents is less tangible but, in our view, equally probable. First, there is no evidence to suggest that BIC Investments, Inc. will go bankrupt or cease doing business if a penalty is assessed against it.[21] Instead, we have every reason to believe, on the evidence in the record, that BIC will continue its work and may possibly build more housing units on the Hammonds' remaining lots. *See* Tr. at 296, 319. In fact, Respondents testified during the hearing that they would build more units on the Hammonds' property if it appeared that construction would yield a profit. *See* Tr. at 297. (There is also a suggestion in the record that such construction may already have begun, or by this time have been finished, on Lot 11. *See* Tr. at 248.) Second, as to Britton Construction Company, we assume the same result. Raymond Britton testified that Britton Construction is no longer operating, but, as discussed in the Initial Decision, the evidence indicates that the company is either still in business, possibly as BIC Construction Inc., or has been succeeded by BIC Investments, Inc. *See* Init. Dec. at 12–13. As in the case of the Hammonds, the tax returns of the two corporate respondents do not negate an ability to pay a $2,000 penalty. For BIC Investments, Inc., the absence of any reportable profit may only signify that salaries paid to the officers of this closely held corporation are a potential source of funds to tap. On this record, the Respondents appear fully able to pay a $2,000 penalty.

5. *Summary*

As discussed above, we are not persuaded by either party that the Presiding Officer's assessment of a $2,000 penalty warrants reversal. We agree with the Presiding Officer that a nominal penalty is appropriate in this case.[22] Were we to engage in a specific analysis of the various penalty

[21] The specter of bankruptcy is not necessarily a reason to avoid assessing a penalty. For example, the PCB penalty policy for the Toxic Substances Control Act states that "[t]echnically, a firm would often be able to pay even if imposing a penalty would cause it to file bankruptcy, since a reorganization might still leave the business in operation." U.S. EPA, *Guidelines for the Assessment of Civil Penalties Under Section 16 of TSCA: PCB Penalty Policy,* 45 Fed. Reg. 59,770, 59,775 n.3 (Sept. 10, 1980), *quoted in New Waterbury*, 5 E.A.D. at 540 n.19.

[22] The Region alleged two separate incidents of CWA violation in the complaint. However, the two alleged violations were not set forth as separate counts, and neither the Region nor the Presiding Officer allocated any portion of the penalty to one violation or the other. In light of our holding—namely, that the parties did not establish reversible error on the Presiding Officer's part—we also do not allocate the penalty or even specifically address whether the second alleged fill episode (which reflected poorly on Respondents' mitigation efforts) constituted a regulated discharge.

factors that make up the gravity component of a penalty calculation,[23] our analysis might differ in certain respects from that of the Presiding Officer.[24] However, we perceive no need to conduct such an exercise in light of our conclusion that a nominal penalty is appropriate and the fact that the parties have not persuaded us that reversible error or abuse of discretion has occurred. *See,* e.g., *In re Predex Corp.,* 7 E.A.D. 591, 597 (EAB 1998) (Board generally will not substitute its judgment for that of a presiding officer absent a showing that the officer committed an abuse of discretion or clear error in assessing the penalty).

III. *CONCLUSION*

For the foregoing reasons, an administrative penalty of $2,000 is assessed against Respondents Britton Construction Company, BIC Investments, Inc., and William and Mary Hammond on a joint and several basis for their violation of CWA section 301(a). Payment of the penalty shall be made within sixty (60) days of receipt of this final order (unless otherwise agreed to by the parties), by cashier's check or certified check payable to the Treasurer, United States of America, and forwarded to:

EPA-Region III
Regional Hearing Clerk
Post Office Box 360515
Pittsburgh, Pennsylvania 15251–6515

So ordered.

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[23] Under the general penalty policy, the gravity component of the penalty calculation encompasses the nature, extent, and gravity factors enunciated in CWA § 309(g)(3). The factors that typically comprise the gravity calculation include, among other things: (1) actual or possible harm caused by the unlawful activity (e.g., amount and toxicity of pollutant, sensitivity of the environment, length of violation); and (2) importance of the permit requirement to the regulatory scheme. *Penalty Framework* at 14–15. An estimation of these factors is an attempt to capture, in subjective terms, the significance of the violation. *See id*. at 13. Once a penalty amount is calculated employing these factors, there are four other factors that can be used to adjust the gravity calculation. They include the violator's degree of willfulness and/or negligence, degree of cooperation, history of noncompliance, and a catch-all "other unique factors" category. *Id*. at 17–24.

[24] As one example, we believe the Presiding Officer overemphasized EPA's so-called "dilatory" enforcement. Plainly, Congress intended for dual enforcement of the CWA, *see* CWA § 309(g)(6)(A), 33 U.S.C. § 1319(g)(6)(A), and Respondents properly remained subject to government requirements and reevaluation thereof as long as their mitigation effort was incomplete.