IN RE CDT LANDFILL CORPORATION

CAA Appeal No. 02-02

FINAL DECISION

Decided June 5, 2003

Syllabus

The United States Environmental Protection Agency Region V ("Region") appeals an April 5, 2002 Initial Decision issued by Administrative Law Judge ("ALJ") Spencer T. Nissen. The appeal arises out of an administrative enforcement action initiated by the Region against CDT Landfill Corporation ("CDT") of Joliet, Illinois for alleged violations of the Clean Air Act ("CAA"), 42 U.S.C. § 7411, and its implementing regulations. In the proceedings below, the Region alleged that CDT failed to satisfy several requirements of the new source performance standards for the municipal solid waste landfill source category, 40 C.F.R. part 60, subpart WWW. Specifically, the Region charged CDT with: (1) failing to timely submit an annual non-methane organic compound (NMOC) emission rate report; (2) failing to submit a gas collection and emission control system design plan within a year after reporting an NMOC emission rate greater than 50 megagrams per year; (3) failing to timely file an application to obtain a CAA Permit Program permit; and (4) failing to timely conduct performance testing of its gas collection and emission control system. The Region sought a penalty of $72,380 against CDT for the alleged violations.

In his Initial Decision, the ALJ found CDT liable for the first three counts of the complaint, but dismissed Count 4 - failure of CDT to timely conduct performance testing of its gas collection and emission control system - based upon his determination that the test method identified by the regulations was not an appropriate method for CDT to use for its performance test. In the penalty portion of his Initial Decision, the ALJ first rejected the Region's proposed penalty for the three counts upon which he had found liability because he concluded that the Region had rigidly applied the CAA Stationary Source Civil Penalty Policy and had failed to consider several important factors. He then calculated a penalty using the CAA statutory factors. The ALJ, however, ultimately declined to assess any penalty because he concluded that the Region had failed to meet its burden of persuasion regarding the penalty because it had not addressed the "ability to pay" factors as required by the CAA. In concluding that the Region had failed to meet its burden of persuasion with respect to CDT's ability to pay, the ALJ cited a Combined Balance Sheet prepared by CDT's accountants, which suggested that there would be a significant shortfall between the amount in escrow for landfill closure costs and the actual closure costs. The balance sheet, which CDT had sent to the Region approximately nine days before the hearing and well after the pre-hearing information exchange period had run, had been admitted into evidence at the hearing by the ALJ over the Region's objections.

The Region appeals the ALJ's dismissal of Count 4. The Region also asserts that the ALJ committed error by admitting the Combined Balance Sheet at the hearing. Finally, the

Region appeals the ALJ's decision to depart from the CAA penalty policy as well as his decision not to assess any penalty for Counts 1 - 3.

Held: The ALJ erred in dismissing Count 4. The pre-2000 regulation expressly allows alternative test methods to be used, with the Administrator's approval, in those instances where the test methods specified in the regulation are not suitable. Accordingly, whether or not the pre-2000 test methods were appropriate to CDT's circumstances, CDT had the means to comply with the regulation by seeking the Administrator's approval of an alternative test method within the regulatory time frame. CDT's attempt to obtain approval of an alternative test method more than a year past the regulatory deadline was untimely.

With respect to the ALJ's admission at hearing of the Combined Balance Sheet, the Board finds that the ALJ did not abuse his discretion when he accepted CDT's late-arriving submission. ALJs retain broad discretion to conduct administrative proceedings and to make determinations regarding the admissibility of evidence during such proceedings. Moreover, in this case, the specific information at issue was not available at the time of the answer or during the period of prehearing information exchange, the financial information was relevant to one of the statutory factors to be taken into consideration in the penalty assessment, and the admission of the one-page document, which arrived at least a week before the hearing, although inconvenient, did not seem significantly prejudicial. Thus, because the ALJ's decision to admit the Combined Balance Sheet at hearing was not a clear abuse of discretion, the Board affirms the ALJ's decision to admit the financial statement.

Regarding the ALJ's penalty assessment, the Board finds that the ALJ articulated a sufficiently detailed and persuasive rationale for his alternative penalty assessment based upon the factors enumerated in the statute. Accordingly, the ALJ did not commit clear error or abuse his discretion in his alternative penalty analysis. Furthermore, with respect to the ALJ's ultimate conclusion that no penalty should be assessed based on CDT's inability to pay, the Board concludes that, because admission of the financial information extinguished the Region's argument that Respondent had waived its capacity to raise ability to pay concerns, and because the Region did not proffer any meaningful evidence of ability to pay, the Region failed to meet its burden of proof on the issue of the appropriateness of the penalty. Accordingly, the ALJ's decision not to assess a penalty for Counts 1 - 3 on the grounds of inability to pay is affirmed.

Finally, although the Board reverses the ALJ's determination with respect to Count 4 and finds CDT liable for that count, because the Board also finds that the Region failed to meet its burden of proof with respect to the appropriateness of a penalty in this case, the Board holds that no penalty should be assessed for Count 4.

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

Opinion of the Board by Judge Fulton:

I. *INTRODUCTION*

The matter before the Environmental Appeals Board (the "Board" or "EAB") concerns alleged violations of section 111 of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7411, and its implementing regulations. In particular, United States

Environmental Protection Agency ("EPA") Region V (the "Region") has appealed an initial decision by Administrative Law Judge Spencer T. Nissen ("ALJ") dated April 5, 2002 ("Initial Decision"), in which the ALJ found Respondent CDT Landfill Corporation ("CDT") liable for Counts 1 - 3 of the Region's complaint, dismissed Count 4, and declined to assess a penalty against CDT for reasons more fully described below. The Region raises issues both with the ALJ's dismissal of Count 4 and his penalty determination. *See* Appellant's Brief in Support of the Notice of Appeal ("Appeal Br."). CDT has not filed a brief in response to the Region's appeal, nor has it raised any issues on cross-appeal.[1]

Specifically, the Region challenges the ALJ's dismissal of Count 4 in which the Region alleged that CDT violated the Act's New Source Performance Standards ("NSPS") by failing to conduct a timely performance test under 40 C.F.R. part 60, subpart WWW. Appeal Br. at 30-32. In addition, the Region contends that the ALJ committed error when he admitted into evidence financial information - a combined balance sheet from the year 2000 ("Combined Balance Sheet") - which CDT had only made available to the Region and the ALJ approximately one week before the hearing. *Id*. at 18-25. Regarding the ALJ's penalty determination for Counts 1 - 3, the Region challenges the ALJ's decision to depart from the CAA Stationary Source Civil Penalty Policy. *Id*. at 25-30. The Region also raises several arguments contending that the ALJ erred in his analysis of CDT's ability to pay a penalty, an error which, according to the Region, ultimately led the ALJ to the decision not to assess any penalty in this matter. *Id*. at 12-18.

We begin our examination of this matter by reviewing the legal background, as well as the factual and procedural background, of the case. We then examine the ALJ's dismissal of Count 4, finding that the ALJ erred when he dismissed Count 4. Next, we examine the ALJ's admission of the Combined Balance Sheet into evidence. As detailed below, the Board finds that the ALJ did not abuse his discretion when he accepted CDT's late submission. Thereafter, we analyze the ALJ's penalty determination. We affirm the ALJ's decision to assess no penalty for Counts 1 - 3 based upon an ability-to-pay analysis, and we hold that, for the same reasons no penalty is assessed for Counts 1 - 3, no penalty should be assessed for Count 4.

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[1] CDT's attorney filed a letter with the Board stating that CDT is "out of business and therefore will not be filing a brief in appeal number 02-2 before the Environmental Appeals Board." Letter from Scott M. Hoster to Clerk of the Board (July 31, 2002).

II. *BACKGROUND*

A. *Statutory and Regulatory Background*

Section 111 of the CAA, 42 U.S.C. § 7411, authorizes the Administrator to publish a list of categories of stationary sources that the Administrator has determined "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." CAA § 111(b)(1)(A), 42 U.S.C. § 7411(b)(1)(A). According to the Act, the Administrator must publish proposed NSPS for new sources within one year of listing a category of sources. CAA § 111(b)(1)(B), 42 U.S.C. § 7411(b)(1)(B). Once the standards of performance promulgated under the Act are effective, it is unlawful for "any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." CAA § 111(e), 42 U.S.C. § 7411(e). The Act defines a "new source" as "any stationary source,[2] the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source." CAA § 111(a)(2), 42 U.S.C. § 7411(a)(2).

On March 12, 1996, EPA promulgated the NSPS for the Municipal Solid Waste ("MSW") Landfill category source. Standards of Performance for Municipal Solid Waste Landfills, 61 Fed. Reg. 9905 (Mar. 12, 1996) (codified at 40 C.F.R. pt. 60, subpt. WWW). Subpart WWW applies to "each municipal solid waste landfill that commenced construction, reconstruction or modification on or after May 30, 1991." 40 C.F.R. § 60.750(a).

The provisions in subpart WWW regulate MSW landfill emissions,[3] which, as described in the preamble to the proposed rule, consist of "a collection of air pollutants, including methane and NMOC's [nonmethane organic compounds], some of which are toxic." 56 Fed. Reg. 24,468, 24,470 (proposed May 30, 1991) (codified at 40 C.F.R. pt. 60, subpt. WWW). Subpart WWW requires that:

> Each owner or operator of an MSW landfill having a design capacity equal to or greater than 2.5 million megagrams and 2.5 million cubic meters, shall either comply with paragraph (b)(2) of this section or calculate an NMOC emission rate for the landfill using the proce-

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[2] The Act defines a stationary source as "any building, structure, facility, or installation which emits or may emit any air pollutant." CAA § 111(a)(3), 42 U.S.C. § 7411(a)(3).

[3] These emissions, also referred to as "landfill gas," are created through the anaerobic decomposition of the refuse in the landfills. 56 Fed. Reg. 24,468, 24,473 (proposed May 30, 1991) (codified at 40 C.F.R. pt. 60, subpt. WWW).

> dures specified in § 60.754. The NMOC emission rate shall be recalculated annually, except as provided in § 60.757(b)(1)(ii) of this subpart.[4]

40 C.F.R. § 60.752(b).

Subpart WWW further provides that the owner or operator of an MSW landfill having equal to or greater than 50 million megagrams of NMOC emissions per year shall, *inter alia*, "[s]ubmit a collection and control system design plan prepared by a professional engineer to the Administrator within 1 year." *Id.* § 60.752(b)(2)(i). The collection and control system is required to treat the collected landfill gas by complying with one of three options. The option relevant to the instant case provides as follows:

> (B) A control system designed and operated to reduce NMOC by 98 weight-percent, or, when an enclosed combustion device is used for control, to either reduce NMOC by 98 weight percent or reduce the outlet NMOC concentration to less than 20 parts per million by volume, dry basis as hexane at 3 percent oxygen. The reduction efficiency or parts per million by volume shall be established by an initial performance test to be completed no later than 180 days after the initial startup of the approved control system using the test methods specified in § 60.754(d).

Id. § 60.752(b)(2)(iii)(B). As stated, this provision requires that an initial performance test be completed no later than 180 days after the initial startup of a control system in accordance with the test methods specified in 40 C.F.R. § 60.754(d). Section 60.754(d), in turn, at the time of the events at issue in this case,[5] provided that either Test Method 25C or Test Method 18 of Appendix A of part 60[6] be used as a test method for determining compliance with the 98 weight-percent efficiency, "unless another method to demonstrate compliance has been approved by the Administrator as provided by § 60.752(b)(2)(i)(B)." 40 C.F.R. § 60.754(d) (1998).

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[4] Section 60.757(b)(1)(ii) allows an owner or operator to submit estimated NMOC emission rates for a five-year period instead of submitting the annual report where the estimated NMOC emission rate in the annual report "is less than 50 megagrams per year in each of the next 5 consecutive years." 40 CFR § 60.757(b)(1)(ii).

[5] Since that time, this particular provision has been amended to allow Test Method 25, as well as Test Method 25A in certain circumstances, to be used. *See* discussion *infra* part III.A.3.

[6] The regulations require the performance test in order to ensure that the control system used reduces NMOC emissions by the appropriate amount prior to release.

Subpart WWW also imposes specific reporting requirements. 40 C.F.R. § 60.757 (2002). Each owner and operator of a MSW landfill subject to the subpart must submit an initial design capacity report to the Agency. *Id*. § 60.757(a). In addition, for those regulated MSW landfills having a design capacity greater than or equal to 2.5 million megagrams and 2.5 million cubic meters, NMOC emission rate reports are required to be submitted to the Administrator initially and annually thereafter, with certain exceptions.[7] *Id*. § 60.757(b).

Additionally, owners or operators of an MSW landfill subject to the subpart having a design capacity greater than or equal to 2.5 million megagrams and 2.5 million cubic meters are subject to part 70 or 71 ("Title V" or CAA Permit Program ("CAAPP")) permitting requirements.[8] *Id*. § 60.752(b).

When an NSPS violation occurs, section 113 of the CAA allows the Administrator to assess a civil administrative penalty up to $25,000[9] per day of violation, not to exceed $200,000,[10] where the first alleged date of violation occurred no more than 12 months prior to the initiation of the action.[11] CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1). Section 113 of the Act enumerates several factors which, "in addition to such other factors as justice may require," must be considered when determining an appropriate penalty:

> the size of the business, the economic impact of the penalty on the business, the violator's full compliance history

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[7] The regulations contain two exceptions. An owner or operator is exempt from annual reporting while a collection and control system is operating in compliance with subpart WWW. 40 C.F.R. § 60.757(b)(3). In addition, as mentioned previously, *see supra* note 4, an owner or operator may choose to submit a five-year NMOC emission rate estimate under limited circumstances. *Id*. § 60.757(b)(1)(ii).

[8] In keeping with Title V of the Act, 42 U.S.C. § 7661-7661f, parts 70 and 71 of Title 40 of the Code of Federal Regulations, which together comprise EPA's Title V regulatory program, require that all subject sources "shall have a permit to operate that assures compliance by the source with all applicable requirements. While Title V does not impose substantive new requirements, it does require that fees be imposed on sources and that certain procedural measures be adopted especially with respect to compliance." 40 C.F.R. § 70.1(b) (state operating permit programs); *see also id*. § 71.1(a) (stating that the federal operating permit program is designed to promote "timely and efficient implementation of goals and requirements of the Act").

[9] Pursuant to the regulations implementing the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, the maximum daily penalty amount allowed under section 113(d) of the CAA has increased to $27,500, not to exceed $220,000, for violations occurring after January 31, 1997. 40 C.F.R. § 19.4 (2002).

[10] *See supra* note 9.

[11] *But see* CAA § 113(d)(1) ("except where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action"). 42 U.S.C. § 7413(d)(1).

> and good faith efforts to comply, the duration of the violation as established by any credible evidence * * * , payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

CAA § 113(e)(1), 42 U.S.C. § 7413(e)(1). In addition to these statutory factors, the Consolidated Rules of Practice Governing the Administrative Assessment of Penalties, Issuance of Compliance and Corrective Orders, and the Revocation, Termination, or Suspension of Permits ("CROP"), 40 C.F.R. part 22, which govern this proceeding, also require that the ALJ consider any civil penalty guidelines issued under the Act. 40 C.F.R. § 22.27(b). According to part 22, should the ALJ decide to assess a penalty different from the proposed penalty in the complaint, the ALJ must "set forth in the initial decision the specific reasons for the increase or decrease." *Id*. Relevant to this matter, the Agency has issued the Clean Air Act Stationary Source Civil Penalty Policy (Oct. 25, 1991) (unpublished), as modified by the Clarification to the October 25, 1991 Clear Air Act Stationary Source Civil Penalty Policy (Jan. 17, 1992) (unpublished) and Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule (May 9, 1997) (unpublished) (collectively the "Penalty Policy"), to assist in enabling consistent application of the Agency's civil penalty authorities. Penalty Policy at 1.

B. *Factual and Procedural Background*

CDT owns and operates an MSW landfill in Joliet, Illinois. The landfill consists of two adjacent areas - - Sites 1978170005 and 1978170006 ("Site No. 0005" and "Site No. 0006"). Respondent's Exhibits ("R Exs.") 3, 4. CDT first began accepting waste at Site No. 0005 in 1984 pursuant to Illinois Environmental Protection Agency ("IEPA") Permit No. 1983-19-OP. R Ex. 2. Pursuant to supplemental permits issued in November 1990 and December 1991, IEPA authorized CDT to install a landfill gas collection and management system. R Exs. 9, 13. CDT closed Site No. 0005 in May 1993, and, subsequently, IEPA determined that closure was complete and in accordance with CDT's closure plan. R Exs. 2, 10.

In June of 1991, CDT submitted its permit application to IEPA for a new solid waste management facility at Site No. 0006 for the disposal of general municipal and non-hazardous special waste. R Ex. 11. CDT began accepting waste at this site in June 1993 after IEPA issued the requested permit. *Id*.

CDT and its contractor KMS Joliet Power Partners, L.P. ("KMS")[12] have worked regularly with IEPA over the last decade requesting particular permits or modifications to already existing state permits for the landfill.[13] *See*, *e.g.*, R Exs. 14, 16, 18. In August of 1995, IEPA's Division of Air Pollution Control issued a construction permit to KMS for the construction of two process gas power combustor engines at the landfill's Site No. 0005. R Exs. 14, 18. On June 24, 1999, the same IEPA division issued to KMS a permit to operate these same emission sources and/or related air pollution control equipment. R Ex. 16. It appears from the record that IEPA did not include as part of this permit an emission testing requirement for the two engines at Site No. 0005 or other NSPS related requirements. R Ex. 16.

With respect to Site No. 0006, IEPA's Division of Air Pollution Control initially authorized KMS to construct two 21.6 mmBtu/hr reciprocating engines fueled by landfill gas on July 17, 1998. R Ex. 15. On March 11, 1999, however, IEPA informed KMS that its application for operation of two new gas engines at Site No. 0006 was incomplete, apparently due to concerns regarding NSPS compliance. *See* R Ex. 8, 18. Although the record does not include IEPA's Notice of Incompleteness, correspondence from KMS in the record reflects that IEPA required KMS to reapply and include "information regarding compliance with NSPS * * * and submission of a [CAAPP permit application]." *See* R Ex. 18 at 2. In October of 1999, IEPA issued a permit modification regarding Site No. 0006 that authorized the operation of a landfill gas extraction/collection system.[14] R Ex. 12.

The Region inspected CDT's landfill on February 8, 1999. C Ex. 1. As a result of this inspection, the Region issued Findings of Violation ("FOV") to CDT. In its FOV, the Region asserted that CDT was in violation of several provisions of the NSPS for Municipal Solid Waste Landfills. C Ex. 12. Specifically, the Region asserted in its FOV: (1) that CDT had failed to submit an annual NMOC emission

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[12] On April 13, 1995, KMS entered into a contract with CDT that authorized KMS to extract landfill gas from the landfill. Under this contract, KMS was responsible for obtaining certain permits necessary for landfill gas extraction at the landfill. Complainant's Exhibit ("C Ex.") 19 (Gas Rights Agreement); *see also* Initial Decision ("Init. Dec.") at 4-5 (Findings of Fact 4-6).

[13] Pursuant to a 1988 delegation agreement, Region V delegated authority to IEPA to implement the NSPS program in Illinois. Under the agreement, IEPA has "[a]uthority for all sources located or to be located in the State of Illinois which are subject to the NSPS promulgated for additional pollutants and source categories and all revisions and amendments to existing and future standards * * * ." C Ex. 25 at 1. The delegation agreement also states that, while IEPA has primary responsibility for NSPS enforcement, "this delegation in no way limits the U.S. EPA's concurrent authority as provided in Sections 111(c)(2) and 112(d)(2) of the Clean Air Act." *Id.* at 2.

[14] Although the operating permit pertaining to Site No. 0006 is not part of the record before us, we assume, given IEPA's focus on the NSPS in reviewing KMS's application, that this operating permit, unlike the permit for Site No. 0005, did address NSPS considerations.

rate report to the Administrator, in violation of 40 C.F.R. § 60.757(b); (2) that CDT failed to submit a gas collection and emission control system design plan within a year after reporting the NMOC emission rate greater than 50 megagrams per year in violation of 40 C.F.R. § 60.757(c); and (3) that CDT failed to file an application to obtain a CAAPP permit in violation of 40 C.F.R. § 60.752(b) and 40 C.F.R. § 70.5(d). C Ex. 12 at 3.

Beginning in October 1999, various discussions occurred between KMS representatives, IEPA, and the Region regarding the alleged failure to conduct performance testing of the gas collection and emission control system located at CDT's landfill. But it was not until March 24, 2000, that KMS began work on an emissions testing program for the gas collection and emission control system at the landfill. R Ex. 18, Chronology Attachment ("Chron.") at 4. On August 8, 2000, KMS formally proposed the use of an alternative test method[15] for conducting the performance testing of the engines. Init. Dec. at 19 (Findings of Fact 29); R Ex. 18 at 4 & Chron. at 6. Subsequently, KMS received oral approval of the alternative test method on August 15, 2000. Init. Dec. at 19 (Findings of Fact 29); R Ex. 18 at 4 & Chron. at 6. On August 17, 2000, KMS submitted its 30-day notification to IEPA and the Region for testing the engines at CDT using the approved alternative test method. Init. Dec. at 19; R Ex. 18 at 4 & Chron. at 6. On September 26 and 27, 2000, KMS conducted the emission performance testing of the gas collection and emission control system at CDT landfill using the alternative test method. C Ex. 18. On October 17, 2000, EPA added the alternative test method proposed by KMS for the CDT facility - Test Method 25A - to the list of enumerated test methods in 40 C.F.R. § 60.754(d) by way of an amendment to the regulations. *See* 65 Fed. Reg. 61,744, 61,799 (Oct. 17, 2000).

Subsequent to the FOV, the Region sent a Pre-filing Notice Letter dated September 8, 1999, to CDT. C Ex. 13. The letter notified CDT of the Region's intention to file a civil administrative complaint against CDT for violations of the CAA. The Region requested that CDT provide the Region with any additional evidence that it believed the Region should consider prior to filing such a complaint, including "financial factors which bear on your [CDT's] ability to pay a civil penalty." C Ex. 13. ("[P]lease submit financial statements, including balance sheets and income statements for the past three years.") In response to the Region's letter, CDT sent two letters to the Region. The first letter, dated September 22, 1999, outlined CDT's current state of noncompliance and progress toward compliance. C Ex. 8. The second letter, dated September 25, 1999, stated that

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[15] Although not entirely clear from the record, it appears that there were concerns that the enumerated test methods in the regulation could not provide representative sample results of emissions like CDT's, which had relatively low concentrations of carbon. The alternative test method was proposed as a means of obtaining more representative sample results. Init. Dec. at 18-19 (Findings of Fact 28); R Ex. 18 at 3-4.

CDT was in the process of closing its landfill and that CDT's revenue was insufficient to cover its current costs of operation. Letter from Thomas R. Osterberger, Esq., to Vivian Doyle, U.S. EPA Region V (Sept. 25, 1999). CDT included with this letter three financial schedules[16] which, according to CDT's attorney, estimated CDT's current financial status.

On September 30, 1999, the Region filed an administrative complaint against CDT. The Region alleged in the complaint that CDT violated section 111 of the CAA, 42 U.S.C. § 7411, as amended, and its implementing regulations at 40 C.F.R. part 60, subpart WWW (Standards of Performance for Municipal Solid Waste Landfills). The Region sought a penalty of $72,380 against CDT for the alleged violations. Specifically, the Region alleged that CDT:

> (1) violated 40 C.F.R. § 60.752(b) and § 60.757(b) by failing to timely submit an annual non-methane organic compound (NMOC) emission rate report to the Administrator;
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> (2) violated 40 C.F.R. § 60.752(b)(2)(i) and § 60.757(c) by failing to submit a gas collection and emission control system design plan within a year after reporting an NMOC emission rate greater than 50 megagrams per year;
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> (3) violated 40 C.F.R. § 60.752(b) and § 70.5 by failing to timely file an application to obtain a CAAPP permit; and
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> (4) violated 40 C.F.R. § 60.8 and § 60.752(b)(2)(iii)(B) by failing to timely conduct performance testing of its gas collection and emission control system.

Administrative Complaint at 4-5.

CDT's answer to the Complaint denied liability for the alleged violations and stated that the proposed penalty was excessive, although the Answer did not relate the penalty's alleged excessiveness to CDT's inability to pay. Answer at 3 ("CDT requests that * * * if CDT is found guilty, that the penalty be assessed in a substantially lower amount."). On April 18, 2000, the ALJ entered his prehearing order. Letter from Honorable Spencer T. Nissen to Scott M. Hoster, Esq., and Louise Gross, Assistant Regional Counsel (April 18, 2000) ("Prehearing Order"). In it, the ALJ directed the parties to prepare and file their prehearing exchanges, specifying that each party include specific items in its prehearing exchange. *Id*. at

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[16] For further information regarding these financial documents, *see infra* note 17.

2-3. Significantly, the ALJ's order required that "[i]f CDT is contending that the proposed penalty exceeds its ability to pay or would jeopardize its ability to continue in business, [it must] provide financial statements, copies of income tax returns or other data to support such contention [by June 2, 2000]." Prehearing Order at 3.

Both the Region and CDT filed their respective prehearing exchanges on June 2, 2000. Despite the fact that CDT had submitted certain financial statements to the Region prior to the filing of the complaint,[17] CDT did not address in its prehearing exchange the issue of its ability to pay a penalty and did not provide any additional financial statements to support such an inability-to-pay argument. However, on January 8, 2001 - nine days before the hearing scheduled for this matter - CDT's attorney sent a letter to the ALJ and to the Region requesting that an attached "Combined Balance Sheet as of September 30, 2000" for CDT "be considered at the hearing next week." Letter from Scott M. Hoster, Esq., to Honorable Judge Spencer T. Nissen (Jan. 8, 2001). The Region sought to exclude CDT's Combined Balance Sheet with two motions, arguing that to allow its admission would prejudice the Region and would be inconsistent with the Part 22 rules. Complainant's Motion to Limit Evidence at Hearing ("Motion to Limit Evidence") (Jan. 9, 2001);[18] Complainant's Motion to Exclude Evidence ("Motion to Exclude") (Jan. 12, 2001). At the January 17, 2001 hearing, the ALJ admitted CDT's Combined Balance Sheet into evidence. Tr. at 21.

In the Initial Decision, issued April 5, 2002, the ALJ dismissed Count 4, but found CDT liable for violating Counts 1, 2, and 3 of the Region's complaint. However, for reasons outlined below, the ALJ did not assess a penalty for the proven violations.

The ALJ's Initial Decision can be summarized as follows. The ALJ first held that CDT was the owner of one landfill encompassing Site Nos. 0005 and 0006 and that the aggregate emissions of the two sites were greater than 50 megagrams per year, thereby subjecting the landfill to subpart WWW.[19] Init. Dec.

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[17] Although the Region included the letter and financial statements as an attachment to its January 9, 2001 Motion to Limit Evidence at Hearing, this letter and its attachments were not part of the prehearing exchange and were likewise not part of the evidence adduced at hearing. *See* Init. Dec. at 21 n.22. The information conveyed by the letter appears to fall somewhat short of the financial documentation contemplated by the ALJ's Prehearing Order.

[18] The Region's first motion was apparently filed prior to the Region's receipt of the Combined Balance Sheet. *See* Complainant's Post-Hearing Br. at 2. It requested the same general relief as the second motion, i.e., to exclude any "new" financial evidence. *Id.*

[19] A threshold issue for the ALJ was what constituted "the landfill" for purposes of this case. Here, he found that the regulation required the two areas or sites - Site No. 0005 and Site No. 0006 - to be regarded as a single landfill. *See* Init. Dec. at 23-25. Thus, when the two areas NMOC emissions

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at 24. The ALJ further determined that CDT had failed to comply with certain regulatory provisions requiring it to: (1) submit an annual NMOC emission rate report with the Administrator; (2) submit a gas collection and emission control system design plan within a year after reporting an NMOC emission rate greater than 50 megagrams per year; and (3) timely file an application to obtain a Clean Air Act Permit Program (CAAPP) permit. *Id*. at 24-25.

The ALJ dismissed Count 4, however, which alleged failure to timely conduct performance testing of a gas collection and emission control system. *Id*. at 22. The ALJ found no liability for this Count because, according to the ALJ, the test method identified by the regulations - Test Method 25C - was not an appropriate method for CDT to use for its performance test. *Id*. at 25-26; *see also* 40 C.F.R. §§ 60.752(b)(2)(iii)(B), 60.754(d) (1998).

In rejecting the Region's proposed penalty for the first three counts, the ALJ reviewed the Region's application of the Penalty Policy. The ALJ found the Region had rigidly applied the Penalty Policy and had failed to consider several significant factors, such as the fact that IEPA had issued permits to the facility that did not fully address NSPS concerns, indicia of CDT's good faith efforts to comply and the true seriousness (or lack thereof) of the violations. Init. Dec. at 26. For these reasons, the ALJ disregarded the proposed penalty and calculated an alternative penalty — $22,500 — under the statutory factors. *Id*. at 26-32.

Ultimately, the ALJ held that the Region failed to meet its burden of persuasion regarding its proposed penalty because it did not address "the size of the business" and the "economic impact of the penalty on the business" as required by the Act. The ALJ referred to these factors together as "ability to pay" factors. *Id*. at 30-32. In concluding that the Region had failed to meet its burden of persuasion, the ALJ cited to CDT's Combined Balance Sheet, which the ALJ had admitted into evidence over the Region's objections.[20] *Id*. at 31. The Combined Balance Sheet and accompanying cover letter suggested that there would be a significant shortfall between the amount in escrow for landfill closure costs and the actual closure costs. *Id*. at 21. The ALJ had some questions regarding the precise numbers contained in the Combined Balance Sheet,[21] but he stated that it was "mere speculation to assume that any portion of the mentioned sums will be available for

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(continued)
were combined, CDT's total NMOC emissions, which were equal or greater than 50 million megagrams per year, subjected CDT to additional subpart WWW requirements. Neither party appealed this determination to the Board.

[20] Further detail regarding the circumstances surrounding the ALJ's admission of CDT's combined balance sheet into evidence follows in section III.B. of this decision.

[21] *See* Init. Dec. at 21 (Findings of Fact 32) ("[T]here is no explanation for the very large closure costs liability.").

payment of penalties." *Id*. at 32. Although the ALJ primarily relied upon the Combined Balance Sheet in his "ability to pay" analysis, he also noted that, in its calculation of the penalty, the Region had cited a Dun & Bradstreet report which "allegedly shows that CDT had a negative net worth."[22] *Id*. at 32; *see also id*. at 20-21 (noting the Region's addition of $2,000 to its penalty calculation due to "size of business" despite the Region's determination that "CDT had a negative net worth"); C Ex. 14 at 4 (Region's penalty calculation, stating that "[a]ccording to a December 1997 Dun & Bradstreet report, the net worth of CDT is -$49,847"). Accordingly, the ALJ held that "[a]lthough a penalty of $22,500 might otherwise be appropriate, Complainant has totally failed to carry its burden of persuasion as to CDT's ability to pay." Init. Dec. at 32. For those reasons, he declined to assess any civil penalty against CDT for Counts 1 - 3. *Id*. at 32.

III. *DISCUSSION*

In Part 22 enforcement appeals, the Board generally reviews an ALJ's factual and legal conclusions on a *de novo* basis.[23] *E.g., In re LVI Envtl. Servs.*, 10 E.A.D. 99, 101 (EAB 2001); 40 C.F.R. § 22.30(f). In our review, we will first examine the ALJ's dismissal of Count 4 (CDT's failure to timely conduct performance testing of its gas collection and emission control system). As discussed below, we find that the ALJ's decision to dismiss Count 4 lacks legal or record support. Accordingly, we reverse the ALJ's dismissal and find CDT liable for Count 4. Next, we turn to the ALJ's decision to admit CDT's late-filed Combined Balance Sheet as of September 30, 2000, into evidence. For reasons explained below, we find the ALJ did not abuse his discretion when he admitted this document into evidence. Next, we review the ALJ's penalty analysis, both in terms of CDT's ability to pay a penalty and the ALJ's explanation for his departure from the Penalty Policy. We find the ALJ's ability to pay analysis to be supported by evidence, and we therefore affirm the ALJ's decision not to assess a penalty for Counts 1 - 3. Lastly, although we find CDT liable under Count 4, we do not assess a penalty for Count 4 for the same reasons the ALJ did not assess a penalty for Counts 1 - 3.

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[22] Although the Region quoted from the Dun & Bradstreet report in its penalty calculation, the latter of which was entered into evidence at hearing, *see* C Ex. 14, the report itself was never entered into evidence.

[23] The Board, however, generally defers to an ALJ's factual findings where credibility of witnesses is at issue "because the presiding officer had the opportunity to observe the witnesses testify and to evaluate their credibility." *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998); *accord In re Advanced Elecs., Inc.*, 10 E.A.D. 385, 392 n.17 (EAB 2002), *appeal docketed*, No. 02-1868 (7th Cir. Apr. 9, 2002).

A. *ALJ's Dismissal of Count 4 (Failure to Conduct Performance Test)*

1. *Initial Decision*

In his findings of fact, the ALJ observed that the applicable regulation required CDT to conduct a performance test of the gas control system no later than 180 days after initial startup[24] and that CDT had not conducted the required testing until September 2000. Init. Dec. at 9, 19 (Findings of Fact 10, 19). Nevertheless, the ALJ found that CDT did not commit a violation. In concluding this, the ALJ stated, *inter alia*, that:

> The regulation, § 60.754(d) prior to the 2000 amendment, provided that Test Method 25C or Method 18 of Appendix A shall be used in conducting the performance test to determine compliance with the 98% efficiency level or the 20 ppmv outlet concentration required by § 60.752(b)(2)(iii)(b). Test Method 25C, however, was inappropriate in that it did not result in tests on samples representative of actual engine emissions and use of an alternative method required the approval of the Administrator. In view thereof, Count 4 alleging delayed testing of CDT's gas collection and control system will be dismissed.

Init. Dec. at 22 (Conclusions ¶ 4); *see also id*. at 18, 26.

2. *Region's Appeal*

The Region challenges the ALJ's holding on Count 4 on two fronts.[25] First, the Region argues that the ALJ's holding essentially attacks the validity of a regulation in the course of an enforcement action. This, the Region submits, is inconsistent with section 307(b)(2) of the CAA, 42 U.S.C. § 7607(b)(2), which precludes judicial review of regulations in the context of civil or criminal proceedings for enforcement when judicial review of the regulation was available at the time of the regulation's promulgation. Appeal Br. at 31.

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[24] As discussed in more detail below, the Region asserts (and CDT does not contest) that, because the system appeared to be operational at the time of the February 8, 1999 inspection, at the very latest, CDT should have completed performance testing on the gas collection and emission control system 180 days later, i.e., by August 8, 1999. *See infra* section III.A.3.

[25] The Region also asserts in passing that it was inappropriate for the ALJ to raise the issue *sua sponte*. Appeal Br. at 31-32. Because we hold CDT liable for Count 4 on other grounds, we do not address this issue here.

Second, the Region asserts that neither party raised the appropriateness of the regulatory test methods at any time before, during, or after the hearing. *Id*. at 32. Given the fact that this aspect of the case was not at issue, the Region argues that it had no way to anticipate the need for testimony to clarify this issue for the ALJ. The Region contends that had it known this was an issue for the ALJ, it would have presented a witness to explain the Region's position on the test methods. Neither party presented any testimony on this issue at hearing; instead, according to the Region, the ALJ relied entirely on a September 11, 2000 letter from Bruce White, Counsel to KMS, to Vivian Doyle, U.S. EPA Region V, which related to a Finding of Violation that KMS had received from the Region.[26] *See id*.; *see also* Init. Dec. at 18-19; R Ex. 18.

3. *Analysis*

The operative regulation, 40 C.F.R. § 60.752(b)(2)(iii), provides that if an owner, or operator of an MSW landfill has a calculated NMOC emission rate equal to or greater than 50 megagrams per year, the owner or operator must choose one of three options in order to comply with the subpart. Specifically, the owner or operator must route all collected gas to one of the following control systems: (1) an open flare pursuant to 40 C.F.R. § 60.752(b)(2)(iii)(A); or (2) a treatment system designed and operated to reduce NMOC by a certain percentage pursuant to § 60.752(b)(2)(iii)(B); or (3) a treatment system that processes the gas for subsequent sale pursuant to § 60.752(b)(2)(iii)(C).

CDT apparently intended to comply with the second option by routing all the collected gas to a control system that would reduce NMOC by a certain percentage, in this instance, 98 weight-percent.[27] *See* R Ex. 8 at 2. This option requires that an initial performance test must be completed no later than 180 days after the initial startup of the control system, and in accordance with the test methods specified in 40 C.F.R. § 60.754(d). In addition, the regulations in force at the time of the alleged violations specifically required either Test Method 25C or Test Method 18 of appendix A of part 60 to be used to determine compliance with the 98 weight-percent efficiency, "unless another method to demonstrate compliance has been approved by the Administrator as provided by § 60.752(b)(2)(i)(B)." 40 C.F.R. § 60.754(d) (1998).

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[26] Apparently, the Region had two separate on-going investigations and/or enforcement actions involving the CDT Landfill - one involving CDT and the other KMS. *See* Letter from Louise C. Gross, Associate Regional Counsel, to Honorable Spencer T. Nissen (July 25, 2000); Letter from Louise C. Gross, Associate Regional Counsel, to Honorable Spencer T. Nissen (Aug. 29, 2000).

[27] For purposes of this appeal, the Board assumes that CDT meets the threshold requirement of having an NMOC emission rate equal to or greater than 50 megagrams per year since neither party appealed the ALJ's holding to this effect.

It is undisputed that CDT failed to complete performance testing within 180 days after initial startup. At the time of the Region's February 8, 1999 inspection, part of the gas collection and emission control system at CDT was already operating. Tr. 60-61; C Ex. 1. Therefore, at the very latest CDT should have completed performance testing by August 8, 1999 (180 days after the February 8, 1999 inspection). The record shows that performance testing was not completed until September of 2000. C Ex. 18, Tr. at 61, 62-63.

Although KMS,[28] IEPA, and the Region had apparently been discussing the use of an alternative test method, Method 25A, since October of 1999, it was not formally proposed to IEPA for approval until August 8, 2000. Init. Dec. at 18-19 (Findings of Fact 28-29); R Ex. 18 at 4-6 & Chron. at 4. IEPA approved the alternative test method on August 15, 2000. Init. Dec. at 19 (Findings of Fact 29); R Ex. 18 at 5.

As discussed above, the ALJ dismissed this Count because he found the test methods[29] prescribed in the regulation prior to the 2000 amendment to be inappropriate in this instance. Although his reasoning is not altogether clear, the ALJ seems to conclude that because the provision prescribing the required test methods was subsequently amended to include Test Method 25A,[30] as well as the original Test Methods 25C and 18, this amendment confirms that the original test methods could not produce representative data, and that CDT was thus powerless to comply.[31] *See* Init. Dec. at 26 ("The regulation formerly requiring use of an inappropriate test method and alternate methods requiring the approval of the Administrator, there is not much to be said for the Complainant's case on this count.").

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[28] Apparently, KMS was responsible under its contractual agreement with CDT to conduct these performance tests at the landfill. *See supra* note 12.

[29] With respect to Method 18, the ALJ stated: "[t]here is no indication or allegation that Method 18 is a realistic or practical method of testing the engines at issue here." Init. Dec. at 18 n.20 (Findings of Fact 28).

[30] In the Initial Decision, the ALJ states that the amendment of the regulation allows for the use of "Method 25." *See* Init. Dec. at 26. We assume that the ALJ was intending to refer to the authorization to use Test Method 25A, the relevant test method in this matter. *See* R Ex. 18 at 4-6 (describing factual history of development of Method 25A by KMS consultants as alternative to Method 25C).

[31] *Compare* 40 C.F.R. § 60.754(d) (1998) ("For the performance test required in § 60.752(b)(2)(iii)(B), Method 25C or Method 18 of appendix A of this part shall be used to determine compliance with 98 weight-percent efficiency * * * , unless another method to demonstrate compliance has been approved by the Administrator * * * .") *with* 40 C.F.R. § 60.754(d) (2001) ("For the performance test required in § 60.752(b)(2)(iii)(B), Method 25, 25C or Method 18 of Appendix A of this part must be used to determine compliance with 98 weight-percent efficiency * * * , unless another method to demonstrate compliance has been approved by the Administrator * * * . In cases where the outlet concentration is less than 50 ppm NMOC as carbon (8 ppm NMOC as hexane), Method 25A should be used in place of Method 25.").

Even if the ALJ is correct that the original test methods set forth in the regulation were not suited to the control system used at CDT's facility,[32] we fail to see the logic in his holding that CDT was therefore powerless to comply. CDT should not be relieved of its duty to conduct a timely performance test merely because the test method ultimately used by CDT - Test Method 25A[33] - was not one of the identified test methods in the regulation prior to the regulatory amendment in 2000.[34] By expressly allowing alternative test methods to be used with the Administrator's approval, the regulation anticipates and provides for instances when the test methods identified are, for whatever reason, not suitable in a particular instance. Accordingly, whether or not the pre-2000 test methods were appropriate to the application at hand, CDT had the means to comply by seeking the Administrator's approval of an alternative test method. Here, CDT did ultimately make an attempt to do just that, but more than a year past the regulatory deadline.[35] Had timely compliance been its objective, CDT should have sought approval far enough in advance of the regulatory deadline to allow for approval and timely compliance. This CDT did not do. CDT should not be rewarded for its neglect in this regard. Accordingly, we reverse the ALJ's liability holding on this Count. Since we are reversing the ALJ's decision on this ground, we do not need to reach the Region's argument that the ALJ is in effect considering a regulation's validity in contravention of section 307 of the CAA.[36] The assessment of an appropriate penalty amount for this Count is discussed below. *See infra* section III.C.3.c.

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[32] In its appeal, the Region does not set forth a convincing case that the ALJ erred in concluding that original test methods set forth in the regulation could not produce representative data at CDT's facility. Indeed, there appears to be little doubt that the method ultimately deployed - Method 25A - was superior to the enumerated test methods set forth in the regulation for this type of control system. As discussed below, our concern with the ALJ's decision centers not on his determination regarding the representativeness of the test methods enumerated in the original, but rather on his assumption that CDT had no other options under the regulation in force at the time the actions in this matter took place.

[33] Init. Dec. at 19; R Ex. 18 at 5 & Chron. at 6.

[34] The only reference to Test Method 25A in the amended provision provides that "[i]n cases where the outlet concentration is less than 50 ppm NMOC as carbon * * * , Method 25A should be used in place of Method 25." 40 C.F.R. § 60.754(d) (2001).

[35] The record indicates that KMS conducted the performance test in this matter, on behalf of CDT, in September 2000. *See* C Ex. 18; *see also supra* note 28 and accompanying text.

[36] In any event, we have previously ruled that "no absolute prohibition against our entertaining challenges to the validity of final Clean Air Act regulations follows from the specific language in section § 307(b) itself, which 'only makes direct reference to preclusion of judicial review, not administrative review.'" *In re Woodkiln, Inc.*, 7 E.A.D. 254, 270 n.16 (EAB 1997) (quoting *In re Echevarria*, 5 E.A.D. 626, 634 (EAB 1994)). Nonetheless, there is a strong presumption against reviewing the validity of final Agency regulations in administrative adjudications. *Id.* at 269.

B. *ALJ's Admission of Respondent's Combined Balance Sheet*

1. *Initial Decision*

As discussed above, on January 8, 2001, nine days prior to the January 17, 2001 hearing, CDT's counsel sent a document entitled "CDT Landfill Corporation Combined Balance Sheet as of September 30, 2000" to the Region and to the ALJ requesting that it be admitted into evidence at the hearing. R Ex. 25. The Region objected to CDT's request in two motions arguing, *inter alia*, that CDT's request violated the procedural rules in part 22, and that if admitted at hearing, the Region would be prejudiced in its ability to present its case due to insufficient time for the Region to analyze the financial information. *See* Motion to Exclude; Motion to Limit Evidence.

The ALJ ruled at hearing that he would admit the Combined Balance Sheet "based on the change in circumstances." Tr. at 21. He further elaborated in the Initial Decision that "the change" to which he had referred at hearing was "the fact that CDT had withdrawn its application to the City of Joliet for an expansion of its landfill and allegedly was 'out of business.'" Init. Dec. at 3. The ALJ also clarified in the Initial Decision that "additional evidence [as to Respondent's financial condition] would be helpful." *Id*. (alteration in original). His decision to admit the Combined Balance Sheet ultimately and significantly influenced his penalty analysis. Specifically, the ALJ cited the Combined Balance Sheet as the only evidence in the record of CDT's financial condition. *Id*. at 32.

2. *Region's Appeal*

The Region argues in its appeal that the ALJ erred in admitting the Combined Balance Sheet into evidence at hearing for a number of reasons. Specifically, the Region asserts that the ALJ erred in admitting this document because, in so doing, the ALJ both failed to enforce his own order and to rule on outstanding motions. Appeal Br. at 16. Here, the Region cites to the April 18, 2000 Prehearing Order, which required CDT to include in its prehearing exchange certain financial information if it wished to put its ability to pay a penalty at issue in this matter. *See* Prehearing Order at 3. The Region argues that the ALJ "never enforced this Order or issued an Order to Show Cause. Nor was an explanation [for the failure to provide information earlier than January 8, 2001] ever asked for by the Administrative Law Judge or provided by Respondent." Appeal Br. at 16. Moreover, the Region asserts that the ALJ erred by not explicitly ruling on the Region's two motions objecting to the admission of the Combined Balance Sheet. *See id*. at 18.

The Region's appeal also asserts that the ALJ's admission of the Combined Balance Sheet was in error because the admission did not comply with 40 C.F.R. part 22. Here, the Region cites to two sections of the part 22 rules - § 22.19 and § 22.22. The Region argues that the ALJ did not comply with 40 C.F.R.

§ 22.19(a) which provides: "[e]xcept as provided in § 22.22(a), a document or exhibit that has not been included in prehearing information exchange shall not be admitted into evidence * * *." Also included in 40 C.F.R. § 22.19 is the requirement that each party include in its prehearing exchange all documents and exhibits it intends to introduce into evidence at hearing and that a respondent is responsible for explaining in its prehearing exchange why the proposed penalty should be reduced or eliminated. 40 C.F.R. §§ 22.19(a)(2)(ii), (a)(3). The Region further points out that the part 22 rules provide that:

> Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion: (1) Infer that the information would be adverse to the party failing to provide it; (2) Exclude the information from evidence; or (3) Issue a default order under § 22.17(c).

40 C.F.R. § 22.19(g). The Region asserts that the ALJ's late admission of the Combined Balance Sheet conflicts with a respondent's obligation under the part 22 rules to include such documents in its prehearing exchange. According to the Region:

> In contrast to the Federal Rules of Civil Procedure, a formal prehearing exchange of information is the primary vehicle of information exchange under the Consolidated Rules. Additional discovery is limited in comparison to the extensive and time-consuming discovery typical in Federal courts. Preamble to Proposed Consolidated Rules, 63 Fed. Reg. 9469, 9472 (February 25, 1998). For that reason, the Consolidated Rules mandate that evidence to support an inability to pay contention be included as part of the prehearing exchange.

Appeal Br. at 21.

Nor did the ALJ, according to the Region, comply with 40 C.F.R. § 22.22(a), which does not allow the Presiding Officer to admit any document that was not provided and was required to be exchanged under § 22.19(a), (e), or (f), "unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so." 40 C.F.R. § 22.22(a). The Region cites several cases where the determination regarding whether a particular document could be admitted rested on whether good cause was shown for admission. Appeal Br. at 21-22 (citing, e.g., *In re Titan Wheel Corp.*, 10 E.A.D. 526 (EAB 2002), *appeal docketed*, No. 4:02-cv-40352 (S.D. Iowa July 19, 2002) and *In re Rybond, Inc.*, 6 E.A.D. 614 (EAB 1996)). The

Region asserts that CDT's request to admit the Combined Balance Sheet did not satisfy this requirement. According to the Region, CDT's letter from its Counsel did not even attempt to show good cause why it had not provided this information earlier. The Region argues that "Respondent was given ample and early opportunities by both the Complainant and Judge Nissen to provide meaningful financial information. Until one week before the hearing, it declined to do so." Appeal Br. at 23. The Region asserts that "[t]he EAB * * * should not reward Respondent for failing to produce the evidence which Complainant repeatedly tried to obtain, nor should it fault Appellant for a failure to produce what could not be produced." *Id*. at 25.

3. *Analysis*

Our analysis of this issue is informed by the CROP, 40 C.F.R. part 22, which governs these proceedings. In describing the powers and duties of an ALJ, the CROP provides that "[t]he Presiding Officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay." 40 C.F.R. § 22.4(c). In doing so, the ALJ, among other things, may "(1) Conduct administrative hearings under these Consolidated Rules of Practice; * * * (4) Examine witnesses and receive documentary or other evidence; * * * (6) *Admit or exclude evidence*; * * * (10) Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by [the CROP]." 40 C.F.R. § 22.4(c)(1)-(10) (emphasis added).

With respect to prehearing information exchange and discovery, the CROP provides that if a party intends to introduce evidence at hearing, except as provided for by 40 C.F.R. § 22.22(a), that information must be included in the party's prehearing exchange. Section 22.22(a), in turn, states that if a party fails to include information in its prehearing exchange "at least 15 days before the hearing date, the Presiding Officer shall not admit the document * * * , *unless the non-exchanging party had good cause* for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so." 40 C.F.R. § 22.22(a)(1) (emphasis added). The CROP further provides, in relevant part, that "[w]here a party fails to provide information within its control as required pursuant to this section, the Presiding Officer *may, in his discretion*: (1) Infer that the information would be adverse to the party failing to provide it; (2) *Exclude the information from evidence*; or (3) Issue a default order under § 22.17(c)." *Id*. § 22.19(g) (emphasis added).

It is clear, on their face, that these CROP provisions grant significant discretion to the presiding officer to conduct administrative proceedings and to make determinations regarding the admissibility of evidence during such proceedings. In interpreting and applying these provisions, the Board has indicated on a num-

ber of occasions that "[o]ur rules depend on the presiding officer to exercise discretion throughout an administrative penalty proceeding." *In re Carroll Oil Co.*, 10 E.A.D. 635, 650 (EAB 2002) (quoting *In re Lazarus, Inc.*, 7 E.A.D. 318, 334 (EAB 1997)); *accord In re J.V. Peters & Co.*, 7 E.A.D. 77, 99 (EAB 1997), *aff'd sub nom. Shillman v. United States*, No. I:97-CV-1355 (N.D. Ohio Jan. 14, 1999), *aff'd in part*, 221 F.3d 1336 (6th Cir. 2000) (unpublished), *cert. denied*, 531 U.S. 1071 (2001). We have also emphasized that "[t]he admission of evidence is a matter particularly within the discretion of the administrative law judge." *J.V. Peters*, 7 E.A.D. at 99 (quoting *In re Sandoz*, 2 E.A.D. 324, 332 (CJO 1987)); *accord In re Titan Wheel Corp.*, 10 E.A.D. 526, 536-37 (EAB 2002), *appeal docketed*, No. 4:02-cv-40352 (S.D. Iowa July 19, 2002); *In re Celotex Corp.*, 3 E.A.D. 740, 744 (CJO 1991). Federal district and circuit courts have similarly recognized agency discretion in making evidentiary decisions during administrative proceedings. *E.g., Atlas Copco, Inc. v. EPA*, 642 F.2d 458, 467 (D.C. Cir. 1979). Consequently, absent an abuse of discretion, the Board gives a presiding officer's evidentiary rulings substantial deference. *Titan Wheel*, 10 E.A.D. 536-37; *J.V. Peters*, 7 E.A.D. at 99*; see also Yaffe Iron & Metal Co. v. U.S. EPA*, 774 F.2d 1008, 1016 (10th Cir. 1985) (an ALJ's determination whether or not to exclude evidence will not be disturbed absent an abuse of discretion).

Under the particular facts and circumstances of this case, the Board finds that the ALJ did not abuse his discretion in admitting the Combined Balance Sheet into the record, despite its late arrival, for several reasons. First, as the statement itself indicates, it reflects financial conditions as of September 30, 2000, which is clearly new information vis-á-vis the time when the answer to the complaint was due[37] as well as when the parties were scheduled to comply with the April pre-hearing exchange order.[38] The letter attached to the Combined Balance Sheet states that "a number of things have occurred in the last couple of months. The landfill has withdrawn its application for expansion with the City of Joliet and is now out of business." R Ex. 25. The record supports this allegedly recent change of events. According to a newspaper article entered into evidence by the Region, CDT had withdrawn its application for an expansion of its Joliet landfill site at the end of September 2000.[39] C Ex. 21. Upon withdrawal of that application, all potential use of the Joliet landfill site by CDT for disposal was extinguished.[40] *See* C Ex. 22. Based upon the facts in the record, it is clear that the

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[37] The Answer was filed on November 3, 1999. Init. Dec. at 2.

[38] The parties were directed to exchange all prehearing information on or before June 2, 2000. Prehearing Order at 3.

[39] According to the article, CDT withdrew its application to expand its landfill on September 26, 2000. C Ex. 21.

[40] According to a second newspaper article entered into evidence, capacity at the Joliet landfill was apparently reached in August of 2000. C Ex. 22.

financial analysis reflected in the Combined Balance Sheet was based on new events surrounding the viability of the company's landfill, arose after the prehearing information exchange period ran, and therefore could not have been exchanged prior to September. Consequently, we believe an ALJ could legitimately, within his discretion, find that "good cause" under 40 C.F.R. § 22.22(a)(1) existed to warrant the document's admission despite its late arrival.[41]

Second, the financial statement was prepared by an outside accounting firm, not CDT, which suggests a degree of reliability that would normally allow its admission into evidence. In regard to the admissibility of financial statements for purposes of determining ability to pay, the Board has indicated in the past that financial statements — because of the level of detail they normally provide (albeit not necessarily in this specific instance) and their focus on providing an accurate representation of a company's financial state of affairs — are generally favored over tax returns, which seek to minimize income for federal income tax reporting purposes. *See In re Bil-Dry Corp.*, 9 E.A.D. 575, 613-14 (EAB 2001) (citing favorably a financial expert's explanation of the difference between tax returns and financial statements, the latter of which "are supposed to be prepared according to generally-accepted accounting principles").[42] Third, as the Combined Balance Sheet was prepared "as of September 30, 2000," R Ex. 25 at 2, its production on January 8, 2001 (following the holidays) does not seem particularly delinquent as it presumably takes some length of time for an accounting firm to produce such financial statements.[43]

A fourth reason upon which the Board bases its finding that the ALJ did not abuse his discretion is the fact that this evidentiary matter was raised in the context of an *administrative* proceeding. Administrative hearings are such that rules allowing evidence into the record tend to be more liberal than in proceedings in other courts, and normally err towards over-inclusion rather than under-inclusion. *See, e.g., In re Green Thumb Nursery*, 6 E.A.D. 782, 795 n.26 (EAB 1997) (noting that "that the Federal Rules of Evidence are more restrictive than our own administrative rules"); *In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355,

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[41] *See* further discussion of the "good cause" exception under 40 C.F.R. § 22.22(a)(1) *infra*.

[42] The Board is not suggesting that income tax returns, prepared in accordance with the rules and regulations for accounting for transactions under the Internal Revenue Code, are in any way less reliable than financial statements prepared in accordance with generally accepted accounting principles. Instead, the Board simply notes that the type of information provided is different, in which event financial statements generally provide more useful information for purposes of determining a company's ability to pay an administrative penalty.

[43] This is not to suggest that the preparation of such documents should proceed slowly in these matters. Rather, this factor goes to show that there may be a reasonable basis to find, as the ALJ implicitly did, that the respondent "provided the required information to all other parties as soon as it had control of the information," as required by the CROP. 40 C.F.R. § 22.22(a)(1).

369 (EAB 1994) (holding that hearsay evidence is admissible in administrative proceedings even if it would not be admissible under the Federal Rules of Evidence); *see also Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981) (recognizing that "strict rules of evidence do not apply in the administrative context"). In light of the more relaxed rules in administrative hearings, together with the liberal standard of review for an ALJ's evidentiary determination, as discussed above, we are particularly wary of overruling an ALJ's decision when the issue raised concerns the ALJ's *admission* of evidence, as opposed to its *exclusion*. *Cf. Atlas Copco, Inc. v. EPA*, 642 F.2d at 467 (D.C. Cir. 1979) (stating that the discretion reposed in agencies to decide whether to admit particular evidence at a hearing is not unbridled and should not "exclude from consideration facts and circumstances relevant to its inquiry" which "may be persuasive weight in the exercise of its discretion").

The Region's arguments are unpersuasive under the particular facts and circumstances of this case. Contrary to the Region's assertions,[44] section 22.19 does not absolutely prohibit the ALJ from admitting evidence submitted after the prehearing exchange. While it is true that an ALJ *may* exclude evidence submitted after this period, it is for circumstances such as these, where certain potentially relevant evidence comes to light regarding one of the mandatory statutory considerations after the prehearing exchange period runs, that the rule gives the presiding officer the discretion to admit the late-arriving evidence.

The Region also argues that there was insufficient "good cause" for admitting the evidence under 40 C.F.R. § 22.22(a)(1). Appeal Br. at 21-23. Although Respondent's request did not explicitly argue a "good cause" basis for the late production of evidence, it did indicate that CDT might be a "candidate for bankruptcy" and explained that "a number of things have occurred in the last couple months," most notably that CDT had withdrawn its application for landfill expansion and was allegedly out of business. R Ex. 25. As noted above,[45] this fact is substantiated by other evidence in the record, which indicates that CDT withdrew its application for a landfill expansion after the prehearing exchange period. C Exs. 21-22. The ALJ apparently considered CDT's "change in circumstances" as an attempt to explain that "good cause" existed for late admission of the Combined Balance Sheet and, accordingly, decided to admit the Combined Balance

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[44] The Region argues that "the Consolidated Rules *mandate* that evidence to support an inability-to-pay contention be included as part of the prehearing exchange." Appeal Br. at 21 (emphasis added). This particular argument, taken to its extreme, would prohibit the admission of evidence that a respondent had filed for bankruptcy or had otherwise fallen into significant financial distress, should such circumstances occur after the exchange period has run.

[45] *See supra* notes 38-40 and accompanying text.

Sheet.[46] *See* Tr. at 21; Init. Dec. at 3, 21. In our view, although the ALJ's discussion on the record was lacking in detail,[47] the facts in the record speak for themselves; thus, we do not find that the ALJ abused his discretion by allowing the admission of the Combined Balance Sheet into evidence at the hearing. Furthermore, while it is true that early in the course of this matter there appeared to be some suggestion that CDT might be having financial difficulties, which CDT apparently failed to verify during the prehearing information exchange, the new information admitted into evidence by the ALJ at the hearing appears to be of a much more serious nature than that originally indicated, and the circumstances giving rise to the new information (i.e., the Combined Balance Sheet) appears to have occurred after the prehearing discovery period had run.[48] These new developments, therefore, could legitimately be considered a change in circumstances that would warrant admission of the Combined Balance Sheet into the record despite its lateness.

Generally, in considering whether late-arriving evidence should be accepted, an important aspect of the inquiry is whether the untimely production would result in unfair surprise to the other party, thereby prejudicing its capacity to properly prepare its case.[49] *In re Predex Corp.*, 7 E.A.D. 591, 604 n.18

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[46] We are not persuaded by the Region's argument that the ALJ failed to rule on outstanding motions objecting to the admission of the Combined Balance Sheet. While not explicit, the Board interprets the ALJ's decision to admit the Combined Balance Sheet as an implicit denial of the Region's two motions. *See Villegas-Valenzuela v. I.N.S.*, 103 F.3d 805, 812 n.7 (9th Cir. 1996) (interpreting an ALJ's consideration of a late-filed affidavit in his decision as an implicit ruling by the ALJ that the affidavit was admissible, despite no specific ruling on any motion regarding its entry).

[47] The fact that the ALJ failed to explicitly recite the language of the regulation at 40 C.F.R. § 22.22(a)(1) in his decision to admit the evidence does not in and of itself demonstrate an abuse of discretion by the ALJ. *See In re Chempace Corp.*, 9 E.A.D. 119, 135 (EAB 2000) (finding that "[w]hile the Presiding Officer did not explicitly recite the factors under 40 C.F.R. § 22.19(f)(1) in denying the Region's request, this shortcoming does not demonstrate an abuse of discretion"); *see also FDIC v. Ogden Corp.*, 202 F.3d 454, 460 (1st Cir. 2000) (finding neither abandonment of abuse-of-discretion standard of review nor automatic remand appropriate where lower court granted motion without explanation).

[48] The Region's reliance on *Titan Wheel* in support of its "good cause" argument is unavailing as, in that case, the Board found that the alleged "late-arriving evidence" had, in actuality, been "readily available prior to the conclusion of the pre-hearing exchange." *In re Titan Wheel Corp.*, RCRA Appeal No. 01-3, slip op. at 21 (EAB, June 6, 2002), 10 E.A.D. __, *appeal docketed*, No. 4:02-cv-40352 (S.D. Iowa July 19, 2002). The Region's reference to *In re Rybond, Inc.* is also unfounded as the Board's decision there, that the lack of legal representation alone does not constitute sufficient "good cause" to vacate a default order, especially in light of the fact that respondent in that case had been given numerous chances to comply, is inapposite to the current situation. *In re Rybond, Inc.*, 6 E.A.D. 614, 626-28 (EAB 1996).

[49] The Board has observed the importance of the question of prejudice to the opposing party in a number of other related settings. *See, e.g., In re Carroll Oil Co.*, 10 E.A.D. 635, 650 (EAB 2002) (holding that undue prejudice to the opposing party is the most significant factor in deciding whether

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(EAB 1998) (agreeing that party should not be allowed to be prejudiced by a late disclosure of evidence); *see also Harris v. Steelweld Equip. Co.*, 869 F.2d 396, 399 (8th Cir. 1989), *cert. denied*, 493 U.S. 817 (1989) ("Our rules of civil procedure are designed to facilitate the complete disclosure of all relevant information before trial in order to eliminate unfair surprise and ultimately promote accurate and just decisions." (quoting *Simplex, Inc. v. Diversified Energy Sys.*, 847 F.2d 1290, 1292 (7th Cir. 1988)).

Here, given that the hearing took place on January 17, 2001, approximately one week[50] after the Region and the ALJ received the new financial information, we are not persuaded that the admission of the Combined Balance Sheet was sufficiently prejudicial to the Region to amount to an abuse of discretion. In its Motion to Limit Evidence, the Region argued: "Complainant would be prejudiced in its ability to present its case in chief, since the time to conduct an analysis of the financial information present would not be sufficient for Complainant to determine if there were any impact on Complainant's proposed civil penalty." Motion to Limit Evidence at 3. Other than this general allegation of prejudice, however, the Region did not inform the ALJ of any specific details as to why it was unable during that week to prepare a response to the one-page financial document. Similarly, at the hearing, the Region objected to the ALJ's admission of the financial document, but provided no further argument in support of its objection and offered no evidence or testimony explaining why its proposed penalty continued to be appropriate. Tr. at 21; Complainant's Motion to Conform Transcript to Actual Testimony, Attach. 2, at 21. Likewise, the Region made no effort to secure or compel the attendance of a witness (for example, from CDT or the accounting firm) who might be examined on the Combined Balance Sheet and its implications; nor did the Region request the ALJ to postpone or reopen the hearing in order to allow for the development and presentation of countervailing proof. The Region appears to have assumed that the ALJ would rule in its favor, or that this Board would reverse the ALJ on this issue, and, accordingly, did not avail itself of opportunities to mitigate any prejudice it may have suffered. Absent some very specific proffer at hearing by the Region demonstrating how it was prejudiced (e.g., why it was not possible for the Region to prepare for a cross-examination of a relatively short and straightforward financial statement with an approximately seven-day advance notice) and/or a request by it to postpone or reopen the hear-

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(continued)
to allow an amendment to a pleading); *In re Lazarus, Inc.*, 7 E.A.D. 318, 334 (EAB 1997) (upholding the ALJ's decision to entertain a late-raised defense where no prejudice resulted from Respondent's assertion of the defense).

[50] It is not entirely clear when the Region learned of this new evidence. CDT allegedly submitted the Combined Balance Sheet on January 8, 2001. Init. Dec. at 2. The Region indicates it received said document "on or about" January 10, 2001, approximately seven days before the hearing. Complainant's Post-Hearing Br. at 2. The Region filed its first motion to limit evidence on January 9, 2001. Init. Dec. at 2.

ing, we are reluctant to find the kind of significant and unavoidable prejudice that would warrant reversing the ALJ on the admission of the Combined Balance Sheet.[51] *See In re Lazarus, Inc.*, 7 E.A.D. 318, 334-35 (EAB 1997) (allowing a late-raised affirmative defense where, among other factors, Region had failed to provide any specific evidence of the alleged prejudice).

The Region also argues in its appeal brief that the Combined Balance Sheet should either "have been excluded or given zero evidentiary weight" because of its unreliability. Appeal Br. at 24. The financial document in question states on its face that it is the "Combined Balance Sheet As of September 30, 2000" of "CDT Landfill Corporation." R Ex. 25. Although not specifically addressing the document's reliability at the hearing, the ALJ noted in his decision that the document was undated and had not been further explained by testimony. Init. Dec. at 21. He also noted that there was no analysis or explanation for the "very large closure cost liability" referenced in the document. *Id*. This being said, the Region did not question the closure cost projection or the other assumptions in the report at the time of the hearing or in its post-trial brief, leaving the Combined Balance Sheet the *only* information regarding CDT's financial situation in evidence. Not surprisingly, then, it became the linchpin of the ALJ's penalty calculation.

As mentioned above, we have typically considered financial statements prepared by an outside accountant to generally have some intrinsic reliability and, for purposes of determining ability to pay, have considered them more favorably than documents such as tax returns, which provide a type of information that is less instructive for those purposes. *See In re Bil-Dry Corp.*, 9 E.A.D. 575, 613-14 (EAB 2001). Although the full significance of the information reported in the Combined Balance Sheet may not be altogether clear, we cannot say that the ALJ's admitting the document, and giving the document some weight as the only meaningful evidence in the record, is clearly an abuse of discretion.[52]

In sum, given that ALJs are given broad discretion on evidentiary matters, that the specific information at issue here was not available at the time of the

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[51] Although admittedly inconvenient for the Region to prepare for CDT's financial statement within this relatively short time frame, the Combined Balance Sheet does not appear to be particularly complex. We have indicated that mere inconvenience alone is not sufficient to bar an affirmative defense raised three weeks before the hearing. *See Lazarus*, 7 E.A.D. at 335. With respect to late-raised defenses, we have also noted that "[p]roof of prejudice is not satisfied simply because the opposing party may have greater difficulty in prevailing on the merits." *Id*. at 335 n.35 (citing *Block v. First Blood Assocs*., 763 F. Supp. 746, 748 (S.D.N.Y. 1991), *aff'd*, 988 F.2d 344 (2d Cir. 1993)). Similarly, from the record before us here, we are not persuaded that the Region was unduly surprised by the late-arriving evidence and thereby prejudiced.

[52] We note that, because of the paucity of evidence with respect to the ability-to-pay issue, the financial document ultimately assumes a large role in the final outcome. For further discussion of the role of the Combined Balance Sheet in the ability-to-pay analysis, see *infra* section III.C.3.b.

answer or during the period of prehearing information exchange, that the information is relevant to one of the statutory factors to be taken into consideration in the penalty assessment, that such financial documents are generally considered relatively reliable, and that admission of the one-page document arriving at least a week before the hearing, although inconvenient, does not seem unavoidably and significantly prejudicial, the Region has failed to convince us that the ALJ's decision to admit the Combined Balance Sheet at hearing was a clear abuse of discretion. Accordingly, under the facts and circumstances of this case, we conclude that the ALJ did not abuse his discretion in admitting the Combined Balance Sheet into evidence at hearing and in relying on the same in his penalty analysis.[53] Accordingly, the Board affirms the ALJ's decision to admit CDT's Combined Balance Sheet.

C. *Penalty Determination*

1. *Initial Decision*

In the Initial Decision, the ALJ disagreed with the Region's proposed penalty of $72,380 based on the Penalty Policy because, according to the ALJ, the Region failed: to consider the implications of the IEPA permits issued to the facility,[54] to give any consideration to CDT's good faith efforts to comply, and to accurately consider the true seriousness of the violations. Init. Dec. at 26. By way of explanation, the ALJ reviewed the Region's penalty calculations for each count and explained why he found these calculations to be inappropriate for the case at hand. *Id*. at 26-29. The ALJ took issue, *inter alia*, with the gravity portion of the proposed penalty - that part of the penalty which reflects each violation's importance to the regulatory scheme. *Id*. at 26-28. Additionally, the ALJ held that in view of the fact that at least one of the IEPA issued permits overlooked certain NSPS requirements, and in view of CDT's relationship with KMS,[55] further mitigation of the penalty was warranted. *Id*. at 28-29. In determining CDT's penalty prior to any adjustment for ability to pay, the ALJ asserted that "the permits issued to CDT and KMS by IEPA must be considered in determining an appropriate

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[53] *See* discussion *infra*, section III.C.3.b, regarding its use in the penalty calculation.

[54] The ALJ cites several construction and operating permits issued by IEPA to CDT and/or KMS for Site Nos. 0005 and 0006 at the CDT landfill. Init. Dec. at 3-4, 7 (Findings of Fact 2-3, 7) (citing R Exs. 7, 9-10, 13-15). He also notes that "the purpose of Subpart WWW is to control landfill emissions and CDT and/or KMS appear to have been accomplishing that objective in whole or in part under permits from IEPA." *Id*. at 29.

[55] The contractual agreement between KMS and CDT seemingly requires KMS to obtain certain environmental permits as well as conduct the emission performance tests - responsibilities that KMS may not have satisfactorily performed. *See supra* notes 12, 28. Both the ALJ and the Region determined that this fact called for mitigation of the penalty to be assessed against CDT, although the ALJ apparently thought that the degree of mitigation contemplated by the Region's proposed penalty was insufficient.

penalty." *Id*. at 29. The ALJ also cited a number of facts he believed demonstrated CDT's good faith efforts to comply. *Id*. at 28-29. In view of these concerns, the ALJ disregarded the Region's proposed penalty and, indeed, the Penalty Policy altogether, and instead fashioned an alternative penalty based on the statutory penalty factors. Applying these factors, the ALJ concluded that "under all the circumstances" a total penalty of $22,500 ($10,000 for Count I, $2,500 for Count II, and $10,000 for Count III) adequately accounted for the duration and seriousness of CDT's violations. *Id*. at 29. The ALJ found that the statutory factors of economic benefit and prior violations, though considered, did not apply in this case and, accordingly, he did not adjust the penalty for these factors. *Id*.

Ultimately, however, the ALJ did not assess a civil penalty in this matter because he found that the Region failed to carry its burden of persuasion regarding CDT's ability to pay a penalty. Finding that the Region had failed to make any showing regarding CDT's ability to pay and that the only evidence in the record regarding CDT's financial condition was the Combined Balance Sheet, the ALJ observed:

> [W]hile no evidence supports asserted landfill closure costs of $6.5 million [on the Combined Balance Sheet], it is mere speculation to assume that any portion of the mentioned sums will be available for the payment of penalties. Although a penalty of $22,500 might otherwise be appropriate, Complainant has totally failed to carry its burden of persuasion as to CDT's ability to pay.

Id. at 31-32. The ALJ held that the Region's burden required that it make a minimal showing from which it may be inferred that respondent had the ability to pay the penalty proposed. *Id*. at 30. He found that the Region's exhibit explaining the penalty calculation and the testimony given by Heather Graham, the Region's Environmental Engineer assigned to the matter, regarding the penalty calculation did not satisfy the Region's burden of proof required under the ALJ's reading of the Board's decision in *In re New Waterbury, Ltd.*, 5 E.A.D. 529 (EAB 1994), and accordingly declined to assess a penalty against CDT. *Id*. at 30-32.

2. *Region's Appeal*

The Region raises several issues on appeal concerning the ALJ's penalty determination. The Region asserts that the ALJ erred in his departure from the Region's proposed penalty, which was determined in accordance with the Penalty Policy, and in his failure to provide a reasoned basis for his alternative penalty calculation. Appeal Br. at 25. To support its argument, the Region emphasizes that penalty policies primarily aid in the application of statutory penalty criteria. *Id*. at 27. The Region argues that "in spite of [the testimony of the Region's two witnesses], the [ALJ] deemed that Complainant had 'overstated the seriousness of

the violations' and had not based its proposal 'on any realistic assessment of the seriousness of the violations, and therefore, is grossly excessive.'" *Id*. at 28 (citations omitted). The Region maintains that the ALJ erred when he disregarded the Region's proposed penalty of $72,380 because he did not use the Penalty Policy in his own analysis to assess a penalty. *Id*. at 29 ("Instead of providing an analysis of how the Penalty Policy might have been better applied, the Presiding Officer gave little or no indication as to where/how he derived the alternative * * * penalty."). Furthermore, the Region believes the ALJ failed to "articulate with reasonable clarity [his] reasons for [his] decision, and identify the significance of the crucial facts" and, therefore, erred in his alternative penalty assessment of $22,500. *Id*. at 29.

Next, the Region argues that the ALJ has misapplied the "burden of proof" set forth in 40 C.F.R. § 22.24 and has misinterpreted the Board's previous cases on ability to pay. Appeal Br. at 13-16. The Region asserts that rather than bearing a separate burden of proof for each particular statutory factor under section 113 of the CAA, the complainant bears the burden of proof regarding only the "appropriateness" of the overall penalty. *Id*. at 14. The Region argues that it has met this burden by considering each of the enumerated statutory factors under section 113 of the CAA, 42 U.S.C. § 7413(e), in developing its proposed penalty. *See* Appeal Br. at 14, 16. Further, the Region argues that it appropriately relied on a presumption of ability to pay because when CDT failed to raise the issue of ability to pay in its Answer, CDT effectively waived the issue. *Id*. at 15 (citing *In re New Waterbury*, 5 E.A.D. 529 (EAB 1994)). Lastly, the Region argues that the ALJ erred in his ability to pay analysis by virtue of his reliance on CDT's Combined Balance Sheet. *Id*. at 25.

3. *Analysis*

We begin our analysis of the ALJ's penalty determination by reviewing the relevant provisions of the Act and the regulations. The CAA enumerates several factors that must be considered when assessing a penalty. As we have noted, section 113(e) of the CAA provides, in pertinent part, as follows:

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

42 U.S.C. § 7413(e). As stated above, the Region utilized the Penalty Policy, which takes into account the statutory criteria, in recommending the penalty in the complaint.

The CROP regulatory provision that governs an ALJ's assessment of a civil penalty provides as follows:

> Amount of civil penalty. If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by 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).

While the regulations do grant the Board *de novo* review of a penalty determination, the Board has many times stated that it will generally not substitute its judgment for that of an ALJ absent a showing that the ALJ committed clear error or an abuse of discretion in assessing a penalty. *See, e.g., In re Carroll Oil*, 10 E.A.D. 635, 656 (EAB 2002); *In re M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 610 (EAB 2002); *In re Chempace Corp.*, 9 E.A.D. 119, 131 (EAB 2000).

ALJs are not compelled to apply EPA penalty policies in calculating penalties. 40 C.F.R. § 22.27(b); *see also Bruder*, 10 E.A.D. at 610; *In re B & R Oil Co.*, 8 E.A.D. 39, 63 (EAB 1998); *In re DIC Americas, Inc.*, 6 E.A.D. 184, 189-91 & n.10 (EAB 1995). This being said, we have noted on numerous occasions that penalty policies serve to facilitate the application of statutory penalty criteria and, accordingly, offer a useful mechanism for ensuring consistency in civil penalty assessments. *See, e.g., Chempace*, 9 E.A.D. at 131; *In re Mobil Oil Corp.*, 5 E.A.D. 490, 514-15 (EAB 1994) (quoting *In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 374 (EAB 1994)).

Although the Board's precedents demonstrate that the Board will normally defer to an ALJ's penalty assessment, the Board nevertheless "reserves the right to closely scrutinize substantial deviations from the relevant penalty policy and may set aside the ALJ's penalty assessment and make its own *de novo* penalty calcula-

tions where the ALJ's reasons for deviating from the penalty policy are not persuasive or convincing." *In re Capozzi*, 11 E.A.D. 10, 32 (EAB 2003); *see also In re Chem Lab Prods.*, 10 E.A.D. 711, 725 (EAB 2002) (rejecting ALJ's penalty assessment where ALJ's reason for departure was based on an impermissible comparison of penalties derived in a settlement context with the penalty to be assessed in a fully litigated case); *Bruder*, 10 E.A.D. at 611 (rejecting ALJ's penalty assessment where ALJ's departure from penalty policy was based on ALJ's misunderstanding as to how the penalty policy should be applied); *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994).

a. *The ALJ's Departure from the Region's Penalty Policy-Based Proposed Penalty*

The Region asserts in its appeal that because the ALJ did not use the Penalty Policy[56] in his alternative penalty assessment, he committed clear error. Appeal Br. at 29. This statement is not supported by our prior cases interpreting 40 C.F.R. § 22.27(b) - the provision that governs an ALJ's assessment of a civil penalty. Indeed, we have stated on numerous occasions that ALJs are not compelled to use penalty policies in setting penalties. *Capozzi*, 11 E.A.D. at 31. Instead an ALJ, "having considered any applicable civil penalty guidelines issued by

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[56] The Penalty Policy suggests that when assessing a penalty under the CAA, the Agency include three components in its penalty: (1) an economic benefit of noncompliance component, (2) a gravity component, and (3) an adjustment factors component. Penalty Policy at 3. In the instant case, the Region determined that the economic benefit component was insignificant and, thus, did not assess a penalty component for it. C Ex. 14 at 1.

The Penalty Policy divides the gravity component into further considerations: actual or possible harm of the violation, importance to the regulatory scheme, and size of the violator. These considerations assist in properly reflecting the seriousness of the violation - a statutory factor to be considered when assessing a CAA penalty. Penalty Policy at 8. The "actual or possible harm" factor is then further divided into additional considerations: amount of pollutant, sensitivity of the environment, toxicity of the pollutant, length of time of the violation, and size of the violator. *Id.* at 9-10. The Penalty Policy offers as guidance a particular dollar figure or range for each of these considerations. For example, the Penalty Policy suggests a $5,000 penalty based on the impact on the regulatory scheme when a respondent conducts a late performance test. *Id.* at 13. Next, the modifications to the CAA Penalty Policy instruct that the gravity component and the economic benefit components of a penalty be increased by 10% to reflect the effects of inflation in accordance with the Debt Collection Improvement Act of 1996. C Ex. 17 (Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule (May 9, 1997)).

After the initial gravity component of the penalty is assigned, the Penalty Policy then calls for the Agency to adjust this initial penalty by considering certain factors. These factors are: degree of willfulness or negligence, degree of cooperation, history of noncompliance, and environmental damage. Penalty Policy at 15-19. Consideration of these factors allows the Agency to increase or decrease the gravity component of the penalty depending on the case's specific facts. In addition to these factors, the Penalty Policy also calls for the Agency to consider a respondent's ability to pay a penalty in adjusting the gravity and economic benefit components of a penalty. *Id.* at 20.

the Agency, is nonetheless free not to apply them to the case at hand."[57] *Id*. (citing *In re Employers Ins. of Wausau*., 6 E.A.D. 735, 758 (EAB 1997)); *accord Bruder*, 10 E.A.D. 598, 609 (EAB 2002) (citing *In re City of Marshall*, 10 E.A.D. 173, 189 n.23 (EAB 2001)); *In re B & R Oil Co.*, 8 E.A.D. 39, 63 (EAB 1998). If the ALJ chooses not to apply the penalty policy, the ALJ must explain his reasons for forgoing the penalty policy. If the Board determines these reasons to be persuasive or convincing, as previously discussed, the Board will defer to the ALJ's penalty analysis. *Capozzi*, 11 E.A.D. at 32.

At the outset, we disagree with the Region's assertion that the ALJ failed to provide a "reasoned, independent determination" for his alternative penalty assessment. The ALJ in the Initial Decision sets out in some detail the particular circumstances which he deemed significant in determining an appropriate penalty against CDT. Init. Dec. at 26-29.

We further disagree with the Region's argument that the ALJ failed to explain adequately his basis for departing from the Region's Penalty Policy-based proposed penalty. Here again, the ALJ provides a detailed articulation of his rationale. For example, the ALJ stated that the penalty failed to consider the confusion generated by IEPA's uneven treatment of NSPS concerns in permits issued. *Id*. at 28-29. In view of IEPA's approach to the landfill, CDT was, in the ALJ's view legitimately "surprised" to learn that Site No. 0005 — a closed landfill — would be factored into the NSPS threshold inquiry. *Id*. at 28. This, in the ALJ's view, warranted greater attention in assessing CDT's "good faith" than heeded by the Region. *Id*. at 29. The ALJ further referred to other indicia of good faith[58] which were, in his view, given insufficient consideration by the Region, including CDT's retention of an environmental consulting firm to review its "permitting/operation practices." *Id*.

The ALJ also concluded that the Region's Penalty Policy-based proposed penalty overstated the seriousness of the violations at issue. In this regard, the ALJ observed, for example, that the annual emissions reports that CDT either failed to submit or submitted late, while not unimportant, had as their primary purpose determining whether a facility remained subject to the applicable requirements. In this case, CDT's initial design capacity and NMOC emission rate report itself conceded regulatory coverage, and CDT's subsequent failure to timely submit annual reports thus served neither to remove the facility from regulatory cov-

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[57] Penalty policies are not binding because they, not having been subjected to the rulemaking procedures of the Administrative Procedures Act, lack the force of law. *See, e.g., Bruder*, 10 E.A.D. at 609; *City of Marshall*, 10 E.A.D. at 189, n.23.

[58] The ALJ additionally indicated that these "good faith efforts" could also appropriately be considered as falling within another of the statutory penalty assessment criteria, that of "other factors as justice may require." Init. Dec. at 29.

erage nor to allow the facility to evade any other requirements - a consideration ignored by the Region.[59] *Id*. at 27. Likewise, with respect to CDT's failure to submit a collection and control system design plan, the ALJ pointed out that this failure must be viewed in a broader context that recognizes as well that CDT did in fact construct and make operational, apparently in a timely manner, a collection and control system, and that the system, as installed, passed muster with IEPA and appears to comport with EPA regulations. These facts, which were overlooked by the Region, in the ALJ's view, tended to diminish the significance of CDT's failure to adhere to the design plan submission requirement in the first instance. *Id*.

In view of the perceived weaknesses in the Region's Penalty Policy-based proposed penalty, the ALJ substituted his own assessment, based on the statutory penalty criteria, for the Region's proposal. *See id*. at 28. While it is true that the ALJ's criticism of the Region's proposed penalty is more appropriately viewed as questioning the Region's application of the Penalty Policy rather than pointing out weaknesses in the Penalty Policy itself, thus raising the question of whether the ALJ might have worked within the framework of the Penalty Policy in developing an alternative penalty assessment, we are not inclined to reverse on his choice to instead limit his focus to the statutory factors. Rather, we find that his articulated rationale, on the whole, reflects a serious inquiry and is predicated on sufficiently persuasive considerations to warrant our deference in keeping with our prior decisions in this area. Accordingly, based on our review of the Initial Decision, we conclude that the ALJ did not commit clear error or abuse his discretion in his alternative penalty analysis. We next consider whether he erred in his ability-to-pay analysis, as a result of which he ultimately determined not to assess any penalty against CDT.

b. *The ALJ's "Ability to Pay"[60] Analysis*

The procedural rules governing this case unquestionably place the burden of proof of the proposed penalty's appropriateness on the Region. The pertinent CROP provision states that "[t]he *complainant has the burdens of presentation*

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[59] In fact, the ALJ pointed out that if CDT's reported emission rates should remain the same for the next three years, "submission of the NMOC report could be dispensed with." Init. Dec. at 27.

[60] Unlike certain other environmental statutes, such as the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 *et seq.*, the CAA does not specifically use the terminology "ability to pay" in describing its penalty assessment criteria. *Compare* 15 U.S.C. § 2615(a)(2)(B) (TSCA's penalty factors) *with* 42 U.S.C. § 7413(e)(1) (CAA's penalty factors). The CAA, however, does refer to "the economic impact of the penalty on the business," 42 U.S.C. § 7413(e)(1), which has traditionally been considered as a violator's "ability to pay" in the Agency's assessment of penalties. *See* Civil Penalty Policy (July 8, 1980) at 14, 19-20; *see also In re Commercial Cartage Co.*, 7 E.A.D. 784, 807 (EAB 1998) (concluding that "[t]he 'ability to continue business' factor from section 205(c)(2) of the Clean Air Act is analogous to the 'ability to pay' factor found in other statutory provisions").

and persuasion that the violation occurred as set forth in the complaint and *that the relief sought is appropriate*." 40 C.F.R. § 22.24 (emphasis added). Consequently, where an environmental statute lists a number of factors that the Agency "shall take into consideration" while assessing a penalty, the Board has explained that "the burden of proof goes to the appropriateness of the penalty taking *all* [statutory] factors into account." *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 538 (EAB 1994) (construing 40 C.F.R. § 22.24(a) (1994))[61] in light of the statutory factors listed in TSCA § 16(a)(2)(B)). Thus, for a Region to make its initial *prima facie* case with regard to a proposed penalty, "the Region must come forward with evidence to show that it, in fact, considered each factor identified in" the relevant act and "that its recommended penalty is supported by its analysis of those factors." *Id*.; *accord In re Lin*, 5 E.A.D. 595, 599 (EAB 1994) (holding that the appropriateness of the penalty must be determined in light of the statutory factors in FIFRA § 14(a)(4)); *see also In re Commercial Cartage Co.*, 7 E.A.D. 784, 807 (EAB 1998) (discussing the evidentiary burdens associated with establishing ability to pay in the CAA context); *In re Kay Dee Veterinary*, 2 E.A.D. 646, 651 (CJO 1988) (holding that the statute and the regulations require the Complainant to establish that the proposed penalty is reasonable). Significantly, in *New Waterbury* we also held that the statutory phrase "shall take into consideration" as used in the TSCA penalty provision does not mean that "there is any specific burden of proof with respect to any individual factor." *New Waterbury*, 5 E.A.D. at 539. "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." *Id*. at 538.

These concepts apply equally to penalty calculations under section 113(e)(1) of the CAA, which uses the identical "shall take into consideration" language before enumerating specific factors to be weighed by the Agency in its penalty assessments.[62] 42 U.S.C. § 7413(e)(1); *see also supra* note 60. In this case, therefore, in order to make its *prima facie* case, the Region must demonstrate that it considered each of the statutory factors enumerated in Section 113(e) of the Act, including ability to pay, and that the recommended penalty is supported by its examination of those factors. *In re Spitzer Great Lakes Ltd.*, 9 E.A.D. 302, 320 (EAB 2000). If the Region successfully makes its showing, the

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[61] Prior to 1999, the regulation at 40 C.F.R. § 22.24(a) stated that: "The complainant has the burden of going forward with and of proving that the violation occurred as set forth in the complaint and that the relief sought is appropriate." The minor amendments to this regulatory provision, *see* 64 Fed. Reg. 40138 (July 23, 1999), since our decision in *New Waterbury* do not affect our analysis regarding the regulation's application to environmental statutes listing factors to be considered in an Agency's penalty assessment.

[62] As stated earlier, section 113(e)(1) provides that "[i]n determining the amount of any penalty * * * the Administrator * * * shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, * * * ." 42 U.S.C. § 7413(e)(1).

burden then shifts to CDT "to rebut the Region's *prima facie* case by showing that the proposed penalty is not appropriate either because the Region failed to consider a statutory factor or because the evidence shows that the recommended calculation is not supported." *Id.*; *accord In re Chempace Corp.*, 9 E.A.D. 119, 136 (EAB 2000); *New Waterbury*, 5 E.A.D. at 538-39.

With regard to the ability-to-pay penalty factor, we have held that "'a respondent's ability to pay may be presumed until it is put at issue by a respondent,'" because the Agency's ability to gather the necessary financial information about a respondent is limited and the respondent is in the best position to obtain the relevant financial records about its own financial condition. *Spitzer Great Lakes*, 9 E.A.D. at 321 (quoting *In re New Waterbury*, 5 E.A.D. at 541); *see also In re Kay Dee Veterinary*, 2 E.A.D. 646, 652 n.15 (CJO 1988) (referring to the "customary evidentiary rule that the party to an adjudicatory proceeding who is in possession of the facts has the responsibility to produce them"). Moreover, "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." *Spitzer Great Lakes*, 9 E.A.D. at 321 (citing *New Waterbury*, 5 E.A.D. at 542). Concomitantly, when a respondent does put its ability to pay (or the economic impact of the penalty on the business)[63] at issue, the Region must demonstrate, as part of it *prima facie* case, that it did consider the appropriateness of the proposed penalty in light of its impact on respondent's business. *In re Lin*, 5 E.A.D. 595, 599 (EAB 1994); *New Waterbury*, 5 E.A.D. at 542. In order to make this showing, the Region can "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." *New Waterbury*, 5 E.A.D. at 542-43; *accord Lin*, 5 E.A.D. at 599. Thereafter, if the respondent does not offer "sufficient, *specific* evidence as to its inability to continue in business to rebut the Region's *prima facie* showing," the ALJ may decide that the penalty is appropriate, at least with respect to the ability to pay issue. *Lin*, 5 E.A.D. at 599.

In his Initial Decision, the ALJ cites *New Waterbury* for the proposition that Complainant has the burden of going forward with "some minimal showing from which it may be inferred that respondent has the ability to pay the penalty proposed." Init. Dec. at 30. The ALJ found that because the statutory factors specifically include ability to pay, the Complainant was required to make some showing regarding CDT's ability to pay, rather than to treat the issue only as a mitigating

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[63] Section 313 of the CAA uses the terminology "economic impact to the penalty on the business." 42 U.S.C. § 7413(e)(1). As mentioned *supra* note 60, EPA has equated this phrase with "ability to pay."

factor.[64] *Id*. at 31. The ALJ found that the Region failed to provide any evidence of CDT's financial condition, and therefore failed to bear its burden of persuasion. *Id*. at 31-32. Because the ALJ concluded that, in light of the substantial sums needed to close the landfill, "it is mere speculation to assume that any portion of" CDT's assets would be available to pay the penalty, the ALJ assessed no penalty for Counts 1 - 3. *Id*. at 31-32.

Although we do not agree with the ALJ's reasoning in its entirety,[65] we do agree with the result. In part III.B.3 above, we found that the ALJ did not abuse his discretion in admitting the Combined Balance Sheet at the hearing. The practical effect of the admission of the financial report was to extinguish any waiver argument and, under *New Waterbury*, clarify that the Region had the burden of going forward with some *general financial* evidence indicating CDT's ability to pay in order to make its *prima facie* case. *New Waterbury*, 5 E.A.D. at 542; *see also Lin*, 5 E.A.D. at 599. This the Region did not do. Instead, the Region, apparently relying entirely on the possibility of the Board reversing the ALJ's decision to admit the evidence on appeal - notwithstanding the deferential standard of review that attends such determinations on appeal - failed to make a serious effort to meet its burden of proof. In particular, the Region, at hearing, did not present a Dun & Bradstreet report[66] or any other evidence on the issue, other than some general statements in its penalty calculation sheet mentioning (but not analyzing) the ability-to-pay factor,[67] and some general testimony that, if anything, tended to

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[64] The Penalty Policy, which the Region used as guidance in calculating CDT's penalty, essentially treats the ability-to-pay analysis as part of the mitigating circumstances that can be used to decrease a penalty. *See* Penalty Policy at 20-21.

[65] In particular, we disagree with his reasoning to the extent it suggests that a separate burden of persuasion applies to each individual penalty factor as opposed to all factors collectively. *See New Waterbury*, 5 E.A.D. at 538.

[66] Considering that the Dun & Bradstreet report upon which the Region had previously relied allegedly shows CDT with a net worth of -$49,847, it seems unlikely that this report would have provided support for the Region's position in any event. *See* C Ex. 14 at 4. Without benefit of the actual report, however, it is difficult to come to any real conclusions about its possible value. We also note that the Region indicated in its penalty recalculation sheet that CDT had provided some minimal financial documents. *See infra* note 67. It is difficult for us to gauge whether this information, had it been presented and analyzed, may have provided some support for the Region's position.

[67] In the "Mitigating Adjustments" section of its penalty calculation sheet, the Region stated that "CDT provided minimal financial documentation concerning its ability to pay a penalty before this matter was filed. Unfortunately, those documents do not contain sufficient information to evaluate CDT's ability to pay the penalty proposed in the administrative penalty order. Although we have requested appropriate financial documents from CDT, we have not received those documents to date. As a result, there has been no mitigating adjustment based on CDT's ability to pay the proposed penalty." C Ex. 14 at 5. A declaration entered into evidence at the hearing contained similar general statements. *See* C Ex. 28 ¶¶ 5-6 (Declaration of Vivian Doyle) (acknowledging the receipt of three financial schedules from CDT but indicating that the financial documents specifically requested by the Region

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suggest that the Region did not, in fact, meaningfully consider ability to pay. For example, the hearing transcript reveals that the engineer who was assigned to the case, in response to the question of whether she considered the issue of ability to pay, testified that "I was not - I did not have any financial information to be able to do any sort of ability to pay calculation." Tr. at 68.[68] In addition, the Region did not attempt to call a CDT employee or CDT's outside accountants as witnesses (albeit potentially hostile) for purposes of examining them on the Combined Balance Sheet, nor did it, in the wake of the judge's ruling admitting the report, ask for a continuance to conduct discovery or take any other steps to develop evidence sufficient to overcome the implication of the Combined Balance Sheet. *Cf. In re Chempace Corp.*, 9 E.A.D. 119, 136 (EAB 2000) (discussing potential tactics a Region may utilize to ultimately carry the burden of persuasion on ability-to-pay issues).

Given the Region's failure to take steps to adduce sufficient and persuasive evidence on the issue of "ability to pay," the only meaningful evidence before the ALJ was the Combined Balance Sheet. Moreover, it bears noting that, while itself not introduced as evidence, the Dun & Bradstreet Report relied upon and quoted by the Region in its Penalty Recalculation which indicates that CDT has a negative net worth, without any other qualifying information, tends to support a finding of CDT's *inability* to pay.[69] Based on the evidence presented at the hearing, therefore, we do not find the ALJ's determination that CDT was unable to pay a civil penalty while at the same time meeting its cleanup obligations to be clearly erroneous. Like the ALJ, we are reluctant to assess a penalty payable to the United States Treasury when doing so would divert monies needed to properly close the landfill. Accordingly, we affirm the ALJ's decision not to assess a fine for Counts 1 - 3.

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had not been received). The financial documents mentioned in both the penalty calculation sheet and the Doyle declaration were not admitted into evidence at the hearing nor were they addressed by the Region at the hearing in any way other than as just described.

[68] Likewise, a declaration by the original engineer assigned to the CDT case appears to suggest that no significant ability-to-pay analysis was performed. *See* C Ex. 28 (Declaration of Vivian Doyle). Despite the fact that the declaration contains a detailed history of the correspondence between the Region and CDT with regard to the ability-to-pay issue, there is no mention of any EPA analysis of CDT's ability to pay other than a statement that, although a letter was received from CDT's counsel with three financial schedules, this information "did not constitute the 'financial statements, including balance sheets and income statements for the past three years' which would have enabled U.S. EPA to determine whether there were, in fact, financial factors which could bear on CDT's ability to pay the penalty proposed." C Ex. 28 ¶ 6. It is unclear whether the Region, beyond a cursory examination, ever analyzed the financial documents that CDT sent to them just before the complaint was filed. Moreover, it is plain that the Region offered no testimony analyzing the Combined Balance Sheet or indicating why, in the face of this evidence, its proposed penalty continued to be appropriate.

[69] We note, however, that "a reported net loss and accumulated deficit by themselves do not prove an inability to pay" a penalty. *In re Cent. Paint & Body Shop*, 2 E.A.D. 309, 317 (CJO 1987).

c. *Penalty for Count 4*

In section III.A above, we reversed the ALJ's dismissal of Count 4 and held CDT liable for its late submission of the performance test. Accordingly, we need to determine an appropriate penalty for this Count.[70] Because we have found that the ALJ's determination regarding CDT's inability to pay a penalty was not clearly erroneous, the same penalty outcome is appropriate for Count 4 as that established for Counts 1 - 3. Accordingly, the Board assesses no penalty for Count 4.

IV. *CONCLUSION*

For the foregoing reasons, we find that the ALJ did not abuse his discretion in admitting the Combined Balance Sheet at the evidentiary hearing. Because admission of the financial information extinguished the Region's reliance on a waiver argument with respect to Respondent's ability to pay and the Region did not proffer any meaningful evidence of ability to pay, we find that the Region failed to meet its burden of proof on the issue of the appropriateness of the penalty. Accordingly, we affirm the ALJ's decision not to assess a penalty for Counts 1 - 3 on grounds of inability to pay. Although we reverse the ALJ's dismissal of liability with respect to Count 4, we ultimately do not assess a penalty for this count based upon the same rationale for which no penalty is assessed for Counts 1 - 3.

So ordered.

[70] The Board's authority to assess a penalty for Count 4 derives from 40 C.F.R. § 22.30(f) ("The Environmental Appeals Board may assess a penalty that is higher or lower than the amount recommended to be assessed in the decision or order being reviewed * * * .").