IN RE SPITZER GREAT LAKES LTD.

TSCA Appeal No. 99-3

FINAL DECISION AND ORDER

Decided June 30, 2000

Syllabus

This is an appeal by Spitzer Great Lakes Ltd. Co. ("Spitzer" or "Respondent") from an Initial Decision arising out of an enforcement action initiated by the U.S. Environmental Protection Agency, Region V ("EPA" or "Region"). The enforcement action was filed against Spitzer for seven alleged violations of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601-2692, relating to Spitzer's handling of polychlorinated biphenyls (PCBs). Spitzer, after retaining counsel, conceded the facts alleged in the complaint and accordingly was found liable on all seven counts.

The parties jointly agreed to cancel the hearing on penalty. They also agreed that there were no material facts in dispute which would have a bearing on the penalty assessment and that they would argue their respective positions regarding an appropriate penalty through written pleadings. Despite that agreement, in its pleadings Spitzer attempted to introduce and argue facts that were contrary to facts it had already conceded. After the reviewing the pleadings, the Presiding Officer assessed $165,000 in civil penalties against Spitzer.

On appeal, Spitzer challenges the Presiding Officer's use of the Agency's penalty policy to determine an appropriate penalty, the assessment of a civil penalty without receiving and/or considering additional evidence, the failure to mitigate the penalty pursuant to statutory penalty mitigation factors, and the decision not to consider ability to pay as a mitigating factor.

Held: Affirmed

(1) As long as presiding officers give due consideration to questions raised in individual cases regarding the propriety of the penalty recommended by the policy, the use of penalty policies can promote fairness and consistency in enforcement proceedings. Spitzer did not challenge the propriety of the policy; Spitzer rather asserted that the Presiding Officer treated the policy as if it were law and thus ignored TSCA. This is not a fair reading of the Presiding Officer's decision. The Presiding Officer articulated the statutory factors set forth in the statute and analyzed each factor sequentially using the PCB Penalty Policy as a guide. The fact that the Presiding Officer did not adopt Spitzer's proposed penalty assessment does not mean that the Presiding Officer gave inappropriate weight to the penalty policy.

2) Spitzer's argument that it should be allowed, without explanation or excuse, to argue facts at the eleventh hour that are contrary to those that it had earlier conceded would thwart the purpose of procedural rules by injecting inefficiency and delay into the process. If Spitzer intended to argue facts or introduce new facts in the penalty phase of the proceeding it should not have stipulated that there were no material facts in dispute nor given up its right to a hearing. Accordingly, in the interests of the orderly and efficient administration of this case, the Presiding Officer appropriately held Spitzer to its earlier concessions.

3) The Presiding Officer did not ignore the statutory penalty mitigation factors. Although Spitzer argued circumstances that it felt demonstrated good faith efforts to comply, the Presiding Officer saw these circumstances as also indicating that Spitzer was well aware of its TSCA obligations, making all the more inexcusable its multiple violations of TSCA's requirements. This conclusion did not constitute error.

4) The Presiding Officer did not commit error in ruling that inability to pay would not be considered as a mitigating factor. Spitzer failed to properly notify the Region that it would assert inability to pay. When Spitzer finally did argue inability to pay it did not produce supporting evidence that it had agreed to produce and was required to produce by order of the Presiding Officer. Under these circumstances, and in accord with previous Board decisions on this issue, Spitzer's failure to produce supporting evidence constituted a waiver of its inability to pay argument.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Kathie A. Stein.

Opinion of the Board by Judge Fulton:

This is an appeal by Spitzer Great Lakes Ltd. Co. ("Spitzer" or "Respondent") from an Initial Decision arising out of an enforcement action initiated by the U.S. Environmental Protection Agency, Region V ("EPA" or "Region"). The enforcement action was filed against Spitzer for seven alleged violations of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601-2692, relating to Spitzer's handling of polychlorinated biphenyls (PCBs).

Spitzer, after retaining counsel for its defense, conceded the validity of the facts alleged in the Region's complaint, and accordingly was found liable on all seven counts. Order Granting Motion for Accelerated Decision (May 25, 1995). In the second accelerated decision on penalty,[1] the Initial Decision presently before us, which addresses the amount of penalty to impose, the Presiding Officer assessed $165,000 in civil penalties against Spitzer. In its appeal, Spitzer challenges the Presiding Officer's use of the Agency's penalty policy, the Presiding

[1] The Region filed two motions for accelerated decision dealing with penalty. The first motion, filed on October 21, 1996, addressed whether Spitzer's ability to pay should be considered as a mitigating factor when the penalty was ultimately assessed. Motion for Partial Accelerated Decision on the Issue of Penalty. The second, filed on November 19, 1996, addressed the appropriate penalty to be assessed. Motion for Accelerated Decision on Penalty.

Officer's assessment of a civil penalty without receiving and/or considering additional evidence proffered by Spitzer, and the Presiding Officer's decision not to consider ability to pay as a mitigating factor.[2]

I. *BACKGROUND*

In December 1986, Spitzer purchased property in Lorain, Ohio, from the American Ship Building Company. Along with the property, Spitzer became the owner of a number of items containing PCBs, including five transformers, several capacitors, and switching equipment. A little more than three years later, in March and April 1990, Spitzer made arrangements for a salvage company, Kelly Salvage & Steel, Inc., to drain the oil from and remove the five transformers from Spitzer's property. The oil from the transformers was drained into fifty-five gallon drums that remained on-site. The transformers were then taken to a salvage yard.

Four months later, on August 17 and 18, 1990, the Region inspected Spitzer's property to determine whether Spitzer was complying with TSCA regulations governing the manufacturing, processing, distribution, and use of PCBs. During the inspection, Spitzer disclosed records documenting Spitzer's former possession of the five transformers that were removed. Although the transformers were no longer at the site, the inspectors found, among other things: (1) 115 fifty-five gallon drums containing dielectric fluid,[3] only ten of which were labeled;

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[2] The Initial Decision was served on February 3, 1997, and Spitzer filed its appeal 45 days later on March 20, 1997. Spitzer relied on the following statement from the Initial Decision to conclude that its appeal was to be filed within 45 days of the Initial Decision:

> Pursuant to 40 C.F.R. § 22.27(c), this initial decision shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties unless (1) an appeal to the Environmental Appeals Board is taken from it by a party to this proceeding or (2) the Environmental Appeals Board elects, *sua sponte*, to review this initial decision.

Initial Decision at 16.

In an order issued on April 16, 1997, this Board dismissed Spitzer's appeal as untimely pursuant to 40 C.F.R. § 22.30(a), which states that any appeal from an initial decision must be filed "within twenty (20) days after the initial decision is served." (40 C.F.R. § 22.30(a) was revised, effective August 23, 1999, allowing parties thirty (30) days from service of the initial decision to file an appeal. 64 Fed. Reg. 40,138 (July 23, 1999)). Spitzer appealed the Board's dismissal to the 6th Circuit Court of Appeals, which reversed the Board's decision and remanded the case for further proceedings. *Spitzer Great Lakes Ltd., Co. v. U.S. EPA*, 173 F.3d 412, 416 (6th Cir. 1999). The case is thus back before us now for a decision on the merits of Spitzer's appeal.

[3] A dielectric substance is one that does not conduct direct electric current. *See* 40 C.F.R. § 280.12. Because of their potential to contain PCBs, dielectric fluids are subject to TSCA regulation pursuant to 40 C.F.R. § 761.1(b).

(2) one oil switch; and (3) twelve large high-voltage capacitors.[4]

Spitzer provided documents to the inspectors indicating that each of the twelve capacitors contained more than 500 parts per million ("ppm") of PCBs. The inspectors also determined that the labeled drums contained dielectric fluid from the transformers that had been removed. The oil in the unlabeled drums had not been tested by Spitzer at the time of the inspection, nor had the oil in the switch. However, the inspection team determined[5] that the foregoing equipment and containers were PCB Items.[6] The inspection team also noted that the PCB items were located in an unenclosed and uncovered area, resting on gravel, dirt, and weeds.

On September 23, 1992, the Region issued an administrative Complaint and Notice of Opportunity for Hearing ("Complaint") to Spitzer alleging seven violations of PCB regulations promulgated pursuant to TSCA. The Complaint alleged that Spitzer: (1) violated 40 C.F.R. § 761.180(a) by failing to develop and maintain appropriate records on the storage and disposition of PCBs and PCB items; (2) violated 40 C.F.R. § 761.30(a)(1)(xii) by failing to maintain records of visual inspections of each PCB transformer at either quarterly or yearly intervals depending on the amount of PCBs in the transformer; (3) violated 40 C.F.R. § 761.65(b) by failing to store the PCBs and PCB items in an area with adequate roofing, walls, and floors; (4) violated 40 C.F.R. § 761.65(c)(8) by failing to label the PCB containers with the date they were placed in storage; (5) violated 40 C.F.R. § 761.40 by failing to mark the twelve large high voltage capacitors and the 115 fifty-five gallon drums with the M_L label;[7](6) violated 40 C.F.R. § 761.40, by failing to mark the storage area for the PCB items with the M_L label; and (7) violated 40 C.F.R. § 761.60 (b)(1) by failing to properly dispose of the transformers.

Spitzer filed an answer and requested a hearing on October 14, 1992. Answer Respondent and Request for Hearing ("Answer"). In its answer, Spitzer as-

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[4] A large high-voltage capacitor is one that contains 1.36 kilograms ("kg") (3 lbs.) or more of dielectric fluid and can operate at 2,000 volts (a.c. or d.c.) or above. 40 C.F.R. § 761.3.

[5] Although the record does not specify how the inspection team determined that the oil in the unlabeled barrels contained PCBs, we note that most oil-filled electrical equipment, such as the switching equipment, is assumed to be PCB-contaminated when its PCB concentration is unknown. 40 C.F.R. § 761.3. In any case, Spitzer has conceded the Region's determination. Response of Spitzer Great Lakes Ltd. to Show Cause Order at ¶ 1.

[6] A "PCB Item" is any manufactured article, item or container that has been in contact with, contains, or has as a part of its makeup any PCBs. 40 C.F.R. § 761.3.

[7] The "M_L label" is a term used to describe the large PCB warning label defined in 40 C.F.R. § 761.45. The M_L label contains letters and striping on a white or yellow background and warns that the labeled instrument contains PCBs and requires special handling. 40 C.F.R. § 761.45.

serted the following affirmative defenses: (1) that it had acted in good faith and stored all electrical equipment and containers in the same manner as the previous owner; (2) that it inspected the equipment and containers on a regular basis in excess of legal requirements; (3) that all oil from electrical equipment was stored in leak-free fifty-five gallon drums, placed on wooden pallets, and covered with tarp; (4) that it maintained records of items containing PCBs in a form that "substantially met the requirements of the law"; and (5) that the civil penalties sought by the Region were unreasonable in light of the technical deficiencies that may have occurred since no PCBs contaminated the ground or water. Answer ¶¶ 13-17.

An order setting prehearing procedures was issued on October 30, 1992, which set forth guidelines and a schedule for the prehearing exchange of information. Order Setting Prehearing Procedures. The Region filed its prehearing exchange on January 8, 1993, and the Respondent filed its prehearing exchange on January 12, 1993. Complainant's Prehearing Exchange; Pre-Hearing Statement of Respondent. In its prehearing statement, Spitzer took the position, among other things, that "under the circumstances the proposed penalties are too high and that, in any event, Respondent cannot afford to pay the proposed penalties." Pre-Hearing Statement of Respondent at ¶ 2.

On March 18, 1993, the Region filed a motion for accelerated decision on liability. The Respondent, however, did not file a reply. On July 18, 1994, the Presiding Officer issued an Order to Show Cause, which observed that the Respondent had not replied to the Region's motion for accelerated decision and ordered the Respondent to show why the motion should not be granted.

On August 9, 1994, the Respondent replied to the Order to Show Cause by stating that, "[a]fter doing a thorough investigation * * * Respondent determined that the facts as set forth in the Complaint were reasonable [sic] accurate and that litigation over those facts would have been an unnecessary use of the Judge's time." Response of Spitzer Great Lakes Ltd. to Show Cause Order at ¶ 1.

On May 25, 1995, in light of Spitzer's response to the show cause order, the Presiding Officer granted the Region's motion for accelerated decision on liability. Inasmuch as Spitzer acknowledged the facts alleged in the Complaint to be accurate, the Presiding Officer reiterated those allegations as "findings of fact" and found Spitzer liable for all seven TSCA violations alleged in the Complaint. Order Granting Motion for Accelerated Decision. Spitzer has not appealed the findings of the May 25, 1995 order.

On April 2, 1996, the Region filed a motion for further discovery that sought, among other things, financial statements for the preceding five years, income tax returns for the preceding five years, and a listing of all corporate assets. According to the Region, this information was needed to determine whether

Spitzer was able to pay the proposed civil penalties, in view of Spitzer's having raised inability to pay the proposed civil penalty as a mitigating factor in its pre-hearing statement. Motion for Further Discovery at 2; Pre-Hearing Statement of Respondent, ¶ 2 (Jan. 12, 1993). However, argued the Region, Spitzer did not provide sufficient data to allow the Region to test that assertion, nor did Spitzer identify witnesses that would testify as to Spitzer's financial condition. Motion for Further Discovery at 2.

In response to the motion for further discovery, Spitzer stated that it did not object to the motion, that it would provide any information sought, and that an order requiring Spitzer to respond to the discovery was not necessary. Response of Spitzer Great Lakes Ltd. to Complainant's Motion for Further Discovery at 1. Since Spitzer did not object to the scope or nature of the discovery sought, the Region's motion was granted on July 19, 1996.[8] Nonetheless, Spitzer did not produce any additional documentation of its financial position.

The Region filed a motion for partial accelerated decision on October 21, 1996, asserting that Spitzer had waived any claim of inability to pay under the authority of this Board's decision in *In re New Waterbury, Ltd.*, 5 E.A.D. 529 (EAB 1994). Motion for Partial Accelerated Decision on the Issue of Penalty (Oct. 21, 1996). The Region noted that forty-five days had passed since Spitzer was obligated to provide financial information to the Region; that a scheduled hearing on penalty was less than thirty days away at the time that the Region's motion for partial accelerated decision was filed; that with the hearing drawing near the Region would not have ample opportunity to analyze the financial data if Spitzer ultimately provided that data; that Spitzer had ignored an order from the Presiding Officer to disclose the information; and that allowing Spitzer to ignore the Presiding Officer's order would undermine the integrity of such orders. *Id.* at 3-4. Spitzer did not respond to the Region's motion.[9]

On November 1, 1996, the Presiding Officer ruled that inability to pay would not be considered as a mitigating factor in assessing the civil penalty. Memorandum Opinion and Order (Nov. 1, 1996). In support of this ruling, the

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[8] At the time that the Motion for Further Discovery was granted, the financial information submitted by Respondent consisted of tax returns for 1991, 1993, and 1994 and financial statements for 1991, 1992, and 1993. *See* Complainant's Motion for Further Discovery at n.1; Complainant's Motion for Partial Accelerated Decision on the Issue of Penalty at n.2. The Region, however, argued that this documentation was insufficient. Motion for Further Discovery at 2. Spitzer has not challenged that assertion.

[9] On October 25, 1996, Spitzer filed a document styled "Response to Proposed Penalty." In that pleading, Spitzer presented its assessment of what an appropriate penalty would be in this matter. Spitzer did not, however, address the motion for partial accelerated decision on penalty filed by the Region on October 21, 1996, which argued that Spitzer waived the right to assert inability to pay as a mitigating factor in the assessment of an appropriate penalty.

Presiding Officer observed that Spitzer did not give notice to the Region that it intended to assert inability to pay the proposed penalty in its answer to the Region's Complaint as required by the rules of practice, and that when Spitzer did raise inability to pay in its prehearing statement, it did not submit sufficient evidence to support that claim. *Id.* The Presiding Officer further noted that Spitzer had failed to provide the Region with access to financial records requested by the Region, despite being ordered to do so on July 19, 1996, when the Region's motion for further discovery was granted, and contrary to Spitzer's statement that it would provide such access. *Id.* The Presiding Officer cited this Board's opinion in *In re New Waterbury, Ltd.*, 5 E.A.D. 529 (EAB 1994), to conclude that because Spitzer failed to produce evidence to support its inability to pay claim, any objection to the penalty based on inability to pay was waived. *Id.* (citing *New Waterbury*, 5 E.A.D. at 542).

A hearing in this matter on penalty had been scheduled for November 19, 1996. *See* Notice of Hearing (Aug. 27, 1996). However, on November 13, 1996, the Region filed a motion to cancel the penalty hearing, representing that in a telephone conference with the Presiding Officer's law clerk, "Counsel for Complainant and Counsel for Respondent both stated their beliefs that no genuine issue of material fact would be presented at a hearing to determine the appropriate penalty to be assessed in this matter" and that "it would be appropriate in this matter to determine the penalty based upon briefing." Motion to Cancel Hearing at 1. The motion went on to propose a briefing schedule. Based on the Region's representation, which Spitzer has never disputed, on November 15, 1996, the Presiding Officer ordered that the hearing on penalty be canceled and established a briefing schedule. Order Canceling Hearing and Providing Schedule for Decision on Penalty Issue.

In accordance with the Presiding Officer's November 15, 1996 order, the Region filed its motion for an accelerated decision on penalty on November 19, 1996, and Spitzer filed its response on December 4, 1996. Along with its response, Spitzer filed the affidavits of Ned Huffman and Alan Spitzer. On December 5, 1996, the Region moved to strike the affidavit of Alan Spitzer because that name had not been included on the list of witnesses that Spitzer provided during the prehearing exchange. Complainant's Motion to Strike.

Spitzer filed a brief opposing the Region's motion to strike on December 13, 1996. Spitzer argued that the Alan Spitzer affidavit was introduced as a substitute for the affidavit of another witness who had suffered a heart attack two months before the date of the filing. Brief in Opposition to Complainant's Motion to Strike. On the same day, the Region filed a reply to Spitzer's opposition, arguing that it had not been aware of the unavailability of any witness until it received the affidavit of Alan Spitzer and that Alan Spitzer's affidavit covered issues that were outside the proposed scope of testimony of the unavailable witness. The Presiding Officer did not rule on the Region's motion to strike, but addressed the matter in

the Initial Decision by stating that the issue was moot.[10] Initial Decision at n.5.

On January 30, 1997, in an accelerated decision on penalty, the Presiding Officer considered the circumstances of each violation and the arguments presented by the litigants. The Presiding Officer then assessed penalties against Spitzer as follows: $18,000 for Count I; $52,000 for Count II; $20,000 for Count III; $10,000 for Count IV; $20,000 for Count V; $20,000 for Count VI; and $25,000 for Count VII, for total of $165,000 in penalties. Initial Decision at 4-14. The amount assessed reflected the Presiding Officer's determination of an appropriate penalty in view of the gravity of the violations at issue. Although Spitzer argued that this penalty should be mitigated in view of the circumstances of this case, the Presiding Officer was not persuaded that mitigation of the gravity-based penalty was appropriate. It is from the Presiding Officer's Accelerated Decision on Penalty that Spitzer takes this appeal.[11]

On appeal, Spitzer essentially presents the following issues:[12] (1) whether the Presiding Officer's application of the U.S. EPA Polychlorinated Biphenyls

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[10] The Presiding Officer apparently viewed the affidavit as immaterial in view of the facts already conceded by Spitzer for liability purposes. The Presiding Officer's conclusion on this point is framed as follows:

> The complainant moved to strike the affidavit of Alan Spitzer, which was attached to respondent's response to complainant's motion for accelerated decision on the penalty issue. In light of the findings and conclusions reached on the penalty issue, the motion is moot. The findings that were the basis for rulings made in this decision were made in the decision on liability.

Initial Decision at n.5.

[11] Interestingly, Spitzer has not challenged, in its appeal, the substance of any of the Presiding Officer's other rulings, including the Presiding Officer's November 1, 1996 order rejecting Spitzer's inability to pay arguments.

[12] The Respondent presented the issues as seven separate questions phrased as follows:

> (1) whether Respondent was permitted to submit additional evidence to the Presiding Officer regarding its attempts to comply with TSCA for the purpose of determining the appropriate penalty;
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> (2) whether EPA's PCB penalty policy is consistent with the statutory provisions of TSCA regarding the imposition of penalties for the violation of TSCA provisions;
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> (3) whether it was proper for the ALJ to rely exclusively on the EPA's PCB penalty policy dated April 9, 1990, in determining the amount of the penalty appropriate in this case;
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> (4) whether Respondent "adopted" the complainant's method or system of analysis, namely the PCB Penalty Policy, by arguing that even under the policy the penalty sought by the Complainant was too high;

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(PCB) Penalty Policy[13] ("PCB Penalty Policy") inappropriately ignored statutory penalty assessment factors in assessing a civil penalty; (2) whether the Presiding Officer should have allowed Spitzer to submit additional evidence to inform the Presiding Officer's determination of an appropriate penalty; (3) whether the Presiding Officer gave due consideration to the statutory mitigation factors; and (4) whether the Presiding Officer should have considered Spitzer's ability to pay as a mitigating factor in assessing an appropriate penalty.

II. *DISCUSSION*

A. *Use of the PCB Penalty Policy*

Spitzer argues that EPA's PCB Penalty Policy can be used as a guideline for assessing civil penalties, but should not be used exclusively in determining the appropriate civil penalty. Brief of Respondent-Appellant's [sic] Spitzer Great Lakes at 7 ("Appeal Brief"). Spitzer claims that the Presiding Officer completely ignored the requirements of TSCA and treated the penalty policy as if it had the force of law. *Id.* at 18. Spitzer goes on to assert that TSCA requires presiding officers to exercise independent judgment and to consider the nature, circumstances, extent, and gravity of violations when establishing the civil penalty. *Id.*

In response, the Region argues that while a presiding officer is required to conduct cases with objectivity and independence, a presiding officer is nonetheless governed by applicable precedents, which include the agency regulations and policies. Region's Reply Brief at 15 ("Reply Brief"). The Region further argues

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> (5) whether it was appropriate for the ALJ to make findings of fact on issues concerning the alleged violations in the absence of any direct, probative evidence on those issues;
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> (6) whether the ALJ should have taken into consideration the Respondent's ability to pay in assessing the amount of penalty; and
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> (7) whether a $165,000 penalty was appropriate under TSCA in view of Respondent's demonstrated compliance with the TSCA both prior to and after the inspection of the U.S. EPA in August of 1990.

Appeal Brief at 3.

Having thus framed the issues, however, Spitzer, in the remainder of its brief, fails to present its arguments in a form that meaningfully relates to these articulated issues. Viewing Spitzer's brief on the whole, and in a manner most favorable to Spitzer, we believe that the distillation of issues presented in the text fairly captures the essence of Spitzer's concerns.

[13] U.S. EPA Polychlorinated Biphenyls (PCB) Penalty Policy, April 9, 1990 ("PCB Penalty Policy"), Notice of Availability of Polychlorinated Biphenyl Policy, 55 Fed. Reg. 13,955 (Apr. 13, 1990).

that EPA's PCB Penalty Policy is not separate and apart from TSCA but rather reflects the Administrator's interpretation of the TSCA penalty criteria and sets forth a methodology for analyzing violations. *Id.* at 17. A presiding officer has the discretion to deviate from that methodology, argues the Region, but in doing so the presiding officer must articulate the reason for doing so and provide an adequate record for review by this Board. *Id.* at 17-18. The Region then states that accepting Spitzer's argument would leave presiding officers free to reject the PCB Penalty Policy without explanation and develop their own methodology for determining appropriate penalties. *Id.* at 18-19.

When assessing civil penalties, TSCA states that the "Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and with respect to the violator, ability to pay, effect on ability to continue to do business, and history of such prior violations, the degree of culpability, and such other matters as justice may require." TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B). EPA's Penalty Policy uses the factors set forth in the statute as headings and presents a method for analyzing each factor. *See* PCB Penalty Policy at 15-19.

The use of penalty policies was addressed at length by this Board in *In re Employers Ins. of Wausau*, 6 E.A.D. 735 (EAB 1997). In *Wausau*, we stated that "EPA's adjudicative officers must refrain from treating the PCB Penalty Policy as a rule, and must be prepared to 're-examine the basic propositions' on which the Policy is based, in any case in which those 'basic propositions' are *genuinely placed at issue*." *Id.* at 761 (citations omitted)(emphasis added). We also observed that as long as presiding officers give due consideration to questions raised in individual cases regarding the propriety of the penalty recommended by the policy, the use of penalty policies can promote fairness and consistency in enforcement proceedings.[14] *Id.* at 760-62.

In this matter Spitzer has not placed the basic propositions of the PCB Penalty Policy at issue. Spitzer merely makes a conclusory assertion, unsupported by specifics, that the Presiding Officer ignored TSCA, thus disregarding every statutory penalty factor favorable to Spitzer, and treated the PCB Penalty Policy as if it were law. This is not, in our view, a fair reading of the Presiding Officer's decision. The Presiding Officer noted at the outset of his analysis that penalties under TSCA are governed by 15 U.S.C. § 2615(a). Initial Decision at 2. The Presiding Officer then articulated the statutory factors set forth in that section and proceeded

[14] In *Wausau* we also emphasized, as we have stated in many cases, that "a Presiding Officer, having considered any applicable civil penalty guidelines issued by the Agency, is nonetheless free not to apply them to the case at hand." *Wausau*, 6 E.A.D. at 758 *(citing In re DIC Americas*, 6 E.A.D. 184, 189 (EAB 1995); *In re Pacific Refining Co.*, 5 E.A.D. 607, 613 (EAB 1994)).

to carefully analyze each factor sequentially using the PCB Penalty Policy as a guide in applying the statutory factors to the facts of this case. *Id.* at 2-14.

Accordingly, we do not find any reason to conclude that the Presiding Officer ignored TSCA or applied the penalty policy in an inflexible manner. The fact that the Presiding Officer did not adopt the Respondent's proposed penalty assessment does not mean that, as Spitzer would have us believe, the Presiding Officer gave inappropriate weight to the penalty policy. The record indicates that the Presiding Officer went through the statutory factors as reflected in the PCB Penalty Policy and applied those factors thoughtfully, while considering all of Spitzer's arguments in the process. We do not find error in either the decision to consult the PCB Penalty Policy or in the manner in which the policy was applied.

B. *Consideration of Additional Evidence*

Spitzer argues that it was entitled to "submit additional evidence which relates to the nature, circumstances, extent and gravity of the violation * * *." Appeal Brief at 7. The evidence of concern to Spitzer apparently[15] includes an affidavit prepared by its President, Alan Spitzer, as well as a number of documents which purport to be records of inspections of PCB items conducted by Spitzer at its facility.[16]

At the outset, we note that Spitzer's claim that it was not allowed to "submit" the material in question is not altogether accurate. For example, the inspections records referenced by Spitzer were included as part of the prehearing exchange between the parties and were consequently part of the record before the Presiding Officer. *See* Prehearing Statement of Respondent, Exhibits 15-30. Similarly, while the Presiding Officer did determine that the Alan Spitzer affidavit was moot, he did not, as suggested by Spitzer's formulation of the issue, refuse to admit it *per se.* In both instances, the Presiding Officer concluded, in essence, that the evidence in question was immaterial in light of Spitzer's prior concessions in the case.

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[15] Spitzer's brief is not a model of clarity on this point. However, inasmuch as the Presiding Officer ruled that the affidavit of Alan Spitzer was moot, *see supra* note 10, and found Spitzer liable (by Spitzer's own admission) for record keeping violations in years for which Spitzer now claims to have records, we assume that these are the documents to which Spitzer makes reference.

[16] Spitzer asserts that although it was found liable under Count I for failing to maintain complete records for the years 1987-1989, it has records for each of those years and provided those records to the Region during the prehearing exchange. Appeal Brief at 11. The Region responds by stating that Spitzer appears to be "confused regarding the facts relevant to particular violations"; that Spitzer did not contest the proposed penalty for Count I in its Response to Motion for Accelerated Decision; and that Spitzer's assertion is not relevant to the violation. Reply Brief at 29-30. Given our ruling below, we do not need to resolve this dispute.

As discussed more fully below, the record here reflects that Spitzer conceded that the allegations of the Complaint were essentially accurate, agreed that there were no issues of fact bearing on the penalty in the case, sacrificed its right to a hearing on this issue, and then, in the context of responding to the Region's motion for accelerated decision on penalty, attempted both to argue facts that were at odds with its earlier concessions in the case and to introduce new material with factual content. Even on appeal, Spitzer advances, without explanation or excuse, a version of the facts contrary to its earlier admissions. *See* Appeal Brief at 4-6.

In examining this issue, we begin with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. part 22, as amended by 64 Fed. Reg. 40,176 (July 23, 1999)("Consolidated Rules of Practice" or "Consolidated Rules").[17] The Consolidated Rules serve the same purpose that the Federal Rules of Civil Procedure serve in the U.S. district courts, namely, to "secure the just, speedy, and inexpensive determination" of judicial proceedings. Fed. R. Civ. P. 1. Consequently, procedural rules are construed in a manner that promotes and ensures judicial efficiency. *E.g.*, *Jacobs v. University of Cincinnati*, 189 F.R.D. 510, 511 (S.D. Ohio 1999).

With regard to the inspection reports, Spitzer appears to be attempting to prove that, although the Complaint alleged that Spitzer did not have records demonstrating that it had inspected the PCB articles at its facility, "Respondent did have inspection records for each of [the] years [in question]." Appeal Brief at 11. Yet, Spitzer had earlier conceded the allegations of the complaint, which included the following paragraph: "At the time of the inspection Respondent had not developed and maintained complete records on the disposition of the PCB items identified herein * * * and did not have annual PCB documents for the following calendar years: 1989, 1988, 1987." Complaint, ¶ 25. The Presiding Officer incorporated this same conclusion in his May 25, 1995 Order Granting Motion for Accelerated Decision (on Liability). Order Granting Motion for Accelerated Decision at 4-5. Spitzer, however, did nothing to disturb that finding and has not sought review of that finding in this appeal.[18]

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[17] The Consolidated Rules of Practice are the regulations at 40 C.F.R. part 22 that govern these proceedings. 40 C.F.R. § 22.3.

[18] Notably, although Spitzer had included documents purporting to be inspection records in its prehearing exchange, the Region has argued that those records were suspect because: (1) Spitzer had been unable to produce such records at the facility during Ohio EPA's inspection; (2) the records subsequently materialized only in the context of litigation; and (3) it was not credible for Spitzer to claim that the inspections had occurred in view of its uncertainty regarding the presence of labels on the transformers at the facility. Region's Reply to Respondent's Response to Motion for Accelerated

Continued

Spitzer argues that, notwithstanding its concession of these facts for liability purposes, it should be permitted to continue to argue the facts, "provided that the Administrator limits the use of the evidence [presented] to a determination of the amount of the penalty which should be imposed for the violation." Appeal Brief at 7. The problem with this argument, however, is that Spitzer also conceded that "there were no material facts in dispute on which a *penalty* might be based." Initial Decision at 8 (emphasis added).

Under these circumstances, we conclude that the Presiding Officer acted appropriately in determining that Spitzer's argument regarding the inspection reports, which is fundamentally at odds with the foregoing conceded facts, "comes too late." Initial Decision at 8. Spitzer's argument that it should be allowed, without explanation or excuse, to argue at the eleventh hour facts contrary to those that it had earlier conceded would, in our view, thwart the purpose of procedural rules by injecting inefficiency and delay into the process.[19] If Spitzer intended to argue facts or introduce new facts in the penalty phase of the proceeding, it should neither have stipulated that there were no material facts in dispute nor given up its right to a hearing on the issue. Accordingly, in the interests of the orderly and efficient administration of this case — a case that had been pending before the Agency for a number of years — the Presiding Officer appropriately held Spitzer to its earlier concessions. *See, e.g.*, *Thompson-Hayward Chem. Co. v. Rohm & Haas Co.*, 745 F.2d 27, 32 (6th Cir. 1984) ("The public interest in an efficient and effective administration of justice requires adherence * * * to the general proposition that conceded * * * issues are not reviewable."); *see also Ahghazali v. Secretary of Health & Human Servs.*, 867 F.2d 921, 927 (6th Cir. 1989) ("Statements in pleadings that acknowledge the truth of some matter alleged by an opposing party are judicial admissions binding on the party making them.").

Spitzer's attempted use of the Alan Spitzer affidavit is a slightly different variant on this same theme. The affidavit, in essence, avers that: (1) during the relevant time frame, Spitzer was taking what it believed were the appropriate steps for disposing of PCB-contaminated oil; (2) Spitzer was well on its way to properly disposing of the PCB-contaminated oil before any inspections were con-

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(continued)
Decision on Penalty at 1-13. It is reasonable to view Spitzer's concession of facts related to this issue as conceding the question of the veracity of its records in the Region's favor.

[19] Throughout these proceedings Spitzer has repeatedly failed to follow the rules of practice, which has interfered with the Presiding Officer's efforts to administer this case. For example, Spitzer failed in its answer to raise "ability to continue to do business" as contemplated by 40 C.F.R. § 22.15(b) even though it would later attempt to raise this issue. Moreover, Spitzer failed to file a timely response to the Region's motion for accelerated decision on liability and did not file until the Presiding Officer issued an order to show cause. Spitzer similarly failed to provide discovery despite its pledge to the Presiding Officer that it would do so and in violation of the Presiding Officer's directive that it do so.

ducted; (3) Spitzer always intended to properly dispose of the PCBs at its facility; and (4) Spitzer employees would not have kept records if they had intended an illegal or clandestine disposal of PCBs. Affidavit of Alan Spitzer ¶¶ 4-7. The thrust of the affidavit appears to suggest that Spitzer took appropriate steps to comply with the PCB regulations and that any violations that occurred were merely of a technical nature. *Id.* at ¶¶ 4-8. While we might agree with Spitzer that its stipulating to facts for liability purposes does not necessarily foreclose examination in the penalty phase of the case of facts that provide further context for an appropriate penalty, we are nonetheless unable to reconcile Spitzer's late attempt to add factual content to these proceedings with its concession that there were no material facts in dispute for purposes of the penalty phase of the case. Spitzer makes no claim that the factual statements in the affidavit were part of the body of conceded facts to which the parties had stipulated. Indeed, the opposite would appear to be true, given the Region's protest that it was deprived of the opportunity to test the veracity of the assertions in the affidavit. Region's Motion to Strike at 2. Under such circumstances, we cannot fault the Presiding Officer's conclusion that the Alan Spitzer affidavit did not merit consideration.[20]

C. *Miscellaneous Mitigation Arguments*

TSCA is a strict liability statute; therefore, lack of intent to violate its requirements does not justify noncompliance.[21] *In re Strandley*, 3 E.A.D. 718, 722 (CJO 1991). Nonetheless, TSCA requires that certain equitable concerns be taken into account when assessing civil penalties against violators. TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(b). These equitable concerns are reflected in the PCB Penalty Policy, which was developed to promote fairness and consistency in penalty assessments. *See Wausau*, 6 E.A.D. 735, 762.

Spitzer argues that the Presiding Officer should have mitigated the penalty proposed by the Region on a number of different grounds. We note at the outset that "the Board generally will not substitute its judgment for that of a presiding officer when the penalty assessed falls within the range of penalties provided in the penalty guidelines, absent a showing that the presiding officer committed an abuse of discretion or a clear error in assessing the penalty." *In re Chempace Corp.*, 9 E.A.D. 119 (EAB 2000) (citing, *e.g.*, *In re Pacific Ref. Co.*, 5 E.A.D. 607 (EAB 1994)). As discussed below, we find that the Presiding Officer in this case

[20] We note that a careful reading of the Presiding Officer's decision reveals that the essentials of the information conveyed by the Alan Spitzer affidavit appear to have already been in the record before the Presiding Officer through some other source. Consequently, it is not clear that the affidavit added meaningful content to the proceedings in any event.

[21] *Intentional* violations of TSCA are subject to *criminal* sanctions. *See* TSCA § 16(b), 15 U.S.C. § 2615(b).

did not abuse his discretion or commit clear error in assessing the penalty recommended for this case by the PCB penalty policy.

Penalty assessment in TSCA PCB cases occurs in two steps. First, the Agency calculates a gravity-based penalty that is determined from the nature of the violation, the extent of potential or actual environmental harm from a given violation, and the circumstances of the violation. Second, the gravity-based penalty is adjusted upwards or downwards based on culpability, history of prior violations, ability to pay, ability to continue in business, and other matters as justice may require. TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B). Spitzer claims that the Presiding Officer failed to consider Spitzer's culpability, prior history of violations, or other matters as justice may require. Appeal Brief at 16.

With regard to culpability (and presumably prior history of violations),[22] Spitzer states that it never owned a site where transformers were present and did not have any experience with PCBs. Under the PCB Penalty Policy, culpability is evaluated based upon (a) the violator's knowledge of the particular requirement, and (b) the violator's degree of control over the violative condition. PCB Penalty Policy at 15. When considering the violator's knowledge, the PCB Penalty Policy frames the question as whether the violator "knew or should have known" of the relevant requirements. *Id.* Under the policy, any company possessing PCBs is deemed to have knowledge of TSCA and the PCB regulations. Accordingly, the PCB Penalty Policy contemplates a penalty reduction based on this factor only when a "reasonably prudent and responsible person" would not have known that the conduct in question was either dangerous or in violation of the PCB regulations. *Id.*

Given the hazards associated with mismanagement of PCBs and the notoriety of those hazards, the PCB Penalty Policy offers a rational starting point for assessing culpability. Significantly, Spitzer has not presented any evidence showing that it could not have reasonably known that its handling of PCBs violated the PCB regulations. On the contrary, the Presiding Officer specifically stated that "[t]here is evidence that respondent knew it had an obligation under TSCA rules."[23] Initial Decision at 15. Spitzer has not challenged that finding, nor do we,

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[22] Although Spitzer maintains that the Presiding Officer failed to consider its prior history of violations, Spitzer does not directly address its prior history of violations in its appeal brief. Interpreting the appeal brief in the manner most favorable to Spitzer, we will assume that Spitzer, by stating that it has no experience with PCBs, intends to state that it has not violated the TSCA PCB regulations in the past.

[23] In this regard the Presiding Officer notes that Spitzer arranged for removal of the oil in the drums, as required by the rules, in August 1990, before the inspectors came to the Respondent's facility. Initial Decision at 15.

in light of the evidence before us,[24] find reason to question that finding. Thus, the Presiding Officer did not err in declining to mitigate the penalty on this ground.

With regard to history of prior violations, we note at the outset that the gravity-based penalties assessed under the PCB Penalty Policy are geared towards first time offenders. PCB Penalty Policy at 15. *Upward* adjustments in the gravity-based penalty are made when a violator has a demonstrated history of prior violations. *Id.* The Region does not allege that Spitzer has a history of violating the PCB regulations, nor does the record indicate that the Presiding Officer drew any such conclusions. The penalty was not increased out of concern about past violations. Rather, the penalties assessed against Spitzer were assessed in accordance with the PCB Policy, with the underlying premise being that Spitzer had not committed similar violations in the past. Therefore, no reduction in penalty is warranted based upon this factor.

With regard to "other factors as justice may require," Spitzer argues that it is entitled to mitigation because it did not force the Agency to conduct a full blown administrative trial in the case. Appeal Brief at 17. According to Spitzer, its willingness to concede rather than litigate key factual points evinces a positive attitude that should be taken into account under the "other factors as justice may require" prong of the statute. Based on our review of the record, this argument was not presented to the Presiding Officer in the case below and is thus raised for the first time on appeal. As a general rule, we do not consider arguments raised for the first time on appeal. *See In re Woodcrest Mfg., Inc.*, 7 E.A.D. 757, 764 (EAB 1998), *aff'd* No. 3:98, CV-0456-AS (N.D.Ind. Dec. 14, 1999); *In re Lin*, 5 E.A.D. 595, 598 (EAB 1994); *In re Genicom Corp.*, 4 E.A.D. 426, 440 (EAB 1992). As we observed in *Woodcrest*:

> The Consolidated Rules of Practice, 40 C.F.R. § 22.30(a), permit adverse rulings or orders of the presiding officer to be appealed. "Because the Presiding Officer cannot issue an adverse order or ruling on an issue that was never raised during the proceedings below, it follows that section 22.30(a) does not contemplate appeals of such issues." *Lin*, 5 E.A.D. at 598. Thus, arguments made * * * for the first time on appeal are deemed to have been waived.

Woodcrest, 7 E.A.D. at 764. Accordingly, Spitzer's argument that it is deserving of leniency because of its cooperative approach to the litigation below is deemed

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[24] Spitzer apparently hired a former employee of the American Ship Building Company, the company from whom Spitzer purchased the property, and that employee performed inspections of the transformers and capacitors on Spitzer's property. Affidavit of Ned Huffman ¶ 2 (Dec. 4, 1996). Although this statement does not indicate whether or not Spitzer knew of its violations, it does suggest that, to some extent, Spitzer was aware that it had regulatory obligations with regard to its handling of PCBs.

waived.[25]

Spitzer further argues that the Presiding Officer failed to take into account Spitzer's efforts to dispose of the PCBs before being visited by state or federal inspectors and maintains that if it were really a "bad guy" it would not have kept records for as long as it did, would not have emptied the transformers before shipping them away, and would not have acted quickly to dispose of the oil-filled drums. Appeal Brief at 17. Spitzer also proffers the fact that it had the transformers emptied of oil and removed from its property as proof that it did not have any sinister intent or purpose.[26] *Id*. As we have already observed, TSCA is a strict liability statute. Therefore, lack of sinister intent or purpose to violate its requirements does not justify noncompliance. *In re Strandley*, 3 E.A.D. 718, 722 (CJO 1991).

Moreover, based on our review of the Initial Decision, the Presiding Officer did not ignore these representations. *See* Initial Decision at 15. Rather than seeing these circumstances as proof of Spitzer's good faith efforts to comply, however, the Presiding Officer saw them as evidence that Spitzer was, in fact, well aware of its TSCA obligations, making all the more inexcusable its multiple violations of TSCA's requirements while Spitzer still possessed the PCBs. *Id*. Given that when

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[25] We note that the PCB Penalty Policy does not include in its list of circumstances warranting penalty mitigation any reference to cooperation during litigation. *See* PCB Penalty Policy at 17. Rather, the kind of cooperation envisioned by the policy is that which is geared towards trying to achieve compliance or environmental improvement. *Id.* We further note that it is far from clear from the record in this case whether Spitzer, in conceding facts and sacrificing its right to a hearing, was motivated by a desire to be cooperative or was simply making tactical or economics-based judgments based on the reality of its case. Moreover, as we have previously observed, Spitzer's approach to the litigation was not uniformly "cooperative." *See supra* note 21.

[26] Spitzer also advances as another indicator of good faith efforts to comply the fact that, while it admittedly did not properly document its inspections of its PCB items, it did perform the required quarterly inspections. On this point, the Presiding Officer in his Initial Decision observed: "Respondent urges that the quarterly inspections were done. Its argument comes too late, however, since it previously agreed with the finding — respondent described that finding as reasonably accurate — that it did not inspect the transformers quarterly." Initial Decision at 4. The Presiding Officer appears to have erred in this assumption. We find no indication in the record that Spitzer had, in fact, conceded that the inspections had not been done. This being said, we are persuaded that the Presiding Officer's error in this regard was immaterial to the outcome in the case since Spitzer was explicitly accused of, and found liable for, recordkeeping violations, not inspection violations. *See* Complaint at ¶ 32, Initial Decision at 7.

Moreover, while it may be true that Spitzer had not conceded a failure to inspect, it is also true that the Region likewise did not concede the point. Indeed, as noted above, the Region questioned the reliability of Spitzer's claim that the inspections did, in fact, occur. *See* supra note 20. Thus, the most that can be said about this issue is that it was a matter of disputed fact between the parties and was thus not part of the body of undisputed facts that the parties agreed should guide the Presiding Officer's penalty assessment. Spitzer, by conceding that there were no *material* facts in dispute for purposes of assessment of a penalty, conceded as well by implication the nonmateriality of this issue.

disposal did finally occur it, too, was undertaken in a manner inconsistent with the regulations, we do not believe that the Presiding Officer committed clear error in rejecting these arguments for mitigation.[27]

In sum, we do not find that the Presiding Officer committed an abuse of discretion or clear error in declining to reduce the penalty because of "other factors as justice may require." The record reflects that the Presiding Officer gave consideration to Spitzer's purported indicia of good faith and found them to be more than outweighed by evidence that Spitzer had acted irresponsibly. In view of the deference ordinarily accorded Presiding Officers' penalty determinations, we uphold the Presiding Officer's ruling on this point.

D. *Ability to Pay*

Spitzer argues that it cannot afford to pay the $165,000 civil penalty assessed by the Presiding Officer because: (1) the company loses more than one million dollars each year; (2) it is unable to cover its debt without regular infusions of capital from its shareholders; (3) paying the assessed penalty will punish its employees because the company will be forced to cut back on expenses; and (4) it has already been penalized because it paid $70,000 to remove PCB oil that it did not create, use, or benefit from. Appeal Brief at 16.

In response, the Region notes that: (1) the Region filed a discovery motion seeking documents that would have allowed the Region to determine Spitzer's ability to pay the proposed penalty; (2) Spitzer did not object to the discovery request and stated that it would provide the information; (3) the Presiding Officer granted the motion and ordered Spitzer to provide the discovery; (4) notwithstanding the Presiding Officer's order, Spitzer failed to provide the requested records; (5) the Region filed a motion for partial accelerated decision on the issue of penalty asserting that Spitzer had waived its right to mitigate the proposed penalty based on inability to pay, but Spitzer did not respond to the motion; (6) the Presiding Officer, relying on precedent established by this Board, ruled that Spitzer had indeed waived the right to assert inability to pay; and (7) on appeal Spitzer does not allege error in the Presiding Officer's decision to grant the discovery motion, nor does Spitzer allege error in the decision to grant the motion for partial accelerated decision. Reply Brief at 25-27.

We find that the Presiding Officer properly excluded consideration of ability to pay as a mitigating factor in assessing the penalty against Spitzer. As noted above, Spitzer raised inability to pay as a mitigating factor in its prehearing exchange by stating that "the proposed penalties are too high and that, in any event, Respondent cannot afford to pay the proposed penalties." Pre-Hearing Statement

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[27] Spitzer has conceded this point in conceding liability on Count VII of the complaint.

of Respondent ¶ 2. However, when asked by the Region, and directed by the Presiding Officer, to substantiate that claim, Spitzer failed to respond. *See* Memorandum Opinion and Order (Nov. 1, 1996).

This Board addressed the burdens of proof associated with demonstrating ability (or inability) to pay a civil penalty in *In re New Waterbury, Ltd.*, 5 E.A.D. 529 (EAB 1994).[28] As we observed there, under TSCA, "ability to pay" is one of several factors to be considered when assessing a civil penalty for violations of TSCA. TSCA § 16(a)(2(B), 15 U.S.C. § 2615(a)(2)(B). The Administrative Procedure Act ("APA") generally places the burden of proof on "the proponent of a rule or order." APA § 7(d), 5 U.S.C. § 556(d). Therefore, as the proponent of an order seeking civil penalties in administrative proceedings, the Region bears, in the first instance, the burden of proof on the appropriateness of a civil penalty. This reality is reflected in the regulations that govern these proceedings. As we have previously observed, the relevant portion of the Consolidated Rules of Practice makes it clear that:

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

New Waterbury, 5 E.A.D. 529, 538.

Although the Region bears the burden of proof on the appropriateness of the overall civil penalty, it does not bear a separate burden with regard to each of the statutory factors. *Id*. Instead, in order to make a *prima facie* case, the Region must show that it considered each of the statutory factors and that the recommended penalty is supported by its analysis of those factors. With this shown, the burden then shifts to the Respondent 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*. at 538-39; *In re Chempace Corp.*, 9 E.A.D. 119, 135 n.22 (EAB 2000).

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[28] In addition, EPA's PCB Penalty Policy states that, "[i]f an alleged violator raises the inability to pay as a defense in its answer or in the course of settlement negotiations, it shall present sufficient documentation to permit the Agency to establish such inability." PCB Penalty Policy at 17. The policy goes on to state, "If the alleged violator fails to provide the necessary information, and the information is not readily available from other sources, then the violator will be presumed to be able to pay." *Id*.

With regard to "ability to pay," we have held that since EPA's ability to obtain financial information about a respondent is limited at the outset of a case, "a respondent's ability to pay may be presumed until it is put at issue by a respondent." *New Waterbury* 5 E.A.D. at 541 (citations omitted). Then, as the party with control over the relevant records, the respondent must, upon request, provide evidence to show that it is not able to pay the proposed penalty:

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

Id. at 542.

In this proceeding, Spitzer placed ability to pay in issue, albeit during the prehearing exchange as opposed to in its answer. Having placed that matter in issue, Spitzer was required to provide evidence sufficient to substantiate its claim. Here, Spitzer had provided some supporting documentation, but not enough, in the Region's view, to allow for a complete assessment. Accordingly, the Region requested additional documentation. Spitzer did not object to the scope of, or the need for, the additional documentation. Rather, Spitzer indicated that it would comply with the request. Then, even after entry of an order directing that it provide the documentation, Spitzer failed to comply.

Spitzer does not offer an explanation for its failure to provide the necessary documentation or comply with the Presiding Officer's order, nor has it argued before the Presiding Officer or on appeal that the documentation that it had provided prior to the request for additional discovery was sufficient to inform a judgment on its ability to pay. Under these circumstances, we find that the Presiding Officer appropriately concluded that Spitzer had waived inability to pay as a mitigating factor.

III. *CONCLUSION*

For the foregoing reasons we find no error in the Initial Decision issued by the Presiding Officer. Accordingly, Spitzer is assessed a civil penalty of

$165,000. Payment of the full amount of the assessed penalty shall be made by forwarding a cashier's or certified check, payable to the Treasurer of the United States, to the following address within sixty (60) days of the receipt of this decision:

U.S. EPA Region V, Regional Hearing Clerk
First National Bank of Chicago
P.O. Box 70753
Chicago, Illinois 60673

A transmittal letter identifying the case and the EPA Docket number, plus Respondent's name and address, must accompany the check. Failure on the part of the Respondent to pay the civil penalty within the prescribed statutory time frame after entry of this final order may result in the assessment of interest on the civil penalty. *See* 31 U.S.C. § 3717; 4 C.F.R. § 102.13.

So ordered.