IN RE NEW WATERBURY, LTD.

TSCA Appeal No. 93-2

REMAND ORDER

Decided October 20, 1994

Syllabus

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 The presiding officer had originally assessed a $35,750 penalty but rescinded the penalty after reopening the hearing on the grounds that the Region had not rebutted New Waterbury's "showing" that it did not have the resources or ability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

Held: The Board concludes that:

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

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

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

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

Opinion of the Board by Judge Firestone:

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

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

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

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

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

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

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

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

I. *BACKGROUND*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. *ISSUES ON APPEAL*

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

III. *ANALYSIS*

A. *Burden of Proof*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. *Reopening the Hearing*

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

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

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

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

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

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

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

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

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

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

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

C. *Penalty Assessment*

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

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

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

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

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

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

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

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

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

IV. *CONCLUSION*

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

So ordered.

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

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

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

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

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

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

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

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

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

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

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

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;
>
> (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;
>
> (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;
>
> (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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(continued)

> (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

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[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

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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

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[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.

IN RE DONALD CUTLER

CWA Appeal No. 03-01

FINAL DECISION AND ORDER

Decided September 2, 2004

Syllabus

On August 24, 2000, Region X of the United States Environmental Protection Agency ("EPA" or "Agency") filed an administrative complaint against Mr. Donald Cutler of Stanley, Idaho, charging him with unlawfully discharging dredged or fill material into waters of the United States in violation of sections 301(a) and 404 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311(a), 1344. Region X alleged that Mr. Cutler, an excavation contractor, used heavy equipment to place dredged or fill material into wetlands between his home in Stanley and Meadow Creek, a tributary of Goat Creek, which leads through Valley Creek into the Salmon River, the Snake River, the Columbia River, and then to the Pacific Ocean. On March 20-21, 2001, Administrative Law Judge Spencer T. Nissen held an administrative hearing in Boise, Idaho, to gather evidence and hear testimony in this case. On December 31, 2002, Judge Nissen issued an Initial Decision finding Mr. Cutler liable for discharging dredged or fill material into wetlands without a CWA section 404 permit and assessing an administrative penalty of $1,250.

On February 28, 2003, Region X filed an appeal of the Initial Decision, contesting both the scope of Judge Nissen's liability determination and the amount of the assessed penalty. With respect to liability, the Region asks the Board to reverse Judge Nissen's decision regarding Mr. Cutler's liability for fill placed along his northern property line, adjacent to Goat Creek. With respect to the penalty, Region X seeks an increase in the $1,250 penalty assessed for the violations, on four separate grounds. First, the Region argues that Mr. Cutler has the ability to pay the $25,000 penalty it proposed for these violations, contrary to Judge Nissen's finding otherwise. Second, the Region contends that Judge Nissen improperly excluded evidence of Mr. Cutler's prior wetlands violations, which could provide a basis for increasing the penalty, because those violations occurred more than five years prior to the fill activities in this case. Third, Region X argues that Judge Nissen erred in holding that Meadow Creek is not critical habitat for endangered salmon. Fourth, the Region claims that Mr. Cutler's culpability was more significant than Judge Nissen acknowledged in the Initial Decision. Appellee filed a reply to the appeal on March 24, 2003, countering these various arguments. The Environmental Appeals Board ("Board") subsequently heard oral argument in the case on January 22, 2004.

Held: The Initial Decision is affirmed in part and reversed in part. The Board holds that, as to the penalty, Judge Nissen properly determined that Mr. Cutler lacks the ability to pay the entire proposed penalty of $25,000. In the Board's view, Region X came forward with a prima facie case of ability to pay, but Mr. Cutler successfully rebutted the Region's case by means of his own testimony, which Judge Nissen found to be credible and which the Region's cross-examination failed to diminish. Accordingly, the Board affirms Judge

Nissen's ruling on this element of the case, finding that Region X failed to meet its ultimate burden under the Consolidated Rules of Practice, 40 C.F.R. § 22.24(a), of demonstrating that Mr. Cutler has the ability to pay the proposed penalty.

The Board finds further, however, that, as to several key predicates of the penalty calculus, Judge Nissen's findings must be reversed. Those predicates include the prior history of violations penalty factor, which Judge Nissen held is restricted, under general EPA policy, to violations occurring within five years of the filing of the complaint in the instant case. The Board is unwilling, as a policy matter, to follow Judge Nissen in drawing a bright-line rule that automatically excludes certain prior violations from the penalty calculus simply by virtue of their age, particularly in view of the Agency's CWA section 404 settlement policy, which, by its terms, does not limit prior history evidence and is authorized for use in litigated cases as well as for settlements.

Another predicate of the penalty analysis is the gravity of the violation. In this regard, Judge Nissen held that Meadow Creek and adjacent wetlands next to Mr. Cutler's home were not designated critical habitat for federally protected salmon species, and thus Mr. Cutler's filling activities in those areas were not particularly grave. The Board finds otherwise, holding that a preponderance of evidence in the record indicates that Meadow, Goat, and Valley Creeks are critical habitat for Snake River spring/summer chinook salmon, a threatened species. The Board therefore concludes that the sensitivity of the environment affected by Mr. Cutler's unlawful fill is extremely high and the gravity of the violations correspondingly high.

A third predicate of the penalty analysis is a violator's culpability. Judge Nissen accepted Mr. Cutler's argument that he lacked culpability because he believed the areas filled were not wetlands and because he had attempted after-the-fact to restore at least some of the filled areas. The Board disagrees, observing that Mr. Cutler had numerous prior contacts with regulatory authorities pertaining to filling of wetlands around his Stanley home, and thus Mr. Cutler knew or should have known the areas filled were federally protected wetlands.

The Board then proceeds to calculate the penalty anew, as it believes Judge Nissen's errors with respect to prior history, gravity, and culpability caused him to understate the significance of Mr. Cutler's violations. The Board accepts Judge Nissen's conclusion that Mr. Cutler is unable to pay a $25,000 penalty but finds evidence in the record that Mr. Cutler may be able to pay a penalty more substantial than the $1,250 initially assessed. The Board observes, however, that there is no clear indication in the record regarding the upper limits of Mr. Cutler's ability to pay. In this regard, the Board finds instructive Agency policy from two other statutory contexts, which provides that in circumstances in which the extent of a violator's inability to pay is not altogether clear, it is appropriate to assume that an entity can, at a minimum, afford to pay a penalty equivalent to four percent of gross receipts averaged over four years. Employing this method, the Board calculates a penalty of $5,548 for Mr. Cutler's wetlands violations. The Board finds that this penalty better reflects the seriousness of Mr. Cutler's violations and does not appear to be beyond his ability to pay.

Finally, because the Board holds that the amount of the penalty in this case is governed by Mr. Cutler's ability to pay, the Board declines to reach Region X's appeal of Judge Nissen's conclusions regarding the extent of wetlands filled by Mr. Cutler. The Board notes that Region X conceded at oral argument that the only significance of this issue would be to increase the amount of the penalty because, if the Region's arguments were to be accepted, a larger area of wetlands would be regarded as affected by Mr. Cut-

ler's actions. The Board declines consideration in light of its finding that the penalty is already constrained by Mr. Cutler's ability to pay.

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

Opinion of the Board by Judge Fulton:

On February 28, 2003, Region X of the U.S. Environmental Protection Agency ("Appellant") filed an appeal of an Initial Decision entered against Mr. Donald Cutler ("Appellee") on December 31, 2002, by Administrative Law Judge ("ALJ") Spencer T. Nissen. In a lengthy opinion, the ALJ determined that Appellee violated sections 301(a) and 404 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311(a), 1344, by discharging dredged or fill material into federally protected wetlands without a CWA permit authorizing him to do so. Pursuant to CWA section 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B), the ALJ assessed a Class II administrative penalty of $1,250 against Appellee for the discharges. In so doing, the ALJ rejected Appellant's proposal of a $25,000 penalty for Appellee's unlawful filling activities.

In its appeal, Appellant contends on a number of grounds that the ALJ erred and/or abused his discretion in analyzing Appellee's liability for violating the CWA and in determining an appropriate penalty therefor. For the reasons set forth below, we affirm the ALJ's Initial Decision in part, reverse it in part, and assess a penalty against Appellee of $5,548.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

Under the CWA, it is unlawful for any person to discharge dredged or fill material into the waters of the United States unless that person obtains a permit authorizing the discharge. CWA §§ 301(a), 404(a), 33 U.S.C. §§ 1311(a), 1344(a); *see In re Slinger Drainage, Inc.*, 8 E.A.D. 644, 647-48 (EAB 1999) (section 404 "operates under the umbrella of section 301(a)," which prohibits the discharge of any pollutant (including dredged or fill material) except in accordance with, inter alia, the permitting provisions of section 404), *appeal dismissed for lack of jurisdiction*, 237 F.3d 681 (D.C. Cir.), *cert. denied*, 534 U.S. 972 (2001). The "waters of the United States" include rivers, streams, and, among other things, "wetlands," 40 C.F.R. § 230.3(s); 33 C.F.R. § 328.3(a), which are "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 40 C.F.R. § 230.3(t); 33 C.F.R. § 328.3(b).

The existence of wetlands is generally determined, and their boundaries delineated, through use of a guidance manual prepared in 1987 by the U.S. Army Corps of Engineers. *See* U.S. Army Corps of Engineers, Wetlands Research Program, Tech. Rep. No. Y-87-1, *Corps of Engineers Wetlands Delineation Manual* (Jan. 1987) ("1987 Manual"). This manual sets forth detailed methodologies for analyzing three parameters that indicate the presence of wetlands: (1) hydric soil;[1] (2) hydrophytic vegetation;[2] and (3) wetland hydrology.[3] *See, e.g., id.* ¶¶ 29-49, at 16-41. In most cases, "evidence of a minimum of one positive wetland indicator from each parameter (hydrology, soil, and vegetation) must be found in order to make a positive wetland determination." *Id.* ¶ 26(c), at 14.

One of the methodologies set forth in the 1987 Manual is intended for use specifically in "atypical situations" where one or more of the three wetlands parameters is deliberately or accidentally disturbed prior to performance of a wetlands analysis. According to the Manual, certain discharges that occur without benefit of a CWA section 404 permit "may result in removal or covering of indicators of one or more wetland parameters. Examples include, but are not limited to: (1) alteration or removal of vegetation; (2) placement of dredged or fill material over hydric soils; and/or (3) construction of levees, drainage systems, or dams that significantly alter the area hydrology." *Id.* ¶ 71(a), at 83. In such cases, a standard delineation conducted after the unpermitted discharge, or "after the fact," would likely indicate that the area in question is not a wetland because it lacks one or more of the three wetland parameters. Such a result would undercut Congress' goal in enacting the CWA (i.e., "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," CWA § 101(a), 33 U.S.C. § 1251(a)) by precluding the application to disturbed resources of otherwise forthcoming regulatory protections. To prevent this outcome, the 1987 Manual establishes mechanisms by which wetlands can be delineated even after they have been disturbed.

An "atypical" or "after-the-fact" wetlands delineation consists of the examination of a combination of direct and indirect evidence, such as: (1) aerial photography, which can be used to document previous vegetation types and soil inundation levels; (2) evidence relating to adjacent areas with similar topography, soils,

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[1] "Hydric soil" is soil "that is saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions that favor the growth and regeneration of hydrophytic vegetation." 1987 Manual ¶ 36, at 26.

[2] "Hydrophytic vegetation" is "plant life that occurs in areas where the frequency and duration of inundation or soil saturation produce permanently or periodically saturated soils of sufficient duration to exert a controlling influence on the plant species present." 1987 Manual ¶ 29, at 16.

[3] "The term 'wetland hydrology' encompasses all hydrologic characteristics of areas that are periodically inundated or have soils saturated to the surface at some time during the growing season." 1987 Manual ¶ 46, at 34.

and hydrology, which can indicate plant community types that likely grew in the disturbed area; (3) past soil surveys; and (4) flood plain management maps. 1987 Manual ¶¶ 73-75, at 84-91; *see In re Veldhuis*, 11 E.A.D. 194, 205-12 (EAB 2003), *appeal dismissed upon stipulation of parties*, No. 03-74235 (9th Cir. Mar. 8, 2004) (upholding ALJ's determination, on basis of atypical delineation evidence, that wetlands existed on farmland prior to its deep plowing). If fill material has been placed over the original soil without physically disturbing that soil, a wetland scientist can sometimes dig down through the fill material to determine whether the original soil underneath qualifies as hydric. 1987 Manual ¶ 74, at 87-88. Other evidence such as stream gauge data, historical records of various kinds, conversations with local government officials or citizens familiar with the site, previous site inspections, and related materials can also be useful in determining the location of former wetlands in an altered landscape. *See id.* ¶¶ 73-75, at 84-91; *see, e.g.*, *Veldhuis*, 11 E.A.D. at 205 (considering testimony of previous landowner).

B. *Factual Background*

Appellee Donald Cutler is the sole proprietor of an excavation contracting business in Stanley, Idaho. For the past thirty-plus years, Appellee has worked approximately six months of the year, from May through October, using front-end loaders, backhoes, dump trucks, and other heavy equipment to move sand, gravel, rock, and other materials in the course of his daily activities in and around Stanley. Tr. at 23. The rest of the year, November through April or so, the ground is frozen and unworkable by excavation equipment, so Appellee spends that time fixing snowmobiles and plowing snow on an occasional basis. Tr. at 415, 418-29, 462-63.

Many years ago, Appellee purchased a parcel of land situated partly in Custer County and partly in Stanley, Idaho, which he used as home base for his excavation business. The property was bounded (approximately) to the south by State Highway 21, which runs in an easterly-westerly direction; to the east by Meadow Creek, a small perennial stream that flows in a northerly direction; and to the north by Goat Creek, a larger perennial stream that flows east and meets Meadow Creek, one of its tributaries, a short distance from the northeast corner of Appellee's property. Goat Creek in turn flows east into Valley Creek, an even larger perennial stream, which flows into the Salmon River approximately one-half mile downstream of its confluence with Goat Creek. Tr. at 252. The Salmon River then flows into the Snake River, which flows into the Columbia River, which ultimately reaches the Pacific Ocean 900 miles away. Tr. at 35, 252-54.

In 1990, Appellee sold off the southern portion of his property adjacent to Highway 21, retaining only a 2.6-acre parcel on the northern side along Goat Creek. About that same time, Appellee decided to construct a new home on the

northeast corner of his property, near another building he used for business purposes and close to the areas where he parked his heavy equipment and stored sand, gravel, and other materials used in excavation work. Initially, Appellee accessed the property by means of a driveway off Highway 21, as he had done for many years. This ended shortly after his sale of the southern parcel, however, when the new owner denied Appellee permission to drive vehicles and equipment across his land, which left Appellee with no means of access to his remaining property. Tr. at 94, 462.

Appellee proceeded to discharge dredged or fill material into Meadow Creek and wetlands adjacent to the creek, and he installed a thirty-foot-long culvert in a channel excavated through the wetlands in preparation for constructing a bridge across Meadow Creek and driveway to his new home. Tr. at 31-39. On May 12, 1992, the U.S. Army Corps of Engineers issued a Notice of Violation to Appellee for these activities, as Appellee had undertaken them without the authorization of a CWA section 404 permit. Tr. at 39-41; EPA Ex. 3. Appellee subsequently applied for an "after-the-fact" permit to construct a bridge crossing and driveway over Meadow Creek for the purpose of providing access to his property from the east. Tr. at 58. The Corps and several natural resource agencies evaluated Appellee's application and determined that the proposed fill activities would result in more than minimal impacts to the Meadow Creek ecosystem. This meant that the general permit typically used for minor road crossings (i.e., Nationwide Permit 14) could not be used in this instance, and, instead, an individual CWA section 404 permit would be required. The State of Idaho informed the Corps, however, that it would not certify that the proposed project would not adversely affect water quality in the area. Tr. at 58-59; EPA Ex. 12, at 2-3. At that point, Appellee hired a consultant to help him modify his project to address the State's concerns, and, on July 7, 1993, the Corps finally issued Appellee a section 404 permit for the bridge crossing/driveway project, as revised. Tr. at 60; Cutler Ex. D. The permit contained a number of special conditions that were intended to minimize the impacts of the project on anadromous fish species in the area. Tr. at 63, 276-77; Cutler Ex. D at 4-5.

A few months later, on September 29, 1993, the Corps issued a second Notice of Violation to Appellee for violating Special Condition #11 of his permit to construct the bridge crossing/driveway. Tr. at 99-101; EPA Ex. 12, at 3. That condition directed Appellee to install sediment control devices such as hay bales or silt fencing in Meadow Creek and a channel Appellee had previously excavated in wetlands. Cutler Ex. D at 4. Appellee had initially placed hay bales in the channel but removed them after completing the bridge and driveway. Tr. at 379. The Corps subsequently agreed to allow Appellee to substitute, for the hay bales and silt fencing, filter fabric and crushed rock over exposed fill faces where erosion would otherwise occur. Tr. at 100-01; EPA Ex. 12, at 3.

Nine months later, on June 27, 1994, the Corps issued a Cease and Desist Order to Appellee, this time for filling wetlands in a triangular area next to the western bridge abutment, between the house and the bridge. Tr. at 101-10; EPA Exs. 4-7. This area, which Appellee called a "mosquito pond," was purportedly part of a larger area Appellee wanted to use to install a lawn around his home. Tr. at 105-06; EPA Ex. 4. The Corps' Order directed Appellee to cease and desist unauthorized work in waters of the United States and ordered him to remove all fill material discharged into the wetland area down to the original ground surface elevation.[4] EPA Exs. 5, 7. On September 16, 1994, when no action had yet been taken by Appellee to comply with the Cease and Desist Order, the Corps sent him a follow-up letter stating that the fill had to be removed or legal action would ensue, at which point Appellee removed the fill. Tr. at 114-15; EPA Exs. 8-9. Appellee later requested a modification of his bridge crossing/driveway permit, which the Corps granted on April 13, 1995. Cutler Ex. E. The modified permit authorized the discharge of fill material into approximately 0.009 acre of wetlands next to the bridge abutment and 156 linear feet of "open trench in wetlands" on the west side of Meadow Creek, in the channel Appellee had previously dredged, with the purpose of returning those areas to a wetlands condition.[5] Tr. at 142-43, 146; Cutler Exs. A, E.

Four-and-a-half years elapsed. On September 20, 1999, a Corps employee driving past Appellee's property on Highway 21 observed that a pile of fill had been placed on uplands next to wetlands near Appellee's residence. EPA Ex. 12, at 3. On November 30, 1999, an employee of the National Marine Fisheries Service, also driving past on Highway 21, witnessed a dump truck and backhoe being used to place fill material from a nearby stock pile into wetlands to the east/southeast of Appellee's house, adjacent to Meadow Creek. The employee stopped and took photographs of the filling activities. Tr. at 69-70, 116-17; EPA Ex. 11. These photographs and subsequent on-site inspections by Corps and EPA employees led the Corps to issue to Appellee, on February 1, 2000, another Notice of Violation, Cease and Desist Order, and Request for Information. *See* EPA Ex. 14. This document identified the violation as the "[d]ischarge of dirt and rock fill material in wetlands adjacent to Meadow Creek" and ordered Appellee to stop filling wetlands around his Stanley home without a permit. *Id.* Appellee did not contact the Corps or otherwise respond to the Notice of Violation, Cease and Desist Order, and Request for Information document. Tr. at 123-24.

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[4] The Corps originally sent this Order to Appellee via certified mail, *see* EPA Ex. 5, but Appellee's wife refused to accept it and it was returned as "unclaimed." Tr. at 111-13; EPA Ex. 6. The Corps therefore found it necessary to hire the local sheriff to serve the document on Appellee. Tr. at 111, 114; *see* EPA Ex. 7.

[5] While, as discussed in Part II.B below, these activities in the early 1990s hold some relevance in the penalty context, they are not included in the list of alleged violations in the case before us. Rather, the complaint concerns fill activities that took place several years later.

C. *Procedural Background*

On August 24, 2000, Appellant filed an administrative complaint against Appellee pursuant to CWA section 309(g), 33 U.S.C. 1319(g), charging him with unlawfully discharging dredged or fill material into approximately 0.1 acre of federally protected waters of the United States around his Stanley home, from "at least 1995 to the present."[6] Compl. ¶¶ 6, 15. On March 20-21, 2001, the ALJ held an administrative hearing in Boise, Idaho, to gather evidence and hear testimony in this case. *See generally* Transcript of Hearing vols. I-II. At the hearing, the ALJ granted Appellant permission to amend the complaint to conform it to the evidence presented, which resulted in an increase in the size of the alleged unlawful fill area from 0.1 acre to 0.3-to-0.5 acre of waters of the United States adjacent to Meadow and Goat Creeks. Tr. at 221-23; *see* Init. Dec. at 21 n.17. In the course of amending the complaint in this way, Appellant did not seek an increase in the proposed $25,000 penalty, which it had recommended on the basis of Appellee's culpability, history of prior violations, and the harm to the environment caused by the illegal fill. Tr. at 222; Compl. ¶¶ 15-18. The ALJ later reopened the hearing, on October 11, 2001, at the request of Appellant, for the purpose of collecting evidence pertaining to Appellee's alleged failure to perform wetlands restoration work required by a Compliance Order issued August 15, 2000, which Appellant believed refuted Appellee's contention at the original hearing that he was acting in good faith to remedy the violations. *See generally* Transcript of Reopened Hearing.

On December 31, 2002, the ALJ issued an Initial Decision in this case, finding Appellee liable for discharging dredged or fill material into wetlands without a CWA section 404 permit and assessing an administrative penalty of $1,250. Init. Dec. at 43-55. Appellant EPA Region X filed an appeal of the ALJ's Initial Decision on February 28, 2003, contesting both the scope of the ALJ's liability determination and the amount of the assessed penalty. *See* Complainant's Appellate Brief ("Appeal Br."). Appellee filed a reply to the appeal on March 24, 2003.

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[6] The Corps and EPA are jointly charged with the administration of CWA § 404. The Corps is responsible for issuing § 404 permits, while EPA may veto Corps permits in certain circumstances. CWA § 404(a), (c), 33 U.S.C. § 1344(a), (c). Both agencies have authority to enforce the Act, and they do so pursuant to an agreement that allocates enforcement responsibilities between the two agencies. *See Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act* (Jan. 19, 1989) ("MOA"); *see also In re Britton Constr. Co.*, 8 E.A.D. 261, 264-65 & n.2 (EAB 1999) (discussing MOA).

In general, the Corps acts as the lead enforcement agency for all violations of Corps-issued permits and for unpermitted discharges. EPA takes the lead over unpermitted discharges involving repeat or flagrant violators and over any other cases or classes of cases it requests. MOA at 3-4. Appellant EPA Region X became involved in this case upon referral from the Corps, in light of Appellee's status as a repeat violator of the CWA.

See Appellee's Brief on Appeal ("Reply Br."). The Environmental Appeals Board subsequently heard oral argument in the case on January 22, 2004. *See generally* Oral Argument Transcript ("OA Tr."). The case now stands ready for decision by the Board.

II. *DISCUSSION*

The Board reviews an administrative law judge's factual and legal conclusions on a de novo basis. 40 C.F.R. § 22.30(f) (the Board shall "adopt, modify, or set aside" the ALJ's findings of fact and conclusions of law or exercise of discretion); *see* Administrative Procedure Act § 8(b), 5 U.S.C. § 557(b) ("[o]n appeal from or review of the initial decision, the agency has all the powers [that] it would have in making the initial decision except as it may limit the issues on notice or by rule"). In so doing, the Board will typically grant deference to an administrative law judge's determinations regarding witness credibility and the judge's factual findings based thereon. *See In re City of Salisbury*, 10 E.A.D. 263, 276, 293-96 (EAB 2002); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998); *In re Echevarria*, 5 E.A.D. 626, 639 (EAB 1994). All matters in controversy must be established by a preponderance of the evidence. 40 C.F.R. § 22.24(b); *Salisbury*, 10 E.A.D. at 289-91; *In re Britton Constr. Co.*, 8 E.A.D. 261, 274 (EAB 1999).

In filing this appeal, Appellant seeks to overturn two central outcomes of the ALJ's Initial Decision. First, Appellant asks the Board to reverse the ALJ's decision regarding Appellee's liability for fill placed along his northern property line, adjacent to Goat Creek. Second, Appellant seeks an increase in the $1,250 penalty assessed for the violations. To achieve these ends, Appellant presents five issues for the Board's consideration. Four of the issues consist of challenges to various components of the ALJ's penalty analysis, while the fifth issue challenges the ALJ's findings pertaining to the extent of wetlands filled without a permit.

In Part II.A below, we begin with the parties' arguments pertaining to Appellee's ability to pay the proposed penalty, as that issue is pivotal — and indeed dispositive — in this case. In Parts II.B and II.C, we turn to arguments regarding the ALJ's treatment, for penalty purposes, of Appellee's prior history of violations and the property's status as critical habitat for salmon under the Endangered Species Act, respectively. In Part II.D, we address the issue of Appellee's culpability for the alleged violations. Because we find the ALJ committed legal errors with respect to several key predicates of the penalty analysis, we decline to accord deference to the penalty assessment and proceed to calculate the penalty anew in Part II.E below. Finally, in Part II.F, we briefly touch on, and find we need not reach, the liability issue Appellant raises by way of a challenge to the ALJ's assignment of substantial weight to testimony given by a witness who purportedly was unqualified to delineate wetlands.

A. *"Ability to Pay" Penalty Factor*

1. *Overview*

We begin with a brief overview of the administrative penalty provisions of the CWA, which contain the requirement that a respondent's "ability to pay" a proposed penalty be considered in the course of assessing a civil administrative penalty for a CWA violation. The Board has had frequent cause to address ability-to-pay questions in its jurisprudence, so the law pertaining to the burdens of proof and other matters pertaining to this penalty factor is well-settled. *E.g.*, *In re CDT Landfill Corp.*, 11 E.A.D. 88, 120-25 (EAB 2004); *In re Wallin*, 10 E.A.D. 18, 34-38 (EAB 2001); *In re Spitzer Great Lakes Ltd.*, 9 E.A.D. 302, 319-21 (EAB 2000); *In re Chempace Corp.*, 9 E.A.D. 119, 132-37 (EAB 2000); *In re Britton Constr. Co.*, 8 E.A.D. 261, 290-92 (EAB 1999); *In re Lin*, 5 E.A.D. 595, 599-602 (EAB 1994); *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 536-50 (EAB 1994).

The CWA provides:

> In determining the amount of any penalty assessed under [CWA § 309(g)], [EPA] * * * shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, *ability to pay*, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3) (emphasis added). Inability to pay a penalty can, if successfully proved, act as a downward adjustment or mitigating factor on a penalty that is otherwise calculated to reflect the gravity of the violation. *E.g.*, *CDT Landfill*, 11 E.A.D. at 121; *see Wallin*, 10 E.A.D. at 38; *Britton*, 8 E.A.D. at 290-92; EPA General Enforcement Policy #GM-22, *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties* 17, 23-24 (Feb. 16, 1984). Otherwise, the effect of ability-to-pay evidence is neutral (i.e., it is never used to increase a proposed penalty).

Under the Consolidated Rules of Practice that govern these enforcement proceedings, the complainant has the initial burden of production, as well as the burden of persuasion, to establish that the penalty sought for an alleged violation is "appropriate," in this instance in light of the penalty factors of CWA section 309(g)(3). 40 C.F.R. § 22.24(a); *accord CDT Landfill*, 11 E.A.D. at 122-24; *Wallin*, 10 E.A.D. at 35 & n.14; *Chempace*, 9 E.A.D. at 132-33. As a general matter, a complainant can make a prima facie case of appropriateness by demonstrating that it considered each of the statutory penalty factors and that the recommended

penalty is supported by analyses of those factors. *CDT Landfill*, 11 E.A.D. at 121-22; *Spitzer*, 9 E.A.D. at 320; *New Waterbury*, 5 E.A.D. at 538-39. With respect to ability to pay in particular, we have recognized that a complainant may have difficulty obtaining financial information about a respondent at the outset of a case, as tax returns, balance sheets, and other data relevant to this issue may not be publicly available at that time. *Spitzer*, 9 E.A.D. at 321; *Chempace*, 9 E.A.D. at 132-33; *New Waterbury*, 5 E.A.D. at 541. As a consequence, we have held that a respondent's ability to pay may be presumed until it is put at issue by the respondent. *CDT Landfill*, 11 E.A.D. at 121-22; *Wallin*, 10 E.A.D. at 36; *Spitzer*, 9 E.A.D. at 321; *New Waterbury*, 5 E.A.D. at 541.

If ability to pay is contested, a complainant must establish a prima facie case that a proposed penalty is nonetheless "appropriate" by presenting, as just mentioned, "some evidence to show that it considered the respondent's ability to pay a penalty." *New Waterbury*, 5 E.A.D. at 542; *accord Britton*, 8 E.A.D. at 290. The complainant "need not present any *specific* evidence to show that the respondent *can pay* or obtain funds to pay the assessed penalty, but can simply rely on some *general* financial information regarding the respondent's financial status [that] can support the *inference* that the penalty assessment need not be reduced." *New Waterbury*, 5 E.A.D. at 542-43; *accord CDT Landfill*, 11 E.A.D. at 122; *Wallin*, 10 E.A.D. at 36; *Britton*, 8 E.A.D. at 290-91. Once this is done, the burden of production shifts to the respondent to rebut the complainant's evidence with specific information of its own that, "despite its sales volume or apparent solvency, it cannot pay any penalty." *New Waterbury*, 5 E.A.D. at 543; *accord Wallin*, 10 E.A.D. at 36; *Spitzer*, 9 E.A.D. at 320; 40 C.F.R. § 22.24(a). The complainant bears the ultimate burden of persuasion as to penalty appropriateness, so, if the respondent satisfies its burden of production, that burden shifts back to the complainant again, in this instance to "rebut [the] respondent's contentions through rigorous cross-examination or through the introduction of additional information." *Chempace*, 9 E.A.D. at 133; *accord CDT Landfill*, 11 E.A.D. at 121-22; *Wallin*, 10 E.A.D. at 36; *New Waterbury*, 5 E.A.D. at 543.

2. *Ability to Pay Evidence and Analysis in the Proceedings Below*

a. *Appellant's Evidence*

In the case at bar, Appellant introduced an expert witness at the hearing to provide testimony regarding Appellee's financial status. The witness, Ms. Beatrice Carpenter, a former Internal Revenue Service auditor and certified public accountant with more than thirty-five years of experience as a financial analyst, reviewed publicly available property records from Custer and Blaine counties in Idaho, as well as tax returns, deeds, court records, and other financial information provided by Appellee. Tr. at 279-82, 285, 298; EPA Ex. 25. These materials indicated that Appellee and his wife Sharon owned three properties in the late 1990s: (1) the Stanley/Custer County property, consisting of 2.6 acres of land, a home,

and several outbuildings, valued in May 2000 at approximately $150,000 and owned free and clear; (2) a Bellevue, Idaho, property (near Sun Valley), consisting of land and a home, valued at approximately $200,000, and in which Appellee and his wife had $50,000 of equity; and (3) another Stanley property, consisting of the Meadow Creek Motel, a home, and some land, which Appellee and his wife sold for a loss of $316 in 1999, although they also obtained in that transaction the repayment of $109,685 in loans they had made to their son Patrick Cutler and daughter-in-law Dawn Cutler, whom they had initially helped to purchase the property in 1993.[7] Tr. at 290-96; EPA Ex. 25, at 1-3; EPA Exs. 20, 22-24, 27; *see* Tr. at 351-54, 366-68, 414. According to Ms. Carpenter, "[t]here is more than enough equity in the [Stanley and Bellevue] homes to pay for the proposed fine." EPA Ex. 25, at 3.

Ms. Carpenter also determined from the materials in her possession that Appellee reported gross business receipts of $132,915, $140,638, $63,241, and $142,550 on his federal income tax returns for 1997-2000, respectively. EPA Ex. 25 (business income information tables); Cutler Exs. G-J (tax returns). After deducting business expenses incurred and the cost of goods expended in earning those receipts, and after adding accelerated depreciation for various heavy equipment assets[8] and any net gain on sales of business property, Ms. Carpenter determined that the cash flow from Appellee's business totaled $59,967, $72,561, $8,209, and $58,910 for the years 1997-2000. Tr. at 305-09; EPA Ex. 25 (business income information tables). The income figures for 1999 are lower than the

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[7] Appellee and his wife were co-signers on Patrick and Dawn Cutler's loan for the property. Tr. at 366. After Patrick and Dawn divorced, the judge ordered Dawn Cutler to operate the motel, but she failed to stay current on the bills and the property went into foreclosure. *Id.* Appellee and his wife stepped in to take over the motel to save their credit. *Id.* at 366-67.

[8] In Ms. Carpenter's opinion, it is appropriate to include accelerated depreciation, which is deducted from income on federal tax returns, in the computation of cash flow available to a business for use. She testified as follows at the hearing:

> [D]epreciation is not truly a cash out-of-pocket type of item. It's a method of allowing [] business equipment purchased over a period of time to be placed against the business income of each year.
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> * * *
>
> [D]epreciation allows for the recapture of amounts expended for business equipment or property over a period of time of the useful life. Now for income tax purposes they allow a shortened life, as opposed to the actual useful life. In addition, they provide for an accelerated method of depreciating these assets over a shorter period of time than what their actual useful life would be. So, therefore, depreciation is normally much heavier in the first years and the useful life may extend beyond the depreciation period.

Tr. at 307, 309-10. For a further discussion of this issue and the ALJ's and our analysis thereof, see *infra* notes 13, 18 and accompanying text.

other years' figures because, Appellant learned at the hearing, Appellee had informally "sold" his excavation business to Patrick and Dawn Cutler in 1999 for $340,000 and then resumed operations three or four months later when his children decided they did not want the responsibility of running the business. Tr. at 352-54, 364-65, 416-18.

Once she had examined the materials related to Appellee's property holdings and business receipts, Ms. Carpenter reviewed the tax returns for evidence of other types of income. She found that from 1997 through 2000, Appellee reported interest income of $1,885, $1,269, $2,061, and $3,345, respectively, as well as stock dividend income. Tr. at 299-305; EPA Ex. 25, at 3; Cutler Exs. G-J. The materials reviewed by Ms. Carpenter contained no information regarding the existence or amounts of specific underlying principal in savings or investment accounts or stock or bond funds to correlate to these figures, so Ms. Carpenter could only speculate as to what amounts of principal at various interest rates might account for these levels of interest and dividend income.[9] Tr. at 299-305; EPA Ex. 25, at 3.

Finally, Ms. Carpenter discovered from the materials she reviewed that Appellee had obtained a $150,000 mortgage on the Bellevue property in July 1999, as well as a $100,000 loan on a new John Deere loader and an $8,000 loan on a Caterpillar skid steer in early 2000. Tr. at 296-99; EPA Ex. 25, at 2-3. She stated that "[t]he ability to borrow funds and the ability to repay loans is an indication of ability to pay." EPA Ex. 25, at 2; *accord* Tr. at 297-99.

Notably, Ms. Carpenter testified that tax returns do not tell the complete story of an individual's financial situation, as assets and investments such as savings and retirement accounts, stocks, bonds, collectibles, life insurance, personal loans, property not used for a business purpose, and the like are not listed on such returns. Tr. at 316. Moreover, tax returns do not report the value of equipment owned by a business or the value of the business itself. *Id.* Accordingly, more than two months prior to the hearing, Appellant had filed a motion for additional discovery with the goal of collecting further salient facts about Appellee's financial status. Motion for Additional Discovery (Jan. 11, 2001). On March 6, 2001, the ALJ denied Appellant's motion "because Appellee had previously supplied a great deal of information concerning his finances" and because the ALJ regarded Appellant's questions as to Appellee's living expenses to be "obnoxious and bur-

[9] Ms. Carpenter noted that the principal underlying these levels of annual interest would have been, assuming simple interest of 5% per year, $37,700 for 1997, $25,380 for 1998, $41,220 for 1999, and $66,000 for 2000. Tr. at 301-02; EPA Ex. 25, at 3. At 3% simple interest, the principal earning $3,325 in interest in the year 2000 would have been $110,000. Tr. at 304.

densome."[10] Init. Dec. at 50 n.40; *accord* Memorandum (ALJ Mar. 7, 2001). However, the ALJ did direct Appellee to provide Region X with a copy of his federal tax return for 2000, no later than one week before the hearing. Order Denying Motion for Additional Discovery (ALJ Mar. 6, 2001).

In summary, therefore, Ms. Carpenter concluded, on the basis of the materials she was able to review, that "it appears * * * [Appellee] would be able to pay the [proposed $25,000] penalty by current business earnings, obtaining a loan, withdrawing savings, sale of assets or payment over a couple of years from income," or some combination of these sources. EPA Ex. 25, at 1, 4. Appellant relied on Ms. Carpenter's financial expertise in presenting its ability-to-pay case against Appellee.

b. *Appellee's Rebuttal Evidence*

In response to Appellant's financial evidence, Appellee testified at the hearing that he had no savings accounts, no formal retirement plan other than Social Security, no Individual Retirement Accounts, and no Keogh plans. Tr. at 350-51, 360. Appellee indicated that he had planned to fund his retirement by selling his excavation business, Tr. at 351, and that he and his wife Sharon intended to move to the Bellevue property upon retirement because they were both originally from that area. Tr. at 352. Appellee explained that because of the seasonal nature of excavation work in Idaho, he and his wife live over the course of the winter (November through April/May) primarily on income from the excavation business, as the snowmobile repair and snow plowing activities he performs during the winter bring in only nominal income. Tr. at 305, 415-16, 418-20; *see* Motion for Additional Discovery Ex. A. Accordingly, while Appellee had over $23,000 in a checking account in November 2000, Tr. at 305, by March 21, 2001, he had less than $1,000 in his two checking accounts combined. Tr. at 350.

In addition, Appellee testified that at the time of the hearing, he had monthly payments of $1,411.92 on the Bellevue mortgage, $1,864 on the new John Deere loader, and $524 on the Caterpillar skid steer. Tr. at 354-59; *see* Tr. at 329-31. Appellee explained that he had assumed these substantial new debts so

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[10] Appellant sought answers to all questions on its Financial Data Request Form, which asks for information on bank accounts, investments, retirement funds and accounts, real estate, other assets, credit cards/lines of credit, and other debts. *See* Motion for Additional Discovery attach. Appellee had previously submitted a partial set of answers to the Financial Data Request Form. *Id.* Appellant also requested financial statements for Appellee's business for calendar year 2000, including an income statement, balance sheet, statement of cash flow, schedule of accounts receivable, and outstanding contracts (if any), as well as a copy of Appellee's John Deere loan financing package. *Id.* at 3. While, in view of the fact that the information sought might well have proved helpful in assessing Appellee's ability to pay, and thus there is room to question the ALJ's characterization of the request as "obnoxious," the Region did not appeal the ALJ's denial of its motion for additional discovery.

that he could place a retirement home on the Bellevue property, replace an old, uninsured loader that had been destroyed in early 1999 when it "rolled down a hill," and replace an old skid steer that had stopped running. Tr. at 352-55, 358. Appellee testified that in 2000, he sold two trailers for $34,000 so that he could meet his payments on these three loans.[11] Tr. at 361. Now, in late March 2001, Appellee indicated that he hoped to borrow money to make payments in April-May on the three loans, presumably until his excavation business resumed operation and provided Appellee's usual stream of income with which to pay his living expenses and debts. Tr. at 357, 360. Appellee stated that he needed all his other equipment to operate his business, Tr. at 361, although he had one truck, worth approximately $15,000, that he could sell because he could no longer afford to license it in the State of Idaho.[12] Tr. at 362-64. He indicated that he would probably use any proceeds from such a sale to make payments on his loans. Tr. at 364.

With respect to the Meadow Creek Motel sales transaction, Appellee testified that by the time he paid off all outstanding bills and obligations, he ended up with approximately $30,000 from the sale, which he and his wife had since spent on living expenses. Tr. at 367, 414-15; EPA Ex. 27. With respect to the interest and dividends reported on his 2000 income tax return, Appellee testified that both resulted from $27,000-$28,000 Sharon Cutler had inherited upon the death of her mother, Molly Fender. Tr. at 368-69; *see* Tr. at 303-05; Cutler Ex. J. Appellee stated that that principal had gone "into the business." Tr. at 369.

Finally, Appellee testified that he had paid over $5,000 (actually $5,344.48) for health insurance for himself and his wife Sharon in the year 2000. Tr. at 370; *see* Tr. at 331. As of the date of the hearing, Appellee was 69 years old and Sharon was 63, Tr. at 348, and Appellee stated that they would have to continue purchasing health insurance until Sharon reached retirement age and could qualify for Medicare. Tr. at 370.

c. *ALJ's Analysis*

Presented with the foregoing evidence and accompanying arguments, the ALJ concluded that Appellee's business is "only modestly profitable at best," as his 1997 through 2000 income tax returns showed adjusted gross incomes of -$2,870, $6,636, -$24,360, and $12,682, respectively. Init. Dec. at 50; *see* Cutler Exs. G-J. To reach this conclusion, the ALJ rejected Beatrice Carpenter's calcula-

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[11] Appellee explained that he had used one of the trailers with a low-boy hitch to move equipment and that he would now use a small pull trailer to perform that task. Tr. at 362. The other trailer was an end-dump unit he did not use very frequently any longer. *Id.*

[12] The State of Idaho had recently increased the truck licensing fee from approximately $200 to $1,940 per year. Tr. at 362-63.

tion of Appellee's income levels, in which she had included accelerated depreciation as part of total cash flow from business activity. Ms. Carpenter had explained that "depreciation is not truly a cash out-of-pocket type of item" but rather is a method of allowing for "the recapture of amounts expended for business equipment or property over a period of time of the useful life" of the asset;[13] therefore, depreciation figures deducted on a business's tax returns should be included in that business's total cash flow. Tr. at 307, 310; EPA Ex. 25. The ALJ held this analysis to be erroneous "for at least two reasons." Init. Dec. at 43 n.32. The ALJ noted:

> Firstly, the Internal Revenue Code specifically allows a reasonable deduction for depreciation and obsolescence (26 U.S.C. § 167) and there can be no doubt that depreciation is a legitimate expense of doing business. Secondly, "cash flow" is not the same as available cash. While depreciation may shield income from taxation, if that money is used for other purposes, it is not available for the payment of penalties, and, of course, the equipment which earned the depreciation will eventually need to be replaced.

Id. Accordingly, the ALJ held that it is improper to add reported depreciation when calculating cash flow, concluding, "[Appellee] could not pay the penalty out of current income or make substantial payments thereon and have any money for personal living expenses." *Id.* at 50.

In addition to rejecting Ms. Carpenter's analysis of Appellee's cash flow, the ALJ also discounted her opinion that Appellee's loan history provided evidence of his creditworthiness. Init. Dec. at 42. He reasoned that the Bellevue, loader, and skid steer loans are secured by the home and equipment they are taken out on, and thus cannot be analogized to a "dead expenditure like the payment of a penalty upon which no security is possible and which has no possibility of a return." *Id.* The ALJ also found that Appellee had no savings and was unlikely to be able to borrow money to pay the penalty, as he was already "leveraged to the hilt." *Id.* at 50. With respect to proceeds Appellee could potentially earn from selling his unlicensed truck, the ALJ observed that he would need those monies for living expenses and loan payments, and that all other equipment is essential to Appellee's excavation business. *Id.* As for the value of that business, the ALJ discounted testimony that it was worth approximately $340,000, finding that the value of the business was "seemingly" the value of the equipment. *Id.* The ALJ

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[13] Ms. Carpenter noted further, "Now for income tax purposes they allow a shortened life, as opposed to the actual useful life. In addition, they provide for an accelerated method of depreciating these assets over a shorter period of time than what their actual useful life would be." Tr. at 310.

concluded that in light of all the facts in the record, Appellee had provided sufficient specific information, within the meaning of *In re Wallin*, 10 E.A.D. 18, 34-38 (EAB 2001), to rebut Appellant's prima facie case of ability to pay.[14] *Id.* at 50-51.

3. *Arguments on Appeal*

On appeal, Appellant raises a series of challenges to the ALJ's decision. First, Appellant argues that the ALJ erred and abused his discretion in rejecting the unopposed, unrebutted expert testimony of Ms. Carpenter that Appellee has the ability to pay the proposed penalty. Appeal Br. at 20. This is not, Appellant asserts, "a case of assessing the credibility of dueling expert witnesses." *Id.* Rather, Appellant contends, the ALJ drew technical conclusions about Appellee's cash flow and finances on the basis of his own opinion rather than on the expert opinion in the record. *Id.* at 20-22. Appellant concludes that the ALJ substituted "his own inaccurate understanding of complex financial matters for that of the qualified expert. In so doing, he erred." *Id.* at 22.

Second, Appellant argues that the ALJ abused his discretion by ignoring Appellee's ownership of substantial assets, namely two homes worth at least $350,000 and a business worth $340,000. According to the ALJ, Appellee could not afford to pay the $25,000 penalty and remain in business, Init. Dec. at 51, but, Appellant contends, the ALJ did not explain how, for example, the sale, rental, or mortgage of Appellee's second home in Bellevue would interfere with his business. Appeal Br. at 23 & n.16 (citing *In re Britton Constr. Co.*, 8 E.A.D. 261, 291 (EAB 1999)). Appellant also argues that there is no evidence in the record that the value of Appellee's excavation business is the value of the equipment, as the ALJ appeared to find; moreover, Appellee proffered no evidence to establish that the business is not worth the $340,000 Patrick and Dawn Cutler agreed to pay for it. *Id.* at 23.

Third, Appellant argues that the ALJ abused his discretion by discounting Ms. Carpenter's testimony as to Appellee's creditworthiness. *Id.* at 24. Appellant does not believe the ALJ's distinction between secured loans versus a loan to pay a penalty is relevant, stating that Ms. Carpenter's unrebutted opinion that Appellee has good credit is still valid. *Id.* Fourth, Appellant objects to the ALJ's observation that Idaho is a community property state and thus half the assets and income belong to Appellee's wife, who is not a party to this proceeding. Init. Dec. at 50. Appellant points out that while Idaho is in fact a community property state, the marital estate (i.e., community property) is nonetheless liable for acts commit-

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[14] Also, with respect to the possible income-producing potential of the Bellevue property, the ALJ stated, "While it seems unlikely that the house would remain vacant, there is no evidence that the Bellevue property was rented or attempted to be rented so as to produce any income." Init. Dec. at 40.

ted by one spouse in the course of managing the community business with the intent of protecting community property. Appeal Br. at 24-25 (citing *Hansen v. Blevins*, 367 P.2d 758, 762 (Idaho 1962)). Appellant concludes by contending that Appellee did not meet his burden of producing evidence to show he could not pay the proposed penalty. *Id.* at 25-26.

For his part, Appellee argues the following in response. First, Appellee engages in a mathematical exercise, adding all the monthly loan payments he made in 2000, plus his medical insurance premium for that year, which yields a sum of $50,943.52.[15] Reply Br. at 16. Then, assuming for the sake of argument that Ms. Carpenter's calculation of approximately $55,000[16] as Appellee's net cash flow from his business in 2000 is correct (which he does not concede, believing it to be much less), Appellee points out that he and his wife would be left with "virtually nothing" — i.e., about $4,000 — to pay their living expenses for that year. *Id.* Given this precarious position, Appellee claims, he has been meeting his financial obligations by "cannibalizing" his assets (i.e., selling the two trailers in 2000; potentially selling the unlicensed truck) and by directing all possible income streams into the business, including his wife's inheritance from her mother. *Id.* at 16, 20.

Second, Appellee criticizes the robustness of Ms. Carpenter's analysis, arguing that she failed to consider Appellee's retirement or health insurance needs in analyzing his ability to pay, despite the fact that she had information that Appellee had been in the excavation business for more than thirty years and consequently was likely approaching retirement age. Resp. Br. at 18-19. Appellee points out that at the hearing, Ms. Carpenter conceded that EPA had not taken Appellee's retirement or health insurance needs into account in evaluating ability to pay. *Id.* at 18 (citing Tr. at 322-24, 332).

Finally, Appellee claims that there is no evidence in the record to establish the value of the business as $340,000, despite Appellant's frequent assertions to that effect. He contends that the record is not clear as to whether the $340,000 figure included the value of the real property at Stanley. *Id.* at 21. Appellee also contends that the figure was reached prior to the front-end loader accident and subsequent replacement, which involved his incurring a significant new debt; that

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[15] This sum is reached by adding twelve Bellevue mortgage payments at $1,411.92 each, twelve John Deere loader payments at $1,864 each, twelve Caterpillar skid steer payments at $564 each, and one health insurance annual premium payment of $5,344.48. Reply Br. at 16.

[16] Ms. Carpenter calculated Appellee's business cash flow for the year 2000 as $58,910. EPA Ex. 25. To obtain a net cash flow for that year of approximately $55,000, Ms. Carpenter observed that Appellee had reported $111,616 on his 2000 tax returns as additional assets purchased in that year. Tr. at 310-11; Cutler Ex. J. After subtracting the $100,000 loader and $8,000 skid steer from that total, Ms. Carpenter was left with "approximately $3,000" (actually $3,616) in other unidentified assets purchased, which she then subtracted from the $58,910 business cash flow for 2000 to derive a net cash flow of approximately $55,000 (or $55,294). Tr. at 310-11.

the transaction was not arm's length and thus did not involve interest paid to the seller on the unpaid balance; and that the two trailers belonging to the business were subsequently sold. *Id.* at 21-22. As a result of these developments, Appellee argues, the $340,000 figure "must be whittled down by a substantial amount." *Id.* at 22. Appellee concludes that "regardless of how one manipulates the figures, the Cutlers are living on the ragged edge." *Id.* at 24.

4. *Analysis*

We uphold the ALJ's determination that Appellant failed to meet its burden of demonstrating that Appellee had the ability to pay a $25,000 penalty. For us, the issue turns in large measure on the testimony of witnesses at the evidentiary hearing, as the Board typically grants deference to ALJ assessments of witness credibility. *E.g.*, *In re City of Salisbury*, 10 E.A.D. 263, 276, 293-96 (EAB 2002); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998); *In re Echevarria*, 5 E.A.D. 626, 639 (EAB 1994). In this instance, Appellant met its prima facie burden of production through its introduction of Ms. Carpenter's ability-to-pay analysis and testimony. *See* Tr. at 279-318; EPA Ex. 25 (Carpenter report). Appellee successfully rebutted Appellant's prima facie case, however, through his own testimony, which the ALJ found to be credible and which Appellant's cross-examination failed to diminish. *See* Init. Dec. at 39-43, 50-51; Tr. at 350-76, 413-26, 442-45, 462-64; OA Tr. at 17-21, 29-32.

Significantly, the hearing brought to light the facts that Appellant had not considered Appellee's retirement or health insurance needs in analyzing ability to pay[17] and that, all things considered, Appellee's income is quite modest, regardless of whether one measures it using the annual cash flow figures computed by Ms. Carpenter or the adjusted gross income figures used by the ALJ.[18] *See*, *e.g.*, Tr. at 305-09, 322-24, 331-32, 370; EPA Ex. 25; Cutler Exs. G-J. In the former instance (i.e., using the larger quantity, cash flow, as the appropriate measure of

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[17] At oral argument, Appellant conceded that it is appropriate in some cases to consider a respondent's retirement and medical insurance needs in evaluating ability to pay. OA Tr. at 25-28.

[18] In holding that it is inappropriate to include reported depreciation when calculating cash flow from a business, the ALJ rejected, without citation to any relevant authority or evidence in the record, Ms. Carpenter's expert opinion to the contrary. Init. Dec. at 42-43 n.32. We find no persuasive basis for the ALJ's conclusion in this regard and find that he erred in rejecting Ms. Carpenter's expert opinion regarding how to take accelerated depreciation into account in assessing ability to pay. *See*, *e.g.*, *In re Wallin*, 10 E.A.D. 18, 36-37 (EAB 2001) (ALJ erred in reducing penalty based on ability to pay where EPA's expert witness testified that respondent had sufficient cash flow to pay proposed penalty and respondent failed to rebut such evidence); *see also infra* Part II.C (citing federal cases for proposition that finders of fact may not substitute their own extra-record opinions for the opinions of qualified experts). Indeed, our issue with Appellant's arguments concerning ability to pay has less to do with Ms. Carpenter's analytical framework than it does with the fact that Appellee adduced certain evidence at trial that had not been fully factored into the somewhat theoretical analysis provided by Ms. Carpenter.

income or cash on hand), Appellee made clear that his payments on the Bellevue mortgage and loader and skid steer loans, as well as his health insurance premiums, consume the better part of his business cash flow, leaving him very little money for daily living expenses and other expenditures. Tr. at 350-60. As a consequence, Appellee has apparently had to sell business assets, such as the two trailers, to meet his loan obligations, and, according to his testimony, he has invested every extra dollar in the business, including monies from the sale of the motel property and his wife's $27,000-$28,000 inheritance. Tr. at 361, 364, 367, 414-15; EPA Ex. 27. Appellee testified that he has had to do this because he has no savings and virtually no earnings in the winter months. Tr. at 350, 415-16, 418-20. Once Appellee came forward with this kind of evidence, the burden shifted back to Appellant to overcome Appellee's testimony in order to satisfy its ultimate burden of proof. This Appellant failed to do.

While it may be true that Appellant's capacity to overcome Appellee's rebuttal was constrained by its inability to secure from Appellee all of the information that might be relevant to the inquiry, this is a limitation partly of Appellant's own making, in that Appellant did not choose to appeal the ALJ's decision denying Appellant's Motion for Additional Discovery.[19] OA Tr. at 60-61. Moreover, Appellant did not make maximum use of its cross-examination of Appellee at the hearing and thus failed to use the opportunity available to it possibly to develop a record more supportive of its arguments. *See* OA Tr. at 17-21, 29-32. Accordingly, we uphold the ALJ's decision regarding Appellee's inability to pay a $25,000 penalty.[20]

This being said, we nonetheless reject as insufficient the $1,250 penalty assessed by the ALJ. While the ALJ did find an inability to pay a $25,000 penalty, we do not read his decision as stating clearly that Appellee is unable to pay a penalty of more than $1,250. Rather, the $1,250 penalty appears to have been predicated on his assessment of the totality of the circumstances, turning not just on ability to pay but also on his determination regarding the gravity of the violation and his conclusions regarding the extent to which Appellee acted in good faith and whether Appellee's pre-1995 compliance history could be considered in

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[19] It bears noting here that if Appellant had chosen to appeal the ALJ's denial of its Motion for Additional Discovery, we might very well have found that denial to be erroneous on the ground that the financial information requested by Appellant is exactly the kind of information a complainant needs to understand to properly analyze a respondent's future retirement needs. *See* OA Tr. at 37, 41-42.

[20] At oral argument before the Board, we learned that, adding to his financial woes, Appellee has incurred legal fees in this proceeding in the amount of $15,000-$18,000, as reflected in a claim for reimbursement of fees filed by Appellee under the Equal Access to Justice Act, 5 U.S.C. § 504. OA Tr. at 32-34, 53. The EAJA action has been stayed pending the completion of the instant case. *Id.* at 34. Notably, Appellant conceded at oral argument that attorney's fees can be considered in evaluating ability to pay. *Id.* at 59.

assessing a penalty. As stated below, we find the ALJ committed legal errors with respect to several factors in his totality-of-the-circumstances analysis. Therefore, we assess our own penalty, based on a proper consideration of the factors involved.

B. *"Prior History of Violations" Penalty Factor*

As mentioned at the beginning of our discussion in Part II.A.1 above, one of the many factors a complainant must consider in the course of quantifying an administrative penalty under CWA section 309(g) is whether the violator has a prior history of CWA violations. CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3); *In re Advanced Elecs., Inc.*, 10 E.A.D. 385, 412 (EAB 2002), *appeal voluntarily dismissed*, No. 02-1868 (7th Cir. May 21, 2003). In this case, Appellant presented evidence that Appellee had previously broken the law protecting wetlands in this country on three separate occasions (summarized in Part I.B, *supra*). In brief, Appellant introduced documents (e.g., Notices of Violation; Cease and Desist Orders) and testimony indicating that in 1991, Appellee placed a large culvert and fill into Meadow Creek and adjacent wetlands without a section 404 permit; that in 1993, Appellee removed sediment-control devices required by an after-the-fact permit he had obtained for the 1991 fill; and that in 1994, Appellee discharged fill material into a triangular area of wetlands adjacent to Meadow Creek without a section 404 permit. *See supra* Part I.B.

The ALJ considered this past history in his Initial Decision but ultimately found it to be of no consequence to the penalty calculus for the pending violation, as none of Appellee's prior infractions had occurred within the five years before the filing of the complaint on August 24, 2000. Init. Dec. at 52-53. Instead, the ALJ held that, as a matter of policy, EPA does not consider violations older than five years when considering the "any prior history" factor. Init. Dec. at 44, 52-53.

To support this finding, the ALJ cited EPA's general enforcement penalty policy, which states that in evaluating history of noncompliance, a complainant should consider how recent any previous similar violations are. *Id.* at 52 (citing EPA General Enforcement Policy #GM-22, *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties* 21 (Feb. 16, 1984)). The ALJ also cited several statute-specific penalty policies issued by EPA that define "prior violations" for purposes of considering compliance history as those occurring within five years or less of the violation at issue. *Id.* (citing Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act, 45 Fed. Reg. 59,770, 59,774 (Sept. 10, 1980); U.S. EPA, *Polychlorinated Biphenyls (PCB) Penalty Policy* 16 (Apr. 9, 1990); Office of Compliance Monitoring & Office of Pesticides & Toxic Substances, U.S. EPA, *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)* app. B footnotes ¶ 4(b) (July 2, 1990); U.S. EPA, *Final Penalty Policy for Sections 302, 303, 304, 311, and 312 of the Emergency*

Planning and Community Right-to-Know Act of 1986 and Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act 24 (1990); Office of Regulatory Enforcement, U.S. EPA, *Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act* 10, 14 (Aug. 1998)). Further, the ALJ cited a CWA settlement policy, which EPA developed primarily for use in CWA section 402 National Pollutant Discharge Elimination System ("NPDES") and CWA section 405 sludge cases, for the proposition that EPA "generally does not calculate economic benefit beginning more than five years prior to the time the complaint should have been filed." Init. Dec. at 52 (citing U.S. EPA, *Interim Clean Water Act Settlement Penalty Policy* 5 (Mar. 1, 1995) [hereinafter *CWA NPDES/Sludge Settlement Policy*]). The ALJ found that proposition to be relevant in this context and an additional reason for disregarding violations discovered and resolved more than five years prior to the issuance of the complaint. *Id.* at 53. Finally, the ALJ noted that "the fact that [Appellee's prior] violations were remedied, i.e., that the unauthorized fill was removed, operates to mitigate the seriousness of the violation in any event," citing the Board's decision in *In re Britton Construction Co.*, 8 E.A.D. 261 (EAB 1999). Init. Dec. at 53.

On appeal, Appellant argues that the ALJ erred in restricting the "any prior history" analysis to five years. Appellant begins by pointing to the Consolidated Rules of Practice that govern this proceeding, which specify that in determining the amount of a civil penalty, an administrative law judge must examine the evidence in the administrative record in conjunction with the penalty criteria (if any) set forth in the relevant statute. Appeal Br. at 4-5 (citing 40 C.F.R. § 22.27(b)). Appellant observes that in drafting the CWA penalty criteria, Congress employed the adjective "any" to describe the prior history it wanted considered in the penalty calculus, which Appellant believes provides evidence of congressional intent that *all* prior violations be considered, regardless of age. *Id.* at 5. Appellant also notes that the ALJ cited no case law to support his narrow reading of the statute, whereas federal district courts have found the term "*any* history of such violations" (which appears in CWA section 309(d), a similar provision to CWA section 309(g)(3)) to include violations more than five years old. *Id.* at 5-6 (citing *United States v. Allegheny Ludlum Steel Corp.*, 187 F. Supp. 2d 426, 433 (W.D. Pa. 2002), *aff'd in part, vacated in part & remanded on other grounds*, 366 F.3d 164 (3d Cir. 2004); *Atl. States Legal Found. v. Universal Tool & Stamping Co.*, 786 F. Supp. 743 (N.D. Ind. 1992); *PIRG of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 720 F. Supp. 1158, 1163 (D.N.J. 1989), *aff'd in part & rev'd in part*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991)).

As for the various penalty policies relied upon by the ALJ, Appellant argues that the ALJ raised them sua sponte, without benefit of briefing by the parties, and that the policies are inapposite or inapplicable to the instant case, for several reasons. First, Appellant contends that the general penalty policy cited by the ALJ contains, at most, a description of how much weight prior violations should be assigned, not whether they should be considered in the penalty analysis. Appeal

Br. at 8. Second, with respect to the statute-specific policies cited by the ALJ, Appellant argues that they demonstrate only that EPA "knows how to limit consideration of the 'prior history' factor when it deems appropriate," and EPA has not done so for wetlands litigation cases, for which no specific penalty policy exists. *Id.* at 7-8. Third, Appellant observes that the economic benefit guidelines of the *CWA NPDES/Sludge Settlement Policy* cited by the ALJ are inapplicable here because, by its terms, that policy applies only to settlement cases, not litigated cases such as this one, and also because that policy specifically indicates that it does not apply to CWA section 404 wetlands cases. *Id.* at 8-9; *see CWA NPDES/Sludge Settlement Policy* at 4 ("This Policy does not apply to actions brought exclusively under CWA § 311 (oil and hazardous substance spills) nor for violations of requirements in § 404 ('wetlands' cases involving disposal of dredged or fill material). Separate penalty policies apply to these two types of cases.").

Appellant notes in this regard that the ALJ did not mention in his Initial Decision the relevant CWA settlement policy for wetlands cases. Appeal Br. at 9 (citing U.S. EPA, *Clean Water Act Section 404 Settlement Penalty Policy* (Dec. 21, 2001) [hereinafter *CWA § 404 Settlement Policy*]). Appellant points out that unlike the *CWA NPDES/Sludge Settlement Policy* cited by the ALJ, which is not intended for use in litigated cases or in wetlands cases, the *CWA § 404 Settlement Policy* provides that it may be used to calculate penalties in administrative litigation proceedings, as well as settlement proceedings, under CWA section 309(g). *See CWA § 404 Settlement Policy* at 7 (stating that settlement penalty calculation methodology can be "adapted" to establish a penalty request in an administrative complaint, provided adjustments are made to ensure the penalty request is higher than the bottom-line settlement penalty amount calculated under the policy) (cited in Appeal Br. at 9). That policy, as Appellant contends, places no time restrictions on the prior violations that may be considered in evaluating compliance history, stating:

> The case development team should consider whether the defendant has a history of prior Section 404 violations including unpermitted discharge violations, permit violations, or a previous violation of an EPA administrative order. The greater the number of past violations and the more significant the violations were, the higher the value that should be assigned to this factor. The earlier violations need not relate to the same site as the present action. Prior history information may be obtained not only from EPA experience with the violator, but also from appropriate Corps Districts, other federal agencies' knowledge and

> records, and the violator's responses to [CWA] Section 308 requests for information.

CWA § 404 Settlement Policy at 14 (quoted in Appeal Br. at 9).

In addition, Appellant argues that the ALJ's holding creates a conflict between the *CWA § 404 Settlement Policy*, which places no time restrictions on what prior violations may be considered, and the statute, which Appellant claims the ALJ has construed as limiting consideration of prior violations to those no older than five years. Appellant observes that, as a result, "bottom-line settlement amounts could be larger than what the Agency reasonably could expect to obtain at a hearing." Appeal Br. at 9-10.

Finally, with respect to the ALJ's citation of *Britton Construction* to support the proposition that prior history evidence can be downplayed in the penalty calculus if the violator remedied or mitigated the prior violations, Appellant points out that *Britton* did not, in fact, deal with mitigation of prior violations, but rather with mitigation of violations that were alleged in the complaint in the case under review. *Id.* at 10; *see Britton*, 8 E.A.D. at 280-84. Appellant therefore argues that the ALJ misapplied the holding in *Britton* in this context. Appeal Br. at 10 (arguing that if the ALJ's reasoning regarding *Britton* were correct, "any prior violations that had been mitigated could never be used to increase [a] penalty," which, Appellant claims, is not a supportable result under the existing statute, regulations, or EPA policy).

In his response to the appeal, Appellee does not address the issue of a five-year limit on "any prior history" and makes no attempt to defend the ALJ's reasoning on this topic. *See* Reply Br. at 4-10. Further, Appellee does not discuss the EPA penalty policies examined by the ALJ or provide any analysis or rationale whatsoever for limiting the prior history examination to five years. *Id.* Instead, Appellee merely describes his property, argues that Appellant has not clearly indicated what areas it believes are filled wetlands, and defends his prior wetlands activities. *Id.* Appellee's arguments are inapposite in this context.

In parsing through the foregoing arguments, we are mindful of the well-established principle that, when assessing penalties in specific cases, administrative law judges must consider, but need not necessarily follow, EPA penalty policies issued under the relevant statutes. *See, e.g., In re Chem Lab Prods., Inc.*, 10 E.A.D. 711, 725, 735-37 (EAB 2002); *In re Carroll Oil Co.*, 10 E.A.D. 635, 653-61 (EAB 2002); *In re Wallin*, 10 E.A.D. 18, 25 n.9 (EAB 2001); *Britton*, 8 E.A.D. at 282 n.9. Instead, judges may exercise discretion in calculating appropriate penalties and may depart from a proposed penalty based on an Agency policy if they explain their reasons for the departure. *E.g., In re CDT Landfill Corp.*, 11 E.A.D. 116-20 (EAB 2003); *In re Capozzi*, 11 E.A.D. 10, 32-39 (EAB 2003); *In re B & R Oil Co.*, 8 E.A.D. 39, 63-64 (EAB 1998).

In the case at bar, it is undisputed that EPA has not issued a litigation-specific penalty policy for CWA section 404 wetlands cases. Appeal Br. at 7. Thus, on one hand, it is understandable that the ALJ considered for possible relevance and instruction a cross-section of EPA litigation penalty policies from other statutory contexts in his attempt to discern whether the Agency has followed a particular pattern or practice concerning prior violations. On the basis of that poll, the ALJ concluded that EPA has a general policy limiting prior history evidence to the five-year window preceding the filing of the complaint.[21] Init. Dec. at 52-53.

On the other hand, it is true, as Appellant suggests, that the single most relevant penalty policy is the *CWA § 404 Settlement Policy*, issued in December 2001. This policy not only relates most particularly to the subject matter of the case at hand, but, by its terms, is adaptable for use in litigated cases. *See CWA § 404 Settlement Policy* at 7, 14. As noted, this policy contains no limit on prior history evidence. The ALJ's failure to observe the different thrust of this penalty policy is understandable in view of the fact that this policy's predecessor, dated December 1990, which was in effect during the time frame of much of the briefing, hearings, and ALJ deliberation in this case (i.e., 2000-2001), did not purport to be adaptable to litigated matters.[22] It is likewise true that the ALJ was operating without the benefit of a coherent statement from EPA on this issue, which might, among other things, explain why it deems a five-year limit to be appropriate in some statutory contexts but not in others.

Nonetheless, as a matter of policy, we are unwilling to follow the ALJ in drawing a bright-line rule that automatically excludes certain prior violations from the penalty calculus simply by virtue of their age, particularly in the face of the most recent penalty policy that may be adapted for use in the litigation context (although styled as a settlement policy) but also does not restrict consideration of prior history evidence. Notably, the broad interpretation of the statutory "any prior history" language of CWA section 309(g)(3) reflected in this policy is consistent with federal case law construing the analogous "any history" penalty provision of CWA section 309(d), 33 U.S.C. § 1319(d). The federal courts have frequently held in this context that a defendant's "entire history of violations is relevant in determining the amount of the civil penalty to be assessed against it." *PIRG of N.J., Inc. v. Magnesium Elektron, Inc.*, 40 Env't Rep. Cas. (BNA) 1917, 1923 n.3,

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[21] In our view, the ALJ did not conclude, as Appellant implies, that the statute itself bars consideration of violations to those no older than five years. *See* Appeal Br. at 9 (discussing purported conflict between *CWA § 404 Settlement Policy* and CWA § 309(g) penalty factors, as interpreted by ALJ).

[22] This Board has generally disfavored the use of settlement penalty guidance outside the settlement context. *See, e.g., In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 394 and n.37 (EAB 2004); *Britton*, 8 E.A.D. at 287 n.16; *In re Bollman Hat Co.*, 8 E.A.D. 177, 186-90 (EAB 1999).

1932 (D.N.J. 1995) (finding six years of CWA violations that occurred more than five years prior to initiation of action supportive of small increase in penalty).[23] Of course, these federal precedents do not affect EPA's enforcement discretion to restrict its consideration of prior history evidence if it so chooses in a particular case; rather, they simply establish the legality under the CWA of considering a longer-than-five-year history of violations without mandating the same.

Under these circumstances, we believe the appropriate course is to allow decisionmakers to examine each CWA case on an individual basis, with freedom to assign weight to prior violations on the basis of their age, their relation to the violations charged in the complaint, and other relevant factors. In our view, evidence of prior wetlands violations is noteworthy, whether the violations are two, five, eight, or more years old, because such evidence indicates in a uniquely powerful way that the violator has in the past been exposed to the basic requirements of the wetlands program and is or should be generally familiar with those requirements and the consequences of noncompliance. Further noncompliance, in light of the violator's prior experience with the regulatory program, then becomes particularly inexcusable. *See, e.g., In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 548-49 (EAD 1998) (noting that a primary purpose of civil penalties is deterrence and assessing an increased penalty against a violator who had received notice of prior alleged noncompliance and the penalties therefor and yet persisted in violating the law).

Because we hold that in an adjudication such as this one, the statutory "any prior history" factor in the CWA is not limited to five years, the penalty in this case should take into account Appellee's prior compliance history. That history reflects a pattern of disregard for the regulatory requirements at issue in this case. It further suggests that Appellee should have been sufficiently aware that his ac-

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[23] *Accord United States v. Allegheny Ludlum Corp.*, 187 F. Supp. 2d 426, 433, 445 (W.D. Pa. 2002) (history of violations stretches back at least fifteen years prior to filing of complaint), *aff'd in part, vacated in part & remanded on other grounds*, 366 F.3d 164 (3d Cir. 2004); *United States v. Gulf Park Water Co.*, 14 F. Supp. 2d 854, 864 (S.D. Miss. 1998) (defendant has long history of CWA violations that have continued uninterrupted for twelve years); *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 349, 354 (E.D. Va. 1997) (six-year history of CWA violations deemed "lengthy and persistent"), *aff'd in part & rev'd in part on other grounds*, 191 F.3d 516 (4th Cir. 1999), *cert. denied*, 531 U.S. 813 (2000); *United States v. Mun. Auth. of Union Township*, 929 F. Supp. 800, 803, 807 (M.D. Pa. 1996) (six-year history of violations may be weighed in assessing penalty); *PIRG of N.J., Inc. v. Hercules, Inc.*, 830 F. Supp. 1525, 1544-45 (D.N.J. 1993) (eight years of CWA violations at another facility that predate complaint in instant action may be considered in determining penalty), *aff'd in part, rev'd in part & remanded on other grounds*, 50 F.3d 1239 (3d Cir. 1995); *Atl. States Legal Found. v. Universal Tool & Stamping Co.*, 786 F. Supp. 743, 751 (N.D. Ind. 1992) (considering nine years of CWA violations preceding filing of instant suit, which covered another five years of violations); *PIRG of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 720 F. Supp. 1158, 1163, 1166 (D.N.J. 1989) (finding eleven years of CWA violations and noting that defendant had "long history of violations [that] would also lead this Court to impose the statutory maximum"), *aff'd in part, rev'd in part & remanded on other grounds*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991).

tivities might affect wetlands to have at the very least consulted with relevant officials prior to engaging in the violative activity. *See, e.g., In re Advanced Elecs., Inc.*, 10 E.A.D. 385, 412 (EAB 2002) (prior history of CWA violations suggests company was aware of applicable regulatory requirements and sanctions for violating them), *appeal voluntarily dismissed*, No. 02-1868 (7th Cir. May 21, 2003); *Ocean State*, 7 E.A.D. at 548-49 (history of prior notices is evidence that Appellee was aware of required compliance and sanctions for noncompliance). Indeed, Appellee's choice to proceed without such consultation suggests a willful disregard for the law. This is a heavy equipment operator with both the ready means to engage in activity that is destructive to wetlands and a history of doing so. The ALJ's decision not to take these considerations into account caused him to understate the significance of the violation.

C. *"Gravity of the Violation" Penalty Factor: Harm to Critical Habitat*

Another of the factors that must be considered in the course of quantifying an administrative penalty under CWA section 309(g) is the "gravity" or seriousness of the violation. CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3); *In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 404 (EAB 2004). In this regard, the ALJ reviewed the expert testimony of Mr. John Olson, an EPA wetlands ecologist, and Mr. David Arthaud, a National Marine Fisheries Service ("NMFS") fisheries biologist, which Appellant proffered at the March 2001 hearing. Both expert witnesses testified that Appellee's filling activities had caused significant harm to wetlands and fisheries habitat around Appellee's home by destroying the functions and values (such as erosion control, water filtration, wildlife habitat) provided by the wetlands to the aquatic ecosystem as a whole. Tr. at 231-39, 262-64, 278. Mr. Arthaud testified that cutthroat trout and bull trout reside in Meadow Creek and that Meadow, Goat, and Valley Creeks are suitable habitat for Snake River spring/summer chinook salmon, Snake River steelhead, and Snake River sockeye salmon. Tr. at 254-59, 262-64, 265-67, 275-78. Notably, all of these species except the cutthroat trout are listed as threatened or endangered under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544. Tr. at 255; *see* 50 C.F.R. §§ 223.102(a)(1)-(2), (7), 224.101(a) (lists of threatened and endangered marine and anadromous species). Mr. Arthaud also testified that Meadow, Goat, and Valley Creeks (among others) have been formally designated as "critical habitat"[24] for salmon under the Endangered Species Act.[25] Tr. at 257, 275. Appel-

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[24] "Critical habitat" consists of specific areas containing physical and biological features that are "essential to the conservation of the species" and that may require special management or protection. ESA § 3(5)(A), 16 U.S.C. § 1532(5)(A); *see* 50 C.F.R. § 402.02 (definition of "critical habitat"); 50 C.F.R. pts. 17, 226 (critical habitat lists).

[25] Mr. Arthaud testified that "Meadow Creek above, through, and downstream from [Appellee's property] is designated as critical habitat, as is Goat Creek and Valley Creek, the entire drainage and, in fact, all the waters of the upper Salmon [River], the head waters, are designated critical

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lee did not introduce any expert testimony or other evidence to rebut the testimony of these two witnesses.

The ALJ evaluated the evidence presented on this issue and rejected Mr. Arthaud's testimony regarding critical habitat as "inaccurate." Init. Dec. at 37. He held instead, on the basis of his own reading of the *Federal Register* notice designating critical habitat for sockeye salmon and spring/summer chinook salmon, that the property in question is *not* critical habitat for those species. *Id.* at 37, 49; *see* 58 Fed. Reg. 68,543 (Dec. 28, 1993) (codified at 50 C.F.R. § 226.205) (critical habitat designation notice). In his view, the critical habitat designations for sockeye and chinook salmon do not include tributaries of Valley Creek, such as Meadow and Goat Creeks, and thus Appellant overestimated the value of the habitat affected by Appellee's unlawful fill. Init. Dec. at 37, 49. The ALJ also took note of an NMFS letter that stated the primary water body affected by Appellee's unlawful filling activities is Valley Creek.[26] *Id.* at 49; *see* EPA Ex. 11, at 1 (NMFS letter). The ALJ reasoned that fill placed in wetlands adjacent to Meadow Creek "has at most an indirect effect on Valley Creek, because Meadow Creek is a tributary of Goat Creek rather than of Valley Creek." Init. Dec. at 49. In addition, the ALJ found that Appellee's fill activities had little-or-no impact on the two miles of Meadow Creek fisheries habitat upstream from Appellee's property (i.e., south of Highway 21). *Id.* For all these reasons, the ALJ held that Appellant "exaggerated" the gravity of the violation. *Id.*

On appeal, Appellant argues that the ALJ clearly erred in substituting his own interpretation of the critical habitat designation notice for unrebutted expert testimony on this subject. Appeal Br. at 13. Appellant points out that the *Federal*

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habitat." Tr. at 257. He stated that Meadow Creek has "[a] production number of a few hundred smolts of steelhead and spring chinook of some kind." *Id.* Mr. Arthaud testified that while he had not personally observed fish in Meadow Creek, he had read survey reports from Idaho Fish & Game that indicate "handfuls" of anadromous fish have been seen in Meadow Creek within the last ten years. Tr. at 266-67. Mr. Arthaud later noted that Meadow Creek is designated habitat for "salmon." Tr. at 275.

[26] This letter notifies the Corps that an NMFS employee observed a dump truck and backhoe being used to place fill into wetlands on Appellee's property on November 30, 1999. The letter states, among other things:

> Valley Creek is the primary waterbody affected by this [unauthorized] project. Valley Creek is designated as critical habitat for Snake River spring/summer chinook salmon * * * and proposed critical habitat for Snake River steelhead * * * . * * *
>
> Valley Creek provides important spawning and rearing habitat for Snake River steelhead and spring/summer chinook salmon. Snake River spring/summer chinook salmon and steelhead juveniles rear in Valley Creek adjacent to and downstream of the subject action * * * .

EPA Ex. 11, at 1.

Register notice was neither referenced by the parties at hearing nor cited in any briefs, and yet the ALJ proceeded to consider it without benefit of testimony or briefing thereon. *Id.* Appellant contends that, in so doing, the ALJ misinterpreted the notice with respect to Valley Creek tributaries and thus clearly erred. *Id.* at 13-14. Appellant also argues that "the uncontroverted expert testimony presented at hearing suggested that Appellee's actions had a disproportionate negative impact on the total fisheries habitat of Meadow Creek," *id.* at 16, as Mr. Arthaud had testified that the filled areas were probably the most valuable habitat given their greater flow and closer proximity to Valley Creek. *Id.*; Tr. at 258.

For his part, Appellee takes the position that the ALJ properly judged Appellant's experts' testimony to be weak, as neither Mr. Arthaud nor Mr. Olson had conducted an on-site inspection of Appellee's property.[27] Reply Br. at 11. Appellee also highlights his own testimony at the hearing, in which he had stated that he had never seen salmon or steelhead in Meadow Creek since he moved to the area in 1973. *Id.* (citing Tr. at 400-01). Appellee also notes that he had observed a variety of wildlife in the area, such as deer, raccoon, beaver, otter, fox, and mice, who did not appear to have been affected by the placement of the "lawn fill." *Id.*

In our view, the ALJ did err, as Appellant contends, in choosing to credit his own layperson's interpretation of the critical habitat designation over the conflicting expert testimony of Mr. David Arthaud. We have reviewed the critical habitat designation in the *Federal Register* notice,[28] as it is in the public domain

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[27] The ALJ appears to have found some significance in the fact that Mr. Arthaud never conducted an on-site inspection of the aquatic ecosystem affected by Appellee's fill, but rather formed his expert opinions on the basis of reports compiled by Idaho Fish & Game, the U.S. Army Corps of Engineers, and others. *See* Init. Dec. at 37 n.29, 49. As Appellant points out, however, Appellant proffered Mr. Arthaud as an expert witness, who is entitled to rely on and interpret the factual findings of others, not as a fact witness. Appeal Br. at 17 (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993) (holding that "[u]nlike an ordinary witness * * * an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation")).

[28] The designation provides:

> [Critical habitat is designated as t]he following areas consisting of the water, waterway bottom, and adjacent riparian zone of specified lakes and river reaches in hydrologic units presently or historically accessible to listed Snake River salmon * * *. Adjacent riparian zones are defined as those areas within a horizontal distance of 300 feet (91.4 m) from the normal line of high water of a stream channel (600 feet or 182.8 m, when both sides of the stream channel are included) * * *.
>
> (a) Snake River Sockeye Salmon (Oncorhynchus nerka). [Critical habitat is designated to include] * * * all Salmon River reaches from the confluence of the Snake River upstream to Alturas Lake Creek; Stanley, Redfish, Yellow Belly, Pettit, and Alturas Lakes (including their inlet and outlet creeks); Alturas Lake Creek, and that portion of Valley Creek

Continued

and therefore subject to official notice by the Board (and by the ALJ below). 40 C.F.R. § 22.22(f) (official notice may be taken of any matter that can be judicially noticed in the federal courts); *see In re EK Assocs., L.P.*, 8 E.A.D. 458, 466 (EAB 1999) ("the contents of the Federal Register 'shall be judicially noticed'") (quoting 44 U.S.C. § 1507); *accord Seymour v. Oceanic Navigating Co.*, 453 F.2d 1185, 1192 n.7 (5th Cir. 1972). The designation notice is quite technical, requiring familiarity with the boundaries of "hydrological units" defined by the U.S. Geological Survey, knowledge of the locations of various dams, waterfalls, lakes, and other geographic features, and information on the direction of flow of various rivers and streams to achieve full understanding of the habitat being designated.[29] *See* 58 Fed. Reg. at 68,551-53 (codified at 50 C.F.R. § 226.205). Assuming Meadow Creek falls within the "Upper Salmon [River] hydrologic unit," it appears that the creek and its adjacent riparian zones are in fact included in the critical habitat for spring/summer chinook, based on our understanding that Meadow Creek is a "river reach presently or historically accessible" to the chinook.[30] *See*

(continued)

> between Stanley Lake Creek and the Salmon River. Critical habitat is comprised of all river[s,] lakes and reaches presently or historically accessible (except reaches above impassable natural falls, and Dworshak and Hells Canyon Dams) to Snake River sockeye salmon in the following hydrologic units: * * * Upper Salmon. * * *
>
> (b) Snake River Spring/Summer Chinook Salmon (Oncorhynchus tshawytscha). Critical habitat is designated to include * * * river reaches presently or historically accessible (except reaches above impassable natural falls (including Napias Creek Falls) and Dworshak and Hells Canyon Dams) to Snake River spring/summer chinook salmon in the following hydrologic units: * * * Upper Salmon * * * .

50 C.F.R. § 226.205(a)-(b).

[29] The map accompanying the notice is small and fails to identify all the geographic features and other details necessary for a precise, stream-by-stream understanding of the designation. *See* 58 Fed. Reg. at 68,554.

[30] The term "river reach" is not specifically defined in the statute or regulations. *See* ESA § 3, 16 U.S.C. § 1532; 50 C.F.R. § 222.102. However, the preamble to the critical habitat designation rule appears to employ the term broadly to include creeks and streams, even intermittent ones. 58 Fed. Reg. at 68,547-48 (stating that above the confluence of the Columbia and Snake Rivers, spring/summer chinook inhabit a wide range of habitats, from large rivers to small perennial and intermittent streams; stating further that the "vast majority" of streams about the Columbia/Snake confluence "contribute essential elements such as food, gravel, large woody debris, and water quality"; and until more information can be gathered, "NMFS chooses to adopt a more inclusive critical habitat designation"). The dictionary defines the common meaning of "reach" as, among other things, "a continuous unbroken stretch or expanse: as (1): an extended portion of water or land (2): a straight portion of a stream or river * * * (4): an arm of the sea extending up into the land * * * ." Webster's Third New Int'l Dictionary at 1888. Mr. Arthaud testified that anadromous species of salmon are physically capable of swimming 920 miles from the Pacific Ocean to Meadow Creek and that such treks are "required" by their life history. Tr. at 254. Thus, it would appear Meadow Creek would qualify as a "river reach" under the regulation.

id. at 68,552 (codified at 50 C.F.R. § 226.205(b)). Meadow Creek may also be included in the critical habitat designation for sockeye salmon, unless the creek is upstream of Valley Creek's confluence with Stanley Lake's outlet creek, in which case it is excluded from the designation. *See id.* at 68,548, 68,552. Because the record lacks detailed information on the geography of the Stanley area and other factors, we cannot be completely certain that these suppositions regarding the habitat designation notice are correct. However, we note that Appellant itself has clarified, on appeal, that Meadow Creek is critical habitat for spring/summer chinook salmon but not for sockeye salmon. Appeal Br. at 14-15.

We turn for resolution of this issue to the Consolidated Rules of Practice governing these proceedings, which specify that all matters in controversy must be established by a preponderance of the evidence in the record. 40 C.F.R. § 22.24(b); *see In re City of Salisbury*, 10 E.A.D. 263, 289-91 (EAB 2002); *In re Britton Constr. Co.*, 8 E.A.D. 261, 274 (EAB 1999). The record in this case contains the testimony of a fisheries biologist, accepted as an expert witness by the ALJ, that Meadow Creek, Goat Creek, Valley Creek, and adjacent wetlands are critical habitat for salmon species of some kind.[31] Tr. at 257, 275. The record also contains a letter from NMFS to the Corps of Engineers stating that Valley Creek is critical habitat for Snake River spring/summer chinook salmon and proposed critical habitat for Snake River steelhead. EPA Ex. 11. (The letter contains no specific mention of Meadow or Goat Creeks.) The record contains a field investigation report prepared by a Corps employee, stating that both Valley and Meadow Creeks "support anadromous fish species [that] would be adversely affected by water quality degradation" in those streams. EPA Ex. 12, at 2. The record contains Appellee's bridge crossing permit, which placed restrictions on Appellee's construction activities to reduce the possibility of adversely affecting "chinook salmon spawning or spawning reds in Meadow or Valley Creeks." Cutler Ex. D at 4. Notably, the record contains no contrary expert testimony or evidence of any kind that Meadow Creek and surrounding environs are not critical habitat for salmon.

On the basis of this record, we conclude that a preponderance of the evidence indicates that Meadow, Goat, and Valley Creeks are critical habitat for Snake River spring/summer chinook salmon. The Appellee did not rebut this evidence at the hearing and does not address on appeal the question whether the area is critical habitat for certain fish. *See* Reply Br. at 10-12. Appellee also presented no evidence that his filling activities did not cause harm to other species of fish that use or could use Meadow Creek even though it may not be designated critical habitat for them. In ignoring the weight of the evidence in favor of his own layperson's reading of a technical notice, which reading in any event appears to

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[31] In his testimony at the hearing, Mr. Arthaud did not specify the particular species of salmon for which Meadow Creek is designated critical habitat. Tr. at 257, 275.

be erroneous with respect to the Snake River spring/summer chinook salmon, the ALJ clearly erred. *See, e.g., Indian Coffee Corp. v. Proctor & Gamble Co.*, 752 F.2d 891, 894-95 (3d Cir.) (trial court erred by substituting own view of reasonable reliance for view of experts), *cert. denied sub nom. Folger Coffee Co. v. Indian Coffee Corp.*, 474 U.S. 863 (1985); *Lagway v. Dallman*, 806 F. Supp. 1322, 1338-39 (N.D. Ohio 1992) (trial judge erroneously substituted own psychological expertise for that of court-appointed expert); *Arrigo v. Heckler*, 604 F. Supp. 401, 403 (E.D. Pa. 1985) (administrative law judge improperly substituted his own lay opinion for that of medical experts); *cf. Wash. State Farm Bureau v. Marshall*, 625 F.2d 296, 305-06 (9th Cir. 1980) (district court erroneously substituted its own judgment for expert opinions relied on by Secretary of Labor).

We recently observed that "in assessing the gravity or seriousness of any violation, [EPA] customarily considers 'the sensitivity of the environment' at the location where the violation occurred." *In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 405 (EAB 2004) (citing EPA General Enforcement Policy #GM-22, *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties* 15 (Feb. 16, 1984)). Furthermore, in an "illegally-filled wetlands case, a 'sensitivity of the environment' analysis would almost always necessarily include a consideration of the quality of the wetlands" affected. *Id.* 11 E.A.D. at 405. In a case where, as here, the wetlands unlawfully filled are federally designated critical habitat for endangered or threatened species, plainly the sensitivity of the environment is extremely high and the gravity of the violation correspondingly high. *Cf. In re Phelps Dodge Corp.*, 10 E.A.D. 460, 522-25 (EAB 2002) (remanding CWA permit for reinitiation of interagency ESA consultation in light of new critical habitat designation for spikedace, a threatened fish species, that was issued prior to issuance of permit but after conclusion of initial ESA consultation). We note in this regard that the record makes clear that the growing season in this part of Idaho is very short, Tr. at 235, and thus it will take at least three-to-five years after wetlands restoration is completed to determine whether that restoration will be successful, allowing potential for ongoing adverse effects on the aquatic ecosystem in the interim. Tr. at 235-38. Moreover, Mr. Olson testified that since the time of European settlement, the semi-arid area now identified as the State of Idaho has lost over half its wetlands, with the best approximation of existing wetlands acreage today being only 0.7 percent of the total land surface of the State. Tr. at 238-39. Thus, the kind of further incremental reduction in wetlands occasioned by actions like those featured in this case are far from inconsequential. All of these factors together convince us that the ALJ understated the gravity of Appellee's violation in this case.

D. *Appellee's Culpability*

A final penalty issue that bears mention is the ALJ's assessment of Appellee's *culpability*. Here again, we find clear error in the ALJ's determination that Appellee was not "culpable" within the meaning of CWA section 309(g)(3), 33

U.S.C. § 1319(g)(3). As Appellant argues with some force, Appellee had numerous prior contacts with regulatory authorities pertaining to filling of wetlands around his Stanley home, and he plainly knew or should have known the areas he filled for his new lawn were jurisdictional wetlands. Appeal Br. at 27-29. Thus, his claims that he lacks culpability because he believed the areas filled were not wetlands, or because he had attempted after-the-fact to restore at least some of the filled areas, *see* Init. Dec. at 29-30, 53-55, simply ring hollow. Having identified error in this portion of the ALJ's analysis as well, we move on in the next section to a reassessment of the penalty.

E. *Calculation of Penalty*

While the Board typically grants administrative law judges deference on penalty assessments, we have found in this instance that, as set forth in the preceding pages, the ALJ committed errors with respect to several key predicates that caused him to understate the significance of the violation. Accordingly, we decline to grant the ALJ's penalty assessment deference and will consider the penalty anew. *See, e.g., In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 390 (EAB 2004) ("[a]lthough the regulations grant the Board *de novo* review of a penalty determination, the Board generally will not substitute its judgment for that of a presiding officer absent a showing that the presiding officer committed clear error or an abuse of discretion in assessing a penalty"); *In re Chem Lab Prods., Inc.*, 10 E.A.D. 711, 735-37 (EAB 2002) (vacating administrative law judge's penalty determination as clearly erroneous and deriving penalty afresh).

Because we regard both the violations and the conduct at issue more serious than suggested by the ALJ, we are inclined towards a more significant penalty. This is, of course, limited by Appellee's ability to pay. *See supra* Part II.A. While we accept the ALJ's conclusion that Cutler is unable to pay a $25,000 penalty, there is evidence in the record that he may be able to pay a penalty more substantial than that assessed by the ALJ. We note, for example, Appellee's testimony relating to the possibility of selling a truck not essential to the business valued at $15,000. This being said, there is no clear indication in the record regarding the upper limits of Appellee's ability to pay.

The Agency has observed in at least two other statutory contexts that in circumstances in which there is an inability to pay a proposed penalty but the extent of that inability is not altogether clear, it is appropriate to assume that an entity can, at a minimum, afford to pay a penalty equivalent to four percent of gross receipts averaged over four years.[32] *See* Guidelines for the Assessment of

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[32] For Board and pre-Board cases addressing these four percent guidelines, see *In re Chempace Corp.*, 9 E.A.D. 119, 138-39 (EAB 2000); *In re Lin*, 5 E.A.D. 595, 601 (EAB 1994); *In re*
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Civil Penalties Under Section 16 of the Toxic Substances Control Act, 45 Fed. Reg. 59,770, 59,775 (Sept. 10, 1980); Office of Compliance Monitoring & Office of Pesticides & Toxic Substances, U.S. EPA, *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)* 23 (July 2, 1990). In this case, Appellee's gross receipts of $132,915, $140,638, $63,241, and $142,550 over the period 1997 to 2000 yield a four-year average of $119,836. We will omit the gross receipts figure for 1999, however, as Appellee's receipts for that year were aberrational due to the temporary "sale" of the business to his children. The remaining three years of gross receipts average $138,701, and four percent of that figure is $5,548. In this case, given the lack of precision in the record on the upper limit of Appellee's ability to pay, we will apply this default assumption to derive a penalty. The resulting penalty, being greater than that assessed by the ALJ, better reflects the seriousness of Appellee's violation. Moreover, based on the record before us, it does not appear to be beyond Appellee's ability to pay.

F. *Liability*

Finally, because the amount of the penalty in this case is governed by Appellee's ability to pay, we do not reach the fifth issue raised by Appellant's appeal, which consists of a challenge to the ALJ's conclusions regarding the extent of wetlands filled by Appellee.[33] At oral argument before this Board, Appellant conceded that the only significance of this issue is that it could serve to increase the amount of the penalty because, if Appellant's arguments were to be accepted, a larger area of wetlands would be regarded as affected by Appellee's actions. OA Tr. at 7-14. In light of our finding that the penalty is already constrained by Appellee's ability to pay, however, a further increase in the penalty is not practicable. Accordingly, we decline to consider this issue further.

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New Waterbury, Ltd., 5 E.A.D. 529, 546-47 (EAB 1994); *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 122, 124-28 (EAB 1994); *In re Cent. Paint & Body Shop, Inc.*, 2 E.A.D. 309, 317-18 n.13 (CJO 1987).

[33] The ALJ held that a preponderance of the evidence introduced at the hearing established that Appellee had filled wetlands to the south and east of his home in November 1999, for the purpose of constructing a lawn around his house. Init. Dec. at 47. The evidence also indicated that sometime after 1992, Appellee placed an undetermined amount of fill north of his house for the purpose of constructing a driveway and parking/turn-around area for his heavy equipment. The ALJ found that it was "not clear that all of the fill placed along the north side of the Cutler property was placed in wetlands." *Id.* at 48. The ALJ concluded that the unlawful fill at issue in this case covered approximately 0.1 acre of federally protected wetlands adjacent to Meadow and Goat Creeks. *See id.* at 46-49, 51-55. On appeal, Appellant argues that the ALJ erred in finding a lack of clarity regarding the extent of fill in wetlands on the north side, largely due to his allegedly improper admission of expert testimony from Dr. Bruce Lium, a man Appellant contends is unqualified to delineate wetland boundaries. Appeal Br. at 30-32.

III. *CONCLUSION*

For the foregoing reasons, a civil administrative penalty of $5,548 is assessed against Appellee for violating the CWA by discharging dredged or fill material into wetlands without a permit authorizing him to do so. Payment of the entire amount of the civil penalty shall be made within sixty (60) days of service of this Final Decision and Order, by cashier's check or certified check payable to the Treasurer, United States of America, and forwarded to:

U.S. Environmental Protection Agency, Region X
Regional Hearing Clerk
Post Office Box 360903M
Pittsburgh, Pennsylvania 15251-6903.

So ordered.

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;
>
> (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;
>
> (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
>
> (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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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.

(continued)
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.

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[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 * * * .").