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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of)
)
CITY OF ROCHESTER,) Docket No. CWA-I-1-88-1009
 New Hampshire,)
)
 Respondent.)

FINAL ORDER

I have reviewed the attached Recommended Decision of James T. Owens, III, Presiding Officer, which decision is hereby incorporated and made a part of this Final Order. I concur with the Recommended Decision, and adopt its conclusions and recommendations. Therefore, IT IS ORDERED:

1. The civil penalty in the proposed administrative order is hereby modified to reflect the conclusions and recommendations of the Presiding Officer.

2. Respondent shall pay a civil penalty of \$21,500.00 for its violations of the Clean Water Act by money order or certified check made payable to "Treasurer, United States of America" and mailed not more than 30 days after issuance of this Order to:

U.S. Environmental Protection Agency
(Region I)
P.O. Box 360197M
Pittsburgh, PA 15251

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The Respondent shall also send notice of such payment, including a copy of the money order or certified check, to the Regional Hearing Clerk at the following address:

Regional Hearing Clerk
U.S. Environmental Protection Agency
(Region I)
JFK Federal Building, Room 2003
Boston, MA 02203

Issuance of this Order constitutes final Agency action for purposes of judicial review, and the Order shall become effective 30 days following its issuance unless an appeal is taken pursuant to Section 309(g)(8) of the Clean Water Act, 42 U.S.C. § 1319(g)(8).

SO ORDERED

Issued this 1st day of March, 1990.

Paul G. Krough, Acting
Julie D. Belaga
Regional Administrator
U.S. Environmental Protection Agency
(Region I)
JFK Federal Building
Boston, MA 02203

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CITY OF ROCHESTER,) Docket No. CWA-I-1-88-1009
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 Respondent.)

RECOMMENDED DECISION

I. PROCEDURAL BACKGROUND

This is a proceeding under section 309(g) of the Clean Water Act ("the Act"), 33 U.S.C. § 1319(g), for assessment of a civil penalty for violations of the Act.

On November 24, 1987, the United States Environmental Protection Agency ("EPA" or "Complainant") issued a complaint against the City of Rochester ("Rochester" or "Respondent") alleging violations of sections 301(a) and 307 of the Act, 33 U.S.C. §§ 1311(a) and 1317; and Respondent's June 11, 1982 National Pollution Discharge Elimination System (NPDES) permit, including the permit as modified on July 29, 1986. Specifically, EPA alleged that Respondent failed to timely and completely implement an industrial pretreatment program in violation of the Act. EPA proposed to assess a Class I administrative penalty of \$25,000.00.

On December 31, 1987, Respondent filed an Answer and Request for a Hearing. Complainant filed a motion for Partial Summary Determination regarding the issue of liability on May 9, 1988. On June 17, 1988, the Respondent filed its Objection to Complainant's Motion for Summary Determination.

By Order, dated March 21, 1989, I granted EPA's Motion for Partial Summary Determination on the issue of liability. I found that Respondent failed to comply with the terms and conditions of its NPDES permit by its failure to operate its program in a manner consistent with general pretreatment regulations 40 CFR § 403, and Respondent's EPA approved pretreatment program. More specifically I found that Respondent had failed to: (i) submit its Industrial Pretreatment Program Progress Report on an annual basis; (ii) issue Industrial User Discharge Permits to significant contributors; (iii) monitor industrial users in accordance with its approved program; (iv) organize data files on its industrial users; and (v) enforce compliance against its industrial users.

On August 17, 1989, pursuant to Section 126.108 of Guidance on Class I CWA Administrative Penalty Procedures, I established dates for submission of written evidence and a

hearing on the assessment of an administrative civil penalty¹.

The hearing was held on September 13, 1989. Each of the parties submitted closing arguments in their respective post-hearing briefs on or before October 31, 1989 and the record was closed on that date.

II. PENALTY CONSIDERATION

In determining the appropriate administrative penalty, Section 309(g)(3) of the Clean Water Act provides that the Administrator should consider the following factors:

...take into account the nature, circumstances, extent and gravity of the violation or violations, and with respect to the violation, the 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. (emphasis added)

¹The hearing scheduled was set following several pre-hearing motions, including Respondent's Motion to Permit Discovery and Respondent's Motion for Production of Information and For Issuance of Subpoenas. By order dated June 12, 1989, I denied Respondent's Motion to Permit Discovery on the basis that the burden of discovery on EPA would defeat the purpose of Section 309(g)(2) of the Clean Water Act which established the Class I administrative penalty process and that Respondent is not entitled to discovery in an administrative proceeding of this type. On July 28, 1989, I denied Respondent's Motion for Production of Information and for Issuance of a Subpena.

Accordingly, the factors outlined below are the basis for this recommended decision

a. Nature, Circumstances, Extent and Gravity

In examining this penalty factor, EPA need not establish that the violation resulted in demonstrable harm to human health, the environment or to the treatment plant. Consideration of the evidence establishing the degree of deviation from the requirements and the duration of the violation is sufficient in reviewing this factor.

I find that the degree and duration of Rochester's violation is significant. The record clearly establishes that Respondent violated the Act by failing to implement five critical elements of its pretreatment program, virtually all of the requirements of the pretreatment regulations². The record also establishes that Rochester did not implement its EPA approved pretreatment program for more than 2 years beyond the time it was required to do so.

The Respondent's program was approved in March of 1985, even if Respondent had substantially implemented the approved pretreatment program in June 1987, as Respondent alleges, the

²See 40 CFR § 403

record supports a significant degree and duration of non-compliance.

Respondent also argues that since there was no harm to the environment, there is no justification for a substantial penalty. I disagree. The purpose of the industrial pretreatment program regulations are preventive in nature. Moreover, if communities are not penalized for failure to implement their pretreatment programs, the environment may not be so lucky the next time. I find that given the nature of the violation a substantial penalty is appropriate as a deterrent.

Finally, I find Rochester's attempts to compare its violations with the violations of similar communities in order to argue for similar penalties is irrelevant and inappropriate in this proceeding since the penalties cited by Rochester were reached by settlement.

b. Degree of Culpability

In considering this factor, I disagree with EPA's assertions that Rochester's conduct during the period of the violation was that of "plain indifference" and "careless disregard". The record indicates that Rochester demonstrated a willingness to address its implementation of the

pretreatment program. The several meetings that Rochester attended with EPA during the course of the violations and the testimony of EPA's and Rochester's witnesses at the hearing do not support EPA's characterization of Rochester.

Furthermore, Rochester presented evidence that during the period that it was involved in building the POTW, it was operating on the assumption that the program need not be implemented until the plant was operational³. I find this to be no excuse for Rochester's continued failure to implement the program. However, it does support Rochester's argument that it did not ignore EPA's inquiries regarding implementation of the program.

Accordingly, I find that although the evidence indicates an inexcusably significant degree of ignorance by Rochester with respect to implementing its program, it does not establish a high degree of culpability.

c. Economic Benefit

EPA presented evidence which indicated that the economic benefit Rochester gained by delaying the implementation of the industrial pretreatment program was fairly substantial.

³Even though I have denied Rochester's Motion to supplement the record concerning its understanding with EPA, I find that the testimony of its engineer sufficient to indicate a misunderstanding which reflects on the degree of culpability.

EPA's witness was experienced in the area of financial management for wastewater systems and analysis of economic benefits for delaying compliance with environmental laws. In performing its analysis, EPA's witness considered capital, operation and maintenance expenses, and concluded that Rochester had realized a substantial economic benefit.⁴

Rochester presented evidence which indicated that EPA's economic benefit calculation failed to consider the purchase of certain equipment. This evidence, establishes that Rochester had in fact purchased sampler equipment during the time in which it should have been purchased in order to comply with the pretreatment regulations. Accordingly, I find that EPA's calculation should have been adjusted to reflect that purchase⁵. Even with taking this adjustment into consideration, the record demonstrates a savings greater than EPA's proposed penalty.

Rochester argues that it did not actually realize an economic savings since, had it complied, the costs would have

⁴\$67,795.00

⁵EPA's analysis indicated a savings of \$1,520 for the delay in purchasing the sampling equipment.

been passed on to the users. I find this argument unpersuasive in that there is no distinction between Rochester and its users. Therefore, it is irrelevant whether it was Rochester, or its users, that realized the substantial economic benefit as a result of the non-compliance. The fact remains that there was an economic benefit as a result of non-compliance.

In summary, I find that the economic benefit to Rochester as a result of non-compliance justifies a significant penalty.

d. Ability To Pay

The only evidence that EPA offers on Rochester's ability to pay is that given the population of 21,000, the maximum penalty per person would be less than \$2.00. I find this to be a reasonable assumption of Rochester's ability to pay.

Rochester asserts that the existing per person capital debt of \$2,142.00 per Rochester sewer users reflects a clear inability to pay the proposed penalty. Although Rochester's allegations are unsubstantiated, the increase in per person debt as a result of a maximum penalty seems insignificant given the existing debt. In conclusion, I find that Rochester has the ability to pay the proposed penalty.

e. Other Factors

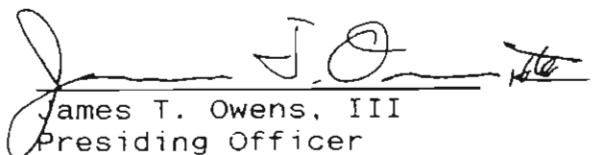
The record establishes that in June of 1987 Rochester had undertaken some sampling activities, maintained some files, and filed an annual report. Since this activity occurred six months prior to the institution of this administrative penalty action, I find that it should be considered as a mitigating factor in determining the appropriateness of the penalty.

III. PENALTY

Based on the record, I find that the serious nature of Rochester's violations and the substantial economic benefit which Rochester realized, supports the assessment of the maximum penalty. However, evidence of Rochester's willingness to comply prior to institution of this administrative proceeding is a mitigating factor. Accordingly, I recommend that a penalty of \$21,500 should be assessed.

Respectively Submitted,

Dated: 2/28/90


James T. Owens, III
Presiding Officer