UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

IN THE MATTER OF	)	
	)	
RM Oil & Gas Company	)	DOCKET NO. CWA-6-00-1615
Drumright, Oklahoma	)	
	)	
RESPONDENT	)	
	)	
	)	

DEFAULT ORDER AND INITIAL DECISION

I. Procedural and Regulatory Background

This Class I administrative penalty action commenced on June 27, 2000, with the filing of a complaint by the Region 6 Water Enforcement Branch Chief (Complainant), Compliance Assurance, and Enforcement Division, United States Environmental Protection Agency (EPA), against RM Oil & Gas Company (Respondent). Complainant alleged that Respondent committed one Class I violation under Section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g), by discharging produced water from a salt water collection line, into a United States water without a National Pollutant Discharge Elimination System (NPDES) permit. The Consolidated Rules of Practice found at 40 C.F.R. Part 22, Subpart I, governs administrative assessment of Class I civil penalties.

Complainant proposed a civil penalty up to $27,500 for the violation alleged in the June 27, 2000, complaint.

By letter dated July 31, 2000, filed on August 2, 2000, Respondent forwarded a general response to the complaint. Respondent limited its response to the complaint's allegations as follows:

> "After due consideration of the facts involved, RM Oil & Gas Company would hereby request a formal hearing on the reference[d] matter.
>
> Although I feel we have all spent considerable money and time, please advise as to the hearing date."

This tribunal conducted a prehearing conference call with the parties on September 19, 2000. Both parties appeared at the prehearing conference and agreed to a prehearing and hearing schedule. According to the schedule agreed upon by the parties and formalized by a September 20, 2000, Order Establishing Further Proceedings and Notice of Hearing, this tribunal required both Complainant and Respondent to submit a prehearing exchange of information on October 25, 2000. In addition, both parties were ordered to participate in a February 7, 2001, hearing if the case remained unresolved.

This tribunal's Order dated September 20, 2000, informed the parties that failure to comply could result in sanctions

authorized under 40 C.F.R. § 22.17. In relevant part, the September 20, 2000, Order states:

> "Complainant's or Respondent's failure to comply with this Order may result in any just or proper sanction as authorized by 40 C.F.R. § 22.17."

It also informed the parties that Class I penalty actions were governed by procedures set forth in the rules for non-Administrative Procedures Act (non-APA) cases. *See* 40 C.F.R. Part 22, Subpart I, published at 64 Fed. Reg. 40138 (July 23, 1999). The Respondent received the September 20, 2000, Order as the return receipt card was signed on October 3, 2000.

Further, on January 19, 2001, the parties were informed of the February 7, 2001, hearing scheduled in this matter. The Regional Hearing Clerk forwarded the parties a hearing notice which reminded the parties of the hearing as follows:

> "This is to inform you of the location for the RM Oil and Gas Company Hearing. It will be on the 13th floor, in the Regional Judicial Hearing Room, on Wednesday, February 7th, at 10:00 a.m. The Environmental Protection Agency is located at 1445 Ross Avenue, Dallas, Texas 75202.... If you have any ... questions, please call me at 214-665-8021."

On January 22, 2001, Respondent acknowledged receipt of the above notice by signing the return receipt card.

Despite the above process and opportunities afforded to Respondent, the Respondent did not file an answer responsive

to factual allegations in the complaint, and failed to submit any prehearing exchange of information until this day. While Respondent requested a hearing by letter dated July 31, 2000, Respondent failed to attend the February 7, 2001, administrative hearing, duly noticed. Accordingly, Respondent's failure to comply with 40 C.F.R. Part 22 hearing procedures are inexcusable.

The procedures governing this Class I civil penalty action are quite clear concerning Respondent's failures identified above. In relevant part, 40 C.F.R. § 22.17(a) and (c) states:

> "A party may be found to be in default: ... upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. Default by the Respondent constitutes, for the purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations.... When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued."

Similar to 40 C.F.R. § 22.17(a), the failure of a respondent to admit, deny or explain any material factual allegation contained in a complaint, constitutes an admission of the factual allegations under 40 C.F.R. § 22.15(b) and (d). If a

default occurs and the defaulting party is found liable, the Presiding Officer must determine the proper civil penalty.

Accordingly, due to Respondent's failure to comply with the written answer requirement found at 40 C.F.R. § 22.15(b), failure to submit the prehearing exchange of information, and failure to appear at the February 7, 2001, hearing ordered and conducted by this tribunal, the Respondent is found in default.[1] Consistent with 40 C.F.R. §§ 22.15(d) and 22.17(a), Respondent's default constitutes an admission of the facts alleged in the Complaint and results in the assessment of a $9,900 penalty proposed within Complainant's prehearing exchange of information, and during the February 7, 2001, administrative penalty hearing.

The below Findings of Fact and Conclusions of Law are based upon the complaint, Complainant's prehearing exchange and the administrative hearing transcript/record.

---

[1] During the conduct of the February 7, 2001, hearing Complainant verbally motioned for a default determination. (Hearing Transcript at pp. 8-11). The motion was granted with respect to liability based upon the administrative record file, including the complaint and prehearing exchange of information. (Hearing Transcript at pp. 11-12). This Default Order and Initial Decision provides specific findings and conclusions for granting a default motion concerning liability and penalty. Notwithstanding, during the conduct of the hearing, Complainant's motion for default was denied with respect to a civil penalty. (Hearing Transcript at p. 12).

II. Findings of Fact and Conclusions of Law

A. *As to the sole violation alleged under the CWA*:

1. Respondent is a corporation incorporated under the laws of the State of Oklahoma. (Complaint at p. 2).

2. Respondent is a "person" as defined under Section 502(5) of the CWA, 33 U.S.C. § 1362(5) and 40 C.F.R. § 122.2.

3. Respondent owned and/or operated an oil field "facility" located in the Southwest Quarter of Section 17, the Southeast Quarter Section 18, and the Northeast Quarter of Section 19, all in Township 27 North, Range 8 East, Osage County, Oklahoma. (Complaint at p. 2).

4. Respondent is an "owner/operator" within the meaning of 40 C.F.R. § 122.2.

5. On February 8, 2000, EPA inspected Respondent's oil field facility and noted a discharge of produced water, highly concentrated with brine (brine water), from a ruptured salt water collection line. (Complaint at p. 4; Prehearing Exchange at Exhibits 3 and 4).

6. Respondent's oil field "facility" including the salt water collection line, is a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14) and 40 C.F.R. § 122.2.

7. By discharging produced water, highly concentrated with brine, Respondent's oil field facility operations resulted in a "discharge of a pollutant" within the meaning of Section 502 of the CWA, 33 U.S.C. § 1362(12) and 40 C.F.R. § 122.2.

8. On February 8, 2000, EPA's inspection of Respondent's facility revealed the discharge of brine water from a salt water collection line leak/spill. The leak/spill traveled from the Southeast Quarter of Section 18, the Northeast Quarter of Section 19, Township 27 North, Range 8 East, Osage County, Oklahoma, into and unnamed tributary and therefrom, into Bird Creek. (Complaint at p. 4; Prehearing Exchange at Exhibit 3).

9. Respondent's discharge of pollutants into Bird Creek constitutes a discharge into "navigable waters" and "waters of the United States" within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7) and 40 C.F.R. § 122.2.

10. On February 8, 2000, EPA's sampling of Bird Creek where the brine water made its initial entry into Bird Creek, registered a concentration of 35,000 parts per million (ppm), total dissolved solids (tds). (Complaint at p. 4; Prehearing Exchange at Exhibit 3).

11. By February 10, 2000, the brine water traveled at least two miles downstream in Bird Creek. As a result, fish and

frogs were killed from exposure to produced water highly concentrated with brine. (Complaint at p. 4; Prehearing Exchange at Exhibit 3).

12. On February 10, 2000, Respondent prepared an emergency Underground Injection Control (UIC) permit to inject brine contaminated water into UIC well No. 46, located in the Northeast Quarter of Section 19, Township 27 North, Range 8, Osage County, Oklahoma. (Prehearing Exchange at Exhibits 3 and 5).

13. Respondent commenced pumping water concentrated with brine from the bottom of Bird Creek on February 10, 2000. (Prehearing Exchange at Exhibit 3). On the morning of February 10, 2000, Respondent's pumps failed. (Prehearing Exchange at Exhibit 3). Pumping operations recommenced on February 11, 2000, with Respondent's removal and disposal of Bird Creek water concentrated with brine, into UIC well No. 46. (Complaint at p. 5; Prehearing Exchange at Exhibits 3 and 4).

14. During February 11 through February 14, 2000, a total of 67,480 barrels of injected fluids, including brine concentrated water, were injected into UIC well No. 46. (Complaint at p. 5; Prehearing Exchange Exhibit 4).

15. During February 11 through February 14, 2000, a total of 1,840 barrels of brine concentrated water were removed by vacuum truck and disposed into the RM Oil & Gas Company, Personia Unit, UIC well system. (Complaint at p. 5; Prehearing Exchange at Exhibit 4).

16. A total of 630 barrels of fresh water were used to wash down areas polluted with produced water highly concentrated with brine. (Complaint at p. 5; Prehearing Exchange at Exhibit 4).

17. Under Section 301 of the CWA, 33 U.S.C. § 1311, it is unlawful for any person to discharge any pollutant from a point source to waters of the United States, except with the authorization of, and in compliance with, an NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

18. At all relevant times, Respondent was a “person” who “owned” and/or “operated” a “point source” oil field facility. The operations at the facility resulted in a “discharge of a pollutant,” produced water highly concentrated with brine, into a “water of the United States,” Bird Creek. (Complaint at p. 3).

19. Because Respondent owned and/or operated an oil field facility that discharged a pollutant to a water of the United

States, the Respondent and the facility operated, were subject to Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

20. Respondent did not have any authorization to discharge pollutants (produced water concentrated with brine) into waters of the United States. (Complaint at p. 4).

21. Respondent's discharge of produced water concentrated with brine, constituted an unauthorized discharge of a pollutant to waters of the United States, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). Therefore, Respondent is liable for violating Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

22. Complainant proposed assessment of a penalty up to $27,500 in the Complaint. (Complaint at p. 6). This tribunal officially notices that Complainant's prehearing exchange of information included a copy of the February 25, 1995, Revised Interim Clean Water Act Settlement Penalty Policy. (Prehearing Exchange at Exhibit 12). In addition, this tribunal also officially notices Complainant's submission of a prehearing exchange of information, settlement penalty policy calculation worksheet which included a civil penalty proposal. (Prehearing Exchange at Exhibit 13).[2] Respondent

[2] The parties may contest this tribunal's official notice in accordance with 40 C.F.R. §§ 22.22(f) and 22.30.

did not contest the prehearing exchange of information submitted despite being afforded the opportunity to do so.

B. *Penalty Assessment*

23. Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), authorizes EPA to assess a civil penalty up to $11,000 per violation, except the maximum amount of any Class I civil penalty shall not exceed $27,500. Although the CWA includes lower penalty amounts in the text of the statute, the Civil Monetary Penalty Inflation Adjustment Rule found at 40 C.F.R. Part 19, provides a penalty amount (up to $11,000 per violation and a $27,500 maximum) adjusted for inflation.

24. Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), provides:

> "[i]n determining the amount of any penalty assessed under this subsection, the Administrator... shall take into account the nature, circumstances, extent and gravity of the violation, ... and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings ... resulting from the violation, and other matters as justice may require."

25. Furthermore, 40 C.F.R. § 22.27(b) includes relevant requirements related to this civil penalty action. In accordance with 40 C.F.R. § 22.27(b):

> "... 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.... If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or motion for default, whichever is less."

26. As reflected by the complaint, Complainant initially sought a civil penalty up to $27,000. During the prehearing exchange of information, Complainant calculated a civil penalty of $15,000 based upon a settlement penalty policy calculation considering the gravity of the circumstances. (Hearing Transcript at pp. 139-140). Complainant then added $13 in economic benefit, and applied a 10% percent settlement reduction to lower the above amount to $13,511. (Hearing Transcript at pp. 139-140).

27. While Complainant continued to use the settlement penalty policy approach in calculating a civil penalty, Complainant recognized the $13,511 civil penalty assessment was more than the statutory maximum allowed for a sole violation. (Hearing Transcript at pp. 139-149). Accordingly, Complainant applied a 10% reduction to the statutory maximum ($11,000) for "quick settlement" purposes. (Hearing Transcript at pp. 139-140).

28. As noted in paragraph 22, Complainant's prehearing exchange included a copy of the February 25, 1995, Revised Interim Clean Water Act Settlement Penalty Policy. The

Complainant's chief penalty witness admitted he used the above document in assessing an appropriate civil penalty.[3] (Hearing Transcript at pp. 97-99, 119-120, 128-129, 138-140). While the Complainant's prehearing exchange settlement penalty policy calculation worksheet noted in paragraph 22 (Prehearing Exchange at Exhibit 13, the second page of two unnumbered pages) did not specify a $9,900 penalty amount, Complainant's witness explained the statutory maximum was $11,000 and he deducted 10% from the statutory maximum for quick settlement. (Hearing Transcript at pp. 133-136, 138-140).

29. Upon review of the total testimony of Complainant's witness responsible for calculating the civil penalty, Complainant proposed assessment of a penalty in the amount of $9,900 during the prehearing exchange of information phase of this civil penalty action. (Hearing Transcript at pp. 134, 138-140).

---

[3] Complainant's use of a settlement penalty policy in a litigated case is addressed more fully later in this Default Order and Initial Decision. Note however, EPA has not issued a civil penalty guideline for the assessment of penalties under Section 301(a) of the CWA, 33 U.S.C. § 1311(a), when arguing for a penalty at a civil trial or administrative hearing. Accordingly, the statutory penalty factors provided in Section 309(g)(3), 33 U.S.C. § 1319(g)(3), govern the administrative assessment of civil penalties in Section 301(a) cases such as this one. In addition, 40 C.F.R. § 22.27(b), limits the civil penalty amount in cases involving defaults.

30. As provided by Complainant's witness responsible for calculating the proposed penalty, Complainant sought assessment of a $9,900 penalty during the hearing (Hearing Transcript at pp. 133-136, 140). In an incredible moment, the same witness recanted near the end of his testimony to seek the statutory maximum of $11,000. (Hearing Transcript at p. 141).[4] For several reasons, including Complainant's submission of a settlement penalty policy in its prehearing exchange of information, Complainant's submission of a settlement penalty policy calculation worksheet proposing a civil penalty in the prehearing exchange of information, Complainant's credible testimony concerning the use of a

[4] This tribunal finds the particular testimony in question incredible because it is inconsistent with credible testimony in the February 7, 2001, hearing, and controverted by the prehearing exchange of information. After careful consideration, during the lion's share of the hearing Complainant's penalty witness testified with confidence in both, appearance (facial expression) and tone of voice, that Region 6 sought a $9,900 civil penalty (Hearing Transcript at pp. 133, 136, 140). In addition, the incredible testimony is not corroborated by other record evidence, and was only provided after Complainant's penalty witness proposed a $9,990 civil penalty five times, and counsel's instruction for the witness to "back out" the 10% quick settlement. (Hearing Transcript at pp. 133, 135-136, 140-141). On the other hand, the incredible testimony is controverted by prehearing exchange of information documents specified herein, which include a 10% penalty reduction for quick settlement. The prehearing exchange of information documents also corroborate the reasoning behind calculating a $9,900 civil penalty proposed by Complainant. (Hearing Transcript at p. 140).

settlement penalty policy to calculate the proposed penalty, Complainant's credible testimony describing what the settlement penalty policy worksheet calculation meant, and Complainant's credible testimony concerning the proposed penalty of $9,900, this tribunal finds that Complainant proposed a penalty of $9,900 during the prehearing stage of this action and at the February 7, 2001, administrative hearing, in which Complainant motioned for default.

31. Having found Respondent in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and determined that Complainant proposed a $9,900, penalty at the prehearing exchange of information, and through credible testimony corroborated by the prehearing exchange of information, at the February 7, 2001, administrative hearing, $9,900 is the appropriate civil penalty in light of Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3) and 40 C.F.R. § 22.27(b). Despite the above, the statutory maximum penalty, $11,000, is an appropriate reference point to evaluate the statutory penalty factors as they apply to this case. *See Atlantic States Legal Foundation, v. Tyson Foods*, 897 F.2d 1128, 1142 (11th Cir. 1990). Accordingly, if this case did not involve a default and the controlling limitations under 40 C.F.R. § 22.27(b), the statutory maximum penalty of $11,000 would be appropriate

under Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), and the findings provided below.

32. In making the above determination this tribunal took into account the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, the economic benefit or savings resulting from the violation, and other matters as justice may require. As to the gravity of the violation, the facts found concerning liability, hearing testimony, and hearing exhibits, provide sufficient evidence to support imposition of the penalty determined ($9,900) by this tribunal.

33. When determining the gravity of the violation, it is proper to examine the severity of the violation. *See Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc*., 720 F. Supp. 1158, 1161, 1163, 1166 (D. N.J. 1989), aff'd in part, rev'd on other grounds, 913 F. 2d 64 (3d. Cir. 1990), cert. denied, 498 U.S. 1109, 111 S.Ct. 1018, 112 L.Ed. 2d 1100 (1991). Based upon credible testimony and reliable evidence, the Respondent's sole violation, an unauthorized discharge of produced water highly concentrated with brine, was severe. Produced water concentrated with brine is mostly composed of sodium chloride. (Hearing

Transcript at pp. 40, 86-87, 103). It has other constituents such as boron sulfate components, and some carbonates. (Hearing Transcript at p. 40). On February 8, 2000, the measurement of tds in the unnamed, intermittent stream flowing into North Bird Creek was above 80,000 ppm. The discharge of produced water with a high concentration of brine entered North Bird Creek from the unnamed, intermittent stream. (Hearing Transcript at pp. 35-39). When Complainant sampled North Bird Creek on February 8, 2000, a reading of 35,000 ppm, tds registered. (Hearing Transcript at pp. 80-84, and Hearing Transcript at Exhibit 3, p. 2). Repeated sampling of North Bird Creek up to approximately 2.0 to 2.5 miles downstream of the brine water discharge registered 25,000 ppm, tds. (Hearing Transcript at pp. 36-37, 80-84, 112, and Hearing Transcript at Exhibit 3, p. 2).

34. Applicable guidelines recommend that livestock and plants not be exposed to water concentrated with more than 5,000 ppm, tds. (Hearing Transcript at pp. 82-83). Indeed, a concentration of 35,000 ppm, tds is well above the limit plant-life can survive. (Hearing Transcript at pp. 82-83). Produced water including high concentrations of brine kills vegetation, and aquatic life including fish, frogs and crayfish. Thus, Respondent’s unauthorized discharge of

produced water with a very high concentration of brine was severe and support imposition of a substantial Class I penalty.

35. This tribunal may also consider the presence or absence of environmental harm in determining the gravity of a violation. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc*., 956 F. Supp. 588, 602 (D.S.C. 1997). In addition, this tribunal may also impose a significant penalty if there is a risk or potential risk of environmental harm. *See Natural Resources Defense Counsel, Inc. v. Texaco Refining & Marketing, Inc*., 800 F. Supp. 1, 21 (D. Del. 1992). The unauthorized discharge of brine water originated from a rupture in a six-inch brine supply line at the Personia Unit facility. (Hearing Transcript at pp. 28-30, 36, 85-87, and Hearing Transcript at Exhibit 3, p. 1). The rupture resulted in a large leak/spill of brine water into an unnamed, intermittent stream which flowed into the northern part of Bird Creek. (Hearing Transcript at pp. 36, 71, 73, 76; Hearing Transcript at Exhibit 3, p. 1). Respondent’s unauthorized discharge of produced water concentrated with brine traveled at least 0.5 miles in the unnamed, intermittent stream and then approximately 2.5 miles downstream in North Bird Creek. (Hearing Transcript at pp. 35-36, 73).

36. The northern part of Bird Creek is one of the cleanest parts of the fast-moving creek. It eventually flows into the Arkansas River. (Hearing Transcript at pp. 36, 41, 73-74). North Bird Creek is considered one of the fresher perennial streams in Osage County, Oklahoma. (Hearing Transcript at p. 41). Cattleman use North Bird Creek to water their livestock, and it sustains wildlife and plant life in the area. (Hearing Transcript at pp. 40-41). The main stem of Bird Creek is used as a secondary water supply for a hospital. (Hearing Transcript at p. 74). Complainant's inspection, and photographs of North Bird Creek and the unnamed stream, evidenced the death of several frogs and fish due to exposure to produced water heavily concentrated with brine. (Hearing Transcript at pp. 39-40, 63-64, 69-71, 75-76, and Hearing Transcript at Exhibits 11A, 11O, and 11Q).

37. Because exposure to concentrations of 25,000 to 35,000 ppm, tds is well above the limit plant-life can survive, the risk of environmental harm to plant-life is extremely high. (Hearing Transcript at pp. 40-41, 82-83, Hearing Transcript at Exhibit 3). It was difficult to assess the extent of any damage to plant-life, including trees and other vegetation, because the leak/spill and EPA's inspection occurred in February (a winter month), a time when many plants are

dormant. (Hearing Transcript at pp. 40-41, 82-83). In light of credible testimony and reliable evidence, the gravity of Respondent's violation is very serious, and supports imposition of a significant Class I penalty. The actual and potential adverse impact to the environment and the severity of the pollution justify imposition of a substantial Class I civil penalty.

38. The main purpose of a penalty is to deter pollution, and deter the violator and others from committing future violations. *See Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc*., 720 F. Supp. 1158, 1166, (D. N.J. 1989). In accordance with the above principle, this tribunal considered the ability of the Respondent to pay the proposed penalty. Although given the opportunity, Respondent neither argued nor submitted any information throughout this civil penalty proceeding concerning relevant economic indicators of the company's financial status, or its ability to pay. (Hearing Transcript at pp. 117, 124). While the hearing record reflects the small size of RM Oil & Gas Company and the ceasing of oil field operations at the Personia Unit, it also notes Respondent's operation of several oil field facilities at locations other than the Personia Unit. (Hearing Transcript at pp. 28, 115, 123-124). Given

Respondent's lack of responsiveness in this civil penalty proceeding, there is no legal argument or specific evidence to show that Respondent cannot both, pay the penalty proposed and continue in business as an oil producer. *See In Re New Waterbury, Ltd.*, 5 E.A.D. 529, 540-543 (EAB 1994). Accordingly, the Respondent's ability to pay the proposed penalty is inferred, and the proposed penalty need not be adjusted due to the Respondent's financial status.

39. Review of any given owner/operator's prior history of violations may involve consideration of the duration of a current violation, whether similar violations were committed in the past, and the duration and nature of all violations, including whether the violations are perpetual or sporadic. *See Student Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc*., 19 Envtl. L. Rep. 20903, 20906 (D. N.J. 1989). Respondent's oil field operations at the Personia Unit, Osage County Oklahoma resulted in one violation, an unauthorized discharge of pollutants into U.S. waters, under Section 301(a) of the CWA, 33 U.S.C. § 1311(a). (Hearing Transcript at pp. 109, 137). The large leak/spill of produced water with very high concentrations of brine occurred on February 7, 2000, and adversely impacted North Bird Creek and vegetation in the area, from at least February 7, 2000,

through February 14, 2000. (Hearing Transcript at pp. 35-40, and Hearing Transcript at Exhibit 3). Although there is no evidence of prior violations under Section 301(a) of the CWA, Respondent was at least verbally noticed of the failure to properly plug underground injection wells under the UIC program found at 42 U.S.C. § 300(h). (Hearing Transcript at pp. 106-107).

40. Further, it is important to note that Respondent commenced oil field operations at the Personia Unit in 1985, and either knew or should have known of the hazards associated with leaks/spills of produced water heavily concentrated with brine. (Hearing Transcript at p. 106). As a result of Respondent's years of oil field operations, the Respondent knew the leaked/spilled, produced water heavily concentrated with brine required proper disposal in UIC permitted wells, UIC wells authorized by rule, or another acceptable medium. (Hearing Transcript at pp. 106-107, 115-116). Hence, Respondent's prior knowledge concerning the conduct of oil field production operations, prior knowledge of proper disposal methods for produced water heavily concentrated with brine, the gravity of the violation as discussed earlier (including the severity of the pollution and the impact on the environment), and Respondent's culpability discussed below

(Hearing Transcript at pp. 120-122), support a substantial Class I civil penalty. Based upon the totality of the circumstances described herein and sound reasoning, Respondent's lack of prior CWA violations does not yield an adjustment to the Class I administrative penalty.

41. A violator's attitude and conduct concerning compliance attainment may result in an increase or decrease of a penalty under the CWA. *See Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc*., 720 F. Supp. 1158, 1166-1167 (D. N.J. 1989). Consistent with paragraphs 12 through 16, there is no question that Respondent conducted clean up operations to address the large leak/spill of produced water heavily concentrated with brine. (Hearing Transcript at pp. 35-39, 41-44, and Hearing Transcript at Exhibit 3). Respondent spent in excess of $10,000 dollars for the clean up. (Hearing Transcript at pp. 97, 117). While Respondent did not hire a clean up contractor to conduct the leak/spill clean up, the Respondent paid for or employed the use of equipment, including a vacuum truck, a bulldozer, a backhoe, several pumps, generators, UIC well equipment, a rig, and clean up labor. (Hearing Transcript at pp. 43-44, 109-112, 142, 146, and Hearing Transcript at Exhibit 3). As found in paragraphs 12 through 16, Respondent's clean up operation

primarily consisted of vacuuming and trucking brine concentrated water for off-site disposal, injecting brine concentrated water into a nearby UIC injection well, building dams to prevent further contamination into North Bird Creek and cleaning the area with fresh water. (Hearing Transcript at pp. 29, 35-37, 41-44, and Hearing Transcript at Exhibits 3, and 11R).

42. On the other hand, several of Respondent's actions exacerbated the actual and potential threat to the environment. For example, Respondent did not discover the rupture of its six-inch brine supply line at the Personia Unit facility. On February 7, 2000, the Bureau of Indian Affairs (BIA) discovered the large leak/spill of produced water highly concentrated brine without any assistance from the Respondent. (Hearing Transcript at pp. 98, 106, 122, and Hearing Transcript at Exhibit 3). The BIA notified Respondent of the leak on February 7, 2000. Respondent failed to notify EPA of the leak/spill when such notification was proper in light the EPA's technical expertise in managing and coordinating spill responses, and the environmental risk presented. (Hearing Transcript at pp. 21-22, 109-110, 118-119). On February 8, 2000, EPA received notification from the BIA concerning the Respondent's ruptured line and leak/spill. (Hearing

Transcript at p. 122, and Hearing Transcript at Exhibit 3). Upon EPA inspection on February 8, 2000, EPA found Respondent's untimely and inappropriate actions failed to prevent the majority of produced water highly concentrated with brine from flowing into North Bird Creek from the unnamed stream. (Hearing Transcript at pp. 29-30, 35, 39, 41). A timely response to the spill/leak was imperative in order to prevent actual harm to the environment. (Hearing Transcript at pp. 39-40).

43. Respondent's actions and failure to act including the lack of conducting spill preventative maintenance activities, negligent location of dams which failed to contain the brine concentrated water, failure to utilize an appropriate work crew to timely contain water concentrated with brine, and failure to secure appropriate equipment to transport polluted water for off-site disposal, led to the actual harm and threats to the environment along the 2.5 mile stretch of North Bird Creek. (Hearing Transcript at pp. 29-30, 35-39, 79, 81, 105-106). In addition, the Respondent's slow response in securing an emergency permit for UIC well No. 46 located by EPA, and negligent pumping operations for the disposal of brine concentrated water, contributed to the environmental harm and risk associated with Respondent's leak/spill.

(Hearing Transcript at pp. 42-44, 110, 120, and Hearing Transcript at Exhibit 3).

44. While the leak/spill occurred on February 7, 2000, pumping operations to remove the brine from the bottom of North Bird Creek commenced on February 10, 2000. The pumps broke down due to Respondent's negligent operation (failure to prime the pumps) of the pumps. Pumping operations recommenced on February 11, 2000, through February 14, 2000. (Hearing Transcript at p. 110, and Hearing Transcript at Exhibit 3). As stated in paragraph 12, Respondent applied for the emergency permit to operate UIC well No. 46 on February 10, 2000, while EPA requested Respondent to submit an emergency permit application on February 8, 2000. (Hearing Transcript at Exhibit 3). Respondent also negligently failed to properly contain the brine water by improperly constructing dams in locations which did not contain the brine water plume. (Hearing Transcript at pp. 35, 37-38, 79). In short, Respondent's failure to act, and actions both negligent and lacking promptness, allowed more brine water to contaminate North Bird Creek. These actions undermine the statutory purpose of the CWA, to restore, and maintain the chemical, physical and biological integrity of the nation's waters. *See*

Natural Resources Defense Counsel, Inc. v. Texaco Refining & Marketing, Inc., 800 F. Supp. 1, 11 (D. Del. 1992).

45. Thus, in spite of Respondent's actions to attain compliance with Section 301(a) of the CWA, 33 U.S.C. § 1311(a), Respondent's negligent and lackluster efforts, as described above, were too slow and ineffective for at least 2.5 miles of North Bird Creek. *See In Re Pepperell Associates*, CWA Appeal Nos. 99-1 & 99-2, slip op. at 47-48, (EAB, May 10, 2000). Such tardiness and negligence increased adverse risks to the environment, and actual harm to the environment by allowing highly concentrated brine water to pollute at least 2.5 miles of North Bird Creek. Without BIA discovery and notification to EPA, and EPA's diligent assistance in ensuring the conduct of the clean up, the leak/spill of brine water and Respondent's negligent clean up activities would have resulted in more extensive harm to the environment in the impacted area. Accordingly, despite Respondent's lack of prior history of violations, the Respondent's culpability in combination with the adverse risk and actual harm to the environment, support imposition of the statutory maximum penalty for Class I cases, $11,000.

46. With respect to economic benefit possibly enjoyed by Respondent, Complainant only calculated a minimal economic

benefit of $13 dollars and found such benefit insignificant. Hearing Transcript at pp. 119-120, 131, 138-139, 143-144). As such, record evidence limits this tribunal's economic benefit assessment to that proposed by Complainant. *See Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1559 (E.D. Va. 1985). Consequently, there is no penalty adjustment due after consideration of the insignificant economic benefit to Respondent.

47. This penalty action does not include a civil penalty adjustment due to other matters as justice requires. Adjustment of a civil penalty based upon the above criteria requires a set of circumstances "far from routine." *See In Re Pepperell Associates*, CWA Appeal Nos. 99-1 & 99-2, slip op. at 44, (EAB, May 10, 2000). Such circumstances are not supported by record information here.

48. However, in light of facts found herein and based upon record information, Complainant's penalty calculation and reasoning are dubious. As provided at paragraphs 22-30, the penalty assessed, $9,900, when calculated by Complainant, clearly considered and utilized the EPA's February 25, 1995, Revised Interim Clean Water Act Settlement Penalty Policy. With sound administration of justice in mind, this tribunal expressly rejects and will not perpetuate Complainant's use of

a settlement policy in a litigated penalty assessment. *See In re Bollman Hat Company*, EPCRA Appeal No. 98-4, slip op. at 14, 17 (EAB, February 11, 1999).

49. The civil penalty analysis and penalty determined by this tribunal are based upon the totality of record evidence, Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), and 40 C.F.R. § 22.27(b). Indeed, to agree with Complainant's penalty calculation and reasoning, to the extent Complainant considered the above settlement policy, would undermine and harm the Agency's settlement practices and policies. The use of a settlement policy in this litigated case would undercut EPA's general policy favoring consistent use of policies. The settlement policy used by Complainant was clearly not intended for use in litigated cases. In practice, the use of a settlement policy in litigated cases undermines any incentive for settlement in civil penalty cases commenced under Class I administrative procedures. For these reasons, this tribunal cannot condone Complainant's penalty calculation and reasoning, to the extent Complainant relied on a settlement policy.

50. Consideration of the statutory penalty determination factors found at Section 309(g) of the CWA, 33 U.S.C. § 1319(g), support imposition of the statutory maximum penalty

of $11,000. Notwithstanding, such a penalty determination cannot be sustained in light of 40 C.F.R. § 22.27(b). Because Respondent defaulted, the above regulation binds EPA to assess the lowest civil penalty proposed in either, the complaint, prehearing exchange of information or default motion. Having determined Complainant proposed a $9,900, civil penalty during the prehearing exchange, and through credible testimony corroborated by the prehearing exchange of information, at the February 7, 2001, administrative hearing (in which Complainant moved for a default), this tribunal finds $9,900 is an appropriate civil penalty.

51. Where a Respondent is found in default, the Consolidated Rules of Practice provide that the relief proposed in the complaint shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. *See* 40 C.F.R. § 22.17(c). This tribunal finds the proposed penalty, $9,900, is not clearly inconsistent with the record of the proceeding or the CWA, and is supported by a preponderance of the evidence pursuant to 40 C.F.R. § 22.24(b).

ORDER[5]

Pursuant to 40 C.F.R. § 22.17, and based upon the record in this matter and the preceding Findings of Fact and Conclusions of Law, this tribunal finds Respondent in default and liable for a total civil penalty of $9,900.

It is therefore ordered that RM Oil & Gas Company shall, within thirty (30) days after this Order becomes a Final Order under 40 C.F.R. § 22.27(c), submit by cashier's or certified check, payable to the United States Treasurer, payment in the amount of $9,900. Such payment shall be sent to:

United States Environmental Protection Agency
Region 6 Hearing Clerk (6C)
P.O. Box 360863M
Pittsburgh, PA 15251

A transmittal letter identifying the title of the case in question, the EPA docket number, the Respondent's name, and

---

[5] This Default Order constitutes an Initial Decision pursuant to 40 C.F.R. § 22.17(c). This Initial Decision shall become a final order unless: (1) an appeal to the Environmental Appeals Board (EAB) is taken from it by any party to the proceedings within thirty (30) days from the date of service provided in the certificate of service accompanying this Default Order; (2) a party moves to set aside this Default Order; or (3) the EAB elects, sua sponte, to review the Initial Decision within forty-five (45) days after its service upon the parties. This Order also corrects two typographical errors found in the hearing transcript. On page one (1), the style of the case is corrected by adding "CWA-6-00-1615" and deleting "CWA-600-1615." On page one-hundred and fourteen (114), "UIC" wells is added and "U.S.C." wells is deleted.

the Respondent's complete address, shall accompany such payment. A copy of the check and transmittal letter shall be delivered or mailed to the Regional Hearing Clerk at the following address:

United States Environmental Protection Agency
Region 6 Office of Regional Counsel (6RC-HO)
Regional Hearing Clerk
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

SO ORDERED this 1st day of May 2001.

/s/
GEORGE MALONE, III
REGIONAL JUDICIAL OFFICER

In the Matter of RM Oil & Gas Company, Respondent, Docket No. CWA-6-00-1615

CERTIFICATE OF SERVICE

I, Lorena S. Vaughn, Regional Hearing Clerk for the Region 6, U.S. Environmental Protection Agency located in Dallas, Texas, hereby certify that I served true and correct copies of the foregoing Order dated May 1, 2001, on the persons listed below, in the manner and date indicated:

Mr. Robert McKee, G.M. RM Oil & Gas Company Main & Lynn St. P.O. Box 501 Pawhuska, Oklahoma 74056	U.S. CERTIFIED MAIL RETURN RECEIPT REQUESTED
Mr. Gary Smith, Esq. U.S. EPA, Region 6 (6RC-EW) 1445 Ross Avenue Dallas, Texas 75202-2733	HAND DELIVERY

Date:

/s/
Lorena S. Vaughn
Regional Hearing Clerk