(101)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV
245 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

IN THE MATTER OF:	:	
	:	DOCKET NO. CWA-IV-93-520
City of Atlantic Beach	:	
Duval County, FL 32233	:	Proceeding to Assess Class I
	:	Civil Penalty Under
	:	Subsection 309(g) of the Clean
RESPONDENT	:	Water Act, 33 U.S.C. § 1319(g)

DECISION AND ORDER OF THE REGIONAL ADMINISTRATOR

This is a proceeding for the assessment of a Class I administrative penalty under subsection 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g). The proceeding is governed by the United States Environmental Protection Agency's (EPA) Proposed 40 C.F.R. Part 28--CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CLASS I CIVIL PENALTIES UNDER THE CLEAN WATER ACT, THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT, AND THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT, AND THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES UNDER PART C OF THE SAFE DRINKING WATER ACT, 56 Fed. Reg. 29,996 (July 1, 1991), issued October 29, 1991 as superseding procedural guidance for Class I administrative penalty proceedings under subsection 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g) ("Consolidated Rules"). This is the Decision and Order of the Regional Administrator under § 28.28 of the Consolidated Rules.

STATUTORY BACKGROUND

The objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the

Nation's waters." Subsection 101(a) of the Clean Water Act, 33 U.S.C. § 1251(a). One key provision of the Act is the prohibition on unauthorized discharges of pollutants: "Except as in compliance with this section and sections 1312, 1316, 1317, 1318, 1342 and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." Subsection 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a).

Section 309 of the Clean Water Act, 33 U.S.C. § 1319, provides for administrative, civil and criminal enforcement actions against person who have violated the prohibition of subsection 301(a). Administrative penalties may be assessed under subsection 309(g) of the Act, 33 U.S.C. § 1319(g): "Whenever on the basis of any information available-(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title...the Administrator...may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection." Before assessing a Class I civil penalty, the Administrator must give the person to be assessed such penalty written notice of the proposed penalty and the opportunity to request, "within 30 days of the date the notice is received by such person," a hearing. Subsection 309(g)(2)(A) of the Clean Water Act, 33 U.S.C. § 1319(g)(2)(A) (emphasis added). Before issuing an order assessing a civil penalty under this subsection the Administrator must provide

public notice of and a reasonable opportunity to comment on the penalty assessment. Subsection 309(g)(4) of the Clean Water Act, 33 U.S.C. § 1319(g)(4).

PROCEDURAL BACKGROUND

The Water Management Division Director of Region IV of EPA (Complainant) initiated this action on June 17, 1993, issuing to the City of Atlantic Beach, Florida (Respondent) an administrative complaint under § 28.16(a) of the Consolidated Rules. Respondent received the administrative complaint by certified mail on July 7, 1993. The administrative complaint contained recitations of statutory authority and allegations regarding Respondent's ownership and operation of its wastewater treatment plant at 1100 Sandpiper Lane, Atlantic Beach, Duval County, Florida. Specifically, Complainant alleged that Respondent had failed to comply with flow and pH monitoring requirements of NPDES Permit No. FL0038776 at times during 1991 and 1992.

The administrative complaint made reference to pertinent provisions of the Clean Water Act and provided notice of a proposed penalty of $20,000. The administrative complaint also provided notice that failure to respond to the administrative complaint within thirty days would result in the entry of a default order and informed Respondent of its opportunity to request a hearing. Complainant transmitted a copy of the Consolidated Rules with the administrative complaint. The notice

of opportunity to request a hearing included in the administrative complaint gave very explicit instructions on procedures for filing a hearing request and made reference to the enclosed Consolidated Rules.

On June 17, 1993, in accordance with subsection 309(g)(1) of the Clean Water Act, 33 U.S.C. § 1319(g)(1), and § 28.19 of the Consolidated Rules, Complainant afforded the State of Florida an opportunity to confer with EPA regarding the proposed penalty assessment.

On July 9, 1993, in accordance with subsection 309(g)(4) of the Clean Water Act, 33 U.S.C. § 1319(g)(4), and § 28.16(d) of the Consolidated Rules, Complainant published public notice of the proposed penalty assessment in the Florida Times-Union (Jacksonville, Florida), providing an opportunity for interested persons to comment on the proposed penalty assessment. No comments were received.

By ORDER OF ASSIGNMENT dated August 23, 1993, the Acting Regional Administrator designated the Presiding Officer in this proceeding pursuant to § 28.16(h) of the Consolidated Rules.[1]

The City of Atlantic Beach failed to respond to the administrative complaint in a timely fashion. On August 10, 1993, Respondent's Attorney, Alan C. Jensen of Jensen & Hould

[1] The Acting Regional Administrator issued a temporary assignment of the case to another Presiding Officer on October 13, 1993. The case was returned to the original Presiding Officer on November 23, 1993.

(Jacksonville, Florida) posted by U.S. Mail a Response and Request for Hearing to the Regional Hearing Clerk. The Regional Hearing Clerk received this letter on August 13, 1993. Under § 28.7(c) of the Consolidated Rules, the August 10 letter is deemed to have been filed on the day it was posted.

Complainant filed a Motion for Default on October 25, 1993. Respondent filed a Response to the Motion for Default and a Motion to Accept as Timely Filed (the Response to the administrative complaint and request for hearing) on November 8, 1993.

Under § 309(g)(2)(A) of the Clean Water Act, 33 U.S.C. § 1319(g)(2)(A), and under § 28.20 of the Consolidated Rules, Respondent had thirty days from its receipt of the administrative complaint to file a response:

> Respondent's deadline. The respondent shall file with the Hearing Clerk a response within thirty days after receipt of the ... administrative complaint.[2]

Since the certified mail return receipt for the administrative complaint was signed on July 7, 1993, the deadline for the filing of the response was August 9, 1993. [Under

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[2] The statutory provision, in relevant part, reads: "Before issuing an order assessing a civil penalty under this subparagraph, the Administrator...shall give to the person to be assessed such penalty written notice of the...proposal to issue such order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order." 33 U.S.C. § 1319(g)(2)(A). (Emphasis added).

§ 28.7(a) of the Consolidated Rules the thirty-day period began on July 8, 1993, and the deadline was automatically extended to August 9 because the thirty days ended on a Saturday, August 7.] As a consequence of its failure to file a timely response to the administrative complaint, Respondent waived its opportunity to appear in this action for any purpose under § 28.20(e) of the Consolidated Rules:

> Waiver. If the respondent fails to make a timely response pursuant to paragraph (a) or (b) of this section, whichever applies, the respondent shall have waived its opportunity to appear in the action for any purpose.

Respondent's failure to file a timely response to the administrative complaint also automatically triggered the default proceedings provision of the Consolidated Rules. Section 28.21(a) of the Consolidated Rules provides:

> Determination of Liability. If the Respondent fails timely to respond pursuant to §28.20(a) or (b) of this Part...the Presiding Officer, on his own initiative, shall immediately determine whether the complainant has stated a cause of action.

By Order dated December 22, 1993 the Presiding Officer determined that the Complainant had stated a cause of action in the administrative complaint. In the same Order the Presiding Officer directed the Regional Hearing Clerk to enter Respondent's default as to liability in the record of the proceeding as required by § 28.21(a)(1) of the Consolidated Rules and directed Complainant to submit a written argument regarding assessment of an appropriate civil penalty in accordance with § 28.21(c) of the

Consolidated Rules. Counsel for Complainant filed this written argument as directed[3] and that submission has been included in the administrative record.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Under § 28.21(a)(1) of the Consolidated Rules, upon entry of Respondent's default as to liability, the allegations as to liability included in the administrative complaint are deemed recommended findings of fact and conclusions of law. Accordingly, I accept those allegations and make the following Findings of Fact and Conclusions of Law:

1. Respondent is a municipality, duly organized and existing under the laws of Florida, and is a "person" within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).

2. Respondent owns and operates a wastewater treatment facility located at 1100 Sandpiper Lane, Atlantic Beach, Florida ("the facility"), which is and at all relevant times a "point source" within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14), which discharges pollutants to the Saint Johns River, a water of the United States with the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7). Respondent is therefore subject to the provisions of the Act, 33 U.S.C. § 1251 et seq.

3. Section 301(a) of the Act, 33 U.S.C. S 1311(a), prohibits the discharge of pollutants into the navigable waters of the

[3] Complainant's original Penalty Argument was submitted on January 24, 1994. At the direction of the Presiding Officer, Complainant supplemented this submission on February 16, 1994.

United States, except in compliance with several sections of the Act.

4. Section 402(a) of the Act, 33 U.S.C. S 1342(a), provides that the Administrator of EPA may issue permits under the NPDES program for the discharge of any pollutant into the navigable waters of the United States upon such specific terms and conditions as the Administrator may prescribe.

5. Pursuant to Section 402 of the Act, 33 U.S.C. S 1342, the Administrator of EPA, through the Director of the Water Management Division, issued NPDES Permit No. FL0038776 ("the NPDES Permit") to the Respondent, effective October 1, 1990 with an expiration date of August 31, 1995.

6. The NPDES Permit authorizes the Respondent to discharge pollutants from the facility into the St. Johns River, subject to the specific terms and limitations of the NPDES Permit. The NPDES Permit establishes requirements to monitor the pH of the facility's effluent continuously with a recorder and to monitor the facility's flow continuously with a recording flow meter and totalizer.

7. During the time periods of June 1991 through November 1991 and from January 1992 through November 1992, the Respondent discharged from the facility to the St. Johns River without monitoring pH continuously with a recorder as prescribed in the NPDES Permit.

8. During the time period of June 1991 through August 1991 and during December 1991,[4] the Respondent discharged from the facility to the St. Johns River without monitoring flow continuously with a recorder as prescribed in the NPDES Permit.

9. The Respondent's failure to monitor pH and flow, as described above, is in violation of Section 308(a) of the Act. Consequently, under Section 309(g)(2)(A) of the Act, 33 U.S.C. § 1319(g)(2)(A), Respondent is liable for the administrative assessment of a civil penalty in an amount not to exceed $10,000 per violation, up to a maximum of $25,000.

10. As required by subsection 309(g)(1) of the Act, 33 U.S.C. § 1319(g)(1), Complainant has consulted with the State of Florida by mailing a copy of the administrative complaint to an appropriate State official and offering the State an opportunity to confer with EPA on this penalty assessment.

11. As required by subsection 309(g)(4) of the Act, 33 U.S.C. § 1319(g)(4), Complainant has provided the public with notice of and a reasonable opportunity to comment on this penalty assessment.

DETERMINATION OF REMEDY

Subsection 309(g)(3) of the Clean Water Act, 33 U.S.C.

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[4] The record evidence, submitted as Complainant's Supplemental Penalty Argument, seems to indicated Respondent did not discharge without monitoring flow in December 1991. See discussion under Extent, pp. 12-14 below.

§ 1319(g)(3), specifies the factors to be considered in determining the amount of a penalty assessed under that subsection of the statute:

> In 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, 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... (emphasis added).

In accordance with Section 28.21(c) of the Consolidated Rules and the Presiding Officer's Order of December 22, 1993, Complainant has submitted a written argument regarding the assessment of an appropriate civil penalty, addressing the nature, circumstances, extent and gravity of the violation and, with respect to Respondent, ability to pay, prior history of such violations, the degree of culpability, and the economic benefit or savings Respondent enjoyed resulting from the violation. Complainant's Penalty Argument combines several of the statutory penalty factors under a single heading of "Nature, Circumstances, Extent and Gravity of Vioaltions." In this Final Decision and Order each of the penalty factors is discussed under its own heading. Some considerations might be applied to more than one penalty factor, so to avoid redundancy, all considerations are recited under the heading of the penalty factor deemed most applicable.

Complainant did not associate specific dollar amounts with the statutory factors in the Administrative Complaint. In its written penalty argument Complainant associated a figure of $45,000 with the "gravity components" (nature, circumstances, extent and garvity) of the violations and a figure of $1,749 was associated with the economic benefit Respondent enjoyed as a result of the violations. Complainant's Notes on the Proposed Penalty, attached to the Administrative Complaint, also concluded that $1,749 was the economic benefit. According to Complainant's Penalty Argument, litigation considerations warranted a substantial reduction ($26,749) of the calculated total penalty, resulting in the proposed penalty of $20,000.

Based upon the administrative record, I have taken into account the following matters in considering the statutory factors before determining an appropriate civil penalty:

Nature: Although legally the liabibities alleged are discharges in violation of an NPDES permit requirements, the real violations in this case are failure to monitor pH and failure to monitor flow. There is no allegation nor any finding of environmental harm in the record of this proceeding. Environmental harm is not, of course, an element of the offense, but if there were some, it could be considered for purposes of assessing a penalty under this factor and/or other factors.

Complainant did not argue any programmatic harm resulted from the violations. Programmatic harm is the damage done to the

integrity of the NPDES program, which is very heavily dependent on timely, accurate and complete effluent monitoring and reporting. Lack of continuous pH and flow monitoring data detracts from EPA's and the public's ability to evaluate the plant's environmental impact. This data can be valuable for water quality assessment, wasteload allocation, assessment of pollution control effectiveness and other purposes, as well as for enforcement purposes. The record shows several significant gaps in the effluent data from this point source were caused by the cited violations, and those gaps are the kind of NPDES programmatic harm that may be considered is penalty assessment. Extent: The record evidence indicates that Respondent failed to monitor pH continuously during these periods: June 18 to August 1, 1991 (Exhibits F, I and J to Complainant's Supplemental Penalty Argument); August 8 to November 15, 1991 (Exhibits F, I and J to Complainant's Supplemental Penalty Argument); January 12 to March 20, 1992 (Exhibits C, D, E, I and J to Complainant's Supplemental Penalty Argument); and April 6 to November 30, 1992 (Exhibits F, H and I to Complainant's Supplemental Penalty Argument). The record evidence also indicates that Respondent failed to monitor flow continuously from June 18 to August 15, 1991 (Exhibits F and H to Complainant's Supplemental Penalty Argument).

On balance, the evidence in the record does not support the finding that Respondent failed to monitor for flow during

December of 1991. In Complainant's Supplemental Penalty Argument, Exhibit H, Respondent's November 11, 1992 letter to Complainant answering questions regarding apparent NPDES violations, Respondent asserts that an erroneous statement was included on the copy of the DMR for December, 1991. Respondent attached to its November 11, 1992 letter a copy of the Florida D.E.R. Monthly Operating Report for that month, which indicates that Respondent did monitor for flow. The DMR itself was not included in the record, but it was presumably the basis for Complainant's assertion that Respondent failed to monitor for flow that month. The content of the "erroneous statement" does not appear in the record. The Presiding Officer expressly directed counsel for Complainant to submit for consideration "any and all evidence of violation, the nature circumstances, extent and gravity of violation..."[5] Had Complainant included the DMR in the record, Respondent would have been bound by the "erroneous statement" since the contents of DMRs are binding admissions. SPIRG v Monsanto, 600 F. Supp. 1190 (D.N.J. 1985), PIRG v Yates Industries, Inc., 757 F. Supp. 438 (D.N.J. 1991). Instead, the record contains some evidence that Respondent did monitor for flow in December of 1991, i.e. the Florida Department of Environmental Regulation (DER) Monthly Operating Report. Accordingly, these violations, alleged in the Administrative Complaint and deemed admitted as to liability in this proceeding

[5] Presiding Officer's letter of January 31, 1994.

because of Respondent's failure to deny them in a timely fashion, are not supported by a preponderence of evidence in the record and will not be considered in the assessment of a penalty.

- Complainant's Notes on the Proposed Penalty Assessment, which the Presiding Officer treated as argument in this proceeding, are more specific than the Administrative Complaint in stating that there were 449 pH monitoring violations and 69 flow monitoring violations alleged in the complaint. Subtracting the 11 December 1991 flow monitoring violations deemed admitted but not supported by a preponderance of record evidence yields a total of 507 NPDES monitoring violations over a year and a half. **Circumstances:** Respondent admitted to EPA that the facility's continuous pH monitoring system was out of service due to lightning, power fluctuations, chart drive failures and sensing probe malfunctions in July, August, September and October of 1991, and most of 1992.[6] Respondent also noted that the pH monitoring system was out of service in Discharge Monitoring Reports filed pursuant to the NPDES reporting requirements for June and for November of 1991 and for March and October of 1992.[7]

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[6] Complainant's Supplemental Penalty Argument, Exhibit J.

[7] Complainant's Supplemental Penalty Argument, Exhibit I. These DMRs roughly bracket the periods of violation of the continuous pH monitoring requirement; DMRs for the other months during these periods are not in the Administrative Record.

Respondent tried to explain the problems of the pH monitoring system in correspondence with Complainant and with the Florida DER. In reply to Complainant's August 17, 1992 Notice of Violation, Respondent stated that plant effluent pH was being continuously monitored, although the chart drive motor had been damaged, because the probe transmitter and pen recorder continued to record.[8] When pressed for a further explanation, Respondent conceded that "When the pH recorder was damaged by lightning and out of service, plant staff took hourly samples while in attendance."[9] In reaction to DER's August 3-4, 1992 observation that the pH meter has been out of service since January 14, 1992, Respondent stated that the "out of service" entry on the Monthly Operating Report was a mistake since the transmitter and receiver had until recently been in service although the chart drive recorder was out. Respondent explained that "when these instruments are out of service, hourly samples are taken as manpower allows."[10] While these efforts to gather effluent information may mitigate the violations to some degree, they are very inadequate substitutes for compliance with continuous monitoring requirements.

Gravity: Discharging in violation of any NPDES permit requirement is a very grave matter. The relative gravity of any violation

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[8] Complainant's Supplemental Penalty Argument, Exhibit D.

[9] Complainant's Supplemental Penalty Argument, Exhibit H.

[10] Complainant's Supplemental Penalty Argument, Exhibit G.

depends on its type, degree and duration. Monitoring and reporting requirements imposed in NPDES permits and in other ways under Section 308 of the Clean Water Act, 33 U.S.C. § 1318, are very important to EPA's mission, and violations of such requirements are viewed very seriously. The DMRs attached to Complainant's Supplemental Penalty Argument, Exhibit I, contain mandatory certifications of the accuracy and completeness of the submitted information, and acknowledge the potential criminal liabilities under Section 309 of the Clean Water Act, 33 U.S.C. § 1319, and the U.S. Criminal Code, 18 U.S.C. § 1001. As an NPDES permitee, Respondent is required at all times to operate and maintain properly all monitoring systems installed or used to achieve compliance with the conditions of the NPDES Permit. 40 C.F.R. § 122.41(e). Respondent plainly failed to maintain properly the pH monitoring system in 1991 and 1992 and failed to maintain properly the flow monitoring system in 1991. Respondent made some effort to mitigate the violations by having some sampling done when plant personnel were available, but these violations were of extensive duration.

Respondent's ability to pay: In a proceeding under the Consolidated Rules the respondent is to bear the burden of going forward to present exculpatory statements as to liability and statements opposing the complainant's request for relief. See § 28.10(b)(1) of the Consolidated Rules. The complainant does not have the burden of persuading Agency decisionmakers on the

respondent's inability to pay if the respondent has failed to come forward with such information by the applicable deadline. Respondent's default results in an unrebuttable presumption that Respondent can pay any assessed penalty. See Preamble to Proposed Consolidated Rules, 56, Fed. Reg. 29.996, 30,013 (July 1, 1991). Accordingly, Complainant has made no affirmative showing of the Respondent's ability to pay, and due to Respondent's default as to liability, the administrative record contains no evidence that the Respondent is unable to pay a penalty.

On this record, and given the presumption discussed in the Preamble to the Consolidated Rules, I am satisfied that Respondent is able to pay a civil penalty.

Prior history of such violations: On August 17, 1992 Complainant issued a Notice of Violation to the Respondent, citing violations of NPDES requirements for continuous monitoring.[11] On December 10, 1992 Complainant issued an administrative compliance order to the Respondent, requiring compliance with NPDES permit requirements concerning continuous pH monitoring.[12] The requirements of the administrative compliance order have been met.[13] These are the same NPDES Permit requirements and the same

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[11] Complainant's Supplemental Penalty Argument, Exhibit C.

[12] Complainant did not place a copy of this Order in the Record of this proceeding. It is described on page 2 of Complainant's January 12, 1994 Penalty Argument and on page 2 of Complainant's Notes on the Proposed Penalty Assessment, attached to the Administrative Complaint.

[13] Complainant's Supplemental Penalty Argument, p. 2.

violations that underlie this action for penalties. The Complainant does not suggest that Respondent had other NPDES Permit violations at this facility, but does refer to "a similar action against another permitted facility owned by the Respondent on December 12, 1990, for violations of continuous monitoring requirements for pH and Total Residual Chlorine."[14] Complainant did not consider the violations involved in the December 12, 1990 action in calculating the proposed penalty in this action. Accordingly, I find Respondent has no history of violations.

Degree of culpability: There is nothing in the record to indicate that any of the violations was intentional. The evidence indicates that lightning strikes were the cause of most of the violations, and that others were caused by equipment failure or malfunction. These events were beyond the Respondent's control and I attach no culpability to their occurence. In each instance repairs were necessary to reactivate the damaged equipment. In the absence of other evidence of culpability, lengthy delays between the damaging event and the procurement of repairs may be indicative of greater culpability and expeditious procurement may indicate relatively less culpability. Complainant's Supplemental Penalty Argument, Exhibit I and J, contain copies of Respondent's purchase orders, invoices and other documentation related to the repairs made to the damaged equipment. With two exceptions, Respondent appears to have delayed procurement for a

[14] Complainant's Penalty Argument, p. 3.

month or more after equipment damage, thus prolonging the continuing violations involved in this action. The exceptions were a Purchase Order dated April 7, 1992, one day after damage was done to the pH probe, and several documents indicating procurement activity less than a month after equipment was damaged on August 8, 1991.[15] Thus a measure of culpability may be inferred from Respondent's delays in procuring repairs and replacements for damaged monitoring equipment.

Economic benefit or savings resulting from the violations: Complainant used EPA's "BEN" computer model to calculate Respondent's economic benefit derived from the violations involved in this action. Complainant estimated the cost of installing continuous monitoring equipment more capable of resisting lightning damage to be $18,000, and calculated an economic benefit figure of $ 1,749.[16]

Such other matters as justice may require: Complainant conceded in its Notes on the Proposed Penalty Assessment that: "[t]he repair of monitoring equipment following lightning strikes was slow because of the proprietary nature of the equipment and the City's dependence on a particular vendor for repairs to that equipment." This element was taken into account by Complainant in

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[15] Some of the procurement documents are illegible and others do not appear to relate to the violations that are the subject of this action.

[16] Complainant's Notes on the Proposed Penalty Assessment, p.3; Complainant's Penalty Argument, pp. 3-4.

proposing a penalty of $20,000.[17] The relevance of the "proprietary nature of the equipment" is not explained in the record, but Respondent should not have been dependent on a single vendor, risking NPDES Permit violations and EPA enforcement action.

Deterrence is another matter that justice requires be considered. Respondent will clearly be specifically deterred from future violations by the assessment of a penalty. Other NPDES permittees will be more generally deterred from NPDES permit violations by assessment of a penalty. In particular, assessment of a penalty for the violations involved in this action will encourage both Respondent and others similarly situated to assure continuing compliance with all NPDES permit requirements, to plan for and deal expeditiously with monitoring equipment failure.

Accordingly, based upon the administrative record and the applicable law, I determine a civil penalty of $ 17,000 is appropriate in this case.

ORDER

On the basis of the administrative record and applicable law, including § 28.28(a)(2)(ii) of the Consolidated Rules, Respondent is hereby ORDERED to comply with all of the terms of this ORDER:

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[17] Complainant's Penalty Argument, p. 4.

A. Respondent is hereby assessed a civil penalty in the amount of $ 17,000 and ORDERED to pay the civil penalty as directed in this ORDER.

B. Pursuant to § 28.28(f) of the Consolidated Rules, this ORDER shall become effective 30 days following its date of issuance unless the Environmental Appeals Board suspends implementation of the ORDER pursuant to § 28.29 of the Consolidated Rules (relating to Sua Sponte review).

C. Respondent shall, within 30 days after this ORDER becomes effective, forward a cashier's check or certified check, payable to "Treasurer, United States of America," in the amount of $17,000. Respondent shall mail the check by certified mail, return receipt requested, to:

United States Environmental Protection
Agency - Region IV
P.O. Box 100142
Atlanta, GA 30384

In addition, Respondent shall mail a copy of the check, by first class mail, to:

Regional Hearing Clerk (4RHC)
United States Environmental Protection
Agency-Region IV
345 Courtland Street, N.E.
Atlanta, GA 30365

D. In the event of failure by Respondent to make payment within 30 days of the date this ORDER becomes effective, the matter may be referred to the United States Attorney for collection by appropriate action in the United States District

Court pursuant to subsection 309(g)(9) of the Clean Water Act, 33 U.S.C. § 1319(g)(9).

E. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefor begin to accrue on the civil penalty if it is not paid as directed. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 4 C.F.R. § 102.13(c). A late payment handling charge of twenty ($20) dollars will be imposed after 30 days, with an additional charge of ten ($10) dollars for each subsequent 30-day period over which an unpaid balance remains.

In addition, a penalty charge of 6 percent per year will be assessed on any portion of the debt which remains delinquent more than 90 days after payment is due. However, should assessment of the penalty charge on the debt be required, it will be assessed as of the first day payment is due under 4 C.F.R. § 102.13(e).

JUDICIAL REVIEW

Respondent has the right to judicial review of this ORDER. Under subsection 309(g)(8) of the Clean Water Act, 33 U.S.C. § 1319(g)(8), Respondent may obtain judicial review of this civil penalty assessment in the United States District Court for the District of Columbia or in the United States District Court for the Middle District of Florida by filing a notice of appeal in

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing DECISION AND ORDER OF THE REGIONAL ADMINISTRATOR in the matter of CITY OF ATLANTIC BEACH, Docket No. CWA-IV-93-520, on each of the parties listed below in the manner indicated:

Alan C. Jensen, Esquire
Jensen & Hould
708 North Third Street
Post Office Box 50457
Jacksonville Beach, Florida 32240-0457

(via Certified Mail - Return Receipt Requested)

Environmental Appeals Board
U. S. Environmental Protection Agency (Mail Code MC1103B)
401 M Street, S.W.
Washington, D. C. 20460

(via Certified Mail - Return Receipt Requested)

Mary E. Greene, Esquire
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

(via Hand-Delivery)

Mr. Benjamin Kalkstein
Presiding Officer
U. S. Environmental Protection Agency, Region III
841 Chestnut Building
Philadelphia, Pennsylvania 19107-4431

(via First Class Mail)

Date: 3/16/94

Julia P. Mooney
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365
(404) 347-1565

such court within the 30-day period beginning on the date this ORDER is issued [5 days following the date of mailing under § 28.28(e) of the Consolidated Rules] and by simultaneously sending a copy of such notice by certified mail to the Administrator and to the Attorney General.

IT IS SO ORDERED.

Date: 3/15/94

JOHN. H. HANKINSON
Regional Administrator

Prepared by: Benjamin Kalkstein, Presiding Officer.