IN RE B.J. CARNEY INDUSTRIES, INC.

CWA Appeal No. 96-2

REMAND ORDER

Decided June 9, 1997

Syllabus

Between 1982 and 1990, B.J. Carney owned and operated a nonpressure wood pole treating facility subject to 40 C.F.R. § 429.75, a pretreatment requirement promulgated pursuant to Clean Water Act § 307(b), 33 U.S.C. § 1317(b). Section 429.75 provides that nonpressure wood-preserving facilities shall not discharge process wastewater pollutants into a publicly owned treatment works (POTW). B.J. Carney's treatment tanks were situated in a depression below ground level. Pentachlorophenol (PCP) from the treatment process found its way into the soil in the depression, where it came into contact with groundwater and/or precipitation. A sump pump pumped the PCP-contaminated water away from the treatment tanks. The water eventually flowed into a POTW owned and operated by the City of Sandpoint, Idaho.

Under its NPDES permit for the POTW, Sandpoint was required to enforce the pretreatment requirements applicable to the industrial users of Sandpoint's POTW. Nevertheless, the Agency also had the authority to enforce those requirements. Further, under its NPDES permit, Sandpoint was directed to issue "industrial waste acceptance" forms, or "IWAs," to the industrial users of its POTW.

In 1985, U.S. EPA Region X informed B.J. Carney, in writing, that B.J. Carney's discharge violated § 429.75. Soon thereafter, B.J. Carney hired a consultant to evaluate methods by which B.J. Carney could achieve compliance with the pretreatment regulation. The consultant's report, prepared in 1986, indicated that the least expensive method for B.J. Carney to achieve compliance was to purchase an evaporator at a cost of $62,000 and operate it at an annual cost of $1,550. Instead of following this recommendation, B.J. Carney claims to have spent $240,000 on soil removal, general repairs, maintenance and housekeeping, and on some improvements intended to reduce but not eliminate the discharge to the POTW.

In 1987, Sandpoint issued an IWA to B.J. Carney, purporting to allow B.J. Carney to discharge lawfully the PCP-contaminated water to the Sandpoint POTW. The Region considered the IWA invalid as it contravened § 429.75, but did not tell Sandpoint the IWA was invalid until 1990. However, in 1987, after the IWA was issued, the Region again advised B.J. Carney in writing that B.J. Carney's discharge was prohibited by 40 C.F.R. § 429.75.

On many occasions between 1985 and 1990, the Region expressed its concern to Sandpoint that Sandpoint was not exercising its responsibility to enforce the pretreatment regulation that B.J. Carney was violating. In late 1989, the Region directed Sandpoint to initiate enforcement proceedings against B.J. Carney. As a result, in April 1990, Sandpoint revised B.J. Carney's IWA to allow for no discharge of process wastewater pollutants, and gave B.J. Carney thirty days to come into compliance. Just before the expiration of this deadline, B.J. Carney

closed its facility. B.J. Carney claims it spent $450,000 to $500,000 closing down its operations, most of which was for soil and equipment removal. Compliance with the pretreatment regulation occurred when B.J. Carney plugged the pipe to the POTW during closure, at a cost of "nickels and dimes." Tr. at 752.

Convinced that Sandpoint was not committed to pursuing an enforcement action against B.J. Carney, the Region filed the complaint in this matter in 1990, seeking a penalty of $125,000 for B.J. Carney's alleged violation of 40 C.F.R. § 429.75. After a four-day hearing on this matter, the presiding officer found B.J. Carney liable for discharging process wastewater pollutants into a POTW on eighteen different occasions between 1985 and 1990 in violation of Clean Water Act § 301, 33 U.S.C. § 1311, and 40 C.F.R. § 429.75. The presiding officer rejected the Region's argument, which was based upon expert testimony, that as a result of its failure to purchase and install an evaporator, B.J. Carney enjoyed an economic benefit of $167,000. Instead, the presiding officer concluded that no determination of economic benefit could be made from this record, and assessed a gravity-based penalty only, in the amount of $9,000.

Both parties appealed.

HELD: The presiding officer did not err in finding B.J. Carney liable for violating 40 C.F.R. § 429.75. That regulation prohibits the discharge of "process wastewater pollutants." As part of B.J. Carney's process, PCP came to rest in the soil in the depression around the treatment tanks, where it came into contact with precipitation and/or groundwater. The collection and removal of this PCP-contaminated water from the depression was an essential part of B.J. Carney's process; if the PCP-contaminated water remained in the depression, the treatment tanks would float, and thereby separate from the pipes that fed the PCP into the treatment tanks. Therefore, the PCP-contaminated water that was removed from the depression around the treatment tanks was "process wastewater" as that term is defined in 40 C.F.R. § 401.11(q). B.J. Carney's discharge does not fit into any exceptions to the "process wastewater" definition applicable to the timber products processing industry set forth in 40 C.F.R. § 429.11(c).

There is a strong presumption against entertaining challenges to the validity of a regulation in an administrative enforcement proceeding. The definition of "process wastewater" is sufficiently clear to give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited. Moreover, B.J. Carney was twice advised, in writing, that the Region considered B.J. Carney to be violating the regulation. Therefore, constitutional principles of due process do not prohibit finding B.J. Carney liable for violating 40 C.F.R. § 429.75.

The presiding officer did not err in rejecting B.J. Carney's claim that the Region was equitably estopped from bringing this action. B.J. Carney failed to demonstrate that the Region's conduct rises to the level of "affirmative misconduct" necessary to estop the government. There is no factual support for B.J. Carney's claim that the Region "acquiesced" in Sandpoint's gradual approach to obtaining compliance. Further, the Region's silence with respect to the IWA does not amount to "affirmative misconduct." Nor does the Region's failure to initiate an enforcement action against B.J. Carney until five years after the Region learned of the violation amount to "affirmative misconduct." Also, fatal to B.J. Carney's estoppel claim is the fact that rather than suffering a detriment, B.J. Carney benefitted from the Region's conduct in that it operated for five years without making the expenditures necessary to comply with the law.

While properly finding liability, the presiding officer erred in concluding that no economic benefit can be assessed on this record, and by injecting the statute of limitations into this case on his own initiative after the hearing had closed without giving the parties an opportunity to show how the statute of limitations impacts the economic benefit calculation. Accordingly, a remand is warranted for the limited purpose of determining how much of the economic benefit occurred within the limitations period and recalculating the penalty accordingly.

A complainant need not demonstrate the exact amount of economic benefit a violator enjoyed from a violation; a reasonable approximation will suffice. If the record supports a partial

economic benefit and the only choice is between finding a partial economic benefit or none at all, it is error to find none. If the full benefit can be reasonably approximated, such benefit should be recovered as part of the penalty assessment. The presiding officer erred in concluding that no approximation of the economic benefit could be made in this case — at least a partial benefit could be reasonably approximated on the record. However, a full economic benefit can reasonably be approximated on remand by starting with the Region's calculation of $167,000 and subtracting from it that portion of the benefit that accrued outside the five-year limitations period.

Contrary to the conclusions of the presiding officer, it was not error for the Region not to use the BEN model. The BEN model is intended for settlement purposes, and the Agency is not required to use it at a hearing.

The presiding officer erroneously concluded that, in effect, it is per se unreasonable to use a discount rate outside the limitations period. Despite the statute of limitations, the point in time at which compliance was initially required may nonetheless be an appropriate time for setting the discount rate. Here, the record contains an unrefuted, reasoned explanation for the selection of a 1984 discount rate (which was outside the limitations period), namely, expert testimony that a 1984 discount rate was used because 1984 is when a company that complied on time would have had to borrow the money to purchase the necessary pollution control equipment.

The Region calculated the economic benefit as continuing through the hearing date in 1993. The presiding officer erroneously concluded that the economic benefit calculation should have ended in 1990, when compliance was achieved through closure. A violator's economic benefit ends when the benefit is disgorged, even if that occurs well after compliance is achieved.

The Region's economic benefit calculation used a 16.0% discount rate, calculated using a weighted average cost of capital (WACC) formula. The Region's expert applied this discount rate for each of the ten years covered by the Region's calculation (1984-1993). The record in any given matter must contain a reasoned explanation and supportable rationale for the selection and use of the discount rate. In general, the propriety of the discount rate used by the complainant can always be raised as an issue by a respondent. Here, the Region's expert explained that she used a single 16.0% rate over a ten-year period because the rate represented the cost of financing pollution control equipment in 1984, and that the financing would not have been renegotiated over the useful life of the equipment. Significantly, this testimony was not refuted. The presiding officer, however, rejected the expert's rationale as "unrealistic since it assumes Carney could have secured an investment that would yield a 16.01% return over close to a ten year period. This is an unreasonable assumption, in light of the varying economic conditions during the relevant period." Even assuming economic conditions varied during this period, there is no evidence in the record supporting the presiding officer's rejection of the expert's assumption that B.J. Carney would not have renegotiated its cost of capital. Therefore, the presiding officer's conclusion rested on an erroneous assumption of fact not supported by evidence in the record.

The presiding officer stated that the economic benefit calculation should have "offset" $240,000 in compliance costs purportedly spent by B.J. Carney to reduce but not eliminate the discharge. The record is full of gaps and inconsistencies concerning exactly what sums were spent by B.J. Carney prior to 1990 and for what purpose they were spent. Because B.J. Carney did not quantify its so-called compliance costs, the presiding officer erred in concluding that had the alleged compliance costs been considered, the economic benefit of noncompliance would have been eliminated. Further, B.J. Carney's compliance efforts were factored into the penalty assessed, in the presiding officer's determination that the violations resulted in minor harm to the environment, and his decision to reduce the gravity-based penalty by 50% to reflect B.J. Carney's "good faith efforts at compliance." No further downward adjustment in the economic benefit is appropriate in this case based on any past expenditures on compliance costs.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge Stein:

By an initial decision issued on March 11, 1996, the presiding officer found B.J. Carney Industries, Inc. ("B.J. Carney") liable for discharging wastewater contaminated with pentachlorophenol from its nonpressure wood-preserving facility into the treatment works owned by the City of Sandpoint, Idaho ("City" or "Sandpoint"). The presiding officer held that this conduct violated 40 C.F.R. § 429.75, a pretreatment regulation promulgated pursuant to the Clean Water Act prohibiting the discharge of "process wastewater pollutants" into a publicly owned treatment works ("POTW"). For these violations, the presiding officer assessed a penalty of $9,000, rejecting the contention made by the complainant, U.S. EPA Region X, that B.J. Carney enjoyed an economic benefit of $167,000 as a result of its noncompliance. Instead, the presiding officer concluded that no economic benefit could be calculated from the evidence in this record. Both parties filed an appeal challenging the initial decision.[1] For the reasons that follow, we affirm the presiding officer's initial decision with respect to B.J. Carney's liability for violating the applicable pretreatment regulation. We also reverse several of the presiding officer's determinations with respect to the analysis of B.J. Carney's economic benefit of noncompliance. We are remanding the penalty assessment for the presiding officer to reopen the hearing to allow evidence and argument as to how the applicable statute of limitations affects the calculation of economic benefit, to determine the economic benefit in accordance with this opinion, and to determine an appropriate penalty based on all of the factors required to be considered under Clean Water Act section 309(g)(3), including the economic benefit of noncompliance.

I. *BACKGROUND*

A. *Regulatory*

At issue in this case is whether B.J. Carney complied with a "pretreatment standard." Pretreatment standards are intended to prevent problems that may result from the introduction of industrial wastes into POTWs, which are usually designed to treat primarily domestic, not industrial, waste. One such problem is that toxic pollutants from industrial waste may "pass through" the POTW untreated and into

[1] The Agency's Office of Enforcement and Compliance Assurance joined Region X in submitting briefs in the appeal of this matter.

navigable waters. Other potential problems include "interference," where the industrial waste interferes with the proper functioning of the POTW, and sludge contamination. *See generally* 46 Fed. Reg. 9404, 9406 (Jan. 28, 1981).

In Clean Water Act § 307(b), 33 U.S.C. § 1317(b), Congress directed the Agency to establish pretreatment standards to prevent such problems.[2] The Agency implemented this statutory provision by developing an extensive set of pretreatment standards. One kind of standard applies across the board to all industrial POTW users, and is known as a "general" or "national" pretreatment standard.[3] Another type of pretreatment standard is a "categorical" standard. These pretreatment standards are keyed to the categories of industries determined to be the most significant sources of toxic pollutants. *In re City of Yankton*, 5 E.A.D. 376, 377 n.3 (EAB 1994). The categorical pretreatment standards are intended to be as stringent as the standards that would apply if the source discharged directly into navigable waters instead of into a POTW. *Id*. All entities within a category must comply with the standard for that category, unless the discharger obtains a variance pursuant to 40 C.F.R. § 403.13 or removal credits pursuant to 40 C.F.R. § 403.7. The last type of pretreatment standard is a "local limit." *See* 40 C.F.R. § 403.5(d). Under Clean Water Act § 307(b)(4) and 40 C.F.R. § 403.4, State and/or local law may establish pretreatment requirements; however, any such requirements may not be less stringent than the federal requirements. *Id*.

The failure to comply with a pretreatment standard after its effective date is unlawful under Clean Water Act § 307(d), 33 U.S.C. § 1317(d). Although, generally speaking, the pretreatment standards are primarily enforced by POTWs,[4] the Agency also has the statutory authority to initiate administrative or civil judicial actions to enforce the pretreatment requirements. Clean Water Act §§ 309(f), (g)(1), 33 U.S.C. §§ 1319(f), (g)(1).

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[2] That section provides, in pertinent part, that "[p]retreatment standards * * * shall be established to prevent the discharge of any pollutant through treatment works * * * which are publicly owned, which pollutant interferes with, passes through, or otherwise is incompatible with such works."

[3] These standards can be found in 40 C.F.R. § 403.5, and, in general terms, prohibit the discharge of pollutants that cause "pass throughs" or "interference."

[4] *See* Clean Water Act § 309(f), 33 U.S.C. § 1319(f) (if POTW does not initiate appropriate enforcement action after notice that a pretreatment standard is being violated, the Agency may initiate such action); 40 C.F.R. § 403.8(f)(1)(ii) (a POTW that is implementing a pretreatment program must be able to require compliance with the applicable pretreatment standards).

The timber products processing industry is one industrial category for which categorical pretreatment standards have been promulgated.[5] Within this category are several subcategories, one of which is for wood preserving plants. The wood preserving segment of the timber industry, in general, conditions wood to remove its natural moisture and increase its permeability, and then impregnates the wood with preservatives. 46 Fed. Reg. 8260, 8261 (Jan. 26, 1981). This last step can by performed by a nonpressure process, which involves immersing the conditioned wood into an open tank containing the preservatives. *Id*. One of the most commonly used preservatives is pentachlorophenol, known as PCP. PCP is a toxic pollutant under the Clean Water Act. *See* 40 C.F.R. § 401.15.

In 1981, the Agency promulgated pretreatment standards for the nonpressure wood preserving industry. *See* 40 C.F.R. part 429 subpart F. These standards provide that for this industry:

> Except as provided in 40 C.F.R. § 403.7 [removal credits] and 403.13 [variance], any existing source subject to this subpart which introduces process wastewater pollutants into a publicly owned treatment works must comply with 40 C.F.R. part 403 [general pretreatment regulation] and achieve the following pretreatment standards for existing sources. *There shall be no introduction of process wastewater pollutants into publicly owned treatment works.*

40 C.F.R. § 429.75 (emphasis added). The pretreatment standard for the nonpressure wood treating industry was published in January 1981, and compliance was required in January 1984.[6]

B. *Factual*

1. *Sandpoint Pretreatment Program*

The City of Sandpoint, Idaho, operates a POTW that received discharges from several industrial users, including B.J. Carney. Section

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[5] This industry "consists of a diverse group of manufacturing plants whose primary raw material is wood and whose products range from finished lumber and other wood building products to hardboard and preserved wood." 46 Fed. Reg. 8260 (Jan. 26, 1981).

[6] *See* 40 C.F.R. § 403.6(b) ("Compliance by existing sources with categorical Pretreatment Standards shall be within 3 years of the date the Standard is effective unless a shorter compliance time is specified.").

402(b)(8) of the Clean Water Act, 33 U.S.C. § 1342(b)(8), requires that POTWs receiving wastewater from industrial sources subject to the pretreatment requirements discussed above establish a pretreatment program to ensure compliance with these standards. Accordingly, Sandpoint submitted a pretreatment program application to the Agency, which the Agency formally approved on August 30, 1984.

Because it discharges into the Pend Oreille River, the Sandpoint POTW is also subject to the NPDES requirements of Clean Water Act § 402(b).[7] Sandpoint's NPDES permit was modified shortly after its pretreatment program was approved to require implementation of that program.[8] *See* Letter from Harold E. Geren, Chief, Region X Water Permits and Compliance Branch, to Joel Petty, City of Sandpoint at 1 (Aug. 13, 1985). When the permit was reissued in September 1985, it again required implementation of Sandpoint's pretreatment program. In particular, Sandpoint's NPDES permit explicitly required Sandpoint to "[e]nforce categorical pretreatment standards," and to "[e]nforce and obtain remedies for non-compliance by any industrial users with applicable pretreatment standards and requirements." NPDES Permit No. ID-002084-2 ("NPDES Permit") Condition III.I.1.a and e. The permit also provided that whenever EPA receives information that an industrial source is violating the applicable pretreatment standard, EPA will notify Sandpoint. "Failure by [Sandpoint] to commence an appropriate enforcement action within 30 days of this notification may result in appropriate enforcement action by the EPA against the source [the industrial user] and [Sandpoint]." *Id*. at Condition III.I.3.

Under 40 C.F.R. § 403.8(f)(1)(iii), a POTW that is implementing a pretreatment program must be able to "[c]ontrol, through permit, order, or similar means, the contribution to the POTW by each Industrial User to ensure compliance with applicable Pretreatment Standards and Requirements." These "individual discharge permits" or "individual control mechanisms" must contain "[e]ffluent limits based on applicable general pretreatment standards * * *, categorical pretreatment standards, local limits, and State and local law." *Id*.

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[7] Under the Clean Water Act, discharges into waters of the United States by point sources, such as the Sandpoint POTW, must be authorized by a permit to be lawful. Clean Water Act § 301, 33 U.S.C. § 1311. The NPDES program established by Clean Water Act § 402 is the principal permitting program under the Clean Water Act.

[8] Indeed, "the development and implementation of a pretreatment program is an integral and enforceable component of [a] POTW's NPDES permit." Office of Water, Training Manual for NPDES Permit Writers at 59 (May 1987).

Presumably in light of 40 C.F.R. § 403.8(f)(1)(iii), Sandpoint's NPDES permit also required Sandpoint to issue "industrial waste acceptance" forms, or IWAs, to all industrial users of the POTW. *See* Tr. at 182 ("IWA" was a "fancy term" for the type of permit issued by Sandpoint to B.J. Carney). According to Sandpoint's NPDES permit, these IWAs "shall contain limitations, sampling protocols, compliance schedule[s] if appropriate, reporting requirements, and appropriate standard conditions." NPDES Permit at Condition III.I.1.b. An IWA issued by Sandpoint, however, could not allow a discharge prohibited by any applicable federal pretreatment standards. *See Int'l Union v. Amerace Corp., Inc.*, 740 F. Supp. 1072, 1078 (D.N.J. 1990) ("As only more stringent local monitoring and reporting requirements replace federal requirements, a POTW does not waive federal requirements by failing to include them in an indirect discharger's permit."); 55 Fed. Reg. 30,082, 30,107 (July 24, 1990) ("Industrial users must comply with all applicable pretreatment requirements under federal law, whether or not they are contained in the permit or equivalent individual control mechanism.").[9]

2. *B.J. Carney Facility and Operations*

Between 1982 and 1990, B.J. Carney operated a thermal wood pole treatment facility in Sandpoint. B.J. Carney treated western red cedar utility poles by dipping them in a solution of oil containing 5% PCP heated to 235 degrees Fahrenheit. First, the poles treated by B.J. Carney were air dried to remove the moisture in the wood. Next, the poles were placed in the treatment tank, where they were held in place. The tank was then filled with the PCP and oil solution, and the solution was heated to the desired temperature. After the wood soaked, the hot oil solution was pumped out, and cold oil was pumped into the tank. After another soaking period, the cold oil was also pumped out, and the treated poles were left in the tank until the next morning, when workers took them out to place untreated poles in the tank. Tr. at 643-647, 697-698.

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[9] An individual discharge permit or control mechanism, such as the IWA mentioned in Sandpoint's NPDES permit, should not be confused with a "local limit" discussed above in Section I.A. A local limit is an effluent limitation, and may be contained in an individual discharge permit, along with other requirements, such as sampling and reporting requirements. *See* 40 C.F.R. § 403.5(d). If no local limits have been promulgated, an individual discharge permit may contain only those limitations implementing the applicable federal pretreatment standards. There is no indication in this case that any local limits are applicable.

Also, as discussed above, under the Clean Water Act and its implementing regulations, any local requirements less stringent than the applicable federal standards do not relieve an industrial POTW user of its obligation to comply with the federal standard.

B.J. Carney did not directly use water in the process described above. B.J. Carney strived to keep all water out of and away from the treatment tanks, for example, by drying untreated poles and by removing snow or ice from them, because even a little bit of water could have created sludge in the treatment tanks, or caused the treatment tanks to boil over. Tr. at 641, 645.

B.J. Carney used two kinds of treatment tanks — a horizontal tank to treat the entire length of the poles, and a vertical or "butt" tank to treat just the ends of the poles. The horizontal tank, the larger of the two, was approximately 100 feet long, 10 feet wide and 8 feet deep. Both tanks were built only a few feet apart and partially underground for structural support and insulation. A depression surrounded the treatment tanks, the bottom of which was occasionally below the ground water level. Thus, migrating ground water occasionally collected in the depression, as did precipitation. Wastewater Discharge Study for B.J. Carney Industries, Inc., prepared by CH2M Hill ("CH2M Hill Report") at 2 (June 1986). While in the depression, the water was exposed to and contaminated by the oil/PCP solution, which found its way into the depression as a result of spills, boil overs, etc. CH2M Hill Report at 2; Letter from Leslie R. Weatherhead, Counsel to B.J. Carney, to Robie Russell, Regional Administrator at 2 (Mar. 23, 1987); Tr. at 647.

Too much accumulation of the water in the depression could have caused the treatment tanks to float, and thus separate from the lines that fed the oil solutions to the tanks. Therefore, in order to keep the tanks operable, it was necessary to remove the water that accumulated in the depression around the tanks on a continuous basis. B.J. Carney removed this water by causing it to flow into a sump pump located in an equipment vault at the end of a treatment tank. The facility could not operate if the sump pump was not operating. Tr. at 738-739. The sump pump automatically turned on whenever there was a few inches of water in it. Tr. at 651. During a 257-day period between September 17, 1985, and May 31, 1986, the sump pump operated every day but one. CH2M Hill Report, Table 3-1. During that same period, the sump pump removed a daily average of 150 gallons of wastewater. *Id*. Based on these data, B.J. Carney's estimated average yearly wastewater flow was more than 50,000 gallons. CH2M Hill Report at 3-9.

From the sump pump, the water went to a four-compartment oil/water separator. The water effluent from the separator, containing PCP that had been separated from the oil, thereafter flowed into a sewer line at the facility and from there to the Sandpoint POTW.

CH2M Hill Report at 2; Letter from Leslie R. Weatherhead, Counsel to B.J. Carney, to Robie Russell, Regional Administrator at 2 (Mar. 23, 1987).

Between 1987 and 1990, B.J. Carney operated profitably. Tr. at 771. Between 1985 and 1990, the facility annually produced approximately $1.5 million in sales. *Id*.

3. *Enforcement Action History*

As explained above, the pretreatment regulation prohibiting process wastewater discharges to POTWs from nonpressure treatment wood preserving facilities became effective in January 1984. In the summer of 1985, based upon reports from the State of Idaho that B.J. Carney's wastewater contained high levels of PCP, the Region did two things. It advised Sandpoint, in writing, of its concern that B.J. Carney was violating the applicable pretreatment regulation, and reminded Sandpoint of its responsibility to enforce that regulation. Letter from Harold E. Geren, Chief, Region X Water Permits and Compliance Branch, to Joel Petty, City of Sandpoint (Aug. 13, 1985). The Region also visited B.J. Carney's facility, and during this visit told B.J. Carney of the Region's concern that B.J. Carney was violating the pretreatment standard. Tr. at 165.

Following that visit, B.J. Carney, by letter, requested a formal determination from the Region as to whether the pretreatment regulation prohibited B.J. Carney's discharge to the Sandpoint POTW. In this request, B.J. Carney acknowledged that its facility is "clearly" a nonpressure wood preserving facility of the type to which the regulation applies. Nevertheless, B.J. Carney explained, the facility neither uses water nor introduces water into its treatment process. Hence, B.J. Carney reasoned, its facility cannot produce "process wastewater." B.J. Carney noted that the source of the PCP-contaminated water was groundwater and/or precipitation, rather than its wood treatment process. Further, B.J. Carney claimed that such water is specifically excluded from the regulatory definition of process wastewater under 40 C.F.R. § 429.11, which excludes "material storage yard run off" from the definition of "process wastewater" as it applies to the timber products processing industry. Letter from James B. Comerford, President, B.J. Carney, to Robert R. Robicha[u]d, Regional Pretreatment Coordinator (Sept. 6, 1985).

The Region responded to B.J. Carney's request on November 6, 1985, clearly informing B.J. Carney that its discharge is prohibited under 40 C.F.R. § 429.75. Letter from Robert S. Burd, Director, Region

X Water Division, to James B. Comerford, President, B.J. Carney at 2 (Nov. 6, 1985). The Region stated that the standard prohibits B.J. Carney's discharge even though B.J. Carney's process does not use water directly. Further, the Region explained that the regulatory exclusion for "material storage yard runoff" does not apply to B.J. Carney's wastewater, which was generated in the vicinity of the treatment tanks, not from any part of the facility designated for material storage. According to the Region, the "Agency had no intention of excluding wastes that were generated in the vicinity of the treatment tanks or which resulted from the treatment process." Noting the regulation's effective date of January 1984, the Region advised B.J. Carney that "[s]ince the facility has been discharging beyond the compliance date, it is considered in violation of the pretreatment standards." The Region further stated that the Region is "required by the Clean Water Act to pursue appropriate enforcement actions against non-complying facilities with pretreatment standards." Because Sandpoint had an approved pretreatment program, and the obligation to enforce that program was contained in its NPDES permit, the Region stated that it would defer to Sandpoint to initiate enforcement, and that it would be coordinating with Sandpoint to ensure that appropriate enforcement action followed.

Around the same time, and perhaps in response to the Region's letter, B.J. Carney employed CH2M Hill, a consulting firm, to prepare a report on the methods available to B.J. Carney to achieve compliance with the pretreatment requirements. CH2M Hill Report at 1-3.

Meanwhile, on September 13, 1985, while B.J. Carney was awaiting the Region's response to B.J. Carney's request earlier that month for a determination on the "process wastewater" issue, Sandpoint issued a notice of violation ("NOV") to B.J. Carney. The NOV alleged that B.J. Carney was discharging process wastewater containing PCP into the Sandpoint POTW in violation of the pretreatment regulation. The NOV ordered B.J. Carney to cease this discharge within thirty days (*i.e.*, by October 13, 1985) unless the EPA and the State gave B.J. Carney a reasonable extension of time, or a compliance schedule, within which to discontinue the discharge. NOV at 2. B.J. Carney decided to try to obtain a schedule extending the deadline for compliance. In the meantime, according to B.J. Carney, B.J. Carney implemented a program of improved housekeeping for the equipment vault, and in particular, the oil/water separator, to reduce the amount of PCP in the wastewater discharge. CH2M Hill Report at 1-2; Tr. at 713-716; Letter from Leslie R. Weatherhead, Counsel to B.J. Carney, to Joel Petty, City of Sandpoint at 1-2 (Mar. 23, 1987).

After a meeting of representatives from B.J. Carney, CH2M Hill, Sandpoint and the State, Sandpoint issued a compliance schedule to B.J. Carney on November 22, 1985. Letter from Joel Petty, City of Sandpoint, to James B. Comerford, President, B.J. Carney at 1 (Nov. 22, 1985). The schedule gave B.J. Carney slightly less than one year from its issuance[10] to achieve compliance, directing that by October 15, 1986, the "violating discharge will be removed from B.J. Carney sewer service." *Id*. at 2.[11]

Six months after the compliance schedule was issued, the Region sent to Sandpoint an audit report expressing concern about the "lack of compliance/monitoring and enforcement of pretreatment standards and requirements on industrial facilities, particularly B.J. Carney." Letter from Robert S. Burd, Director, Region X Water Division, to Joel Petty, City of Sandpoint at 1 (May 21, 1986). The Region directed Sandpoint to "place a high priority on issuing an Industrial Waste Acceptance (IWA) form to B.J. Carney with applicable pretreatment standards and requirements. A draft should be submitted to the Region for review by June 30, 1986." *Id*. at 2.

On June 20, 1986, B.J. Carney's consultant, CH2M Hill, issued its report.[12] The report clearly stated that compliance with the NOV, and the pretreatment regulation, required that the discharge of PCP-contaminated wastewater to the POTW be eliminated.[13] The report evaluated two methods of eliminating the PCP discharge. One method, identified in the report as alternative 3, would have allowed B.J. Carney to use the existing treatment tanks but to upgrade some of its equipment and install a wastewater evaporator. The other method of eliminating the PCP discharge was to replace the treatment tanks and equipment vault with a totally above-ground facility. CH2M Hill Report at 5-11. The report estimated the cost of this method to be significantly greater than the cost of installing an evaporator. Despite its

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[10] Thus, B.J. Carney was given until almost three years beyond the January 1984 compliance date to achieve compliance with the applicable pretreatment regulation.

[11] The Regional Pretreatment Coordinator saw the compliance schedule right after Sandpoint issued it, and believed it to be reasonable. Tr. at 177.

[12] Under the compliance schedule, B.J. Carney was required to submit to Sandpoint by June 22, 1986, a final report recommending the method proposed for eliminating the discharge.

[13] CH2M Hill Report at 1-2 ("this type of plant is allowed no wastewater discharge"), 2-1 ("Discharge elimination is the only way to meet the strict requirements of the [NOV]."), 4-4 ("The only means of meeting the strict requirements of the [NOV] and compliance schedule is to eliminate any wastewater discharge to the Sandpoint POTW.").

clear acknowledgment that the NOV and the pretreatment regulation required the PCP discharge to be eliminated, the CH2M Hill report nevertheless also evaluated two methods for reducing, but not eliminating, the discharge.[14]

The CH2M Hill report was sent to the Regional Pretreatment Coordinator, who objected to the report insofar as it recommended methods to reduce, but not eliminate, the discharge:

> Based on a review of CH2M Hill's study of the B.J. Carney facility, I cannot support the recommendation of discharging treated wastewater to Sandpoint's sewer system. EPA officially notified B.J. Carney that it must comply with the *no discharge pretreatment standards*. The company was aware of this prior to initiation of this study. * * *
>
> We continue to be concerned about the continued discharge of wastewater into the city sewers. The city needs to consider stepped up enforcement to remedy this situation.

Memorandum from Robert R. Robichaud, Regional Pretreatment Coordinator, to Joel Petty, City of Sandpoint (July 11, 1986) (emphasis supplied).

Representatives from B.J. Carney, CH2M Hill and Sandpoint met to discuss the report. As a result of those discussions, Sandpoint revised B.J. Carney's compliance schedule on August 20, 1986. One of the reasons for revising the schedule was "to allow B.J. Carney an ample opportunity to defend their position that this water is not process water per E.P.A. guidelines." Letter from Joel Petty, City of Sandpoint, to James B. Comerford, President, B.J. Carney at 1 (Aug. 20, 1986). Therefore, under the revised schedule, B.J. Carney was

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[14] The first of these two methods, identified in alternative 1 of the report, would have allowed continued use of the existing treatment tanks, and required the installation of a new wastewater surge/skim tank, a new oil/water separator and cartridge filter, and a new activated carbon filtration system. The other method, identified as alternative 2, differs only from the first in that instead of requiring an activated carbon filtration system, it would also require wastewater acidification and oil extraction, and a new wastewater neutralization tank. CH2M Hill Report at 2-2. The important difference between the two methods for *reducing* the discharge and alternative 3 (the least expensive method for *eliminating* the discharge) is that alternative 3 would enable B.J. Carney to comply with the no discharge requirement for process wastewater pollutants, whereas the first two alternatives would not.

required to "'actively' pursue the clarification of the process water definition with E.P.A. staff." *Id*. We note that the revised schedule contained this requirement despite the fact that approximately nine months before (in November 1985) the Region had specifically advised B.J. Carney that it was discharging process wastewater pollutants in violation of the pretreatment regulation. The revised schedule did not change the October 15, 1986 deadline for eliminating the discharge of PCP-contaminated wastewater to the Sandpoint POTW.

Throughout this time, the Region continued to be concerned about Sandpoint's implementation of the pretreatment program, particularly as it applied to B.J. Carney's facility, and on September 30, 1986, the Region issued a compliance order to Sandpoint. Sandpoint was specifically ordered to provide a status report regarding B.J. Carney's record of compliance with the applicable pretreatment regulation. In response, Sandpoint reported that B.J. Carney was making progress on its compliance schedule, albeit at a pace slower than expected. Letter from Joel Petty, City of Sandpoint, to Robie Russell, Regional Administrator at 1 (Oct. 9, 1986).

On January 9, 1987, Sandpoint issued an IWA to B.J. Carney[15] that, directly contrary to the pretreatment regulation, purported to allow B.J. Carney to discharge PCP-contaminated wastewater into the Sandpoint POTW indefinitely.[16] The record contains no indication that a draft of the IWA was submitted to the Region before it was issued to B.J. Carney, even though the Region had requested such a process.[17] However, almost immediately after the IWA was issued, an EPA inspector took a copy of the IWA back to the Region for review by the Regional Pretreatment Coordinator. Tr. at 212, 408. The Regional Pretreatment Coordinator reviewed the IWA in March 1987, and determined that it was invalid because it allowed B.J. Carney to discharge process wastewater pollutants, namely PCP, to a POTW in violation of the pretreatment requirements. Tr. at 211-213. The

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[15] This was more than six months after the Region had directed Sandpoint to place a "high priority" on issuing an IWA with "applicable pretreatment standards and requirements" to B.J. Carney. *See* Letter from Robert S. Burd, Director, Region X Water Division, to Joel Petty, City of Sandpoint at 2 (May 21, 1986).

[16] Specifically, the IWA allowed such discharges not to exceed 50 mg/l per day, and required such discharges to be monitored monthly.

[17] *See* Letter from Robert S. Burd, Director, Region X Water Division, to Joel Petty, City of Sandpoint at 2 (May 21, 1986) (In directing Sandpoint to place a high priority on issuing an IWA to B.J. Carney, the Region stated that "[a] draft should be submitted to the Region for review by June 30, 1986.").

Regional Pretreatment Coordinator did not tell Sandpoint he thought the IWA was invalid. Tr. at 211-213.[18] With respect to the IWA issued in 1987, the Region appears to have remained silent until 1990, when the Region clearly informed Sandpoint that the IWA was invalid and therefore could not have been approved:

> The [IWA] issued to the company by the city on January 9, 1987, allowing the company to discharge [PCP] into the city's POTW, was never approved by the EPA. Furthermore, because of the prohibition on discharges of process wastewater, EPA could not approve a permit which allows a discharge of process wastewater from B.J. Carney to the POTW.

Letter from Harold E. Geren, Chief, Region X Water Permits and Compliance Branch, to Ronald Chaney, Mayor of Sandpoint at 2 (Apr. 30, 1990).

Soon after the IWA was issued, B.J. Carney, through counsel, again wrote to the Region setting forth in detail B.J. Carney's position that the pretreatment regulation did not prohibit B.J. Carney's discharge to the Sandpoint POTW.[19] Letter from Leslie R. Weatherhead, Counsel to B.J. Carney, to Robie Russell, Regional Administrator (Mar. 23, 1987). The letter echoed B.J. Carney's previous correspondence to the Region by explaining that no water is directly used in or produced as a by-product from the wood treatment process utilized by B.J. Carney. Further, the letter repeated the legal argument that the regu-

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[18] The Regional Pretreatment Coordinator attributed his decision in this respect to the fact that Sandpoint, at that point in time, was subject to an enforcement action (the compliance order of September 3, 1986). Because of the pending enforcement action against Sandpoint, the Regional Pretreatment Coordinator believed that someone who worked in the part of the Region responsible for enforcing the pretreatment regulations (which he did not) should inform Sandpoint about the Region's view that the IWA was invalid. Therefore, the Regional Pretreatment Coordinator advised an inspector, who worked in the enforcement program, of his assessment of the IWA, Tr. at 211-213, *see also* Tr. at 372-373, and assumed that the inspector (or another representative of the enforcement component of the Region) would inform Sandpoint of the IWA's invalidity. The inspector, however, also did not tell Sandpoint that the IWA was invalid. Tr. at 372-373.

[19] B.J. Carney had advised Sandpoint at the time the revised compliance schedule was issued in August 1986, that it intended to seek from the Region a "clarification" that the pretreatment regulation does not apply to its discharge. *See* Letter from Joel Petty, City of Sandpoint, to James B. Comerford, President, B.J. Carney at 3 (Aug. 20, 1986). Almost six months after the revised compliance schedule was issued, Sandpoint asked B.J. Carney to follow up on this stated intention. Letter from Joel Petty, City of Sandpoint, to James B. Comerford, President, B.J. Carney at 1 (Jan. 26, 1987).

lations were never intended to apply to contaminated groundwater or surface water runoff, as evidenced by the regulation excluding "material storage yard runoff" from the definition of "process wastewater."

The Region responded to the letter from B.J. Carney's counsel on September 4, 1987, again rejecting B.J. Carney's interpretation of the pretreatment regulation, and emphasizing that:

> EPA notified your client in a letter dated November 6, 1985, that the categorical pretreatment standards for the non-pressure subcategory applied to its discharge. These regulations allow for no discharge of process wastewater pollutants.
>
> We have re-examined the issue in light of your letter and continue to maintain our previous position[.]

Letter from Robert S. Burd, Director, Region X Water Division, to Leslie R. Weatherhead, Counsel to B.J. Carney at 1 (Sept. 4, 1987). In sum, the Region stated, "we believe the applicable regulations explicitly cover discharges emanating from B.J. Carney." *Id*. at 2. B.J. Carney concedes that the Region unambiguously stated that the pretreatment regulation prohibited B.J. Carney's discharge. Tr. at 705. Nevertheless, B.J. Carney transmitted the Region's response to Sandpoint with a cover letter stating that B.J. Carney "continue[s] to believe that their interpretation of the regulation is incorrect." Letter from James B. Comerford, President, B.J. Carney, to Joel Petty, City of Sandpoint (Sept. 25, 1987). Moreover, because it disagreed with the Region's interpretation of the regulation, B.J. Carney advised Sandpoint that "it's our intention to go with the status quo," in other words, to continue discharging PCP-contaminated wastewater into Sandpoint's POTW. *Id*.

The Region's report of its 1989 audit[20] of Sandpoint's pretreatment program cited the "continued non-compliance of one of the city's industrial users, B.J. Carney Industries, Inc." Letter from Harold E.

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[20] Between late September 1987 and late 1989, little activity of note occurred. It appears Sandpoint may not have been fully satisfied with B.J. Carney's performance under the IWA, as in late 1987, Sandpoint proposed terminating B.J. Carney's POTW service, and had even scheduled a show cause hearing. *See* Letter from Joel Petty, City of Sandpoint, to Robert S. Burd, Director, Region X Water Division (Nov. 4, 1987). The hearing was postponed, and not rescheduled, for reasons not entirely clear on this record. Apparently, during this time, there was some exploration by EPA of whether the facility would also be subject to enforcement actions under other environmental statutes.

Geren, Chief, Region X Water Permits and Compliance Branch, to Ronald Chaney, Mayor of Sandpoint at 1 (Mar. 22, 1990). The Region emphasized that "[o]n September 4, 1987, EPA notified the company that it must comply with EPA's pretreatment standards." *Id*. Accordingly, the Region directed Sandpoint to initiate enforcement procedures, and more specifically, to submit to the Region an enforcement strategy describing the actions Sandpoint proposed to take. The Region warned Sandpoint that its failure to initiate appropriate enforcement action might result in EPA's initiation of enforcement action against Sandpoint and B.J. Carney.

Sandpoint promptly responded to the Region's letter. Sandpoint proposed a three-part enforcement strategy: the issuance to B.J. Carney of a revised IWA allowing no discharge of PCP, the issuance of a notice of violation should B.J. Carney not comply with the revised IWA, and the scheduling of a show cause hearing if the parties were unable to resolve their differences with respect to the notice of violation. Letter from Joel Petty, City of Sandpoint, to Harold E. Geren, Chief, Region X Water Permits and Compliance Branch at 4 (Apr. 4, 1990). Sandpoint, however, also questioned whether B.J. Carney was in violation of the law, as it was discharging pursuant to an IWA. *Id*. at 2. The Region approved Sandpoint's enforcement strategy, provided it was initiated within thirty days of Sandpoint's receipt of the Region's approval, and rejected Sandpoint's claim that no violation had occurred. Letter from Harold E. Geren, Chief, Region X Water Permits and Compliance Branch, to Ronald Chaney, Mayor of Sandpoint (Apr. 30, 1990).

Sandpoint issued a revised IWA to B.J. Carney on May 29, 1990. The revised IWA allowed no discharge of PCP to the Sandpoint POTW. The notification of the revised IWA indicated that it was being issued "pursuant to a directive from the United States Environmental Protection Agency." Letter from Ronald Chaney, Mayor of Sandpoint, to James B. Comerford, President, B.J. Carney (May 29, 1990). B.J. Carney was allowed thirty days to come into compliance with this revised IWA. *Id*. Just before this deadline, B.J. Carney asked Sandpoint to reconsider its decision to issue the revised IWA, which B.J. Carney considered to be based upon EPA's erroneous interpretation of its regulations. Letter from James B. Comerford, President, B.J. Carney, to Ronald Chaney, Mayor of Sandpoint (June 27, 1990).

On July 16, 1990, the B.J. Carney facility in Sandpoint closed its operations. Tr. at 669. On the next day, Sandpoint submitted to the Region for its review a proposed notice of violation citing B.J. Carney for failing to comply with the revised IWA. Letter from Ronald Chaney,

Mayor of Sandpoint, to Harold E. Geren, Chief, Region X Water Permits and Compliance Branch (July 17, 1990). In addition, Sandpoint asked the Region to reconsider its directive to pursue appropriate enforcement action against B.J. Carney, noting that the dispute is "one of interpretation of the regulations." *Id*.

Convinced at this point that Sandpoint was not committed to pursuing an enforcement action against B.J. Carney, *see* Tr. at 362, Region X issued the complaint in this matter on September 27, 1990, and amended it on October 12, 1990. As amended, the complaint alleged that B.J. Carney violated Clean Water Act § 301(a), 33 U.S.C. § 1311(a), by discharging process wastewater pollutants, namely PCP, to the Sandpoint POTW from at least February 1986 until January 1990 contrary to 40 C.F.R. § 429.75, which prohibits the introduction of process wastewater pollutants from a nonpressure wood treatment facility into a POTW. The complaint sought a penalty of $125,000 for these violations. A hearing on the matter was held on October 19-22, 1993, during which 833 pages of testimony were produced and 48 exhibits were introduced into evidence.

4. *Initial Decision*

On March 11, 1996, the presiding officer, Administrative Law Judge Daniel M. Head, issued an initial decision in this matter finding B.J. Carney liable for eighteen discharges of process wastewater containing PCP to the Sandpoint POTW in violation of Clean Water Act § 301(a) and 40 C.F.R. § 429.75. For these violations, the presiding officer assessed a penalty of $9,000, rather than the $125,000 sought by the Region.

The presiding officer rejected B.J. Carney's claim that the pretreatment regulation, 40 C.F.R. § 429.75, did not prohibit B.J. Carney's discharge. In essence, the presiding officer concluded that the broad regulatory definition of "process wastewater" encompassed B.J. Carney's discharge, which was not included in the "material storage yard runoff" exception to that definition. Moreover, the presiding officer found that as a matter of fact, the removal of this wastewater from the depression around the treatment tanks was an essential part of B.J. Carney's process. Initial Decision at 5, 12.

The presiding officer also rejected B.J. Carney's claim that the Region should be equitably estopped from pursuing this enforcement action based upon the Region's purported history of acquiescing to Sandpoint's "policy of gradualism" with respect to eliminating the discharge. The presiding officer found that the Region did not acquiesce

to Sandpoint's enforcement approaches, noting that on two occasions the Region directly informed B.J. Carney that its facility was discharging to the Sandpoint POTW in violation of the pretreatment regulation. Moreover, the presiding officer found that B.J. Carney failed to suffer a detriment adequate to sustain an estoppel claim.

The presiding officer, however, rejected the Region's contention that a $125,000 penalty was appropriate for these violations. First, the presiding officer explained that the Region's proposed penalty was based upon a broad assertion in the complaint that B.J. Carney violated the pretreatment regulation between February 1986 and July 1990, while the evidence only supported a finding that B.J. Carney violated the regulation on eighteen specific dates during that period.[21] Next, the presiding officer concluded that these eighteen violations were minor in nature, because the evidence demonstrated that the PCP introduced by B.J. Carney to the Sandpoint POTW had only a minimal effect on the environment.[22] Accordingly, the presiding officer assessed a $1,000 penalty for each of the eighteen violations. The presiding officer subsequently reduced this $18,000 penalty by 50%, to $9,000, under the statutory directive to consider "other matters as justice may require" when assessing a penalty,[23] in light of "the two conflicting regulatory approaches [of the Region and Sandpoint], the extended delay in bringing this Federal enforcement proceeding, and Carney's good faith efforts at compliance."[24] Initial Decision at 33. The presiding officer rejected the Region's contention that B.J. Carney enjoyed an economic benefit of $167,000 as a result of its noncompliance, and instead concluded that no economic benefit could be calculated based upon the evidence in the record.

Both parties filed appeals from the initial decision. B.J. Carney appealed the presiding officer's conclusion that B.J. Carney violated 40 C.F.R. § 429.75, while the Region appealed the presiding officer's conclusion that the economic benefit of noncompliance could not be determined on this record. Oral argument on the latter issue was held before this Board on September 26, 1996, and all of the issues were extensively briefed.

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[21] The number and date of the violations found by the presiding officer has not been raised by either party as an issue in this appeal.

[22] Again, this finding has not been challenged by either party in this appeal.

[23] Clean Water Act § 309(g)(3), 33 U.S.C. § 1319(g)(3).

[24] This aspect of the penalty calculation has not been challenged by either party in this appeal.

II. *ANALYSIS*

A. *Liability*

1. *Discharge of Process Wastewater*

B.J. Carney concedes that its facility was subject to the pretreatment standards for the nonpressure wood preserving industry contained in 40 C.F.R. § 429.75.[25] That regulation prohibits the introduction of "process wastewater pollutants" into a POTW. A "process wastewater pollutant" is a pollutant present in process wastewater. 40 C.F.R. § 401.11(r). PCP is a toxic pollutant under § 307(a)(1) of the Clean Water Act, 40 C.F.R. § 401.15, and there is no dispute in this case as to whether PCP is a "pollutant" for the purposes of the phrase "process wastewater pollutants." The sole issue here is whether that pollutant was contained in "process wastewater," as the Region contends, or in non-process wastewater, as B.J. Carney contends.

The term "process wastewater" is defined in the definition section of 40 C.F.R. part 400 as "any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, by-product, or waste product." 40 C.F.R. § 401.11(q). According to B.J. Carney, in order for the wastewater at issue to be "process wastewater," the water must have come into contact with the PCP "during manufacturing or processing." Respondent's Appellate Brief ("B.J. Carney Brief") at 22-24. B.J. Carney argues that the regulation "requires both a temporal and physical presence of water and the pollutant in the actual manufacturing process." B.J. Carney Brief at 23. B.J. Carney further contends that "[t]he phrase 'during manufacturing or processing' applies to water coming into contact with the product or waste product in the *course* of the *process* not merely excess groundwater discharged from a plant during the time processing may be occurring." B.J. Carney Brief at 28 (emphasis supplied). Because its treatment process did not directly employ or produce water, B.J. Carney contends that it did not discharge "process wastewater."

We are not persuaded by B.J. Carney's arguments. In our view, B.J. Carney has interpreted the regulatory definition too narrowly and contrary to the facts of this case. B.J. Carney argues that the phrase "dur-

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[25] Letter from James B. Comerford, President, B.J. Carney, to Robert Robicha[u]d, Regional Pretreatment Coordinator at 2 (Sept. 6, 1985) ("The wood preserving plant in question is clearly a Subpart F - non-pressure subcategory. As such, the pretreatment standards do not allow the introduction of 'process wastewater' pollutants into [a] P.O.T.W.").

ing manufacturing or processing" requires that the contact between the water and the PCP had to occur in the actual tanks used to treat the wood poles. This contention has no foundation in the record, which to us clearly demonstrates that as part of B.J. Carney's "process," PCP came to rest in the soil around the treatment tanks and was collected and removed by pumping the groundwater to the POTW.

PCP was used as a raw material in B.J. Carney's log treating process, and through spills of that raw material, or boilovers from the treatment tanks, PCP found its way into the soil around the treatment tanks. B.J. Carney admitted that occasional spills and/or boilovers occurred at the facility. Tr. at 661. In addition, PCP could have found its way into the soil by dripping off the logs as they were removed from the treatment tanks.[26] There is no doubt that as part of B.J. Carney's process, there were instances where PCP escaped into the soil, either as a raw material or a waste product. Once in the soil, the PCP contacted, and thereby contaminated, the groundwater and precipitation that also came to rest there.

Moreover, B.J. Carney's process required that this PCP-contaminated groundwater be collected and removed. Throughout this case, B.J. Carney has emphasized that its process depended upon the removal of the groundwater and precipitation in the depression around the treatment tanks. As part of its operations, B.J. Carney caused the PCP-contaminated groundwater and/or precipitation to flow into the equipment vault where a sump pump forwarded it to a separator and then to the POTW. As early as 1985, B.J. Carney informed the Region that this water "*must* be pumped off to avoid what otherwise would be a *disastrous* floating of the treat[ment] tank and the breakage of [the] feed lines that contain [the PCP] solution."[27] Later, in 1987, B.J. Carney's counsel stated that "[t]he depressions *must* be dewatered as ground water accumulates to prevent the treatment tanks from floating. Permitting the treatment tanks to float would result in damage to the treatment facilities and a serious risk of rupture of pipes and spillage of process solution."[28] Indeed, at the hearing on this matter the president of B.J. Carney testified that he *had* to

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[26] Indeed, one reason B.J. Carney closed the facility was concern about possible regulations requiring drip pads to catch such drips. Tr. at 748.

[27] Letter from James B. Comerford, President, B.J. Carney, to Robert Robicha[u]d, Regional Pretreatment Coordinator (Sept. 6, 1985) (emphasis added).

[28] Letter from Leslie R. Weatherhead, Counsel to B.J. Carney, to Robie Russell, Regional Administrator at 2 (Mar. 23, 1987) (emphasis added).

operate the sump pump in order to operate the facility, thus removing the water from the depression and eliminating the risk that the treatment tanks would float and detach from their feed lines. Tr. at 738-739. To keep the facility operational, the sump pump operated practically daily. On 256 days of a 257-day test period, the sump pump pumped a daily average of 150 gallons of wastewater out of the facility. CH2M Hill Report at Table 3-1.

In light of these admissions and facts, B.J. Carney's argument that the collection and removal of this wastewater is not an integral part of its "process" is simply not credible. Instead, B.J. Carney has construed the term "during manufacturing or processing" too narrowly, and contrary to the plain facts of its own operation or "process." The facts make clear that the wastewater ultimately discharged by B.J. Carney came into contact with PCP that came to rest in the soil during, and as a part of, B.J. Carney's process, and that the collection and removal of the contaminated wastewater was an integral part of B.J. Carney's process. On these facts, we conclude that B.J. Carney's wastewater was "process wastewater" as defined by 40 C.F.R. § 401.11(q).[29]

The regulatory history of the term "process wastewater" supports our conclusion. When proposing exceptions to the "process wastewater" definition, the Agency drew a distinction between material storage yard runoff, which is not to be considered "process wastewater," and precipitation in the immediate vicinity of storage tanks, which is. *See* 44 Fed. Reg. 62,810, 62,831 (Oct. 31, 1979). The Agency clearly stated that "precipitation on the immediate area of the retort is included in the definition of process wastewater." *Id*. at 62,831.[30] Further, the Agency stated that "rainwater falling in the immediate vicinity of the treating area" is included in that definition. *Id*. at 62,834. Plainly, then, the determination that B.J. Carney discharged "process wastewater" is supported by both the letter and the regulatory history of the applicable regulations.[31]

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[29] The presiding officer concluded that the facts also demonstrate that the PCP-contaminated wastewater discharged by B.J. Carney "result[ed] from the * * * use of any raw material [PCP]," and is thus "process wastewater" on that basis as well. Initial Decision at 12.

[30] While the discussion of the proposed regulation mentions "retorts," vessels used in the pressure treatment method of preserving wood, the discussion was in the context of explaining §§ 401.11(q) (definition of "process wastewater") and 429.11(c) (exclusions for the "process wastewater" definition for the timber products point source category), which apply to non-pressure methods as well. We can discern no reason why the two should be treated differently here.

[31] To support its argument, B.J. Carney relies on a 1974 document developed for the purpose of promulgating effluent guidelines for the timber products processing industry. *See*

Continued

Lastly, despite B.J. Carney's arguments, the wastewater it generated does not fit within the narrowly tailored exclusion to § 401.11(q) applicable to the timber products processing industrial category. For the timber products processing industry, including the nonpressure wood treatment subcategory, "[t]he term 'process wastewater' specifically excludes noncontact cooling water, material storage yard runoff (either raw material or processed wood storage), and boiler blowdown."[32] 40 C.F.R. § 429.11(c). However, there is no specific exemption from the "process wastewater" definition for precipitation or groundwater in the immediate vicinity of the treatment tanks, leading one to conclude that had the Agency wanted such an exemption, it would have included one in § 429.11(c). Because § 429.11(c) does not specifically exempt groundwater and precipitation in the vicinity of the treatment tanks from the definition of "process wastewater," it must be included in that definition, if it otherwise fits within the definition of "process wastewater."

Accordingly, for the reasons set forth above, we conclude that the presiding officer did not err when he concluded that B.J. Carney's discharge was "process wastewater" for the purpose of 40 C.F.R. § 429.75, which prohibited B.J. Carney from discharging process wastewater pollutants into the Sandpoint POTW.

2. *Due Process*

Prior to the hearing in this matter, the presiding officer issued an order disposing of the Region's motion to strike the affirmative

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"Development Document for Effluent Limitation Guidelines and New Source Performance Standards for the Plywood, Hardboard, and Wood Preserving Segment of the Timber Products Processing Point Source Category," (Apr. 1974) ("Development Document"). In particular, B.J. Carney relies upon one part of one sentence in this 300-page document, which states that "there is no process waste water generated in nonpressure processes" for treating wood. Development Document at 275. This phrase, however, does not persuade us to rule differently in this matter. An isolated phrase in a lengthy development document is insufficient to overcome the plain language embodied in the subsequently promulgated regulation, which prohibits nonpressure wood treatment facilities from introducing "process wastewater pollutants" into POTWs. 40 C.F.R. § 429.75. Obviously, when it adopted the regulation, the Agency was of the view that nonpressure wood treatment facilities could generate process wastewater. The clear language of the regulation itself, as well as the facts in this case, refute any contrary suggestion that can be drawn from the isolated portion of the document upon which B.J. Carney relies.

[32] B.J. Carney has never contended that the wastewater at issue came from the portions of its facility used to store treated and untreated wood. Thus, B.J. Carney has not and cannot claim that the wastewater in question is excluded as material storage yard runoff. Rather, it has argued that the wastewater at issue is analogous to (but not the same as) material storage yard runoff. For the reasons set forth in the text above, we reject this view.

defenses raised in B.J. Carney's answer.[33] B.J. Carney had raised as an affirmative defense the argument that § 429.75 is too vague to provide sufficient notice of the conduct it prohibits, and thus violates the due process provisions of the United States Constitution. The presiding officer rejected this argument, explaining that even if the constitutional claim can be addressed in these proceedings, he was not persuaded that the pretreatment regulation was unconstitutionally vague. Therefore, the presiding officer granted the Region's motion to strike this affirmative defense.

B.J. Carney appeals this ruling. Before this Board, B.J. Carney contends that § 429.75, and in particular the phrase "process wastewater," is so vague that the principles of due process prohibit a finding that B.J. Carney is liable for violating that regulation. As evidence of the regulation's alleged vagueness, B.J. Carney cites testimony from the hearing in which an Agency employee who worked on drafting the regulation expressed some uncertainty about whether a facility that had closed could still continue to discharge "process wastewater" in violation of § 429.75. B.J. Carney Brief at 25-27 (citing Tr. at 127-128). Further, B.J. Carney contends, the alleged vagueness of the regulation was not cured by the fact that before the complaint was filed, the Region twice gave B.J. Carney express notice that its discharge was prohibited by the regulation. B.J. Carney Brief at 28. B.J. Carney argues that the Region applied an *ad hoc* interpretation of the regulation in this case, contrary to the requirements of due process. *Id*. We find these arguments unpersuasive.

As a preliminary matter, we note that constitutional challenges to regulations, even challenges based upon due process claims, are rarely entertained in Agency enforcement proceedings, and there is a strong presumption against entertaining challenges to the validity of a regulation in an administrative enforcement proceeding. *In re Echevarria*, 5 E.A.D. 626, 634 (EAB 1994). The decision to review such challenges "is at best discretionary, and a review of a regulation will not be granted absent the most compelling circumstances." *Id*. at 634. Further, "the mere assertion of a constitutional claim alone does not amount to a compelling circumstance justifying a deviation from the general rule against reviewing the validity of regulations in administrative enforcement actions." *Id*. at 637. Here, B.J. Carney's constitutional claims warrant little discussion.

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[33] As will be discussed later in this opinion, the order granted the Region's motion to strike B.J. Carney's affirmative defense that section 309(g) of the Clean Water Act cannot be retroactively applied, and granted the Region's motion to dismiss B.J. Carney's counterclaim for attorneys' fees.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The prohibition against vagueness applies to administrative regulations as well as statutes. *General Electric Co. v. United States EPA*, 53 F.3d 1324, 1328-1329 (D.C. Cir. 1995). "A regulation is unconstitutionally vague if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Thomas v. Hinson*, 74 F.3d 888, 889 (8th Cir. 1996).

We cannot say that § 429.75, and in particular the phrase "process wastewater" as defined in the regulations for the purpose of § 429.75, fails to provide a reasonable warning as to what conduct it prohibits. In our view, the term "process wastewater," as it is defined for purposes of § 429.75, albeit broad, is nonetheless clear in its terms.[34] As demonstrated in the previous section, the facts of this case easily satisfy the definition of the term. Similarly, there is little doubt about what is prohibited — on its face, the regulation provides for a no discharge standard. "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756 (1974).

Moreover, B.J. Carney *knew* its discharge was prohibited under § 429.75. On two separate occasions the Region clearly, and in writing, advised B.J. Carney that it interpreted the regulation as prohibiting B.J. Carney's discharge. The Supreme Court has recognized that a vagueness claim may be unsuccessful where "the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry[.]" *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Here, B.J. Carney sought a determination from the agency that promulgated the pretreatment regulation as to whether the regulation prohibited its discharge, and indeed, twice received a written determination that its discharge was prohibited. B.J. Carney cannot now claim that it lacked notice of the conduct required by law. *See General Electric*, 53 F.3d at 1329 (agency's pre-enforcement contact with regulated party explaining required conduct may provide notice for due process purposes). Moreover, the Region's position in this enforcement action is consistent with its statements to B.J. Carney in 1985 and 1987 that B.J. Carney's discharge was prohib-

[34] Compare *In re CWM Chemical Services, Inc.*, 6 E.A.D. 1 (EAB 1995) where we concluded that because the PCB disposal regulations were silent with respect to how to measure PCB concentrations, they failed to provide notice that dry weight measurements were required, and therefore due process precluded a finding that the respondent violated a requirement to measure PCB concentrations on a dry weight basis.

ited, and there is no evidence to support B.J. Carney's suggestion that this proceeding is based upon an *ad hoc* interpretation of the pretreatment requirement.[35]

Finally, B.J. Carney's reliance upon the testimony of an Agency employee with respect to a hypothetical question of whether a closed facility could still discharge "process wastewater" in violation of § 429.75 is misplaced. Whether § 429.75 applies to a closed facility is not important here, where B.J. Carney is charged with violating the regulation *before* its facility closed. As detailed above, § 429.75 is not vague in its mandate that B.J. Carney's discharge, occurring during B.J. Carney's active operations, was prohibited. *See Village of Hoffman Estates*, 455 U.S. at 495 ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.").

For these reasons, B.J. Carney's due process claim is rejected.

3. *Equitable Estoppel*

On appeal, B.J. Carney claims that the presiding officer erred when he concluded that the Region was not equitably estopped from bringing this action. We conclude that the presiding officer did not err in this respect.

"When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60 (1984). For that reason, "it is well settled that the Government may not be estopped on the same terms as any other litigant." *Id.* A party seeking to estop the government bears a heavy burden of demonstrating the traditional elements of estoppel and some "affirmative misconduct" on the part of the government. *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995). This means that "a party asserting equitable estoppel against the United States must demonstrate that there was affirmative misconduct upon which the party reasonably relied to its detriment." *In re Wego Chemical & Mineral Corp.*, 4 E.A.D. 513, 522 (EAB 1993).

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[35] Thus, there is no merit in B.J. Carney's claim that § 429.75 is vague in that it fails to provide clear standards to be enforced, thereby allowing arbitrary and discriminatory enforcement. The language in § 429.75, and in the definition of "process wastewater" for the purpose of § 429.75, is entirely objective in nature, and thus, "contains no broad invitation to subjective or discriminatory enforcement." *Grayned*, 408 U.S. at 113.

B.J. Carney bases its estoppel claim on the following facts: the Region delegated to the City of Sandpoint the authority to enforce the City's pretreatment program, the Region directed Sandpoint to issue B.J. Carney an IWA, Sandpoint issued an IWA to B.J. Carney allowing the discharge of PCP-contaminated wastewater to the POTW, the Region was aware of and did not object to the IWA, and the Region waited until five years after it learned of the violations to initiate this enforcement action. In B.J. Carney's view, these facts demonstrate that the Region "acquiesced in the City's policy of gradualism with regard to the Carney matter," B.J. Carney Brief at 17, and waived enforcement of the pretreatment standards. *Id*. at 20. B.J. Carney contends that the Region's decision to "acquiesce and delay" amounts to affirmative misconduct. Specifically, B.J. Carney argues that the Region's failure to voice its objections to the IWA or initiate an enforcement action before 1990 were "green lights" from the Region signaling that B.J. Carney's conduct was acceptable to the Region. *Id*. at 18. Further, B.J. Carney argues that it reasonably relied upon these "green lights" to its detriment. *Id*.

B.J. Carney has failed to demonstrate that the Region's conduct in this case rises to the level of "affirmative misconduct" necessary to meet the heavy burden of estopping the government, and hence its claim must fail. B.J. Carney identifies two bases for its claim that the Region engaged in affirmative misconduct: the alleged "acquiescence" of the Region in Sandpoint's purported strategy of gradually requiring compliance, and the Region's delay in initiating an enforcement action until five years after it learned of the violations. We will examine each of those claims.

B.J. Carney argues that the Region "acquiesced" in Sandpoint's gradual approach to obtaining compliance in this case, but the record clearly refutes this claim. First, as mentioned earlier, on two occasions the Region directly informed B.J. Carney that it was in violation of the pretreatment standard. Second, we have identified at least eight documents in this record by which the Region informed Sandpoint between 1985 and 1990 of its concerns with regard to Sandpoint's failure to enforce the pretreatment standard applicable to B.J. Carney.[36]

[36] Letter from Harold E. Geren, Chief, Region X Water Permits and Compliance Branch, to Joel Petty, City of Sandpoint (Aug. 13, 1985) ("We are not only concerned about the level of PCP, but also that B.J. Carney continues to discharge process wastewaters in violation of the federal pretreatment regulation."); Letter from Robert S. Burd, Director, Region X Water Division, to James B. Comerford, President, B.J. Carney (Nov. 6, 1985) (In a letter copied to the Mayor and several officials of Sandpoint, the Region stated that "[s]ince the facility has been discharging

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Plainly, there was no acquiescence. Instead, the record shows that the Region exercised great patience and restraint by working with these parties in an effort to achieve compliance. The Region gave Sandpoint time to learn and implement a new program,[37] particularly with respect to B.J. Carney. Further, under its NPDES permit, Sandpoint had the initial responsibility to enforce the pretreatment standards. As Sandpoint's NPDES permit makes clear, the Region retained the authority to enforce the pretreatment regulations. NPDES Permit Condition III.I.3; *See also* Clean Water Act § 309(g)(1), 33 U.S.C. § 1319(g)(1). Sandpoint had the primary, or initial, responsibility for enforcement, but not the exclusive responsibility. For almost five years, the Region urged Sandpoint to fulfill this responsibility, all the while repeatedly advising Sandpoint about the Region's concern that B.J. Carney was not complying with the applicable standard. It was not until the Region was convinced that Sandpoint would not exercise its enforcement authority that the Region initiated this action.

Nor did the Region "acquiesce" to the City's approach by failing to object to the January 1987 IWA. As explained above in the Background section, the Region considered the IWA improper because it allowed B.J. Carney to discharge PCP-contaminated waste-

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beyond the compliance date, it is considered in violation of the pretreatment standards."); Letter from Robert S. Burd, Director, Region X Water Division, to Joel Petty, City of Sandpoint (May 21, 1986) ("Our chief concerns are the lack of compliance/monitoring and enforcement of pretreatment standards and requirements on industrial facilities, particularly B.J. Carney."); Memorandum from Robert R. Robichaud, Regional Pretreatment Coordinator, to Joel Petty, City of Sandpoint (July 11, 1986) ("EPA officially notified B.J. Carney that it must comply with the no discharge pretreatment standards. * * * The city needs to consider stepped-up enforcement to remedy this situation."); Compliance Order (Sept. 30, 1986) ("To date, the city has not fully implemented the following portions of the pretreatment order: * * * (b) compliance monitoring of all significant industrial users."); Letter from Robert S. Burd, Director, Region X Water Division, to Leslie R. Weatherhead, Counsel to B.J. Carney (Sept. 4, 1987) (In a letter copied to the City of Sandpoint, the Region stated that "[w]e continue to be concerned regarding B.J. Carney Industries' lack of compliance with the no discharge standard, as well as the city of Sandpoint's enforcement efforts to date."); Letter from Harold E. Geren, Chief, Region X Water Permits and Compliance Branch, to Ronald Chaney, Mayor of Sandpoint (Mar. 22, 1990) (The enclosed audit report discusses the "continued non-compliance of one of the city's industrial users, B.J. Carney Industries, Inc."); Letter from Harold E. Geren, Chief, Region X Water Permits and Compliance Branch, to Ronald Chaney, Mayor of Sandpoint (Apr. 30, 1990) (directing Sandpoint to initiate enforcement action against B.J. Carney).

[37] Sandpoint's pretreatment program was approved by the EPA in August 1984, slightly more than six months after the pretreatment regulation at issue became effective in January 1984. The Regional Pretreatment Coordinator testified that "[b]ack in '84 when the programs [were] being developed and implemented, we were very patient with our cities because it was new to them. We were trying to work with them in terms of helping them understand how to implement the program[.]" Tr. at 153.

water into the POTW in direct violation of the pretreatment regulation. However, the Region did not inform the City of its opinion until April 1990. While the Region's failure to object to the IWA when it was issued is certainly regrettable, it does not amount to "affirmative misconduct."

Courts have routinely held that "[m]ere negligence, delay, inaction, or failure to follow agency guidelines does not constitute affirmative misconduct" sufficient to estop the government. *Board of County Commissioners of the County of Adams v. Isaac*, 18 F.3d 1492 (10th Cir. 1994).[38] In circumstances very similar to the ones presented here, courts have relied upon this standard to deny claims of estoppel against the EPA. For example, in *United States v. City of Toledo*, 867 F. Supp. 603 (N.D. Ohio 1994), the EPA charged the City of Toledo with violating several effluent limitations in its NPDES permit. The City argued that its compliance with those limitations was excused by a document entitled "Director's Final Findings and Orders (DFFO)" issued by the State, and because the City operated in reliance upon this document, EPA was estopped from alleging violations of the permit. The court rejected this claim, concluding that the "EPA's failure to clarify the lawfulness of reliance on DFFO's * * * does not meet[] the demanding standard of *affirmative* misconduct." 867 F. Supp. at 607. The court explained that equitable estoppel "is not available where the agency has simply acted in an indifferent, passive or negligent manner," and that the record in that case showed only inaction on the part of the EPA. *Id*.

Likewise, in *United States v. Arkwright, Inc.*, 690 F. Supp. 1133 (D.N.H. 1988), the EPA charged Arkwright, Inc. with violating the Clean Air Act because Arkwright emitted certain pollutants in excess of the levels allowed by Rhode Island's state implementation plan (SIP). Rhode Island and Arkwright agreed that Arkwright could not meet the SIP's emission levels, and therefore entered a consent agreement that they submitted as a proposed SIP modification to EPA for approval. EPA did not act on this proposed modification until two

[38] *See, e.g., Deltona Corp. v. Alexander*, 682 F.2d 888, 892 (11th Cir. 1982) (government's failure to object to known development plans does not amount to affirmative misconduct estopping government from denying permit to fill wetlands); *United States v. Bethlehem Steel Corp.*, 829 F. Supp. 1023, 1035 (N.D. Ind. 1993) (ten-year delay in processing delisting petition does not amount to affirmative misconduct estopping EPA from enforcing laws pertaining to handling of hazardous materials), *aff'd in part and rev'd in part on other grounds*, 38 F.3d 862 (7th Cir. 1994); *Slagle v. United States*, 809 F. Supp. 704, 710 (D. Minn. 1992) (government's failure to object to State-issued development permit does not amount to affirmative misconduct estopping government from denying permit to fill wetlands).

years later, when it rejected it. During that two-year interval, Arkwright operated in violation of the SIP emission levels but in compliance with the consent agreement negotiated with Rhode Island. Arkwright argued, in response to EPA's enforcement action, that because it interpreted EPA's silence with respect to the proposed SIP modification as an approval of the proposal, upon which Arkwright relied to its detriment, EPA should be estopped from enforcing the SIP. The court rejected this argument, explaining that "[f]ederal courts have refused to regard the Government's failure to act as affirmative misconduct. * * * Accordingly, the Court finds that EPA's inaction does not amount to affirmative misconduct." 690 F. Supp. at 1143.

We find these cases very persuasive. Here, the Region's silence with respect to the IWA is not dissimilar from the Agency's silence with respect to the DFFO in *City of Toledo* or the proposed SIP modification in *Arkwright*. Consistent with those decisions, we conclude that the Region's delay in expressing its views on the invalidity of the IWA does not amount to "affirmative misconduct" sufficient to estop the Agency from pursuing this enforcement action.

Alternatively, we note that to the extent B.J. Carney relied upon the Agency's silence with respect to the IWA, such reliance was not reasonable. The record contains ample evidence demonstrating that B.J. Carney should have known that the Agency would find the IWA objectionable. In November 1985, more than a year before the IWA issued, the Region directly advised B.J. Carney in writing that it was subject to the no discharge requirement:

> [Y]our facility is covered by Subpart-F of 40 CFR Part 429, which allows for no discharge of pollutants into the POTW. The compliance date for the pretreatment standards was January 25, 1984. Since the facility has been discharging beyond the compliance date, it is considered in violation of the pretreatment standards.

Letter from Robert S. Burd, Director, Region X Water Division, to James B. Comerford, President, B.J. Carney at 2 (Nov. 6, 1985). Within one year of the IWA's issuance, the Region again, in writing, notified B.J. Carney that B.J. Carney was violating the pretreatment standard, which allowed no discharge of process wastewater pollutants, and that the Region "continue[d] to be concerned regarding B.J. Carney, Industries' lack of compliance with the no discharge standard, as well as the [C]ity of Sandpoint's enforcement efforts to date." Letter from Robert S. Burd, Director, Region X Water Division, to Leslie R. Weatherhead, Counsel to B.J. Carney at 2 (Sept. 4, 1987). B.J. Carney

concedes the clarity with which the Region stated its position in that letter. Tr. at 705. Yet, B.J. Carney consciously and deliberately chose to ignore the Region's written warnings that B.J. Carney was violating the no discharge requirement in the regulations. *See* Letter from James B. Comerford, President, B.J. Carney, to Joel Petty, City of Sandpoint (Sept. 25, 1987) ("We continue to believe that [the Region's] interpretation of the regulations is incorrect. * * * [S]o it's our intention to go with the status quo.").

In similar circumstances, courts have found it unreasonable to rely upon the Agency's silence. *See Public Interest Research Group v. Yates Industries*, 757 F. Supp. 438, 449 (D.N.J. 1991) ("It would be unreasonable to rely on silence in order to ignore the clear wording of an [NPDES] permit."). For example, in *United States v. City of Menominee*, 727 F. Supp. 1110 (W.D. Mich. 1989), the Menominee Paper Company (MPC) discharged into a POTW under the assumption that a discharge permit proposed by the State in 1979 was operative. However, the 1979 proposed permit was not operative because EPA objected to it. Instead, a permit issued in 1973 was operative. MPC claimed that EPA was estopped from initiating an enforcement action in 1988 based upon violations of the 1973 permit, when EPA knew that MPC was operating under the assumption that the proposed 1979 permit governed, and did nothing to clarify this situation. The court rejected this claim, noting that "[i]t is disingenuous for MPC to now assert, in its words, that it simply 'assumed all was well' with the 1979 permit despite the signs that USEPA might insist on the continuing applicability of the 1973 permit." 727 F. Supp. at 1122.

Citizens, including corporate citizens who regularly deal with the government, are charged with full knowledge of the applicable law, and the reasonableness of a party's reliance must be considered in this light. *Id.*; *United States v. Marine Shale Processors*, 81 F.3d 1329, 1349 (5th Cir. 1996). Applying these standards to this case, we have no doubt that B.J. Carney, charged with full knowledge of the law and having twice been informed, in writing, by the Region that its conduct was prohibited, cannot be said to have reasonably relied upon the Region's silence with respect to the IWA.

We now proceed to an examination of B.J. Carney's argument that the Region engaged in "affirmative misconduct" by failing to initiate an enforcement action against B.J. Carney until five years after it learned of B.J. Carney's violations of the pretreatment regulation. In addition, B.J. Carney suggests that by this delay, the Region has waived its ability to enforce that regulation with respect to B.J. Carney. Both claims lack merit.

The Region did not waive any right to bring this enforcement action. "[G]enerally speaking[,] public officers have no power or authority to waive the enforcement of the law on behalf of the public." *United States v. Amoco Oil Co.*, 580 F. Supp. 1042, 1050 (W.D. Mo. 1984). Thus, in *City of Menominee*, the court held that the Agency did not waive its ability to enforce the Clean Water Act although the Agency knew MPC was operating under the assumption that a proposed 1979 permit was valid but did not initiate an enforcement action until nine years after the 1979 permit was proposed. 727 F. Supp. at 1121. Moreover, the court held that the Agency's inaction in enforcing its claim did not amount to "affirmative misconduct" that would estop the Agency. *Id.* The court observed that "[n]o right exists to pollute our nation's waters. The burden is on the polluter to comply with the CWA, not on USEPA to ensure compliance." *Id.* at 1122. Likewise, in *United States v. Chevron, U.S.A., Inc.*, 757 F. Supp. 512 (E.D. Pa. 1990), the court held that "the fact that the EPA did nothing for four years to enforce the regulations against Chevron would not be considered an affirmative misrepresentation and does not satisfy the first requirement of the equitable estoppel defense." *Id.* at 515. "Simply put, the government may not be estopped from enforcing the law, even following an extended period of no enforcement or underenforcement." *Washington Tour Guides Ass'n v. National Park Service*, 808 F. Supp. 877, 882 (D.D.C. 1992).[39] Clearly, B.J. Carney cannot successfully employ an estoppel defense that is based upon the Region's non-enforcement of the pretreatment regulation.[40]

Also fatal to B.J. Carney's estoppel claim is the fact that it has not suffered any detriment from the Region's conduct in this matter. As explained by the Supreme Court, "the party claiming the estoppel must have relied on its adversary's conduct 'in such a manner as to change his position for the worse.'" *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59 (1984) (citations and

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[39] Where environmental statutes are involved, there is a clear public policy favoring this result. If the Agency could be estopped from enforcing the environmental statutes, public health, and the environment, would suffer as a result. *See Chevron, U.S.A. Inc.*, 757 F. Supp. at 516 ("Even if Chevron had been entitled to rely on * * * the EPA's delay in prosecution, the health of the public and its interest in a pollution-free environment should not be sacrificed because these actions work a potential hardship on Chevron."); *Arkwright*, 690 F. Supp. at 1143 ("If EPA cannot penalize companies which violate approved air quality standards, then the general populace will suffer from unhealthy air pollution levels").

[40] Furthermore, the Region's delay in initiating this action has a reasonable explanation. As explained above, the Region was attempting to get Sandpoint to exercise its primary responsibility to enforce the pretreatment standards. It was only after the Region was convinced that Sandpoint would not initiate enforcement proceedings that the Region did.

footnotes omitted). In that case the estoppel was denied because "the consequences of the Government's misconduct were not entirely adverse," in that the detriment suffered was "the inability to retain money that it should never have received in the first place." *Id.* at 61.

In our view, this case is strikingly similar. Although it is not precisely clear what detriment B.J. Carney claims,[41] it is readily apparent to us that B.J. Carney has not suffered *any* detriment. If anything, B.J. Carney *benefitted* from the Region's conduct in this matter. We agree with the presiding officer's analysis of this issue:

> Faced with [B.J. Carney's] violations of the regulation at issue, [the Region] had several options. One option would have been an immediate Federal enforcement action against [B.J. Carney] as soon as the violations were discovered. Since [B.J. Carney's] eventual method of compliance was to discontinue operations, an earlier enforcement action might have forced an earlier shutdown of operations. [B.J. Carney] acknowledges that it operated profitably during the years 1987 to 1990 (Tr. 771) and, as [the Region] points out, an earlier shutdown would have prevented [B.J. Carney] from earning profits during those years.

Initial Decision at 20. The Region's decision not to pursue an enforcement action against B.J. Carney until 1990 had the effect of allowing B.J. Carney to operate profitably up until that time. At most, the "detriment" here is the inability to retain a benefit, the economic benefit of noncompliance, that should have never been received in the first place.[42] Accordingly, there can be no estoppel. *See Washington Tour Guides Ass'n*, 808 F. Supp. at 879 (no estoppel based upon nonenforcement where party seeking to estop government conducted business successfully during period of nonenforcement); *Chevron, U.S.A.*,

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[41] B.J. Carney's brief on this point is less than a page long. B.J. Carney Brief at 18. It consists of three paragraphs, the first of which explains that B.J. Carney "began to implement a program to minimize its PCP discharge to the Sandpoint POTW." *Id.* The next paragraph refers to EPA's approval, in the spring of 1990, of Sandpoint's plan to bring B.J. Carney into compliance by revising the IWA and issuing an enforcement order. B.J. Carney notes that it was in compliance with Sandpoint's plan (indeed, it had shut down after being issued a revised IWA) when the Region initiated this action. *Id.* The last paragraph merely states that "[t]he proposed penalty notice was issued after Carney spent enormous sums to close down, lose its income, entirely, and timely ceased to discharge." *Id.*

[42] Indeed, the recovery of this economic benefit is a crucial component of the Region's case, as discussed below in section II.B.

Inc., 757 F. Supp. at 516 (no estoppel where the "only detriment is that Chevron may have to correct the alleged violations now instead of when they were allegedly instituted").

Any harshness perceived to result from this analysis is tempered by the principle that the facts upon which B.J. Carney unsuccessfully relies to show estoppel may nevertheless be considered in connection with assessing a penalty. *See Marine Shale Processors*, 81 F.3d. at 1349 n. 11 ("The district court followed the proper course of action by refusing to estop the government and by considering [the facts underlying the estoppel claim] as a mitigating factor in its penalty calculations."); *City of Toledo*, 867 F. Supp. at 608 (although the city's reliance upon its DFFO and its belief that it was complying with the law are not a defense, they are "factors that may well weigh heavily in the city's favor when consideration is given to the penalty"). Here, the presiding officer considered the facts underlying B.J. Carney's estoppel claim and reduced his gravity penalty assessment by 50% in light thereof, Initial Decision at 32-33, and this aspect of the initial decision has not been appealed.

4. *Retroactive Application of Clean Water Act § 309(g)*

One of the affirmative defenses raised by B.J. Carney and stricken by the presiding officer's pre-hearing order was that the Region could not retroactively apply Clean Water Act § 309(g), 33 U.S.C. § 1319(g), to conduct occurring before February 4, 1987. On appeal B.J. Carney contends that the presiding officer erred in striking this defense. We conclude that he did not.

In particular, B.J. Carney argues that prior to 1987, enforcement of the Clean Water Act could only occur in a federal district court. By amendments to the Clean Water Act effective on February 4, 1987, Clean Water Act § 309(g) was added to the statute, authorizing EPA to enforce the Clean Water Act through administrative adjudications. B.J. Carney argues that prior to February 4, 1987, it had a right to a jury trial on the alleged violations up to that date, and that the application of Clean Water Act § 309(g) to conduct occurring before February 4, 1987, deprived B.J. Carney of its jury trial right. Further, B.J. Carney argues that because the scope of appellate review of a federal district court decision is greater than the scope of federal court review of an agency decision, the retroactive application of Clean Water Act § 309(g) erroneously imposes a reduced scope of appellate review upon B.J. Carney.

The argument advanced by B.J. Carney here was considered and rejected in *Sasser v. Administrator*, 990 F.2d 127 (4th Cir. 1993), where

the court held that Clean Water Act § 309(g) can be applied to conduct that began before February 4, 1987, and continued after that date. 990 F.2d at 129 ("Since Dr. Sasser's violations continued long after the enactment of the 1987 amendment, the Administrator acted within the jurisdiction that Congress conferred on him in 33 U.S.C. § 1319(g)").

Here, B.J. Carney's violations began before February 4, 1987, and continued after that date. Indeed, of the eighteen violations found by the presiding officer, only two occurred before that date. Initial Decision at 24 n.13. Consequently, under *Sasser*, the presiding officer did not err when he concluded that the Region could use Clean Water Act § 309(g) in this case. B.J. Carney's arguments that it has been denied its right to have this claim adjudicated in a federal court before a jury and with the accompanying standard of appellate review are premised upon the erroneous assumption that Clean Water Act § 309(g) cannot be used as an enforcement mechanism in this case, and therefore this claim must be rejected.

5. *EAJA Claim*

B.J. Carney filed a counterclaim in these proceedings seeking attorneys' fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. The presiding officer, in his pre-hearing order, granted the Region's motion to dismiss this counterclaim on the ground that the Region was "substantially justified" in filing its complaint, and therefore B.J. Carney had failed to demonstrate its entitlement to an award under EAJA.[43]

On appeal, B.J. Carney contends that the presiding officer erred in dismissing its counterclaim for fees under EAJA. B.J. Carney argues that the Region's claim was not substantially justified[44] because of all

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[43] In pertinent part, EAJA states:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, *unless* the adjudicative officer of the agency finds that the position of the agency was *substantially justified* or that special circumstances make an award unjust.

5 U.S.C. § 504(a)(1) (emphasis added).

[44] We note that the requirement to be a "prevailing party" is a precondition for recovery under EAJA § 504(a)(1). *See, e.g., In re Biddle Sawyer Corp.*, 4 E.A.D. 912 (EAB 1993). B.J. Carney does not in its brief articulate the basis on which it can be considered a "prevailing party" for the purposes of EAJA, and we do not address that issue here.

the reasons set forth elsewhere in its appeal brief, namely, that its discharge is not prohibited by the pretreatment regulation, that the regulation is too vague to satisfy due process, that the Region is equitably estopped from bringing this action, and that Clean Water Act § 309(g) cannot be applied retroactively in this case. B.J. Carney Brief at 32. We have rejected each and everyone of these claims, and consequently, there is no merit to B.J. Carney's argument that the Region's complaint was not substantially justified for the purposes of EAJA. B.J. Carney has failed to demonstrate that the presiding officer erred in dismissing its EAJA claim.

B. *Penalty*

The Region's appeal challenges the presiding officer's penalty assessment, and in particular, the presiding officer's rulings with respect to B.J. Carney's alleged economic benefit of noncompliance. According to the Region's notice of appeal, the presiding officer misconstrued the applicable standard for evaluating an economic benefit presentation, and therefore wrongly concluded that no reasonable approximation of B.J. Carney's economic benefit from noncompliance could be made on this record. Further, the Region argues, the presiding officer erred by ruling that: 1) the economic benefit calculation cannot include the period of time before the five-year statute of limitations period, and the period of time after compliance is achieved; 2) the Region's discount rate was defective; 3) the Region's calculation should have "offset" sums allegedly spent by B.J. Carney to achieve compliance; 4) the Region's calculation should have "offset" sums allegedly spent by B.J. Carney to close the facility; and 5) that profits made by B.J. Carney during its noncompliance may be a valid measure of the economic benefit in this case, rather than the method used by the Region.

For the reasons that follow, we conclude that the presiding officer made several errors in his analysis of B.J. Carney's economic benefit, the most significant being his failure to find any economic benefit on this record and his injection of the statute of limitations into this case on his own initiative without requesting that the parties address its implications for the economic benefit calculation. These errors require a remand for the purpose of reopening the record to determine how much of the $167,000 economic benefit calculated by the Region's expert accrued within the limitations period and for the presiding officer to reassess the penalty in accordance with this opinion. We also reverse the presiding officer's rulings with respect to the discount rate, the "offsets" for alleged compliance costs, and the length of time during which economic benefits continue to accrue.

1. *Importance of Economic Benefit of Noncompliance*

The Clean Water Act provides that "[i]n determining the amount of any penalty assessed [in an administrative enforcement action], the Administrator * * * shall take into account the * * * *economic benefit or savings (if any) resulting from the violation*." Clean Water Act § 309(g)(3), 33 U.S.C. § 1319(g)(3) (emphasis added). Thus, "Congress has specifically stated that violators should not be allowed to profit from delays in compliance with the Agency's standards." *Student Public Interest Research Group of New Jersey v. Hercules, Inc.*, 29 Env't Rep. Cas. (BNA) 1417, 1419 (D.N.J. 1989).

The Region rightly claims that the "recapture of a violator's economic benefit from noncompliance is the cornerstone of the Agency's civil penalty program." Appellant's Brief in support of Appeal of Initial Decision ("Region's Brief") at 4. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 890 F. Supp. 470, 492 (D.S.C. 1995) ("Removing a violator's economic benefit is central to the enforcement provisions of the CWA."). Since 1984, the Agency's stated enforcement policy has been to recover a violator's economic benefit of noncompliance in order to deter violations. EPA General Enforcement Policy #GM-22 ("A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties") (Feb. 16, 1984). This continues to be a core principle of the Agency's enforcement and compliance assurance program. Operating Principles for an Integrated Enforcement and Compliance Assurance Program (Nov. 27, 1996).

Assessing a penalty amount that reflects a violator's economic benefit of noncompliance serves two purposes vital to an effective enforcement program. First, it deters violations by taking away the economic incentive to violate the law. *See Atlantic States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1141 (11th Cir. 1990) ("Insuring that violators do not reap economic benefit by failing to comply with the statutory mandate is of key importance if the penalties are successfully to deter violations."); *United States v. Roll Coater, Inc.*, No. IP 89-828C, 1991 U.S. Dist. LEXIS 8790 (S.D. Ind. 1991) ("[U]nless the company is fined an amount at least as great as the economic gain in not complying with the regulations, the statute serves little deterrent value."); *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp 1542, 1557 (E.D. Va. 1985), *aff'd*, 791 F.2d 304 (4th Cir. 1986), *rev'd on other grounds*, 484 U.S. 49 (1987) (If a penalty does not include the economic benefit of noncompliance, "the violator and potential violators would perceive that it pays to violate the law, creating an obvious disincentive for compliance."); *In re A.Y. McDonald*

Industries, Inc., 2 E.A.D. 402, 423 (CJO 1987) ("the economic benefit component serves to remove any incentive to violate the [law] by requiring the violator to pay the expenses avoided or deferred through noncompliance."). Recovering the economic benefit of noncompliance thus provides an incentive for regulated entities to comply on time. 60 Fed. Reg. 66,706, 66,707 (Dec. 22, 1995); *see* Interim Clean Water Act Settlement Penalty Policy at 4 (Mar. 1, 1995) ("The objective of the economic benefit calculation is to place violators in the same financial position as they would have been if they had complied on time.").

Second, the economic benefit of noncompliance component of a penalty helps "ensure a level playing field by ensuring that violators do not obtain an economic advantage over their competitors who made the necessary investment in environmental compliance." 60 Fed. Reg. 16,875, 16,876 (Apr. 3, 1995). In essence, the Agency's ability to recoup a violator's economic benefit "protects responsible companies from being undercut by their noncomplying competitors, thereby preserving a level playing field." 60 Fed. Reg. at 66,707.[45] Congress plainly intended this result when it enacted section 309(g)(3) of the Clean Water Act. *See* S. Rep. No. 99-50, at 25 (1985) ("Violators should not be able to obtain an economic benefit vis-a-vis their competitors due to their noncompliance with environmental laws.").

2. *Calculation of Economic Benefit*

In general, there are three different types of economic benefits that may flow from a violator's failure to invest in the necessary pollution control measures:

> First, by delaying the expenditure of funds on compliance, a violator obtains the use of the money for other purposes in the meantime. Second, a violator may also avoid some costs altogether — for example, the costs

[45] The critical role of economic benefit in the Agency's enforcement efforts was reaffirmed in the Agency's policy for encouraging self-policing, disclosure and correction of violations. *See* 60 Fed. Reg. 66,706 (Dec. 22, 1995) ("Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations"). As an incentive for encouraging voluntary disclosure and correction of violations, the Agency's policy is to eliminate or reduce the "gravity-based" penalties that should result from the violation, if the conditions of the policy are met. The Agency's policy statement, however, makes abundantly clear that the Agency is not willing to forgo its right to assess a penalty reflecting the violator's economic benefit of noncompliance; the Agency's policy expressly reserves the right to recover this benefit, even when a violator voluntarily discloses a violation, thus emphasizing the fundamental role of this penalty component to the enforcement program. 60 Fed. Reg. at 66,707.

> of maintaining and operating the pollution control system until it is implemented. Third, a violator may, in addition, obtain a competitive advantage as a result of its violation — for example, it may be able to offer goods at a lower price, thereby possibly increasing its sales and profits.

Chesapeake Bay Foundation, 611 F. Supp. at 1558. Here, the Region maintains that B.J. Carney's economic benefit is of the second type, and in particular, is the avoided costs of purchasing and operating an evaporator to eliminate the discharge of the PCP-contaminated wastewater. *See* section II.B.3 *infra*.

There is no single or uniform method that must be followed to determine the economic benefit that flows from avoiding the purchase and installation of pollution control equipment; even the Agency's computer model for calculating economic benefit is "not designed to directly address this situation." "Ben: A Model to Calculate the Economic Benefits of Noncompliance, User's Manual" ("BEN User's Manual") at B-8 (1993).[46] One way of approximating this type of avoided cost is to determine how much the violator saved from avoiding compliance. *See* Clean Water Act § 309(g)(3) (penalty should reflect "economic benefit or savings (if any) resulting from the violation"); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 574 (5th Cir. 1996) (upholding trial court's decision to calculate the economic benefit "by reference to the money [the violator] saved by not" complying).[47]

Taking this approach, the calculation of the economic benefit from avoiding compliance would begin with determining what timely

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[46] To assist the Agency in calculating the economic benefit of noncompliance, the Agency has developed a computer model known as "BEN." BEN is intended to be used for settlement purposes only; it is not intended for use at administrative hearings, where it is anticipated that other evidence, such as expert testimony, will be produced to establish an economic benefit from noncompliance. BEN User's Manual at 1-2. Nevertheless, many of the general principles that are utilized in BEN, as discussed in the user's manual for that program, are helpful here, in the administrative hearing context, for the purpose of understanding the economic benefit of noncompliance component of a penalty calculation. We rely on BEN only for purposes of familiarizing the reader with some of the general principles of economic benefit calculations that will be discussed later in this opinion. As discussed *infra*, contrary to the statements of the presiding officer, it was not error for the Region not to use the BEN computer model in this case.

[47] In its brief, the Region notes that "any analysis of economic benefit must consider * * * what the violator saved by not investing in pollution control." Region's Brief at 10 n.6.

compliance would have cost.[48] In addition to the price of the pollution control equipment itself, a violator typically will incur operation and maintenance costs as well as costs to finance the purchase of that equipment. In economic benefit calculations, this latter cost is referred to as a "discount rate." "The discount rate is an interest rate that reflects the violator's cost of capital. In essence, this is the cost of financing pollution control investments." 61 Fed. Reg. 53,025, 53,029 (Oct. 9, 1996). The Region has described the discount rate as:

> [T]he linchpin of any economic benefit analysis. It plays such a critical role as any analysis of economic benefit must consider how much it costs to finance pollution control costs, and what the violator saved by not investing in pollution control equipment.

Region's Brief at 10 n.6.

One method of determining a discount rate, and indeed, the one used by the Region here, is a method known as the weighted average cost of capital ("WACC"). "WACC is a method of determining the cost of capital to a company by combining the debt cost of capital and equity cost of capital and weighing those costs based on the proportion of debt and equity in a company's financial structure." *Friends of the Earth*, 890 F. Supp. at 482 n.3. The WACC method is the one used in the BEN model, where it is described as follows:

> The weighted-average cost of capital represents the average cost, after taxes, of capital to the violator, assuming constant risk and constant capital structure. In the case of pollution control expenditures, BEN assumes that the investment is financed with both debt and equity, in a mix representing the entity's existing mix of debt and equity financing.

BEN User's Manual at 4-30.

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[48] In contrast, where the violator has delayed compliance, *i.e.*, where the violator has complied but in an untimely fashion, an economic benefit calculation typically begins by measuring the difference (in the same-year dollars) between what the violator spent to comply and what timely compliance would have cost. This is a typical, but not required, methodology. *See e.g.*, *United States v. Municipal Authority of Union Township*, 929 F. Supp. 800 (M.D. Pa. 1996) (economic benefit from violating pretreatment regulations did not come from dairy's delaying capital investment in pollution control measures, but from producing at a volume above that which would have allowed it to operate within its permit).

Once the cost of timely compliance, that is, the avoided cost, is determined, the next step in the calculation is to adjust that figure to reflect the passage of time since compliance was required. As explained later in this opinion, contrary to B.J. Carney's assertions and the presiding officer's decision, the benefit from avoiding compliance costs continues until such time as the benefit is relinquished in the form of a penalty payment. It follows, then, that to recapture fully a violator's economic benefit from noncompliance, the calculation must reflect that the violator had the use of this money from the time it should have spent the money until the time it pays the penalty. BEN User's Manual at B-8.

3. *Evidence in the Record*

The evidence produced by the Region to show B.J. Carney's alleged economic benefit of noncompliance consists solely of the testimony of Kimberly Zanier, a certified public accountant and an Internal Revenue Service employee then on loan to the EPA for the purpose of, among other things, calculating economic benefits and training others to do so. Zanier was admitted as an expert at the hearing. The Region did not offer, and therefore the record does not contain, any document detailing Zanier's computations and calculations.[49]

Zanier first considered what type of economic benefit B.J. Carney enjoyed, and concluded that B.J. Carney's economic benefit stemmed from the compliance costs B.J. Carney avoided. As explained previously, B.J. Carney operated from 1984 to 1990 in violation of the applicable pretreatment regulation. In 1986, a consultant hired by B.J. Carney, CH2M Hill, prepared a report indicating that the least expensive way for B.J. Carney to come into compliance with the regulation would have been to install an evaporator that would have eliminated the discharge to the POTW. CH2M Hill Report at Table 5-9 and accompanying text. Zanier relied upon the report by treating the economic benefit as accruing from the failure to install and operate the pollution control equipment necessary to eliminate the discharge, namely, the evaporator identified in the CH2M Hill report. In other words, Zanier's economic benefit calculation is based only upon the avoided

[49] We note that the pre-hearing exchange information provided by the Region did not include a penalty calculation worksheet that explained the economic benefit of noncompliance portion of the proposed penalty. Instead, the Region merely stated that B.J. Carney's alleged economic benefit of noncompliance exceeds the $125,000 maximum administrative penalty allowed under Clean Water Act § 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B). Further, although Zanier apparently relied upon a chart and blackboard drawings during her testimony, none of those materials were included in the record.

costs of the evaporator. Zanier did not treat this as a case where the economic benefit flowed from delaying the costs of closure.

Next, Zanier calculated the amount of costs avoided by B.J. Carney, that is, what the costs of timely compliance would have been. According to Zanier, B.J. Carney avoided $62,550 in capital costs by not installing the evaporator.[50] Tr. at 443. The CH2M Hill report was prepared in 1986, and therefore the $62,550 figure is in 1986 dollars. CH2M Hill Report at Appendix D p.2. Zanier also used that report to conclude that B.J. Carney avoided $1,550 annual operation and maintenance (O/M) costs for the evaporator. Again, the $1,550 figure is in 1986 dollars. The capital costs and O/M costs are the avoided costs that form the foundation of Zanier's economic benefit calculation.

Zanier calculated the avoided costs as of the date when compliance with the pretreatment regulation was first required - January 1984. She took the avoided capital and O/M costs and "deflated" them from 1986 dollars to 1984 dollars. Tr. at 445. The record does not reveal either of these deflated costs. Zanier then added the deflated capital and O/M costs together, but again, this sum is not in the record.[51]

Having determined what compliance would have cost when it was required in 1984, Zanier then proceeded to adjust that cost to reflect the fact that B.J. Carney enjoyed the use of those funds since 1984, when the funds should have been but were not spent on compliance. Zanier's calculation assumed that B.J. Carney would relinquish the benefit in October 1993, when the hearing took place. To calculate the total benefit B.J. Carney was enjoying in 1993 as a result of avoiding costs since 1984, Zanier utilized a discount rate of 16.0%, which she calculated herself, using a WACC formula. Tr. at 480-482, 490. Zanier took the sum of the avoided capital costs and O/M in 1984 dollars and multiplied it by the 16.0% discount rate to determine the cash B.J. Carney would have had on hand at the end of 1984 as a result of avoiding compliance. Tr. at 446. Next, Zanier took the amount so calculated for 1984 and added to it the O/M costs not paid in 1985. *Id*. Then, she again applied to this sum the 16.0% discount rate to determine the cash B.J. Carney would have had on hand at the

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[50] This figure includes the cost of the evaporator ($48,000) and a portion of the building to house it, as well as the related engineering, construction and installation costs required to bring the equipment on-line. Tr. at 487-488.

[51] The annual cash flow amounts in Zanier's calculation were after-tax cash amounts. The tax rates used by Zanier are not at issue here, and therefore, for the sake of convenience, will not be referred to in our discussion of her calculation.

end of 1985 as a result of avoiding compliance. Tr. at 447. She repeated this procedure for each successive year up until 1993 when the hearing was held. Tr. at 447. Zanier's rationale for applying the same 16.0% discount rate for each year was that the discount rate represented the cost of financing pollution control equipment in 1984, a cost she determined would not be renegotiated after 1984. Tr. at 491. In this manner, Zanier calculated B.J. Carney's economic benefit of noncompliance to be $167,000. *See* Tr. at 445-447.

Zanier's testimony with respect to her selection and use of a discount rate was not refuted by any contrary evidence at the hearing. B.J. Carney did not put on an expert witness to counter Zanier's testimony, but instead relied on its cross-examination of Zanier. With respect to the discount rate, B.J. Carney's cross-examination verified the figures Zanier used in her WACC calculation. The cross-examination also confirmed that Zanier employed the same discount rate of 16.0%, utilized to determine the costs of financing pollution control equipment for 1984, for each successive year of the calculation. Through its cross-examination of Zanier and direct examination of its own witnesses, B.J. Carney failed to produce any evidence refuting Zanier's rationale for using the 1984 discount rate in this fashion, and in particular, failed to produce evidence that B.J. Carney would have renegotiated its financing during the useful life of the evaporator. Although B.J. Carney's questions to Zanier on cross-examination suggested that it is unreasonable to assume that the discount rate did not change between 1984 and 1993, none of Zanier's answers provided evidence to support this proposition.

B.J. Carney's cross-examination of Zanier also focused on other aspects of her economic benefit calculation. For instance, the cross-examination elicited testimony that the calculation did not include any consideration of, or "offsets" for, sums B.J. Carney spent to close its facility in 1990. Zanier restated that she considered B.J. Carney's economic benefit to be a result of avoiding compliance and not a result of delaying the costs of closure. Consequently, Zanier testified that any costs associated with closure were not considered in her calculation. Tr. at 469. James B. Comerford, president of B.J. Carney, testified that the company spent approximately $450,000 to $500,000 to close the facility in 1990. Tr. at 671. This money was spent to dismantle all processing and manufacturing apparatus at the facility. Tr. at 671. According to Comerford, a "big, big chunk of all that money was involved with soil removal." Tr. at 672. Comerford admitted that the facility could have complied with the zero discharge requirement without removing this soil. Tr. at 751-752. Compliance was achieved merely by plugging the pipe that carried the wastewater to the POTW

after operations at the facility ceased. Tr. at 751. The cost of plugging the pipe was, in Comerford's words, "nickels and dimes." Tr. at 752.

B.J. Carney's questioning of Zanier also examined whether Zanier "offset" from her calculation the sums allegedly spent by B.J. Carney to reduce, but not eliminate, the discharge. Zanier testified that she did not make such "offsets" in her calculation, and in fact, was not aware of any such sums allegedly spent by B.J. Carney.[52] Tr. at 471. Comerford testified that prior to commencing the facility's closure in 1990, B.J. Carney spent approximately $240,000 to either clean up the site or reduce the amount of discharge into the POTW. Tr. at 673. This figure includes approximately $50,000 spent to remove a pile of soil. Tr. at 673, 627. It also includes removing sludges that were in the system when B.J. Carney acquired the facility. Tr. at 673. General repairs and maintenance to the operating system are also included in this amount. *Id*. This $240,000 also includes housekeeping and improvements intended to reduce the amount of the discharge.[53] Comerford admitted that none of these efforts achieved compliance with the zero discharge requirement. Tr. at 718. With the exception of the $50,000 for soil removal, the record contains nothing about the individual costs of these activities; all that the record provides is that before 1990, B.J. Carney spent approximately $240,000 on soil removal, general repairs, maintenance, housekeeping, and on improvements intended to reduce but not eliminate the discharge to the POTW.

4. *Initial Decision*

The presiding officer rejected the Region's argument that B.J. Carney enjoyed an economic benefit of $167,000 from its failure to comply with the pretreatment regulation, stating that "for several reasons, the record in this case does not support [the Region's] calcula-

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[52] Zanier did, however, assume that B.J. Carney had taken some of the preliminary steps identified in the CH2M Hill report as recommended for the use of an evaporator, thus making her determination of the avoided costs conservative. Tr. at 488. Comerford admitted that B.J. Carney did not take some of these steps. Tr. at 686.

[53] For example, Comerford testified that B.J. Carney installed a new roof over the tank to divert rainwater away from the sides of the tank (Tr. at 677), installed cement gutters to carry rainwater away to drainage fields (*Id*.), repacked valves (Tr. at 712) and installed collection devices (Tr. at 629). A letter from B.J. Carney's counsel to Sandpoint details a partial list of the efforts B.J. Carney allegedly made to reduce the discharge, and includes the following: improvements in operation and maintenance of oil/water separator, repair and replacement of valves, installation of drip pads and containments under pumps, valves and other machinery in sump area, fabrication of steel containment box around outside sewer drain, repair and improvement of utility and oil-line troughs, and modifications to sump area and boiler room. Letter from Leslie R. Weatherhead, Counsel to B.J. Carney, to Joel Petty, City of Sandpoint (Mar. 23, 1987).

tion of this benefit." Initial Decision at 27. It is not at all clear from the initial decision, however, which reason or reasons compelled his complete rejection of the Region's economic benefit calculation.

First, the presiding officer rejected the Region's decision to calculate the economic benefit from January 1984, the date when compliance was first required. The presiding officer stated that the applicable statute of limitations, 28 U.S.C. § 2462,[54] bars the Region from seeking penalties in this case for events prior to October 12, 1985.[55] Therefore, the presiding officer concluded, October 12, 1985, and not January 1984, was "the earliest date that should have been used to calculate economic benefit." Initial Decision at 28. In addition, the presiding officer stated that it was inappropriate for Zanier to use a discount rate from 1984 because 1984 is outside of the statutory limitations period. According to the presiding officer, Zanier should have used a discount rate that applied during the limitations period. *Id.* at 29.

The presiding officer injected the statute of limitations issue into this case by relying upon it in his initial decision even though it had not been raised as an issue by B.J. Carney. Nevertheless, the presiding officer did not reopen the hearing for additional evidence with respect to the relationship between the statute of limitations and the Region's economic benefit calculation, or invite briefing on the matter from the parties.

Second, the presiding officer rejected the Region's decision to calculate the economic benefit up until the hearing date in October 1993. According to the presiding officer, "Carney came into compliance in July 1990 and this should have been the ending date for the benefit." Initial Decision at 28. The presiding officer reasoned that B.J. Carney "had a colorable legal theory on the 'process waste water' issue that would have completely vitiated liability," and therefore it was not equitable for the Region to attempt to recover that portion of the benefit that accrued merely because B.J. Carney contested the complaint. *Id.*

Third, the presiding officer found it "very questionable whether [Zanier] applied the appropriate discount rate when calculating [B.J. Carney's] economic benefit." *Id.* at 29. The presiding officer rejected Zanier's rationale for using the same rate over the period between

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[54] This section provides that "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture * * * shall not be entertained unless commenced within five years from the date when the claim first accrued * * *."

[55] The complaint was filed on October 12, 1990.

1984 and 1993, which was that the WACC discount rate represents a cost of capital that would have been incurred in 1984 and not renegotiated thereafter. He observed that the 16.0% rate used by Zanier was "to determine the return that a company would expect to earn on its investments" and "did not vary over the entire nine year, nine month period (1/26/84-10/19/93) used in the [Region's] calculation, * * * a period during which economic conditions, including the cost of debt and the cost of equity, certainly did vary." *Id.* The presiding officer concluded that Zanier's calculation "unreasonabl[y]" assumed that B.J. Carney could have secured an investment that would have yielded a 16.0% return over a period of almost ten years. *Id.* The presiding officer did not rely on any specific evidence in the record to support his opinion that the assumption was unreasonable.

Based upon these perceived flaws in the Region's calculation, the presiding officer ruled that the Region's "presentation does not provide a satisfactory method of quantifying economic benefit because of the flaws in the calculation discussed above. Therefore, a reasonable approximation of economic benefit cannot be made in this cause [sic]." Initial Decision at 30-31. In the presiding officer's view, this case was similar to *Student Public Interest Research Group of New Jersey v. Monsanto Co.*, 29 Env. Repp. Cas. (BNA)1078 (D.N.J. 1988), *aff'd,* 870 F.2d 652 (3d Cir. 1983), where the court was unable to approximate economic benefit despite detailed testimony and evidence. The presiding officer found two similarities between *Monsanto* and the case at bar: "the doubtful assumptions on which the calculations were based and the failure of the witnesses to utilize a computer program (the BEN program) to calculate economic benefit." Initial Decision at 30.

Further, the presiding officer observed that "it was uncontroverted that [B.J. Carney] expended about $240,000 to reduce the discharges during the period of operations at issue." Initial Decision at 31. Calling these expenditures "good faith efforts to come into compliance," the presiding officer labeled Zanier's failure to consider these expenditures in her calculation a "serious flaw." *Id.* He stated "it is equitable to offset any costs for attempting to eliminate the discharge against the costs saved by non-compliance. It is clear that had this offset been made, the economic benefit cost saving from non-compliance would have been entirely eliminated, in light of the substantial sums expended in compliance efforts." *Id.*

Having concluded that the Region did not provide him with a basis for determining B.J. Carney's economic benefit, the presiding officer looked at possible alternative bases for determining the economic benefit. First, he noted that the Region could have argued that

B.J. Carney benefitted from delaying its closure costs, estimated at $450,000 to $500,000, from October 1985 (the start of the statutory limitations period) until July 1990 (when closure occurred). But, because no evidence on these delayed costs was presented, the presiding officer refused to speculate as to what benefit they produced. Initial Decision at 31-32. Similarly, the presiding officer noted that the Region could have attempted to use B.J. Carney's profits during its period of noncompliance as a measure of its economic benefit, but again, because there was no evidence in the record on B.J. Carney's profits, the presiding officer refused to speculate as to what such a benefit might have been. Initial Decision at 32. Accordingly, the penalty assessed against B.J. Carney did not include any economic benefit component.

5. *Standard for Establishing Economic Benefit*

Under 40 C.F.R. § 22.24, the Region bears the burden of persuasion in these proceedings (by a preponderance of the evidence) that the proposed penalty is appropriate. An "appropriate" penalty is one which reflects a consideration of each factor the governing statute requires to be considered, and which is supported by an analysis of those factors. *See In re Employers Insurance of Wausau and Group Eight Technology, Inc.*, 6 E.A.D. 735, 756 (EAB 1997) (explaining requirements to establish prima facie case of an appropriate penalty); *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 538 (EAB 1994) (same). The governing statute here, Clean Water Act § 309(g)(3), expressly requires the Agency, when determining a penalty, to take into account the economic benefit or savings, if any, resulting from the violation, among other factors.[56] Therefore, in this case the Region bears the burden of persuasion that its proposed penalty is appropriate in light of, among other things, the statutory directive to recover from the violator the economic benefit resulting from the violation.

To meet this burden, a complainant need not show with precision the exact amount of the economic benefit enjoyed by the respondent.

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[56] In pertinent part, this section provides:

> 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.

It is sufficient that the complainant establish a "reasonable approximation" of the benefit. *See Sierra Club, Lone Star Chapter*, 73 F.3d at 576; *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 80 (3d Cir. 1990). The legislative history of section 309(g)(3) of the Clean Water Act clearly supports this standard:

> The determination of economic benefit * * * will not require an elaborate or burdensome evidentiary showing. *Reasonable approximations of economic benefit will suffice.*

S. Rep. No. 99-50, at 25 (1985) (emphasis supplied).

Courts have recognized that "[p]recise economic benefit to a polluter may be difficult to prove," *Powell Duffryn Terminals*, 913 F.2d at 80, and therefore have strived to find reasonable approximations of economic benefit in order to effectuate the purposes underlying the statutory provision. *See United States v. The Municipal Authority of Union Township*, 929 F. Supp. 800, 806 (M.D. Pa. 1996) (although "it is in the nature of this factor that its qualification will be imprecise," courts "must endeavor to reach a 'rational estimate of [the violator's] economic benefit'"); *Chesapeake Bay Foundation*, 611 F. Supp. at 1558 (while proving the extent of economic benefit "will often be impossible," given the purpose of the statute a court should rely upon any objective evidence to arrive at a rationale estimate of economic benefit). Indeed, "it would eviscerate the Act to allow violators to escape civil penalties on the ground that such penalties cannot be calculated with precision." *Municipal Authority of Union Township*, 929 F. Supp. at 806-807. This standard, however, does not mean that wholly unsubstantiated guesswork or broad, conclusory statements lacking any reasonable foundation are sufficient to demonstrate an economic benefit. A complainant must provide, on the record, a reasoned explanation of how the "reasonable approximation" of economic benefit was derived.[57]

Here, the presiding officer plainly understood that a "reasonable approximation" was the standard by which to evaluate the Region's

[57] As noted above, in enforcement actions seeking penalties under Clean Water Act § 309(g)(3), the complainant, in this case the Region, bears the burden of producing evidence to show that it has considered a violator's economic benefit, and that its recommended penalty is supported by its analysis of the economic benefit and other factors identified in that statute. *See New Waterbury*, 5 E.A.D. at 538.

evidentiary presentation of B.J. Carney's economic benefit. *See* Initial Decision at 31. He erred, however, in concluding that a reasonable approximation could not be made in this case.

To begin with, there was a significant portion of the Region's economic benefit calculation that was unaffected by the principal issues of concern to the presiding officer, namely, the benefit enjoyed by B.J. Carney in 1986.[58] This period of time was well within the applicable limitations period and before compliance was achieved in 1990 and is unaffected by the discount rate issues discussed *infra*.[59] Thus, despite the alleged deficiencies in the Region's calculation, the presiding officer nevertheless could have reasonably approximated at least a portion of the benefit enjoyed by B.J. Carney as a result of its noncompliance.

Given the importance of recovering economic benefit, where at least part of the economic benefit can be approximated, courts have routinely opted to recover the partial benefit rather than ignore it merely because the entire benefit cannot be approximated. For example, in *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, the record allowed the court to "determine at least the portion of economic benefit accruing to Gwaltney because of the delay in expending funds" on the pollution control equipment. 611 F. Supp. at 1559. The court noted that "[w]hile this amount is probably less than Gwaltney's total economic benefit, the Court has no basis for rationally arriving at a figure any larger." *Id.* Likewise, in *Atlantic States Legal Foundation v. Universal Tool & Stamping Co., Inc.*, 786 F. Supp. 743 (N.D. Ind. 1992) the court rejected the plaintiff's attempted proof that Universal Tool enjoyed a $1-2.5 million windfall as a result of failing to install an ultrafiltration system, which the plaintiff claimed was the equipment required to achieve compliance. Nevertheless, the court agreed with

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[58] The record contains evidence as to the cost of an evaporator in 1986 dollars ($62,550), and the cost of O/M for the evaporator in 1986 dollars ($1,550). Thus, if B.J. Carney had complied in 1986 (albeit late), it would have spent at least $62,550 plus $1,550, or $64,100. Admittedly, this is only a portion of what B.J. Carney would have spent to achieve compliance in 1986, as we assume that B.J. Carney would have had to raise the $62,550 necessary to purchase the evaporator, and there would have been a cost of borrowing or raising that money, but there is no evidence in the record as to what that cost would have been in 1986. The 1986 figures do not include any discount rate. Tr. at 445-447. Thus, B.J. Carney avoided the expenditure of at least $64,100 in this case. (It would also be reasonable to add to this figure the O/M costs for 1987, 1988, 1989 and 1990, but the record does not separate out those costs; rather these amounts are included in the overall claimed economic benefit figure of $167,000.)

[59] The issue of "offsets" was also of concern to the presiding officer. We address this issue in section II.B.9, *infra*, where we conclude that B.J. Carney has not met its burden of quantifying the specific costs that, in its view, should "offset" the economic benefit calculation.

the plaintiff that Universal Tool enjoyed some benefit. The court, however, found that the benefit in that case stemmed from Universal Tool's delay in installing a clarifier, a piece of equipment different than the ultrafiltration system the plaintiff claimed was necessary to achieve compliance. Because the plaintiff's case was based upon the ultrafiltration system, the plaintiff "offered the court no guidance as to the defendant's benefit from [the] delay" in installing the clarifier. 786 F. Supp. at 751. The court, on its own initiative, found evidence in the record to support an $85,000 benefit stemming from Universal Tool's delay in installing a clarifier, a benefit significantly less than that proposed by the plaintiff. *See also Sierra Club, Lone Star Chapter*, 73 F.3d at 575 (court upheld low estimate of economic benefit because "we note that a court need only make a 'reasonable approximation of economic benefit'"); *cf. Public Interest Research Group v. Magnesium Elektron, Inc.*, 40 Env. Rep. Cas (BNA) 1917, 1930 (D.N.J. 1995) (even though court found that plaintiff's calculation overestimated economic benefit, where the record was insufficient to allow an adjustment, the plaintiff's calculation was accepted because the deficiencies in the record were outweighed by the fact that the record contained the best evidence of the cost of compliance).

In contrast, as noted above, the presiding officer relied upon *Student Public Interest Research Group of New Jersey v. Monsanto*, 29 Env. Rep. Cas (BNA) 1078 (D.N.J. 1988), *aff'd*, 870 F.2d 652 (3d Cir. 1983) where the court determined that a reasonable approximation of economic benefit could not be made, despite detailed testimony and evidence. The presiding officer's reliance upon *Monsanto* was misplaced for two reasons. First, as explained above, despite the purported deficiencies in the Region's calculation identified by the presiding officer, the record provided sufficient evidence from which at least a partial, reasonable approximation could have been made. Indeed, the principal perceived deficiencies in the Region's calculation upon which the presiding officer apparently relied to reject that calculation *in toto* do not affect the economic benefit B.J. Carney enjoyed in 1986.[60] Thus, unlike *Monsanto*, this case does not fail to provide *any* satisfactory method of quantifying at least a partial economic benefit. Second, we respectfully disagree with *Monsanto*'s, and the presiding officer's, opinion that the BEN model must be used to establish economic benefit at a hearing. The Agency has made clear that the BEN model is intended

[60] *See* n.58, *supra*, and accompanying text.

for settlement purposes only.[61] B.J. Carney has never argued that the BEN model should have been used here, and indeed, agrees that the Agency is not required to use it in a hearing context. Oral Arg. Tr. at 46-47.

We conclude that although the presiding officer was aware of the applicable standard for evaluating an economic benefit calculation, he committed reversible error when he determined that, on this record, no reasonable approximation of B.J. Carney's economic benefit could be made. At least a partial economic benefit could be reasonably approximated. If the record supports a partial economic benefit and the only choice is between finding a partial economic benefit or none at all, it is error to find none. However, we do not suggest that the partial benefit enjoyed by B.J. Carney in 1986 is a reasonable approximation of B.J. Carney's total economic benefit from noncompliance. If the full benefit can be reasonably approximated, such benefit should be recovered as part of the penalty assessment. Here, we believe that a full economic benefit can be reasonably approximated on remand by starting with the Region's calculation of $167,000,[62] and subtracting from it that portion of the benefit that accrued outside the five-year limitations period.

6. *Statute of Limitations*

a. *Benefit Accruing Outside Limitations Period*

As stated above, one of the flaws the presiding officer found in the Region's economic benefit calculation was that the calculation included a period of time outside the applicable five-year statutory limitations period. The Region's calculation of B.J. Carney's economic benefit spanned the period of time between January 1984, when the pretreatment regulation became effective, and 1993, when the hearing was held. The presiding officer noted that the statute of limitations[63]

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[61] *Cf. In re Harmon Electronics, Inc.*, 7 E.A.D. 1, 46-47 (EAB 1997) (a self-policing and self-disclosure policy would be undermined if penalty reductions allowed by the policy were fully applied in an adjudicatory rather than a settlement context); *In re Spang & Co.*, 6 E.A.D. 226, 248-49 (EAB 1995) (policy to encourage supplemental environmental projects as a tool to achieve settlements has no applicability in a contested adjudication).

[62] As explained in the following sections in the text, we conclude that the $167,000 figure suffers from only one of the flaws identified by the presiding officer, that flaw being that the $167,000 figure includes, in part, an economic benefit that accrued outside the statutory five-year limitations period.

[63] *See supra* n.54.

prevented the Region from recovering penalties for the violations that occurred outside the limitations period, here, between January 1984 and October 1985. Therefore, the presiding officer concluded that the Region's economic benefit calculation erroneously included the economic benefit B.J. Carney enjoyed before October 1985.

We note that the presiding officer raised the statute of limitations issue *sua sponte* after the hearing was closed, thereby precluding the Region from presenting any evidence or argument as to how the statute of limitations might affect the economic benefit calculation, and in particular, as to what portion of the claimed $167,000 benefit accrued within the limitations period, after October 1985. *See* section II.B.4, *supra*. In 1993 and 1994, the time of the hearing and post-hearing briefs on this matter, the issue of whether the five-year statute of limitations in 28 U.S.C. § 2462 applied to Agency administrative enforcement actions was unsettled, and it was the Agency's general position that it did not apply.[64] Presumably, for the aforementioned reasons, the Region did not factor the statute into its calculation of B.J. Carney's economic benefit of noncompliance. The applicability of the statute of limitations to Agency administrative enforcement actions was established after the post-hearing briefs in this matter had been submitted, but before the initial decision.[65] However, the presiding officer did not reopen the hearing to allow the parties to address its implications for the economic benefit calculation.[66] Consequently, the Region requests a remand for the purpose of demonstrating what economic benefit B.J. Carney enjoyed within the statutory limitations period. Oral Arg. Tr. at 23.[67]

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[64] Indeed, one year prior to the hearing in this matter, the Chief Judicial Officer upheld the Agency's position that the statute of limitations did not apply to the Agency's administrative enforcement proceedings. *See In re 3M Company (Minnesota Mining and Manufacturing)*, 3 E.A.D. 816 (CJO 1992), *rev'd*, *3M Company v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994).

[65] *See 3M Company v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994). The Circuit Court issued its decision on March 4, 1994, a few months after the parties in this proceeding filed their post-hearing briefs in December 1993 and January 1994.

[66] Compare this case with *In re Hardin County, OH*, 4 E.A.D. 318 (EAB 1992), where the presiding officer issued an order directing the parties to show cause why a complaint should not be dismissed in light of a new legal rule announced by a federal court while the administrative adjudicatory process was pending.

[67] Although the Region's notice of appeal claims that "[t]he Presiding Officer miscalculated the correct time for the statute of limitations in limiting the calculation of the economic benefit," the Region did not further address the issue in its briefs filed in connection with this appeal. Moreover, at oral argument, the Region suggested that it did not disagree with this portion of

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In our view, such a remand is warranted for several reasons. It is clear that B.J. Carney enjoyed a substantial economic benefit between 1985 and the hearing date, although the record does not allow us to determine the precise amount.[68] As explained above, at the time the Region made its evidentiary presentation, B.J. Carney had not raised the statute of limitations as an "affirmative" defense,[69] and the *3M* case regarding the applicability of the statute of limitations to administrative proceedings had not yet been decided. Plainly, under such circumstances, the Region had no reasonable basis for believing that the statute of limitations needed to be factored into its economic benefit calculation such that it needed to separate out that portion of the benefit occurring after October 1985 and that portion which occurred before. Because the Region "had no reason to anticipate or to address challenges of that nature in its evidentiary presentation or its briefs, * * * [i]t was error for the [presiding officer] to reject a penalty proposal based on the Region's failure to offer evidence that the Region, was under no * * * obligation to offer and thus, as far as it knew or had reason to know, was not expected to offer." *Employers Insurance of Wausau*, 6 E.A.D. at 763. Here, the presiding officer never put the Region on notice of the statute of limitations issue until the initial decision was rendered. Thus, assuming the presiding officer appropriately raised the statute of limitations issue in the absence of such argument by B.J. Carney,[70] "it was error to articulate that demand only

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the presiding officer's decision. Oral Arg. Tr. at 5, 20-23. Consequently, it appears to us that the Region is no longer contesting the presiding officer's ruling that the Agency cannot recover the economic benefit that was enjoyed outside the limitations period, and we will not address the merits of this specific issue.

[68] The Region's economic benefit figure of $167,000 is derived from a calculation covering the period of time from 1984 to 1993. On the record before us, it is impossible to determine what part of the Region's figure represents the period within the limitations period — from October 1985 until 1993 — but it would appear to be a not insubstantial amount. *Cf.* Oral Arg. Tr. at 21 (counsel for the Region, Jonathan Libber, asserted, without reference to any supporting evidence, that the amount of benefit accruing within the limitations period is $105,000, which would equate to over $150,000 "had it been brought up to 1996 dollars").

[69] Because the statute of limitations is an "affirmative" defense, it was incumbent upon B.J. Carney, not the Region, to raise it as an issue in this matter. *See Davis v. Bryan*, 810 F.2d 42, 44 (2d Cir. 1987) (The statute of limitations is an affirmative defense that is waived if not promptly pleaded, and "[i]f a defendant fails to assert the statute of limitations defense, the [trial] court ordinarily should not raise it *sua sponte*."). B.J. Carney concedes it did not expressly raise the statute of limitations defense, Oral Arg. Tr. at 33, and no such defense appears in B.J. Carney's answer to the complaint, contrary to the requirements of 40 C.F.R. § 22.15(b) (an answer shall state "the circumstances or arguments which are alleged to constitute the grounds of defense").

[70] *See* n.69 *supra*. The propriety of the presiding officer's decision to raise the statute of limitations issue has not been raised as an issue in this appeal.

after the hearing, when the demand could no longer be satisfied." *Id.* at 39. The Region should have had the opportunity to show what B.J. Carney's economic benefit would have been within the applicable limitations period, *i.e.*, by excluding that portion of the $167,000 benefit that predates the limitations period.[71] Accordingly, a remand is warranted for the limited purpose of reopening the record to address this issue.

b. *Use of a Discount Rate Outside the Limitations Period*

The presiding officer also concluded that the statute of limitations affected the Region's selection of a discount rate. In particular, he faulted the Region for using a 1984 discount rate in its calculation when 1984 is outside the limitations period. The Region has appealed this determination.

We disagree with the presiding officer's analysis of how the statute of limitations affects the selection of a discount rate. In effect, the presiding officer concluded that an economic benefit calculation is necessarily defective if it uses a discount rate outside the limitations period. In our view, the presiding officer went too far in concluding that, in effect, it is per se unreasonable to use a discount rate outside the limitations period when examining the costs a violator avoided or delayed in achieving compliance. Despite the statute of limitations, the point in time at which compliance was initially required may nonetheless be an appropriate time for setting the discount rate, which, as explained in section II.B.2 *supra*, represents the cost of financing pollution control equipment. Thus, during the limitations period, the violator avoided or delayed paying a cost that was established outside the limitations period. We think it was wrong for the presiding officer to conclude that the statute of limitations automatically precludes the use of such a discount rate in economic benefit calculations. The statute of limitations does not preclude a company from obtaining a benefit, it only precludes the Agency from recovering that portion of the benefit that was realized more than five years before the complaint was filed, outside the limitations period.[72]

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[71] It is possible that even after excluding the pre-limitations period, B.J. Carney's economic benefit exceeds the statutory maximum $125,000 penalty, thus rendering the penalty unaffected by the statute of limitations. However, on this record, it is impossible to make such a determination.

[72] The statute of limitations is an artifice of the law to preclude stale claims. *See generally* 51 Am.Jur.2d Limitations of Actions Section D ("Operation and Effect"). Nothing in that doctrine

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We wish to emphasize, however, that in any case, the complainant must provide a reasoned explanation on the record for its selection of a discount rate. Here, Zanier testified that she selected a 1984 rate because that is when compliance was first required, *i.e*, that is when a company that complied on time would have had to borrow the money to purchase the necessary pollution control equipment. B.J. Carney never challenged her assumption that 1984 was the beginning date for the benefit. Thus, we see no error in using a discount rate outside the limitations period in this case. (B.J. Carney did, however, disagree with using a 1984 discount rate over a ten-year period, from 1984 to 1993. The latter issue is discussed at section II.B.8, *infra*.)

7. *Ending Date*

As previously stated, the Region calculated B.J. Carney's economic benefit as continuing through the hearing date in October 1993. The presiding officer disagreed with this approach, concluding that "Carney came into compliance in July 1990 and this should have been the ending date for the benefit." Initial Decision at 28. The presiding officer reasoned that B.J. Carney had a "colorable" legal theory with respect to its liability, and it should not be penalized by the Region's attempt to recover any benefit that accrued merely because B.J. Carney contested the complaint. *Id*.

On appeal, the Region argues that a violator's economic benefit ends when the benefit is disgorged, even if that occurs well after compliance is achieved, and we agree. The Region's reasoning is persuasive, because until a violator disgorges the economic benefit it received as a result of its noncompliance, it still enjoys the benefit of having those funds available for its use and/or competitive advantage, presumably in an interest-bearing or otherwise profitable fashion. In this case, B.J. Carney admits that it is currently enjoying such a benefit: at the oral argument, B.J. Carney conceded that it had set aside an amount equal to the statutory maximum penalty ($125,000). Oral Arg. Tr. at 37-38.

By attempting to recover the benefit that accrues until it is disgorged, the Region is not "penalizing" B.J. Carney for contesting the complaint, but rather, seeking to fulfill the dual statutory objectives of fostering compliance and placing B.J. Carney in the position it would

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per se precludes the use of a discount rate outside the limitations period so long as any prelimitation benefit is subtracted from the total benefit. We note that in general a respondent remains free to argue that a discount rate other than the one used by the complainant should apply on the particular facts of its case.

have been had it complied on time. B.J. Carney chose not to invest in compliance. Having been found in violation, B.J. Carney should not be allowed to benefit economically from that violation, and thus be placed in a better position that those who followed the law and complied on time.[73]

B.J. Carney argues that because it chose closure as its method of compliance, any economic benefit it enjoyed ended when the facility was closed. We find this reasoning unpersuasive. Even though B.J. Carney closed the facility at issue here, B.J. Carney is still existing in corporate form,[74] and, moreover, it is admittedly enjoying the benefit of having available to it, presumably in an income-producing fashion, the money it saved by its noncompliance. Thus, the fact that the facility closed has no impact on determining when the calculation of B.J. Carney's economic benefit should end.

8. *Use of a Single Discount Rate Over Time*

The presiding officer found two errors in the 16.0% discount rate used by the Region in its economic benefit calculation. First, the presiding officer believed that the use of a rate from 1984 was "not appropriate because the statute of limitations bars any penalty for violations prior to * * * 1985." Initial Decision at 29. For the reasons set forth above in section II.B.6.b, we disagree, and consequently, the presiding officer's decision to reject the discount rate on the basis of the statute of limitations was in error.

Second, the presiding officer stated that the Region unreasonably assumed that B.J. Carney could have secured an investment that

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[73] We recognize that numerous court cases have used a violator's compliance date as an ending date for calculating the economic benefit. *See, e.g., Chesapeake Bay Foundation*, 611 F. Supp. at 1558, 1563 (economic benefit calculated to end on the date compliance is achieved or expected); *Atlantic States Legal Foundation v. Universal Tool*, 786 F. Supp. at 751 (economic benefit calculated over the four-year period between the date compliance is required and the date the company purchased equipment to achieve compliance). However, the specific issue of whether the economic benefit calculation should end on the date of compliance or on the date the benefit is disgorged, which is the issue facing the Board, was neither raised nor addressed in those cases. We have found no judicial precedent in which this issue was both raised and decided.

[74] To demonstrate that B.J. Carney is still in business despite closing its Sandpoint facility, the Region cited a Dun & Bradstreet report on B.J. Carney. *See* Region's Response to B.J. Carney's Reply Brief on Economic Benefit at 2 n.1. B.J. Carney moved to strike this reference, and the Region opposed the motion. The motion is denied. In any event, the information contained in the Region's reference is irrelevant for our purposes, as the parties have never disputed B.J. Carney's continued corporate existence.

would have yielded a 16.0% return annually between 1984 and 1993, a period during which, the presiding officer opined, discount rates varied, and therefore the Region's economic benefit calculation wrongfully applied the 16.0% discount rate over the period from 1984 to 1993. *Id*. On appeal, the Region contends that the presiding officer erroneously rejected the discount rate on this basis, and we agree.

Where a complainant seeks to recover a violator's economic benefit of noncompliance, and the calculation of that benefit utilizes a discount rate, the record in any given matter must contain a reasoned explanation and supportable rationale for the selection and use of the discount rate. The propriety of the discount rate used by the complainant can always be raised as an issue by a respondent.[75] This would include, to use this case as an example, the propriety of using a single discount rate calculated by a WACC formula and applied in an economic benefit calculation spanning ten years. After a careful review of this record, however, we conclude that B.J. Carney's cross-examination was not sufficient to discredit Zanier's testimony.[76] Although Zanier's testimony is sparse in places, the evidence in the record, as discussed more fully *infra*, as a whole, is sufficient to establish that the 16.0% discount rate used by the Region can be used to reasonably approximate B.J. Carney's economic benefit. *See United States v. Bethlehem Steel Corp.*, 829 F. Supp. 1047, 1055 (N.D. Ind. 1993) (court accepted government expert's economic benefit calculation where court found expert credible, and where defendant failed to provide its own expert testimony).

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[75] The Region's appeal suggests that because B.J. Carney did not produce a competing economic benefit calculation at the hearing, the presiding officer was required to accept the Region's calculation. We disagree. As a procedural matter, a respondent is not obligated to present a competing economic benefit calculation at the risk of being assessed the penalty sought by the complainant. It is the complainant that bears both the initial burden of production and the ultimate burden of persuasion as to whether the penalty it seeks is appropriate in light of the governing statute and regulations. *In re New Waterbury, Ltd.*, 5 E.A.D. 529 (EAB 1994). For a respondent's purposes, it may be sufficient merely to cross-examine the complainant's witnesses or challenge the complainant's evidence.

[76] We do not by any means suggest that the record in this matter is a model of how an economic benefit case should be presented. This record does create confusion. *See* n.78, *infra*. Furthermore, the inclusion of a penalty worksheet or a document providing a more specific breakdown of the $167,000 in claimed economic benefit would have been of assistance to the Board, *see* n.49, *supra*, and might have enabled the Board to determine the economic benefit and total penalty on its own without the necessity for a remand. Nevertheless, there is enough evidence in this record to support a conclusion that the 16.0% discount rate can be used to calculate the economic benefit in this case.

Preliminarily, we note that in this appeal there is no dispute reflected in the record as to the propriety of using a WACC formula, as opposed to some other formula, to determine the discount rate. Indeed, there is no evidence in the record that shows that the use of a WACC was inappropriate or that another method should have been used. Further, there is no dispute as to whether Zanier miscalculated the WACC rate. There is no evidence in the record to suggest that a specific numerical value other than 16.0% should have been used. The issue of concern here is whether it was reasonable for Zanier to use a figure representing an appropriate discount rate for 1984 (16.0%) for each of the ten years covered by her economic benefit calculation. We conclude that there is nothing in this record which demonstrates that this was wrong.

It is clear to us that Zanier's economic benefit calculation attempted to approximate an amount equal or close to what a complying company would have spent in 1984 to purchase and install an evaporator and thereby comply with the applicable pretreatment regulation. Such an approach is beyond a doubt consistent with one of the fundamental goals of the statutory directive to recoup a violator's economic benefit, which is to provide a level playing field among regulated entities by placing a violator in the same place it would have been if it had complied on time. To calculate this benefit, Zanier used a discount rate, and in particular a figure representing the WACC in 1984, to determine the costs a complying company would have incurred to obtain the required pollution control equipment, and thereby the costs B.J. Carney avoided. As explained above, a discount rate represents the cost of financing pollution control equipment. *See* 61 Fed. Reg. at 53,029 ("The discount rate is an interest rate that reflects the violator's cost of capital. In essence, this is the cost of financing pollution control investments."); BEN User's Manual at 4-19 ("The discount rate is based on the cost of capital for pollution control investments."). Significantly, Zanier provided a rationale for applying this 1984 discount rate for each of the ten years of her calculation. Zanier explained that the discount rate she used represented the cost of financing pollution control equipment in 1984, and that the cost would not have been renegotiated over the useful life of the equipment.[77] Tr. at 491. This testimony was not refuted by any evidence produced at the hearing, either on cross-examination of Zanier, or direct examination of B.J. Carney's witnesses.

[77] We note that the BEN User's Manual assumes that water pollution control equipment has a useful life of fifteen years. BEN User's Manual at 4-20.

Despite the fact that there is no evidence in the record that B.J. Carney would have renegotiated its costs of financing the 1984 purchase of an evaporator, the presiding officer rejected Zanier's rationale for using a 1984 discount rate over the ten-year period covered by her calculation. The presiding officer concluded that Zanier's rationale was "unrealistic since it assumes Carney could have secured an investment that would yield a 16.01% return over close to a ten year period. This is an unreasonable assumption, in light of the varying economic conditions during the relevant period."[78] Initial Decision at 29. However, there is no evidence in the record supporting the presiding officer's rejection of Zanier's assumption that B.J. Carney would not have renegotiated its cost of capital. Thus, even assuming that economic conditions varied during the approximately ten-year period in question, there is no evidence that any such varying economic conditions would have changed Zanier's rationale. Fixed rate financing for a ten-year period would seem to be an option open to a company seeking to acquire an expensive item of pollution control equipment. The presiding officer's conclusion that economic conditions varied during that period such that use of a single discount rate was unreasonable or unrealistic, therefore, is an assumption of fact that is not supported by any evidence in the record.

In our view, the presiding officer erred in making this unsupported factual assumption in the face of a completely contrary, plausible assumption that formed part of an expert witness' testimony. Because the presiding officer's rejection of the discount rate rested upon this unsupported factual assumption, the rejection of the dis-

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[78] It is not entirely clear what the presiding officer meant by his view that Zanier's rationale unrealistically assumed B.J. Carney could have "secured an investment that would yield a 16.01% return[.]" Initial Decision at 29. The presiding officer could be alluding to the portions of Zanier's testimony suggesting a linkage between the discount rate and a return the violator could have obtained through a "alternative investment." *See, e.g.*, Tr. at 446, 447. Perhaps he was referring to the concept that a discount rate, and in particular a WACC rate, in part reflects a violator's rate of return on internal investments. *See* Region's Brief at 10 n.6; BEN User's Manual at A-6. In our view, the record (including Zanier's testimony) is somewhat confusing on this issue. *See also* Oral Arg. Tr. at 55-56 (Counsel for the Region, Jonathan Libber, stated that "the 16 percent discount rate has often been confused often — well, in this case, the presiding officer and today I also heard some language that would indicate there is some confusion. It's not the investment, return on investment that a violator could go out and get in the marketplace. It is the cost the violator faces when trying to finance pollution control equipment which reflects the riskiness investment in that violator.").

Whatever the confusion on this issue in the record and the initial decision, however, it is not material to the outcome of this case in light of Zanier's unrefuted testimony that she used a WACC rate to compute the discount rate and that the cost of financing the evaporator would not have been renegotiated during the life of the equipment.

count rate was erroneous. Reviewing the evidence that is in the record with respect to the discount rate, there stands a reasonable rationale for using the 1984 discount rate over the ten-year period covered by the economic benefit calculation, specifically the testimony of Zanier that B.J. Carney would not have renegotiated its cost of financing. There is no evidence to refute this rationale. Nor is there any evidence that the discount rate itself was calculated erroneously, that a specific different rate should have been used, or that a WACC rate is inappropriate. On this record, the presiding officer erred in relying upon a factual assumption unsupported by record evidence to reject the unrefuted rationale for using the 1984 discount rate in this fashion.

9. *Offsets: Alleged Compliance Costs*

In his initial decision, the presiding officer opined that it is "uncontroverted that [B.J. Carney] expended about $240,000 to reduce the discharges during the period of operations at issue." Initial Decision at 31. In the presiding officer's view, the Region's failure to consider these expenditures in its economic benefit calculation was a "serious flaw" because "it is equitable to offset any costs for attempting to eliminate the discharge against the costs saved by non-compliance." *Id*. According to the presiding officer, "[i]t is clear that, had this offset been made, the economic benefit cost saving from non-compliance would have been entirely eliminated[.]" *Id*.

The Region contends that the presiding officer's reasoning with respect to B.J. Carney's alleged compliance costs is wrong. Emphasizing that compliance required zero discharge to the POTW, the Region argues that B.J. Carney never attempted to achieve compliance. Instead, B.J. Carney attempted only to reduce, but not eliminate the discharge, when the applicable pretreatment regulation called for no discharge of process wastewater pollutants.[79] For the reasons stated below, we conclude that the offsets against the economic benefit were not appropriate here.

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[79] Alternatively, the Region argues that even if the $240,000 was spent to achieve compliance, B.J. Carney would have benefitted from delaying these costs, and therefore it was to B.J. Carney's benefit that these delayed costs were not included in the economic benefit calculation. In other words, the Region argues, assuming hypothetically B.J. Carney is correct that it spent $240,000 to achieve compliance, the Region's calculation is conservative in B.J. Carney's favor because it did not include any benefit B.J. Carney enjoyed from delaying the expenditure of these sums.

There has been no showing that B.J. Carney spent $240,000 in an attempt to eliminate the discharge as required by the pretreatment regulation. *See* n.80, *infra*, and accompanying text.

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The record does not support a finding that B.J. Carney spent $240,000 in an attempt to comply with the zero discharge requirement.[80] The record is full of gaps and inconsistencies concerning exactly what sums were spent by B.J. Carney prior to 1990 and for what purpose they were spent. Several points in the hearing transcript indicate that this $240,000 figure includes $50,000 which was spent to remove a pile of contaminated soil (Tr. at 627, 708), something clearly not necessary to achieve compliance with the pretreatment regulation. Additional testimony reveals that part of the $240,000 was spent on general housekeeping and maintenance (Tr. at 673), which we assume would have been done regardless of the pretreatment requirements. B.J. Carney concedes it had the burden of quantifying on the record the amount of money it spent directed at achieving compliance. Oral Arg. Tr. at 50-51. B.J. Carney, however, failed to satisfy this burden; at best, the record shows that B.J. Carney made some efforts to reduce the discharge, but that the cost of these efforts were not quantified on the record and the purpose for which the individual expenditures were undertaken cannot also be sufficiently ascertained.

We also note that B.J. Carney's compliance efforts already have been factored into the penalty assessed. To the extent some of the $240,000 reduced the PCP discharge and thus the harm to the environment, those costs were indirectly reflected in the penalty calculation by the presiding officer's conclusion that B.J. Carney's violations resulted in only minor harm to the environment. Initial Decision at 25. *See also* Oral Arg. Tr. at 29. Furthermore, the presiding officer reduced the gravity-based penalty by 50% under the "other factors as justice may require" rubric for, among other reasons, "Carney's good faith efforts at compliance." Initial Decision at 32-33. This ruling was not challenged on appeal. We do not believe that any further downward

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Even if such a showing had been made, there has been no showing that the expenditure of these sums would have negated the need to purchase and operate an evaporator. Thus, we can only conclude that if the expenditure of $240,000 was necessary to achieve compliance, it was *in addition to* the purchase and operation of an evaporator. It follows, then, that if compliance required both the purchase and operation of an evaporator *and* $240,000 worth of other measures, any benefit B.J. Carney enjoyed from delaying the expenditure of the $240,000 was *in addition to* the benefit enjoyed from avoiding the purchase and operation of an evaporator. Therefore, it does not appear to us that had the $240,000 been considered in the Region's economic benefit calculation, it would have negated the Region's $167,000 calculation; instead, it appears that it would have increased that amount.

[80] Although the presiding officer stated it was "uncontroverted" that B.J. Carney spent $240,000 in an "attempt[] to eliminate the discharge," Initial Decision at 31, B.J. Carney conceded at oral argument that "[t]he costs that we incurred were to reduce the levels at which we were discharging, *not to reach a zero.*" Oral Arg. Tr. at 43.

adjustment in the economic benefit is appropriate in this case based upon any past expenditures on compliance costs.[81] For this reason, the presiding officer erred in concluding that had the alleged compliance costs been considered, the economic benefit of noncompliance in this case would have been eliminated.[82]

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[81] It strikes us that the question of offsets for compliance costs in the economic benefit context is more complex than either the presiding officer or the parties have made it out to be. *Cf.* Oral Arg. Tr. at 29. While we need not explore the question further in this case because of the failure of B.J. Carney to meet its burden of quantifying any such costs, we note that given the fundamental importance of recovering the full economic benefit, whether and to what extent, and under what circumstances, an offset (or other adjustment to economic benefit) may be appropriate for "good faith, reasonable efforts to achieve compliance" is not always a simple matter. This issue, and in particular its relationship to other typical penalty adjustment factors, such as good faith efforts to comply, in which some kind of penalty reduction but typically not a "dollar for dollar" offset is often granted, is one best fleshed out as a general policy matter by the Office of Enforcement and Compliance Assurance. *Compare United States v. Bethlehem Steel Corp.*, 829 F. Supp. at 1056 (economic benefit calculation should not be credited with unsuccessful compliance measures) *with Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC) Inc.*, 956 F. Supp. 588 (D.S.C. 1997) at 14 (subtracting from economic benefit calculation the costs of purchasing equipment used in unsuccessful compliance attempts).

[82] The presiding officer stated that instead of considering B.J. Carney's alleged compliance costs in the economic benefit calculation, he could have considered these costs as a mitigating factor under the statutory rubric of "other factors as justice may require." Initial Decision at 31 n.18. The accuracy of this statement has not been raised as an issue in this particular case. Nevertheless, we note that in *In re Spang & Co.*, 6 E.A.D. 226, (EAB 1995), we explained what is necessary for application of the "justice" factor in the context of past expenditures on "environmental good deeds" (which allegedly were not required by law). In *Spang*, we emphasized that sight must not be lost of the fact that "initial compliance with the law is the primary objective of the Agency's enforcement efforts and that penalties play an important deterrent role in those efforts." *Id*. at 250. We further stated that "use of the justice factor should be far from routine, since application of the other adjustment factors normally produces a penalty that is fair and just." *Id*. This is consistent with the underlying principle of the "justice" factor which is "to operate as a safety mechanism when necessary to prevent an injustice." *Id*. Thus, under the circumstances in *Spang*, we stated that adjustment under the "justice" factor may be warranted only if the evidence of those good deeds is "clear and unequivocal, and the circumstances must be such that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice." *Id*.

On remand, we do not think that any further downward adjustment in the penalty based on the $240,000 in alleged "compliance" costs is appropriate under the "justice" factor. We note that the presiding officer has already considered these costs in his decision to reduce the gravity portion of the penalty by 50%, and this issue has not been appealed. *See* n.24, *supra*. Furthermore, B.J. Carney has not met its burden of quantifying its alleged "compliance" costs. On this record, we are not persuaded that a failure to give any further downward adjustment would be an injustice, let alone a "manifest injustice." For these reasons, this issue should not be considered on remand.

10. *Closure Costs and Profits*

Having concluded that the Region's evidentiary presentation did not allow a reasonable approximation of B.J. Carney's economic benefit from noncompliance, the presiding officer looked at other ways to determine the benefit. Specifically, the presiding officer looked to see if there was any way to calculate the benefit B.J. Carney enjoyed by delaying its costs of closing the facility, estimated to be about $450,000 to $500,000,[83] or the benefit B.J. Carney enjoyed from the profits it made during its noncomplying operations.

Contrary to the Region's arguments on appeal, the presiding officer did not say that the Region's economic benefit calculation was deficient and should be rejected because it failed to "offset" B.J. Carney's closure costs, or to consider B.J. Carney's profits. The presiding officer only mentioned closure costs and profits because he concluded, wrongly in our view, that he could not make a reasonable approximation of economic benefit based upon the Region's evidentiary presentation.[84]

11. *Remand*

In sum, we find that only one of the alleged deficiencies found by the presiding officer with respect to the Region's economic benefit calculation exists. That error is the Region's failure to exclude from its calculated benefit of $167,000 the amount that accrued outside the limitations period. Because the Region had no notice of this issue, a remand is warranted for the limited purpose of allowing the Region to calculate this exclusion.

Accordingly, on remand, the presiding officer shall, in conformance with this opinion and after any new evidence is received during the reopened hearing, determine the economic benefit that B.J.

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[83] The record is clear that this figure represents the cost of removing the soil and treatment tanks from the facility, costs not required to achieve the zero discharge required by the pretreatment regulation. Compliance was achieved merely by plugging the pipe at a cost of "nickels and dimes." Tr. at 752.

[84] We do not mean to suggest that profits and delayed closure costs can only be examined if there is no other way to calculate economic benefit. The Region agrees that in certain circumstances, profits and delayed closure costs may be appropriate methods of determining economic benefit. Profits, delayed costs and avoided costs are all potential matters to consider in determining a suitable method of calculating an economic benefit, and a complainant is not obligated to use any one of them in a particular matter. Rather, the use of any one of them, alone or in combination, is a strategic decision for a complainant.

Carney enjoyed within the limitations period. Then, also in accordance with this opinion, the presiding officer shall determine an appropriate penalty based on all of the factors he is required to consider under Clean Water Act § 309(g)(3), including the statutory directive to recover a violator's economic benefit of noncompliance.

III. *CONCLUSION*

For the reasons set forth above, we affirm the presiding officer's conclusion that B.J. Carney is liable for violating the pretreatment requirement contained in 40 C.F.R. § 429.75. With respect to the penalty, however, we reverse the rulings of the presiding officer with respect to the economic benefit of noncompliance, with the exception of his ruling that the penalty shall exclude any economic benefit that accrued outside the limitations period. We therefore remand the case to the presiding officer for the limited purpose of determining: 1) how much of the $167,000 economic benefit accrued within the limitations period, and 2) an appropriate penalty based upon all the factors required to be considered under Clean Water Act § 309(g)(3), including the amount of B.J. Carney's economic benefit within the limitations period.

So ordered.