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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR  
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HEARINGS CLERK  
EPA--REGION 10

In the matter of: )  
)  
)  
Ark Fisheries, Inc. ) DOCKET NO. CWA-10-2010-0239  
)  
and )  
) COMPLAINANT'S PREHEARING  
Lynn Babington, ) EXCHANGE  
)  
Respondents. )  
\_\_\_\_\_ )

Pursuant to 40 C.F.R. § 22.19, and the Presiding Officer's Prehearing Order dated November 30, 2010, Complainant Environmental Protection Agency ("EPA") submits this Prehearing Exchange. EPA respectfully reserves the right to supplement this Prehearing Exchange if necessary prior to hearing with proper notice to Respondents.

**I. WITNESSES.**

1. Derek Schruhl. Mr. Schruhl is a compliance officer in the EPA Region 10 NPDES Compliance Unit in Seattle. Mr. Schruhl has reviewed the NPDES permit compliance files in this matter, and he will testify regarding the allegations in the complaint, and Respondents' general lack of compliance with the monitoring and reporting requirements of the NPDES permit. Mr. Schruhl will also testify regarding Respondents' good faith efforts to comply, harm caused by the violations, history of violations and the nature, circumstances and extent of the violations.

2. Lloyd Oatis. Mr. Oatis is a financial analyst with EPA Region 10 in Seattle. He will testify regarding Respondents' claim of inability to pay the proposed penalty. His cv is attached as Exhibit C36.

3. Leigh Woodruff. Mr. Woodruff is an environmental scientist with EPA. He works in the Total Maximum Daily Load ("TMDL") Program for Region 10, and he is located in the Boise Office. Mr. Woodruff will testify as an expert witness regarding the nutrient problems in Snake River, and the impact of aquaculture discharges on the water quality of the Snake River. Mr. Woodruff's cv is attached as Exhibit 37.

4. EPA reserves the right to call all fact witnesses named by Respondents, and to name additional witnesses to rebut testimony offered by Respondents.

## **II. EXHIBITS.**

For purposes of the list of documents below, "Complainant's Exhibit No." is abbreviated as "C\_\_\_." The documents themselves are labeled "Complainant's Ex. No."

- C1: Letter to Director, EPA, Region 10, from Ark Fisheries, Inc. and Silver Creek Farms, Inc. dated 8/22/05
- C2: 2005 Annual Report Availability and attachments dated 2/20/06
- C3: 2006 Annual Report Availability dated 3/20/06
- C4: 2008 Annual Report Availability dated 1/4/09
- C5: 2009 Annual Report Availability and attachment dated 8/9/10
- C6: 2007 Annual Report of Operations and attachments dated 10/20/10
- C7: 2005 Discharge Monitoring Reports (DMR)
- C8: 2006 DMRs

- C9: 2007 DMRs
- C10: 2008 DMRs
- C11: 2009 DMRs
- C12: 2010 DMRs
- C13: EPA Compliance Order dated 9/18/01
- C14: EPA Compliance Order dated 9/19/01
- C15: Notice of Noncompliance dated 12/10/01
- C16: EPA Compliance Order dated 3/6/02
- C17: Request for Information dated 4/3/02
- C18: Letter to Lynn Babington, ARK Fisheries from LeRoy Loiselle, EPA, dated 5/17/02
- C19: Letter to Lynn Babington, ARK Fisheries from Rob Sharpnack, Idaho Department of Environmental Quality (IDEQ), dated 8/5/04
- C20: Notice of Violation dated 8/18/04
- C21: Notice of Violation dated 8/20/04
- C22: Water Compliance Inspection Report dated 3/7/05
- C23: Notice of Violation dated 6/15/05
- C24: Notice of Violation dated 8/2/05
- C25: Letter to Ark Fisheries from Irene Hopkins, EPA, dated 9/30/05
- C26: Water Compliance Inspection Report dated 5/22/06
- C27: Letter and attachment to Lynn Babington, ARK Fisheries, Inc. from Rob Sharpnack, IDEQ, dated 4/2/07
- C28: Letter to Lynn Babington, Ark Fisheries, Inc. from Diane Davis, EPA, dated 7/24/07
- C29: Letter to Lynn Babington, Ark Fisheries, Inc. from Diane Davis, EPA, dated 11/30/07

- C30: Letter to Lynn Babington, Tunnel Creek Fish Hatchery from Kimberly Ogle, EPA, dated 1/16/08
- C31: Letter and attachment to Ark Fisheries, Inc., c/o Lynn Babington, Tunnel Creek from Rob Sharpnack, IDEQ, dated 2/26/08
- C32: Letter and attachment to Lynn Babington, Ark Fisheries, Inc. from Diane Davis, EPA, dated 12/10/08
- C33: Letter and Request for Information and Compliance Order to Lynn Babington, Ark Fisheries Inc. from Edward Kowalski, EPA, dated 4/8/09
- C34: Email to Lynn Babington, Ark Fisheries, Inc. from Chris Gebhardt, EPA, dated 6/23/09
- C35: Letter to Lynn Babington, Silver Creek Farms from Alfred Vann, EPA, dated 12/4/09
- C36: Memorandum from Carla Fromm, EPA to Chris Gebhardt, EPA, dated 12/7/09
- C37: Letter and Request for Information to Lynn Babington, Ark Fisheries Inc. from Edward Kowalski, EPA, dated 7/23/10
- C38: Lloyd Oatis CV
- C39: Leigh Woodruff CV

### **III. PROPOSED PENALTY**

Complainant respectfully submits the following statement explaining how the proposed penalty will be calculated. In accordance with Section 22.14 of the Part 22 Rules, 40 C.F.R. § 22.14(a)(4)(ii), the Complaint in this matter does not include a specific penalty demand. Pursuant to Section 22.19 of the Part 22 Rules, 40 C.F.R. § 22.19(a)(4), Complainant intends to file (no more than 15 days after Respondents file their prehearing information exchange) a document specifying a proposed penalty and explaining how this penalty was calculated in accordance with the criteria set forth in the CWA. The following discussion outlines the legal and factual framework Complainant will employ in proposing this specific penalty amount.

Section 309(g) of the CWA authorizes the assessment of an administrative civil penalty for a Section 301 violation of up to \$10,000 per day for each day the violation continues, with a maximum penalty of \$125,000. Pursuant to the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, the statutory maximum administrative penalty amounts have been increased to \$16,000 per day, with a maximum penalty of \$177,500. 40 C.F.R. § 19.4, Table 1. The Complaint in this matter alleges that Respondents failed to timely submit discharge monitoring reports and required annual reports on a regular basis for at least five years despite many requests and much prodding from EPA. The Complaint also alleges that Respondents failed to collect required samples, failed to comply with monthly average effluent limits, failed to comply with a CWA section 308 Information Request, and that they discharged for a permit without the benefit of NPDES permit coverage for their facility.

Complainant will propose a specific penalty in this matter that is based on the applicable statutory penalty factors in section 309(g)(3) of the CWA. These factors are “[1] the nature, circumstances, extent, and gravity of the violation, or violations, and, with respect to the violator, [2] ability to pay, [3] any prior history of such violations, [4] the degree of culpability, [5] economic benefit or savings (if any) resulting from the violation, and [6] such other matters as justice may require.” 33 U.S.C. § 1319(g)(3). Each of these six factors is discussed briefly below.

A. Nature, Circumstances, Extent, and Gravity of Violation

The nature, circumstances, extent, and gravity of the violation reflect the “seriousness” of the violation. *In re Urban Drainage and Flood Control District, et al.*, Docket No. CWA-VIII-94-20-P11, 1998 EPA ALJ Lexis 42, at \*56 (Initial Decision, June 24, 1998). The seriousness of

a particular violation depends primarily on the actual or potential<sup>2</sup> harm to the environment resulting from the violation, as well as the importance of the violated requirement to the regulatory scheme. *See id.*

Complainant believes that the nature, circumstances, extent, and gravity of the violations in this case are significant and justify a substantial penalty. The bulk of Respondents' violations arise from failure to report. The backbone of the CWA NPDES is self-reporting. *See United States v. Sheyenne Tooling*, 952 F. Supp. 1414, 1418 (D.N.D. 1996) ("The efficacy, indeed the possibility, of enforcement under the Clean Water Act relies largely upon self-testing and reporting.") On a regular basis for many years, Respondents have failed to submit necessary reports to EPA to document their compliance with the CWA. While the reports were eventually produced, it took numerous CWA section 309(a) Orders and much prodding from EPA to convince Respondents to submit their DMRs and annual reports.

The evidence will show that Respondents have never taken seriously their reporting duties under their NPDES permits. Respondents run an aquaculture facility that discharges

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<sup>2</sup> In analyzing the degree of harm posed by a violation, it is not necessary to establish that the violation caused actual harm in order to justify imposition of a substantial civil penalty; the fact that the violation posed potential harm may be sufficient. *See United States v. Gulf Park Water Company, Inc.*, 14 F. Supp. 2d 854, 860 (S.D. Miss. 1998) ("The United States is not required to establish that environmental harm resulted from the defendants' discharges or that the public health has been impacted due to the discharges, in order for this Court to find the discharges 'serious'. . . . Under the law, the United States does not have the burden of quantifying the harm caused to the environment by the defendants"); *United States v. Municipal Authority of Union Township*, 929 F. Supp. 800, 807 (M.D. Pa. 1996) ("It must be emphasized, however, that because actual harm to the environment is by nature more difficult and sometimes impossible to demonstrate, it need not be proven to establish that substantial penalties are appropriate in a Clean Water Act case."), *aff'd* 150 F.3d 259 (3d Cir. 1998); *Urban Drainage*, 1998 EPA ALJ Lexis 42, at \*65 ("A significant penalty may be imposed on the basis of potential environmental risk without necessarily demonstrating actual adverse effects") (citing *United States v. Smithfield*

phosphorous to the Snake River, which is a water body subject to a total maximum daily load (TMDL) for nutrients. Respondents' history of noncompliance with their reporting requirements undermines EPA's ability to track compliance with the TMDL.

Respondents' monthly average violations for phosphorus are serious because the receiving water is subject to a TMDL for nutrients. Likewise, Respondents' unpermitted discharges into the Snake River are of consequence because unauthorized discharges significantly undermines the Clean Water Act's regulatory scheme. *See United States v. Pozsgai*, 999 F.2d 719, 725 (3<sup>rd</sup> Cir. 1993) (noting that "[u]npermitted discharge is the archetypal Clean Water Act violation, and subjects the discharger to strict liability"). The evidence in this matter will establish that Respondents discharge aquaculture wastes to the Snake River for a period of 60-days without a permit.

**B. Respondents' Ability to Pay**

In its 1994 *New Waterbury, Ltd.* decision, the Environmental Appeals Board ("EAB") set forth a now well-established process for considering and proving in the context of an administrative hearing a violator's ability to pay a civil penalty.

Where ability to pay is at issue going into a hearing, the Region will need to present some evidence to show that it considered the respondent's ability to pay a penalty. The Region need not present any *specific* evidence to show that the respondent *can pay* or obtain funds to pay the assessed penalty, but can simply rely on some *general* financial information regarding the respondent's financial status which can support the *inference* that the penalty assessment need not be reduced. Once the respondent has presented *specific* evidence to show that despite its sales volume or apparent solvency it cannot pay any penalty, the Region as part of its burden of proof in demonstrating the "appropriateness" of the penalty must respond either with the introduction of additional evidence to rebut the

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*Foods, Inc.* 972 F. Supp. 338, 344 (E.D. Va. 1997), *aff'd*, 191 F.3d 516 (4<sup>th</sup> Cir. 1999)).

respondent's claim or through cross examination it must discredit the respondent's contentions.

*In re New Waterbury, Ltd.*, 5 E.A.D. 529, 542-430 (EAB 1994) (emphasis in original); *see also*

*In re Chempace Corp.*, FIFRA Appeal Nos. 99-2 & 99-3, slip op. at 21 (EAB, May 18, 2000).

Accordingly, while the Region has the initial burden of production to establish that the Respondents have the ability to pay the proposed penalty, "[t]he burden then shifts to the respondent to establish with specific information that the proposed penalty assessment is excessive or incorrect." *Chempace Corp.*, slip op. at 22. Failure by a respondent to provide specific evidence substantiating a claimed inability to pay results in waiver of that claim. *In re Spitzer Great Lakes Ltd.*, TSCA Appeal No. 99-3, slip op. at 29 (EAB, June 30, 2000).

At any hearing in this matter, Complainant will establish that it has considered Respondents' ability to pay in proposing a civil penalty and will, at a minimum, present general financial information about Respondent that shows that they are financially solvent and they control substantial assets including a large number of aquaculture facilities.<sup>1</sup> Should such information be included in Respondents' prehearing exchange, Complainant will consider it in proposing a specific penalty amount.

C. Prior History of Violations

In a case involving the application of EPA's Clean Air Act asbestos penalty policy, the EAB noted that

[a] history of prior notices not only is evidence that the respondent was aware of the required compliance, but also is evidence that the respondent was aware of sanctions for

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<sup>1</sup> To date, Respondents have provided substantial financial documentation to EPA during settlement discussions. Because those documents may or may not be available for use at hearing, Complainant intends to file a motion for discovery on ability to pay information after Respondents have submitted their prehearing exchange if Respondents do not put into the record the documents already supplied to EPA during settlement.



noncompliance. . . . [A] compliance history that includes receipt of a prior [immediate compliance order or "ICO"] indicates that the party was not deterred by such knowledge of the sanctions for noncompliance. It, therefore, is appropriate for persons who have received such warning or an ICO to be subject to an increased penalty if a violation subsequently occurs in spite of the specific notice provided by the ICO.

*In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 548-49 (EAB 1998) (footnotes omitted).

Courts and presiding officers have reached similar conclusions in cases involving violations of the Clean Water Act. *See, e.g., Student Public Interest Research Group of N.J. v. Hercules, Inc.*, 29 ERC 1417, 1422-23 (D.N.J. 1989) (past unpunished violations considered as part of "history of violations" factor used in penalty assessments); *In re Donald Cutler*, 11 E.A.D. 622, 647 (EAB 2004) (violations older than five years may be considered under "prior history" factor); *In re C.L. "Butch" Otter and Charles Robnett*, Docket No. CWA-10-99-0202, slip op. at 24-25 (Initial Decision, April 9, 2001) (holding that two prior Cease and Desist Orders from Corps "weigh heavily in the assessment of the [\$50,000] penalty in this case."); *see also In re Ketchikan Pulp Co.*, TSCA-X-86-01-14-2615 (ALJ Dec. 8, 1986) (holding that, under the Toxic Substances Control Act, unadjudicated notices of violation sent to respondent are relevant to the issue of respondent's good faith and commitment to comply).

Respondents have an extensive history of noncompliance with its reporting requirements. EPA has notified Respondents on numerous occasions that they have not timely filed their DMRs or annual reports. Regardless of whether these notices are considered a "prior history of violations" or evidence of Respondents' "degree of culpability" (see following section of this prehearing exchange), they should weigh heavily in assessing a substantial civil penalty.

D. Degree of Culpability

In other CWA enforcement cases, presiding officers have noted “the respondent’s willful disregard of the permit process or Clean Water Act requirements” as supporting the assessment of the maximum penalty allowed by statute. *See, e.g., In re Urban Drainage*, 1998 EPA ALJ Lexis 42, at \*68. In this case, Respondents’ disregard of CWA requirements has manifested itself in numerous late reporting violations, most of which resolved themselves only after repeated requests from EPA for the information. The specific civil penalty proposed by Complainant will reflect the fact that Respondents have shown a long-standing disregard for the requirements of their NPDES permits. Respondents’ degree of culpability, as evidenced by all of these considerations, warrants a substantial civil penalty.

E. Economic Benefit

Complainant believes that Respondents have realized at least a modest economic benefit as a result of the violations described above.

F. Other Matters as Justice May Require

Complainant is unaware of any “other matters as justice may require” that would warrant a downward adjustment to the proposed penalty. *See In re Spang & Co.*, 6 E.A.D. 226, 250 (EAB 1995) (“[U]se 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.”).

**III. ESTIMATE REGARDING LENGTH OF HEARING.**

Absent lengthy cross-examination, Complainant estimates that it will require approximately one day for its case in chief. The length of time required for rebuttal testimony and cross examination of Respondents' witnesses will depend on the number and substance of documents and witnesses disclosed in Respondents' Prehearing Exchange.


**IV. LOCATION OF HEARING.**

Complainant proposes Twin Falls, Idaho for the hearing location. Respondents reside near Twin Falls. Twin Falls has a courthouse. Complainant proposes Boise, Idaho as the alternate location for the hearing. Counsel for Complainant is located in Boise and many of the witnesses are located within a short driving distance of Boise. Boise also has court rooms that have been used by the EPA administrative law judges in the past.

**V. AVAILABLE DATES FOR HEARING**

Complainant proposes, and Respondents stipulate to a hearing date of June 7-8, 2011. Counsel for complainant will be out of the country September 26 - Nov. 7. The only dates currently unavailable for Complainant's counsel between May 1 and September 26, 2011, are June 13-17, 2011.

RESPECTFULLY SUBMITTED this 18th day of February, 2011.

  
\_\_\_\_\_  
Mark A. Ryan  
Assistant Regional Counsel  
Region 10

CERTIFICATE OF SERVICE

I hereby certify that copies of Prehearing Exchange in the Matter of Ark Fisheries, Inc. and Lynn Babington, Docket No. CWA-10-2010-0239, were sent to the following persons in the manner indicated:

Original plus one copy hand-delivered to:

Carol Kennedy  
Regional Hearings Clerk  
EPA Region 10  
1200 Sixth Avenue  
Seattle, Washington 98101

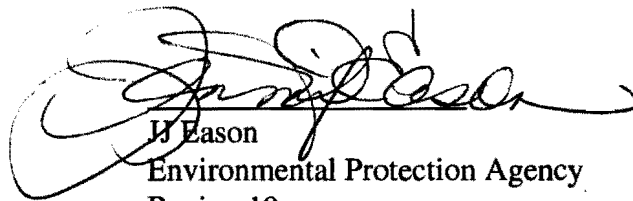
A true and correct copy by U.S. Mail to:

Honorable Barbara A. Gunning  
Administrative Law Judge  
U.S. EPA Office of Administrative Law Judges  
1200 Pennsylvania Ave. NW  
Mail Code 1900L  
Washington, D.C. 20460

A true and correct copy by Certified U.S. Mail to:

Mr. Lynn Babington  
2825 South 1050 East  
Hagerman, Idaho 83332

Dated: February 18, 2011

  
J Eason  
Environmental Protection Agency  
Region 10