UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

IN THE MATTER OF:	)	
	)	
ROBERT WALLIN D.B.A.	)	
BOB WALLIN DAIRY	)	**Docket No. 10-98-0069-CWA/G**
Enumclaw, Washington	)	
	)	
Respondent	)	
	)	

INITIAL DECISION

By: Alfred C. Smith
Presiding Officer

Issued: May 9, 2000
Denver, Colorado

Appearances

For Complainant:
R. David Allnutt Esq. , Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA Region 10
Seattle, WA

For Respondent:
Robert Wallin, Caroline Wallin and Troy Wallin - Pro se

I. **INTRODUCTION**

On February 13, 1998, the U.S. Environmental Protection Agency, Region 10 ("EPA", "USEPA", "the Agency", or "Complainant"), conducted an NPDES inspection of the Wallin Dairy Farm ("Wallin Dairy", "Farm", "Facility", or "Respondent") located at 44927 196th Avenue SE, Enumclaw, Washington. The Farm contains an animal confinement lot ("Facility"). At the time of the inspection, the Facility confined more than 300 "animal units" as that term is defined in 40 C.F.R. Part 122, Appendix B.[1]

At the time of the inspection, the EPA inspectors observed wastes from the Facility being discharged through a man-made ditch into a wetland area, ***waters of the United States.***

On May 22, 1998, the EPA issued an Administrative Complaint against Robert Wallin under Section 309(g)(2)(A) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1319 (g)(2)(A), for violations of Section 301(a) of the CWA, 33 U.S.C. 1311(a). The Complaint charged the Respondent with discharging wastewater into ***"waters of the United States"*** without a permit. For the subject violation, the Complainant proposed assessing the Respondent a civil penalty of $11,000.00.

On June 29, 1998, counsel for the Respondent, Paul F. Eagle, filed a Notice of Appearance, Answer and Request for a Hearing. The Answer denied various allegations in the Complaint, thereby setting the stage for a hearing. Upon filing of the Answer, the undersigned was designated Presiding Officer to conduct these proceedings, whereupon this matter was set for a pre-hearing telephone conference. Due to counsel for the Respondent's unavailability, the pre-hearing conference call was deferred until December 15, 1998. None of the outstanding issues were resolved by the December 15, 1998, pre-hearing telephone conference. After consulting with the parties, the matter was set for hearing on April 6, 1999. On January 25, 1999, counsel for the Respondent filed Notice of Intent to Withdraw, effective February 4, 1999. The Respondent elected to proceed ***pro se.*** On February 5, 1999, the Complainant filed its pre-hearing information exchange. On March 2, 1999, I conducted a final pre-hearing conference in preparation for the hearing. To assist the ***pro se*** Respondent, my summary of the final telephone conference included a simplification of the hearing procedures set forth in ***the Consolidated Rules of Practice, 40 C.F.R. Part 22.***

---

[1]. "... An animal feeding operation is a concentrated animal feeding operation ("CAFO") for purposes of § 122.23 if either of the following criteria are met . (a) More than the number of animals specified in any of the following categories are confined .... (10) 300 animal units; ... and either one of the following conditions are met: pollutants are discharged into navigable waters through a manmade ditch, flushing system or similar manmade device; ... into waters of the United States ...."

A hearing, in accordance with ***the Consolidated Rules of Practice, 40 C.F.R. Part 22***, was held on April 6, 1999, in Courtroom #407 of the U.S. Bankruptcy Court, Park Place Building, 1200 Sixth Avenue, Seattle Washington 9810l. It was apparent during the proceedings that the Respondent, acting **pro se**, was not familiar with the Consolidated Rules of Practice, or administrative procedure in general. To insure a fair hearing, the Respondent was given wide latitude in presenting its case.

On June 12, 1999, for the Respondent, Caroline Wallin filed one page of written post hearing comments. On June 18, 1999, counsel for the Complainant filed a post hearing brief along with proposed findings of fact and conclusions of law.

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties, and the arguments made by them, are in accordance with the findings, conclusions and views stated herein they have been accepted, and to the extent they are inconsistent therewith they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses are not in accord with the findings herein it is not credited.

Upon consideration of the entire administrative record in this matter, for the reasons set forth below, I find the Respondent liable for violating ***Section 301(a) of the CWA, 33 U.S.C. § 1311(a)***, and assess a penalty of Three-thousand dollars ($3,000.00).

II STATUTE AND REGULATIONS

Section 301(a) of the Act, 33 U.S.C. § 1311(a), provides that, except as in compliance with **Sections 30l, 302, 306, 307, 318, 402 and 404 of the Act, 33 U.S.C. §§ 1311, 1312, 1316,1317,1328, 1342 and 1344,** the discharge of any pollutant by any person shall be unlawful. **Section 502(12) of the Act, 33 U.S.C. § 1362(12)**, defines ***discharge of a pollutant*** as "... (A) any addition of any ***pollutant*** to ***navigable waters*** from any ***point source***." **Section 502(6) of the Act, 33 U.S.C.§ 1362(6)**, defines ***pollutant*** as "... agricultural wastes discharged into water."

Section 309(g)(2)(A) of the Act, 33 U.S.C. § 1319(g)(2)(A), provides that any person who violates **Section 301(a) of the Act, 33 U.S.C. § 1311(a),** shall be subject to a civil penalty of $11,000 per violation, except that the maximum amount of any civil penalty shall not exceed $27,500[2].

A ***concentrated animal feeding operation (CAFO)*** is a ***point source*** subject to the NPDES permit program, pursuant to 40 C.F.R. § 122.23. Concentrated animal feeding operation

[2] See 40 C.F.R., Part 19. Adjustment of Civil Monetary Penalties for Inflation.

means an "animal feeding operation" which meets the criteria in Appendix B of 40 C.F.R. Part 122 (See footnote #1).

These proceedings are governed by the ***"Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation or Suspension of Permits,* 40 C.F.R. Part 22, Fed. Reg./Vol. 64, No. 141/July 23, 1999, ("Consolidated Rules of Practice", "Consolidated Rules", or "the Rules").**

III ISSUES

In its Answer, the Respondent denied that: **(1)** At the time of the February 13, 1998, inspection, pollutants were discharged into navigable waters through a manmade flushing system (**Paragraph I.7**. of the Complaint); **(2)** Waters of the ditch flow to the White River (**Paragraph I.12.** of the Complaint); **(3)** The discharge constitutes a discharge into ***navigable waters***, within the meaning of Section 502(7) of the Act (**Paragraph I.13.** of the Complaint); **(4)** The discharge constitutes a discharge from ***a point source,*** within the meaning of Section 502(14) of the Act (**Paragraph I.14**. of the Complaint); **(5)** Respondent is liable for a civil penalty of $11,000 (**Paragraph I.17.** of the Complaint); and **(6)** There was a discharge of pollutants in violation of Section 301(a) of the Act (**Paragraph I.18.** of the Complaint). The Respondent also alleged it had implemented a waste management plan, created with the help of the U.S. Natural Resources Conservation Service, which the Respondent claims limited its culpability.

IV DISCUSSION

In order to prove a ***prima facie*** violation of ***Section 301(a) of the Act, 33 U.S.C. § 1311(a)***, the Complainant must demonstrate that the Respondent: (1) discharged a ***pollutant***; (2) from a ***point source*** ; (3) into ***a navigable water***; (4) without an NPDES permit or other authorization.

A. Discharge of a Pollutant

Section 502(12) of the Act, 33 U.S.C. §1362(12), defines the term ***discharge of a pollutant*** as "... (A) any addition of any pollutant to navigable waters from any ***point source***, ..." ***Section 502(6) of the Act, 33 U.S.C. § 1362(6),*** defines the term ***pollutant*** as "... dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, ..., and ***agricultural wastes*** discharged into water ***(emphasis ours).***"

The Wallin Dairy is a concentrated animal (cattle) feeding operation. At the time of the February 13,1998, inspection, approximately 300 cattle were held in a confined area for milking and other purposes. Wastes generated in this confined area are normally scraped or flushed into a below-ground 30,000 gallon tank. When the tank fills up, its contents are pumped up-gradient to a pasture

area (field) for disposal. The wastes are disposed of by land application, on the field, using a spray gun. During the winter months, when the ground is frozen, the wastes are not readily absorbed into the ground.

On February 13, 1998, after a recent land application of wastes by Wallin Dairy, Mr. Roberto testified[3] that he and Mr. Lazzar[4], observed a discharge of wastewater from the field into an unnamed drainage ditch bordering the Wallin Dairy Farm. The discharge of wastewater contained animal wastes and high concentrations of fecal coliform organisms. The presence of fecal coliform organisms indicates the possible presence of disease causing organisms **("pathogens")** that constitute a threat to human health. This wastewater discharge is ***the discharge of a pollutant*** (agricultural wastes) within the meaning of **Section 502(12) of the Act, 33 U.S.C. § 1362(12).** Mr. Roberto and Mr. Lazzar followed the discharge of wastewater along the drainage ditch to a point where it flowed down a canyon wall into a wetland area. In the wetlands area the discharge entered an unnamed creek.

I find, that contrary to the Respondent's denial,[5] that at the time of the February 13, 1998, inspection, pollutants were discharged through a manmade flushing system into waters of the United States. The discharge of wastewater observed by EPA inspectors on February 13, 1998, constituted a "***discharge of pollutants***", within the meaning of **Section 502(12) of the Act, 33 U.S.C. §1362(12).**

B. <u>From a Point Source</u>

Section 502(14) of the Act, 33 U.S.C. § 1362(14) defines ***'point source'*** as "... any discernable, confined and discrete conveyance, including but not limited to any ... ***concentrated animal feeding operation*** **(emphasis ours)**, ... from which pollutants are or may be discharged."

The Respondent operates a Dairy Farm located at 44927 196th Avenue SE, Enumclaw, Washington, ***Farm,*** which contains an animal confinement lot, ***Facility***. At the time of the February 13, 1998, NPDES inspection, the Facility confined more than 300 "animal units". The Facility stables or confines, and feeds or maintains dairy cattle for a total of 45 days or more in any 12 month period. Neither crops, vegetation, forage growth, nor post harvest residues are sustained in the normal growing season over any portion of the Facility.[6] The Facility is therefore a ***Concentrated Animal Feeding Operation*** **("CAFO")** as that term is defined in Section 502(14) of the Act, 33 U.S.C. §1362(14)

---

[3] Hearing Transcript, pp 41 - 48 (Tr., pp 41 - 48).

[4] Mr Roberto and Mr. Lazzar are EPA inspectors.

[5] See **paragraph I.7**. of the Complaint.

[6] May 22, 1998, Administrative Complaint.

and 40 C.F.R. Part 122, Appendix B. Specifically, 40 C.F.R. § 122.1(b)(2)(i) defines ***CAFOs*** as ***point sources*** requiring NPDES permits for discharges into waters of the United States.

I find that the Wallin Dairy is a **concentrated animal feeding operation** and therefore a ***"point source"*** within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362 (14), and 40 C.F.R. Part 122, Appendix B.

C. Into a Navigable Water

Section 502(7) of the Act, 33 U.S.C. § 1362(7), defines ***"navigable waters"*** as ***waters of the United States.*** The term ***waters of the United States*** means " ... (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) All interstate waters including interstate ***wetlands;*** ... , 40 C.F.R. 230.3(s). The term ***wetlands*** means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. ***Wetlands*** generally include swamps, marshes, bogs and similar areas, 40 C.F.R. § 230.3(t). The discharge of wastewater from the Wallin Dairy, which occurred on February 13, 1998, was a discharge from a ***"point source"*** into ***wetlands,*** which are ***waters of the United States.***

The Complainant attempted to further establish that the subject discharge entered, or threatened a specific water of the United States, the White River. On November 18, 1998, Mr. Roberto accompanied by Mr. Lazzar revisited the area of the Wallin Dairy Farm. The purpose of this inspection was to establish a connection between the subject discharge and the White River (Tr., p.53). During the November 18, 1998, inspection Mr. Roberto and Mr. Lazzar walked[7] the unnamed creek from the point of discharge, where the discharge entered the wetland area, to a point approximately 1.5 miles downstream where the channel of the unnamed creek connects with the White River (Tr., p.58).

The flow of water in the unnamed creek was intermittent, and the creek bed was dry at several points between the point of discharge and the White River. See Mr. Roberto's testimony[8] "...At the time we were there (November 18, 1998) there was no flow in the channel. ...." As noted above, the point where a sample was taken, from the unnamed creek, at the point of discharge from the Wallin Dairy Farm, is approximately 1.5 miles upstream from where the channel of the unnamed creek connects with the White River. By the Complainant's own evidence, the channel of the creek bed was

[7] Mr. Roberto and Mr. Lazzar returned on December 22, 1998, to complete their walk of the channel of the unnamed creek to the point where it joins with the White River.

[8] See Tr., p. 54.

dry at several points between where it received the subject discharge and where it connected with the White River.

I find that the subject discharge entered ***wetlands,*** which are ***waters of the United States***, but that the discharge ***did not enter,*** or have the potential to enter ***the White River***. Because the creek bed of the unnamed creek was dry at several points along its 1.5 mile channel connecting it with the White River, it is highly improbable that the discharge could have migrated downstream, through the dry stretches of the channel, to pose a ***potential risk of harm*** to the White River. I further find, that the subject discharge did not enter or threaten the White River. As such, the February 13, 1998, discharge of wastewater from the Wallin Dairy posed no risk of harm to the White River.

D. Without an NPDES Permit or other Authorization

The authority to run the NPDES permit program is delegated to the State of Washington. Ms. Belinda Hovde, a Water Quality Inspector employed by the Washington State Department of Ecology ("DOE"), at the Northwest Regional Office in Bellevue, Washington testified that:

> " In accordance with Section 402 of the Clean Water Act, EPA has delegated to the State of Washington the authority and responsibility to issue NPDES permits to point sources in the State of Washington. 40 C.F.R. § 122.1(b)(2)(i) defines Concentrated Animal Feeding Operations ("CAFOs") as point sources requiring NPDES permit coverage for discharges. The DOE issues the permits for CAFOs in the State of Washington. In Washington, Dairy Farm CAFOs may obtain NPDES coverage by applying for coverage under the "Dairy Farm National Pollutant Discharge Elimination System and State Waste Discharge General Permit ("Dairy Farm General Permit") .... (6) ... Robert Wallin did not have a Dairy Farm General permit on February 13, 1998, authorizing the discharge of Dairy wastes or other pollutants into waters of the State or of the United States"[9].

Therefore, the subject discharge was not authorized by a NPDES permit, any other provision of the Act, or regulations promulgated pursuant thereto, or by the State of Washington.

No animal feeding operation is a concentrated animal feeding operation if such animal feeding operation ***discharges only*** in the event of a 25 year, 24 hour storm. Mr. William Puckett testified, for the Complainant, that a 24 hour, 25 year storm event was not exceeded for the Enumclaw, Washington area on or about February 13, 1998.[10]

---

[9] Written Testimony of Belinda Hovde - Transcript, Ex. # 13

[10] Transcript p.84, Ex.#14.

Since the subject discharge was not the result of a 25 year, 24 hour storm, and the Facility is a concentrated animal feeding operation, which did not have a permit authorizing a discharge, I find that the subject discharge that occurred on February 13, 1998, was unlawful and a violation of **Section 301(a) of the Act, 33 U.S.C. § 1311(a),** and regulations promulgated pursuant thereto.

V. PENALTY

Administrative penalties for violations of **Section 301(a) of the Act, 33 U.S.C. § 1311(a),** are determined in accordance with **Section 309(g) of the Act, 33 U.S.C. § 1319(g)**. **Section 309(g)(2)(A), 33 U.S.C. §1319(g)(2)(A),** provides for Class I civil penalties of up to $11,000 per day for each day a violation continues, and a maximum penalty of $27,500[11]. **Section 309(g) (3) of the Act, 33 U.S.C. § 1319(g)(3)**, directs that ***"the nature, circumstances, extent and gravity of the violations, 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"*** are to be considered in determining the amount of any penalty to be assessed. In addition, **the Consolidated Rules of Practice, § 22.27(b),** provides that "... if the Presiding Officer decides to assess a penalty different in amount from the penalty proposed in the Complaint, the Presiding Officer shall set forth in the **Initial Decision** the specific reasons for the increase or decrease." **40 C.F.R. § 22.27(b).**[12]

Complainant asserts that the facts of this case warrant the imposition of the statutory maximum penalty for a single violation of the Act - $11,000.00. Respondent maintains that no penalty is appropriate in this case and asserts its inability to pay any penalty that is assessed. As set forth below, after considering the entire administrative record and applying the statutory penalty factors to this case, I find that a Three-thousand dollar ($3,000.00) penalty is appropriate for the subject violation.

The ***Consolidated Rules of Practice*** require that the Presiding Officer consider any civil penalty guidelines issued under the applicable Act. The EPA has not promulgated any civil penalty guidelines specific to the Clean Water Act. However, the enforcement staff is generally guided in the assessment of civil penalties by two documents: (***1) Policy on Civil Penalties (the "Penalty Policy"), and (2) A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties (the "Penalty Framework"), both dated February 16, 1984.***

---

[11] See 40 C.F.R., Part 19. Adjustment of Civil Monetary Penalties for Inflation.

[12] Consolidated Rule 22.27(b) also directs that the Presiding Officer consider, in addition to the factors enumerated in the statute, any civil penalty guidelines issued under the statue. The Agency has not issued any civil penalty guidelines for assessment of penalties for violations of CWA § 301(a). Accordingly, the statutory penalty factors alone will guide assessment of the penalty in this case.

Below, the ***"nature, circumstances, extent and gravity"*** of the violation will be considered initially as the ***"gravity component"***. The remaining statutory factors: **ability to pay, culpability, economic benefit, prior violations, and other matters as justice may require will be considered as *"adjustment factors"*** with respect to the penalty amount. The overall approach, consistent with the ***Agency Penalty Policy Framework***, will be to derive a base penalty amount, based on ***the gravity of the violation***, which may then be modified based on the ***adjustment factors***.

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

Upon considering the nature, circumstances and extent of the violation, I have found **(IV.C. above)** that the discharge of wastewater from the Wallin Dairy on February 13, 1998, entered an unnamed creek in a wetland area 1.5 miles away from the White River. The channel of the unnamed creek was dry at several points before it connected with the White River. Therefore the discharge did not have the potential to enter, or threaten the White River. Because the discharge did not have the potential to threaten the White River, there was no risk of harm, or potential risk of harm, to The White River. However, the discharge is clearly a violation of the Act, since it entered wetlands, which are waters of the United States.

In its Post Hearing Brief[13], Complainant argues the Clean Water Act case law is clear that 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 is sufficient" (emphasis ours).*** In support of its position the Complainant cited: ***United States v. Gulf Park Water Company, Inc.***, 14 F. Supp. 2d 854 (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. Smithfield Foods, Inc.,*** 972 F. Supp. 338, 344 (E.D. Va 1997) ("***The court may justifiably impose a significant penalty if it finds there is a risk or potential risk of environmental harm,*** **(emphasis ours)** even absent proof of actual deleterious effect"); ***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.3d259 (3rd Cir. 1998).

---

[13] **B. Consideration of the Nature, Circumstances, Extent and Gravity of the Violation Provides Further Support for the Assessment of an $11,000 Penalty.** Complainant's Post Hearing Brief, p. 19

The Complainant correctly states that it is not necessary to establish actual harm to the environment. ***The court may justifiably impose a significant penalty if it finds there is a risk or potential risk of environmental harm***. See ***United States v. Smithfield Foods, Inc.,*** above. Although it is not necessary for the Complainant to establish actual harm to the environment to warrant the imposition of a penalty; in the instant case, it must introduce some evidence that there was a risk of harm, or potential risk of harm to the White River, to warrant the maximum penalty.

In an attempt to justify imposition of the maximum penalty, the Complainant presented testimony of the potential presence of highly dangerous disease causing organisms in the wastewater discharge from the Wallin Dairy[14], and the highly sensitive nature of the White River and its ecosystem to pollution.[15] But this testimony is only relevant if the Complainant produces some evidence of a potential risk of harm to the White River, from the subject discharge.

Notwithstanding the sensitive nature of the White River and its ecosystem[16], or the highly pathogenic nature of the cattle manure containing wastewater discharge[17], this testimony is only relevant, pertaining to the White River, if the discharge posed a potential risk of harm to the White River. The Complainant is required to produce some evidence of a potential risk of harm to the White River[18] to sustain its position that the gravity of the violation warrants the maximum penalty.

---

[14] Dr. Stephanie Harris, EPA's chief microbiologist testified regarding the potential human threats posed by respondent's discharges. She provided uncontested expert testimony at hearing to establish the prevalence of a variety of human pathogens in dairy waste including ***E. Cole 0157:H7, Cryptosporidium parvum, Samonella, and Giardia.*** (Tr. p. 120).

[15] Mr. Robert Fritz, a habitat biologist, presented written testimony (Tr., Ex. # 16) concerning the potential environmental effects of agricultural wastewater, particularly as it pertains to the White River (Tr., pp104-111). In his written testimony Mr. Fritz stated that: The White River and its tributaries are the habitat for a diverse fishery including, but not limited to several salmon species, steel head trout, bull trout, cutthroat trout, and rainbow trout. The river is also used by members of the Muckle shoot Tribe for various recreational purposes including swimming, rafting and fishing. The State of Washington has identified the White River as "impaired" for a number of pollutants associated with agricultural runoff including dissolved oxygen, ammonia nutrients, fecal coliform and temperature.

[16] See testimony of Mr. Fritz - Exhibit # 16

[17] See testimony of Dr. Stephanie Harris - Tr. pp 112 - 134

[18] See *United States v. Gulf Park Water Company, Inc*. and *United States v. Smithfield Foods, Inc.* above

An evaluation of the nature, circumstances and extent of the violation does not support the Complainant's position. The discharge entered an unnamed creek in a wetland area, 1.5 miles from the White River. The closest point to the White River where Complainant sampled the discharge was 1.5 miles from the White River. The discharge did not have the ability to reach the White River, since the channel of unnamed creek was dry at several points between the point of discharge and the White River. It has been found, that in determining the seriousness of a discharge, the location of a discharging system is as important, if not more so, than what comes out of the pipe[19]. In the instant case, because of the location of the discharge and dry conditions in the unnamed creek, the discharge did not pose a risk of harm to the White River.

Admitting the potentially highly dangerous nature of the subject discharge, its localized impact must be given considerable weight; especially considering the standard practice by Dairy Farms and other agricultural operations of disposing of wastes by land application, using a "big gun" sprinkler. This practice is legal, and does not require a NPDES permit, as long as, there is no discharge to "navigable waters". Wastes applied to the land in this manner, however dangerous, present no risk of harm to waters of the United States, so long as they do not escape; notwithstanding, that they potentially contain significantly higher concentrations of the same deadly pathogens potentially present in the subject discharge. As long as these waste waters do not escape Wallin Dairy's fields and pastures, they present no risk or potential risk of harm to the environment (within the meaning of the Act, since they did not enter, or threaten to enter waters of the United States) notwithstanding their extremely dangerous nature. [20]

In determining the seriousness of the violations, the courts have considered the frequency and severity of the violations, and the effect of the violations on the environment and the public. See ***U.S. v. Smithfield Foods, Inc., 972 F.Supp 338 (E.C. Va. 1997),*** and ***United States v Avatar Holdings, Inc.***, No CIV.FTM.93-281-21, 1996 WL 479533, at *6 (M.D.Fla. Aug.20, 1996) (unpublished) (the seriousness of the violations is determined by considering "the number, duration and degree of the violations as well as the ***actual or potential harm*** to human health and the environment"; ***"[a] substantial reduction in the maximum statutory penalty is warranted where the violations caused minimal environmental damage")***; ***Friends of the Earth, Inc. v. Laidlaw Envtl. Serv***. (TOC), inc., 956 F.Supp. 588,602 (D.S.C. 1997) ***("presence or absence of environmental harm is relevant" to the penalty assessment) (emphasis ours).***

The Complainant has shown that the Respondent violated the Clean Water Act by discharging pollutants into wetlands (waters of the United States). A penalty is clearly warranted for the violation.

---

[19] ***U.S v. Gulf Park Water Co., Inc.,*** 14 F.Supp.2d 860, 861 (S.D.Miss. 1998)

[20] Notwithstanding their highly pathogenic nature, these animal wastes can be legally disposed of by land application, without violating the Clean Water Act, so long as there is no discharge to waters of the United States.

But the Complainant has failed to show that the discharge posed a potential risk of harm to the White River, which would warrant imposition of the maximum statutory penalty for a single discharge. Because of the local nature of the discharge, it did not pose a threat or risk of harm to the White River. For the above reasons, a substantial reduction in the maximum statutory penalty for a single violation is warranted. Therefore, I find that the gravity component of the penalty should be reduced by 50%, to Five-thousand, five-hundred dollars ($5,500.00).

B. Respondent's Ability to Pay

The Complainant's case regarding the Respondent's ability to pay relies on the testimony of Dr. Billy Joe Henderson[21]. Dr Henderson's written testimony (See Tr., Exhibit # 15), argues that Wallin Dairy has the ability to pay a civil penalty of $11,000. In support thereof, Dr. Henderson stated[22] that "*... [t]hird; the depreciation schedules attached to these tax returns reveals a number of recent purchases costing far more than $11,000.* ***By deferring purchases similar to these, Mr. Wallin might be able to pay the proposed penalty.*** ***" (emphasis ours).***

Dr. Henderson's, Complainant's expert witness, testified that Respondent ***might*** be able to pay a penalty if the Respondent deferred certain purchases. Since the Respondent's business income tax returns were the basis of Complainant expert's financial analysis, the purchases shown on the tax returns are presumed to be business related. As these purchases were business related, there is a strong presumption that they were necessary for the Respondent to stay in business. The Complainant introduced no evidence to overcome the presumption that the purchases were business related, and necessary to stay in business. If these purchases were deferred as suggested by Complainant's expert witness, the Respondent ***might not*** have been able to stay in business ***(emphasis ours)***.

Further, a determination that the Respondent was not able to pay the proposed maximum penalty does not require a highly technical financial analysis of its assets. One need only look at Respondent's lack of funds to continue the services of legal counsel to defend itself in the critical stages of this case. It was readily apparent, at the hearing, that Respondent was not capable of mounting an adequate defense, due to the absence of legal counsel. Because of the lack of funds, to continue the services of counsel, Respondent was forced to proceed ***pro se.*** I find that the Respondent was at a considerable disadvantage in the hearing, due to lack of legal counsel. Since this was due to the lack of funds, this factor weighs heavily in my finding that the Respondent did not have the ability to pay the proposed penalty.

---

[21] Tr., pp 94-103, and Ex. # 15.

[22] Exhibit #15, p. 4., paragraph 10.

For the above reasons, I find that the Respondent did not have the ability to pay the proposed penalty. Based on the Respondent ability to pay, the penalty arrived at in **IV.A.** above, for the gravity component, is adjusted downward to Three-thousand dollars ($3,000.00).

C. History of Prior Violations

The Complainant alleges[23] that the February 13, 1998, violation was not an isolated incident, but no evidence of other violations is contained in the administrative record. Since the Complainant failed to produce evidence of prior violations in the pre-hearing stage of these proceedings, it cannot introduce such evidence at any subsequent stage of these proceedings.[24] Therefore, I find that the Respondent has no history of prior violations.

D. Culpability

In its Post Hearing Brief[25] Complainant observed that "After receiving the complaint in this matter, Respondent spent approximately $32,000 to install a 2.5 million gallon waste storage pond at the dairy.[26] The purpose of this project was to prevent future discharges and thus assure compliance with the CWA.[27]...." Since the commencement of this penalty action, Respondent has spent considerable sums on other improvements intended to prevent future discharges. He has developed a new farm plan, re-guttered the roofs covering the confinement area, moved approximately one-third of his cattle to leased properties off-site, and removed cattle from and re-seeded the dirt-floor confinement area.[28] Also, the Respondent projected substantial costs to operate, maintain, and purchase replacement components for the new wastes storage pond.[29] Based on the Respondent's timely corrective actions, I find that the penalty should not be increased for culpability.

---

[23] Complainant's Post Hearing Brief, p. 23.

[24] See the Consolidated Rules § 22.22(a). "... If, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19 (a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, ..."

[25] Complainant's Post-Hearing Brief, p. 5

[26] Tr. p. 99.

[27] Tr. pp 140, 141.

[28] Tr. pp 140, 141.

[29] Tr. p. 151.

E. Economic Benefit

To support recovering the economic benefit of non-compliance the Complainant cited ***United Stated v. A.A. Mactel Construction***, Civil Action No. 89-2372-V, 1992 U.S. Dis. LEXIS 21790 (D. Kan. March 31, 1992) ("recovery of economic benefit is essential and .. Should serve as the floor below which the maximum civil penalty should not be mitigated"). Notwithstanding the Court's holding in ***Mactel Construction***, the CWA clearly provides for mitigation of the economic benefit based on the Respondent's ability to pay.

In its Post Hearing Brief, the Complainant made an issue of the Respondent's failure to challenge Dr. Henderson's conclusions, impeach his methodologies, or contest the assumptions he used in arriving at a $15, 418 economic benefit figure. It was clear during the hearing that the Respondent, acting **pro se**, did not have the knowledge, ability or expertise to challenge Dr. Henderson's complex economic analysis. Therefore, I give no weight to Respondent's failure to challenge Dr. Henderson's testimony.

Notwithstanding any economic benefit which the Respondent may have realized, based solely on the Respondent's ability to pay, I find that the penalty should not be increased for economic benefit.

F. Conclusion

In conclusion, although I find that the Respondent does not have the ability to pay the proposed penalty, the Respondent should pay an appropriate penalty for violating the Clean Water Act. Therefore, for the reasons set forth above, the Respondent is assessed a $3,000.00 penalty, for the subject violation.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is a ***person*** within the meaning of Section 502(5) of the Act, 33 U.S.C. §1362(5);

2. Respondent operates a Dairy Farm located at 44927 196th Avenue SE, Enumclaw, Washington ("Farm") which contains an animal confinement lot ("Facility");

3. The Facility stables or confines and feeds, or maintains dairy cattle for a total of 45 days or more in any 12 month period;

4. Neither crops, vegetation, forage growth, nor post harvest residues are sustained in the normal growing season over any portion of the Facility;

5. The Facility is a ***Concentrated Animal Feeding Operation*** **("CAFO")** and a ***point source,*** as those terms are defined in 40 C.F.R. Part 122, Appendix B, and Section 502(14) of the Act, 33 U.S.C. § 1362(14).

6. On February 13, 1998, EPA conducted an NPDES inspection of the Facility;

7. At the time of the February 13, 1998, NPDES inspection the Facility confined more than 300 "animal units";

8. At the time of the February 13, 1998, NPDES inspection EPA inspectors observed agricultural (animal) waste, generated by the Facility, being discharged through a man-made ditch, into wetlands;

9. The agricultural (animal) waste is a ***pollutant*** within the meaning of Section 502(6) of the Act, 33 U.S.C. §1362(6);

10. The wetland is a ***navigable water and water of the United States***, within the meaning of Section 507(7) of the Act, 33 U.S.C. §1362(7);

11. A CAFO is a ***point source*** requiring a NPDES permit to discharge to ***waters of the United States,*** within the meaning of Section 507(14) of the Act, 33 U.S.C. § 1362 (14);

12. The Wallin Dairy Farm, a CAFO, did not have a NPDES permit to discharge to waters of the United States, on February 13, 1998;

13. At the time of the February 13, 1998, discharge there was no 25 year, 24 hour storm to exempt Wallin Dairy Farm from needing a NPDES permit to discharge.

14. The February 13, 1998, discharge of wastewater from the Wallin Dairy, described in **Paragraph 8** above, constitutes the discharge of pollutant, by a person, from a point source, into waters of the United States, without a NPDES permit, in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a);

15. Section 309(g)(2)(A) of the Act, 33 U.S.C. § 1319(g)(2)(A), provides for civil penalties of up to $11,000, not to exceed $27,500, for violations of Section 301(a) of the Act, 33 U.S.C. § 1311(a);

16. Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3), provides that in determining the amount of the penalty to be assessed that 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."

17. The point of discharge was approximately 1.5 miles from the White River;

18. The channel of the unnamed creek, which could carry the discharge to the White River, was dry at several points between the point of discharge and the White River;

19. The subject discharge of pollutants did not threaten or have the potential to threaten the White River.

20. The discharge posed no risk or potential risk of harm to the White River.

21. Because the subject discharge posed no risk or potential risk of harm to the White River, a substantial reduction of the gravity component, of the proposed maximum penalty for a single violation, is warranted;

22. The gravity component of the proposed $11,000 penalty should be reduced by 50%, to $5,500.00;

23. The violator has no history of prior violations.

24. Once aware of the discharge the Respondent took immediate steps to prevent any future discharges. These steps included both construction of a larger containment structure and operational changes that reduced the number of animals on the Facility. There is no increase in the penalty based on the Respondent's culpability.

25. The Respondent had the ability to pay the penalty ***only if*** it had deferred certain business related expenses, which may have been necessary to stay in business.

26. The Respondent ***did not have the ability to pay*** for legal counsel to represent it in the latter critical stages of these proceedings.

27. Based on the Respondent's ability to pay, the base penalty amount arrived at in **Paragraph 22** above is adjusted downward to $3,000.00; and

28. Based on the above Findings of Fact and Conclusion of Law, the Respondent is assessed a penalty of $3,000.00 for violating Section 301(a) of the Act, 33 U.S.C. § 1311(a), by discharging pollutants into waters of the United States without a permit.

ACCORDINGLY, IT IS ORDERED that Respondent is assessed a penalty of **Three-Thousand dollars ($3,000.00)** for violating **Section 301(a) of the CWA, 33 U.S.C. § 1311(a),** by discharging pollutants into the "waters of the United States" without a permit.

Payment of the full amount of the civil penalty assessed must be made within sixty (60) days of the service date of the final order by submitting a certified check or cashier's check payable to Treasurer, United States of America, and mailed to:

U.S. EPA, Region X
(Regional Hearing Clerk)
P.O. Box 36903
Pittsburgh, PA 15251-6903

A transmittal letter identifying the subject case and the EPA docket number, plus Respondent's name and address must accompany the check.

Failure by Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalty. **31 U.S.C. § 3717 4C.F.R. § 102.13.**

Pursuant to **the Consolidated Rules, 40 C.F.R. § 22.27(c)**, this initial decision will become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceedings unless: (1) an appeal to the Environmental Appeals Board is taken from it by a party to this proceeding; or (2) the Environmental Appeals Board elects, sua sponte, to review this initial decision.

If an appeal is taken, it must comply with **the Consolidated Rules, 40 C.F.R. § 22.30**. A notice of appeal and an accompanying brief must be filed with the Environmental Appeals Board and all other parties within thirty (30) days after this decision is served upon the parties.

SO ORDERED This 9th Day of May, 2000

/S/
Alfred C. Smith
Presiding Officer