UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

REGION 3
PHILADELPHIA, PENNSYLVANIA

IN THE MATTER OF: John Simon, Steve Harman and Evalena Fox d/b/a SHE RENTALS P.O. Box 774 Elkins, WV 26241-0774 RESPONDENTS	)))))))))	DOCKET NO. CWA-III-156

DECISION AND FINAL ORDER OF THE REGIONAL ADMINISTRATOR

This is a proceeding for the assessment of a Class I administrative penalty under § 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g). The proceeding is governed by the Environmental Protection Agency's Proposed 40 C.F.R. Part 28--CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CLASS I CIVIL PENALTIES UNDER THE CLEAN WATER ACT, THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT, AND THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT, AND THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES UNDER PART C OF THE SAFE DRINKING WATER ACT, 56 Fed. Reg. 29,996 (July 1, 1991), issued October 29, 1991 as superceding procedural penalty guidance for Class I administrative penalty proceedings under Subsection 309(g) of the Clean Water Act ("Consolidated Rules"). This case involves a failure to respond to an Environmental Protection Agency information-gathering letter issued under § 308 of the Clean Water Act, 33 U.S.C. § 1318. **This is the Decision and Final Order of the Regional Administrator under § 28.28 of the Consolidated Rules, following a default by the Respondent.**

PROCEDURAL BACKGROUND

The Director of the Water Protection Division of Region III of the United States Environmental Protection Agency (Complainant) initiated this action on September 25, 1996, issuing to John Simon, Steve Harman and Evalena Fox d/b/a SHE

RENTALS, an administrative complaint under § 28.16(a) of the Consolidated Rules. The administrative complaint was served by certified mail, and John Simon received it at the SHE RENTALS post office box on or about October 2, 1996. The administrative complaint contained recitations of statutory authority and allegations regarding SHE information-gathering letter dated November 8, 1995, delivered to SHE RENTALS three times by mail and once by hand. The administrative complaint made reference to pertinent enforcement provisions of the Clean Water Act, provided notice of a proposed penalty of $10,000.00 and notice that failure to respond to the administrative complaint within thirty days would result in the entry of a default order, and informed SHE RENTALS of its opportunity to request a hearing. Complainant transmitted a copy of the Consolidated Rules with the administrative complaint. The notice of opportunity to request a hearing included in the administrative complaint gave very explicit instructions on procedures for filing a hearing request and made reference to the enclosed Consolidated Rules.

The deadline for filing a response to the administrative complaint was November 1, 1996. SHE RENTALS failed to respond to the administrative complaint in a timely fashion.

By Order of Assignment dated December 10, 1996, the Acting Regional Administrator designated Benjamin Kalkstein as the Presiding Officer in this matter. By letter of December 18, 1996, the Presiding Officer offered SHE RENTALS an opportunity to explain its failure to respond to the administrative complaint by January 10, 1997. John Simon, on behalf of SHE RENTALS, wrote the Presiding Officer a letter dated January 8, 1997, but it was unresponsive to the Presiding Officer's December 18, 1997 letter.

UNTIMELY RESPONSE

Under § 28.20 of the Consolidated Rules, Respondent had thirty days from its receipt of the administrative complaint to file a response:

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

This thirty-day time limit is statutorily-based:
...Before issuing an order assessing a civil penalty under this subparagraph, the Administrator...shall give to the person to be assessed such penalty written notice of the Administrator's...proposal to issue such order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order. Subsection 309(g)(2)(A) of the Clean Water Act, 33 U.S.C. §

1319(g)(2)(A)(emphasis added).

Since the certified mail return receipt for the administrative complaint was signed by Respondent on or about October 2, 1996, the deadline for the filing of the response was November 1, 1996. As a consequence of its failure to file a timely response to the administrative complaint, **Respondent waived its opportunity to appear in this action for any purpose.** See § 28.20(e) of the Consolidated Rules.

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

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

The Presiding Officer determined that the administrative stated a cause of action against SHE RENTALS, the partnership,(Respondent) but not against the individuals John Simon, Steve Harman and Evalena Fox. [Complainant did not alleged them to be "persons" within the meaning of § 502(5) of the Clean Water Act, 33 U.S.C. § 1362(5)]. On March 10, 1997, the Presiding Officer issued an Order Directing Entry of Default as to Liability setting forth his determination, and directed Complainant to submit a written penalty argument in accordance with § 28.21(b) of the Consolidated Rules. Complainant's counsel filed the required penalty argument on April 1, 1997. Complainant did not seek the Presiding Officer's permission to amend the administrative complaint to state a cause of action against the individual partners, although that option was available to Complainant under §§ 28.18(b)(2) and 28.21(a)(2)(i).

STATUTORY BACKGROUND

The objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Subsection 101(a) of the Clean Water Act, 33 U.S.C. § 1251(a). One key provision in the implementation of the Clean Water Act is the information-gathering authority conferred upon the Administrator of the Environmental Protection Agency in § 308(a) of the Act: "Whenever required to carry out the objectives of this chapter...the Administrator shall require the owner or operator of any point source to...make such reports...and provide such other information as he may reasonably require..." 33 U.S.C. § 1318(a).

Administrative penalties may be assessed under conditions set

forth in § 309(g)(1) of the Clean Water Act, 33 U.S.C. § 1319(g)(1): "Whenever on the basis of any information available the Administrator finds that any person has violated section...1318 of this title...the Administrator...may, after consultation with the State in which the violation occurs, assess a class I or a class II civil penalty under this subsection."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Under § 28.211(a)(1) of the Consolidated Rules, upon entry of Respondent's default as to liability, the allegations as to liability included in the administrative complaint are deemed recommended findings of fact and conclusions of law. As modified by the Presiding Officer in the March 10, 1997 Order Directing Entry of Default as to Liability, I accept those recommendations and make the following Findings of Fact and Conclusions of Law:

(1) SHE RENTALS is registered to do business as a partnership in West Virginia.

(2) As a partnership, SHE RENTALS is a person within the meaning of § 502(5) of the Clean Water Act, 33 U.S.C. § 1362(5).

(3) SHE RENTALS has in the past and currently does business in West Virginia.

(4) SHE RENTALS operates a cell stabilization pond treatment system which receives sewage from approximately seven (7) rental homes owned by SHE RENTALS near Montrose, Randolph County, West Virginia, and which directly discharges pollutants from a point source to Leading Creek, a tributary of Tygart Valley River, a tributary of the Monongahela River.

(5) Leading Creek is a navigable water as set forth in § 502(7) of the Clean water Act, 33 U.S.C. § 1362(7). SHE RENTALS is therefore subject to the provisions of the Act, 33 U.S.C. § 1251 *et seq.*

(6) On or about December 23, 1993, the West Virginia Department of Commerce, Labor and Environmental Resouces, through the Department's Division of Environmental Protection ("WVDEP"), issued to SHE RENTALS General Permit No. WV0103110 ("the Permit"), pursuant to § 402 of the Clean Water Act, 33 U.S.C. § 1342. This Permit is applicable to sewage treatment and disposal systems with a design capacity of 40,000 gallons per day or less (excluding mine bathhouses).

(7) SHE RENTALS is subject to the Permit through its Registration, No. WVG550238 ("the Registration"), which permits

SHE RENTALS to discharge to Leading Creek in accordance with the effluent limitations, monitoring requirements and other conditions set forth in the Permit.

(8) On or about November 8, 1995, EPA mailed a letter to SHE RENTALS *via* certified mail, in which the Agency requested information from Respondent on its compliance history with the Permit and the Registration. The purpose of the letter was to determine whether SHE RENTALS, which owns and/or operates a point source, was in violation of the Clean Water Act, its implementing regulations and the Permit, pursuant to § 308 of the Act, 33 U.S.C. § 1318.

(9) Subsequently, EPA mailed to SHE RENTALS copies of the November 8, 1995 letter by regular mail and by Federal Express mail. SHE RENTALS failed to respond to these three communications.

(10) On July 25, 1996, Jack Fleshman, a WVDEP environmental inspection supervisor, served by hand a copy of the November 8, 1995 EPA letter to John Simon, a partner in SHE RENTALS.

(11) A response to the November 8, 1995 EPA letter was due 30 days after receipt. As of September 19, 1996, EPA had not received any response from SHE RENTALS.

(12) SHE RENTALS is therefore in violation of § 308 of the Clean Water Act, 33 U.S.C. § 1318.

(13) EPA has consulted with the WVDEP regarding this action.

DETERMINATION OF REMEDY (PENALTY)

In accordance with § 28.21(b) of the Consolidated Rules and the Presiding Officer's Order of March 10, 1997, Complainant has submitted a written argument ("Penalty Justification Brief") regarding the assessment of an appropriate civil penalty.

Based upon the administrative record, I have taken into account the following matters in determining an appropriate civil penalty: The nature, circumstances, extent and gravity of the violation:

Complainant characterizes the nature of the violation as "extremely serious," and I agree. The Clean Water Act depends very heavily on honest and timely reporting of discharge-related information. "Cooperation by dischargers, therefore, is critical to the effective enforcement of the Act, and failure to respond in a timely manner to a request for information under Section 308 of the Act risks damaging or irreparable environmental

consequences and may threaten human health." *In re: Rofor Plating Co., Inc.*, EPA Docket No. CWA-2-I-91-1112 (Sept. 16, 1993), 1993 CWA LEXIS 215. (Administrative Law Judge Head), at 2. "Programmatic harm is the damage done to the integrity of the NPDES program, which is very heavily dependent on timely, accurate and complete effluent monitoring and reporting. Lack of...data detracts from EPA's and the public's ability to evaluate the plant's environmental impact. This data can be valuable for water quality assessment, wasteload allocation, assessment of pollution control effectiveness and other purposes, aswell as for enforcement purposes." *In re: City of Atlantic Beach*, EPA Docket No. CWA-IV-93-520 (March 3, 1995) (Regional Administrator Hankinson), at 11-12.

It is worth noting that under the Clean Water Act, any person who knowingly violates § 308 may be prosecuted criminally, punished by a fine of not less than $ 5,000 nor more than $ 50,000 per day of violation, and/or imprisoned for not more than three years. Even a negligent violation of § 308 can lead to a fine of $ 2,500 to $ 25,000 per day of violation and/or up to two years in prison. See § 309(c) of the Act, 33 U.S.C. § 1319(c). While these sanctions are perhaps more appropriate in cases of intentional submission of false information, their potential applicability to the conduct for which SHE RENTALS has been determined to be liable is a clear indication that the nature of Respondent's failure to comply with EPA's information-gathering letter is extremely serious.

The record contains little evidence regarding the nature, circumstances, extent and gravity of the violation. The declaration of EPA's Anthony Meadows, who calculated the proposed penalty in this matter, is Exhibit C to the Complainant's Penalty Justification Brief. In Mr. Meadows' opinion, $ 10,000 reflects the nature, circumstances, extent and seriousness of the violation. Mr. Meadows' 12 years of enforcement experience as an environmental engineer with EPA provide ample support for the value of his opinion, and Complainant's burden of persuasion under § 28.10(e) of the Consolidated Rules has been met.

Respondent's extended failure to respond to the § 308 letter, despite three EPA mailings and a hand delivery by WVDEP personnel, whether intentional or negligent, bespeaks an all too casual attitude towards lawful information-gathering efforts by EPA. Respondent's default precluded it from participating in the penalty assessment phase of the proceeding, so there is nothing in the record upon which to evaluate the circumstances of its failure to comply with the November 8, 1995 letter. Like the complete failure to comply in *In re: Rofor Plating Co., Inc.*, cited above, SHE RENTALS' violation was a "grave violation of the Act warranting substantial penalty." *In re: Rofor Plating Co.,*

Inc., at 5.

SHE RENTALS' ability to pay: Information regarding the economic impact of the penalty lies almost exclusively within the control of the Respondent. Under these Consolidated Rules, a defaulting respondent is unable to argue that the economic impact of the penalty is too severe or otherwise unfair, because he has waived the opportunity to appear in the action for any purpose.Consolidated Rules § 28.20(e). According to the *Preamble* to theConsolidated Rules, a "default results in an unrebuttable (*sic*) presumption that the respondent can pay any assessed penalty." 56Fed. Reg. 30,013 (July 1, 1991). "Any assessed penalty" must be taken to mean any penalty within the statutory limits, here, the limit is $ 25,000. See § 309(g)(2)(A)of the Act, 33 U.S.C. § 1319(g)(2)(A).

Complainant submitted no information regarding SHE RENTALS' financial situation, but Mr. Meadows "chose to reduce the penalty by 50 % to reflect She Rentals' small size as a three-person partnership." Meadows' Declaration, 6. In addition, several of SHE RENTALS' tenants submitted a comment letter protesting the proposed penalty assessment in response to the public notice in a local newspaper. The tenants felt that the proposed penalty would "only add to the operating costs of the landlord and increased costs for the tenants." The record is thus admittedly sparse, but in light of the "unrebuttable presumption" of the Consolidated Rules, it supports a finding that even the proposed $10,000 penalty will not be beyond SHE RENTALS' ability to pay.

SHE RENTALS' prior history of such violation: A pattern or history of similar violations should be grounds for increasing the amount of the penalty assessed, although the absence of such a pattern should not justify a penalty reduction. *In the Matter of B.J. Carney Industries, Inc.,* EPA Docket No. CWA-1090-09-93-309(g) (March 11, 1996) CWA LEXIS 3, 34 (Administrative Law Judge Head).

There is no specific evidence in the record regarding any prior history of violations of § 308 of the Clean Water Act. Mr. Meadows' declaration makes a reference to "significant efforts by EPA and West Virginia to compel SHE Rentals' compliance," Meadows Declaration 7, but that reference does not appear to relate to prior violations of § 308 of the Clean Water Act. Whether only violations of § 308 could be considered as "prior history of such violations," or whether any past Clean Water Act violations could be considered need not be decided here, since the record contains no evidence of any prior history of Clean Water Act violations of any kind by SHE RENTALS. Consideration of this factor on the record before me does not justify an increase in the penalty.

SHE RENTALS'S degree of culpability: As stated above,

Respondent's prolonged failure to respond to EPA's November 8, 1995 letter is indicative of a too casual attitude towards its legal obligations as a member of the regulated community. Nothing in the record indicates that compliance with the 30-day response time required by EPA's § 308 letter was beyond SHE RENTALS' capability. Had SHE RENTALS responded in a timely fashion to the § 308 letter, presumably there would have been no need for Complainant to institute this penalty action. The same casual attitude has apparently led to SHE RENTALS' default in this proceeding. SHE RENTALS is fully culpable for the violation.

Mr. Meadows doubled the $ 5,000 figure based upon "SHE Rentals' past compliance history and culpability." Meadows Declaration, 7 (emphasis added). It follows that something less than the $ 5,000 add-on Mr. Meadows had in mind for "past compliance history and culpability" may be appropriate to reflect the full culpability of SHE RENTALS in this case.

The economic benefit or savings (if any) resulting from the violation: There is no evidence of economic benefit in trhe record. Complainant's proposed penalty and Penalty Justification Brief assumed that Respondent obtained no economic benefit from this violation, and I agree with that assumption.

Such other matters as justice may require: Complainant did not address any other matters in proposing a penalty of $ 10,000, and did not argue any in its Penalty Justification Brief. I think that the notion of deterrence is implicit in any enforcement action, and particularly in penalty assesments. Respondent may be deterred from future violations by the assessment of a penalty. Other persons may be deterred from similar violations by assessment of a penalty in this case. In particular, assessment of a penalty for the violation involved in this action may encourage Respondent and others similarly situated to take more seriously EPA's information gathering activities and their own responsibilities in connection with those activities.

By way of summary, I am in substantial agreement with Complainant's argument regarding penalty assessment in this case. The only portion of Complainant's argument without adequate support in the record is the Respondent's compliance history. Complainant "grouped" this argument with the statutory factor of culpability , but one gropes in vain for any basis in the record to adjust the penalty for prior violations. Further, I conclude there is a deterrent value to assessing a significant penalty here, a factor that Complainant may have assumed but did not argue.

Accordingly, based upon the administrative record and the applicable law, I determine a civil penalty of $8,500 is appropriate in this case.

ORDER

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

45.A. Respondent is hereby assessed a civil penalty in the amount of $8,500 and ORDERED to pay the civil penalty as directed in this ORDER.

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

C. Respondent shall, within 30 days after this ORDER becomes effective, forward a cashier's check or certified check, payable to "Treasurer, United States of America," in the amount of $ 8,500. Respondent shall mail the check by certified mail, return receipt requested, to:

United States Environmental Protection Agency
Region III
P.O. Box 360515
Pittsburgh, PA 15251-6515

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

Regional Hearing Clerk (3RC00)
United States Environmental Protection Agency Region III
841 Chestnut Building
Philadelphia, PA 19107

D. In the event of failure by Respondent to make payment within 30 days of the date this ORDER becomes effective, the matter may be referred to the United States Attorney for collection by appropriate action in the United States District Court pursuant to subsection 309(g)(9) of the Clean Water Act, 33 U.S.C. § 1319(g)(9).

E. Pursuant to 31 U.S.C. § 3717, the United States is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty if it is not paid as directed. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 4 C.F.R. § 102.13(c). A late payment

handling charge of twenty ($20) dollars will be imposed after 30 days, with an additional charge of ten ($10) dollars for each subsequent 30-day period over which an unpaid balance remains.

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

JUDICIAL REVIEW

Respondent has the right to judicial review of this ORDER. Under subsection 311(b)(6)(G)(i) of the Clean Water Act, 33 U.S.C. §1321(b)(6)(G)(i), Respondent may obtain judicial review of this civil penalty assessment in the United States District Court for the District of Columbia or in the United States District Court for the District in which the violation is alleged to have occurred by filing a notice of appeal in such court within the 30-day period beginning on the date this ORDER is issued (5 days following the date of mailing under § 28.28(e) of the Consolidated Rules) and by simultaneously sending a copy of such notice by certified mail to the Administrator and to the Attorney General.

IT IS SO ORDERED.

Date: April 29, 1997 /S/_____
W. Michael McCabe Regional Administrator

Prepared by: Benjamin Kalkstein, Presiding Officer.