UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IV

IN THE MATTER OF:	)	
	)	DOCKET NO. CWA-IV 94-509
Battelle Memorial Institute	)	
505 King Avenue	)	Proceeding to Assess Class I
Columbus, Ohio 43201-2693	)	Civil Penalty Under
NPDES Permit No. FL0035394	)	Subsection 309(g) of the Clean
	)	Water Act, 33 U.S.C. § 1319(9)
Respondent	)	
_____	)	

DECISION AND ORDER OF THE REGIONAL ADMINISTRATOR

This is a proceeding under Section 309(g) of the Clean Water Act ("CWA" or "the Act"), as amended, 33 U.S.C. §1319(g). The proceeding is governed by the United States Environmental Protection Agency's (EPA) proposed 40 C.F.R., Part 28, CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CLASS I CIVIL PENALTIES UNDER THE CLEAN WATER ACT, THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT, AND THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT, AND THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES UNDER PART C OF THE SAFE DRINKING WATER ACT, 56 Fed. Reg. 29,990 (July 1, 1991), issued October 29, 1991 as superseding procedural guidance for Class I Administrative penalty proceedings under subsection 309(g) of the Clean Water Act, 33 U.S.C. §1319(g) ("Consolidated Rules"). This is the Decision and Order of the Regional Administrator under § 28.28 of the Consolidated Rules. PROCEDURAL BACKGROUND

The Water Management Division Director of Region IV of EPA

(Complainant) initiated this action on September 27, 1994, issuing to Battelle Memorial Institute (Respondent or Battelle) an administrative complaint pursuant to 309(g) of the CWA, 33 U.S.C. § 1319(g) and under § 28.16(a) of the consolidated Rules. The complaint alleged that Respondent violated Section 301(a) of the Act, 33 U.S.C. §1311(a), by discharging a pollutant into the Halifax River, a navigable water, without a valid National Pollutant Discharge Elimination System (NPDES) Permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342(a). The complaint more specifically alleged that Respondent had been issued NPDES permit No. FL0035394 (the Permit), effective on September 1, 1990, with an expiration date of August 31, 1992. The Respondent had applied for renewal of the Permit on June 8, 1992, however the application was returned to the Respondent as being incomplete. The Respondent then failed to resubmit an application for, and did not receive, an NPDES permit renewal or a new permit for the discharge of a pollutant from the facility, prior to the expiration of the existing permit. The allegation of discharging a pollutant without an effective NPDES permit was based upon Discharge Monitoring Reports (DMRs) submitted by Respondent. (Administrative Record [AR] 17)

On November 18, 1994, the Complainant filed a Motion for Summary Determination on the Issue of Liability pursuant to 40 C.F.R. proposed Part 28. Thereafter, Respondent filed a Response to Complainant's Motion for Summary Determination and Counter Motion for Summary Determination on the Issue of Liability. By

Order of the Presiding Officer dated June 1, 1995, Respondent was summarily determined to be liable for discharging without a valid NPDES permit in violation of § 301 of the CWA, 33 U.S.C. § 1311, for the period from September 1, 1992, to March 31, 1994, inclusive. That Order of Summary Determination of Liability dated June 1, 1995, is hereby incorporated in full[1] /1/ and constitutes in part a consideration of the nature, circumstances and gravity of Respondent's violation.

The Summary Determination Order eliminated the necessity for a hearing on the issue of liability. The appropriate penalty was the only issue remaining.

On June 8, 1995, Complainant filed a Motion for Accelerated Recommended Decision, pursuant to proposed rule 40 C.F.R. § 28.25, based upon the premise that there is no compelling need for further fact finding, and that a $25,000 remedy can be determined based on the Administrative Record and Complainant's brief supporting the motion. Thereafter, on June 22, 1995, Respondent filed a Response to Motion for Accelerated Recommended Decision and Statement of Position Regarding the Remedy. While

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[1]In the Response to Motion for Accelerated Decision Battelle asserts that any liability attributed to discharging without an NPDES permit would have ceased on December 10, 1993, the date EPA issued the administrative Order containing interim limitations for the discharge of pollutants. Respondent requested that the Recommended Decision to the Regional Administrator reflect this change in the Summary Determination Order. However, as stated in paragraph 20 of the Administrative Order, the Order "does not operate as an NPDES permit nor does it replace, modify or eliminate any requirement of the CWA". Therefore, the Summary Determination Order remains unchanged.

agreeing that the matter should proceed to accelerated determination, Respondent requested oral argument on the issue of remedy, citing the fact that the parties held diametrically opposite view points on that topic. Complainant then filed a Reply to Respondent's Response. Both parties thereafter filed additional and final documents refuting the other's arguments on penalty.

Section 28.25(a) of the Consolidated Rules provides that:

> "[a]ny party may request..., that the Presiding Officer accelerate his recommended decision on the basis that there is no compelling need for further fact finding concerning remedy."

Therefore, in order to approve the request, there must be a finding that there is no compelling need for further fact-finding concerning remedy.

Respondent's request for oral argument is based upon the fact that the parties' views are diametrically opposed. Indeed, Complainant seeks a $25,000 penalty, claiming that if not limited to the $25,000 maximum allowable penalty under a Class I penalty order it would be seeking a penalty of $58,140. Respondent asserts that the maximum penalty appropriate under the circumstances is $900. With respect to the request for oral argument, while the Consolidated Rules make clear that the Presiding Officer has the discretion based on a compelling need for additional fact-finding on issues material to remedy to allow the participants to introduce testimony on such issues, "[t]he Presiding Officer shall not allow testimony if the issues can be appropriately explored by use of legal argument and affidavits or

the submission by the participants of written recommended findings of fact and conclusions of law..." 40 C.F.R. § 28.26(h) (emphasis added). The parties took full advantage of their ample opportunity to provide written recommendations regarding remedy. There is no need for oral argument on the issue of remedy and the matter is ripe for determination.

ACCELERATED DECISION CONCERNING REMEDY

In determining the appropriate administrative penalty, Section 309(g)(3) of the Act, 33 U.S.C. § 309(g)(3), provides that the Administrator should take into account the following statutory factors:

> ...the nature, circumstances, extent and gravity of the violation, or violations, and with respect to the violator, the 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...

Complainant attributes $58,000 to the gravity components of the penalty (nature, circumstances, extent and gravity) and $140 to economic benefit gained by Respondent as a result of the violations. Complainant claims that it would have found a one third reduction justifiable based upon other matters that justice may require, but that in seeking the $25,000 maximum allowable under a Class I penalty order, it expected a prompt and appreciative settlement. Respondent, on the other hand, while contending that no penalty is appropriate, concedes that a $900 penalty may be justifiable based upon the $140 alleged economic benefit multiplied more than six times. (See Response to Motion

for Accelerated Recommended Decision, p. 11.[2]).

Section 28.26(h) of the Consolidated Rules also limits the Presiding Officer to consideration of any applicable Agency policy except any Agency policy, or portion thereof, that applies to settlement of a penalty claim concerning the assessment of an administrative penalty. Based upon the administrative record, I have taken into account the following matters in considering the statutory factors before determining an appropriate civil penalty:

Nature: Although the statutory violation was the discharge of a pollutant without an NPDES permit, Battelle's actual wrongdoing was failure to submit a timely and complete permit renewal application. In actuality, Respondent had reapplied, albeit approximately three months late (Motion for Accelerated Decision p.2), but had omitted certain information on the application form pertaining to effluent data for BOD, TOC, and TSS. (See AR 7) It then failed to resubmit the application with that data until 19 months later. However, there is no allegation nor any finding of environmental harm in the record of this proceeding. While a showing of environmental harm is certainly

[2]Respondent took a different posture with respect to remedy in its Answer to the Administrative Complaint (AR 14). Citing the guidance contained in Section IV of the Penalty Calculation Methodology of the EPA Civil Penalty Policy on the Clean Water Act (February 11, 1986), Respondent concluded that a penalty of $1290 might be warranted. However, as set forth at §28.26(h) of the Consolidated Rules, this policy in and of itself is not to be relied upon by the Presiding Officer. See discussion under Background, p. 6 above.

not necessary (See Student Public Interest Research Group of New Jersey, Inc. v. Monsanto Company, 1988 WL 156691 *15(D.N.J.), the record before me indicates Respondent's discharge was in compliance with the effluent limitations contained in its expired NPDES permit as well as the Sate of Florida Discharge permit. See Respondent's Answer (AR 14) and Notes on the Proposed Penalty attached to the Complaint, paragraph 6 (AR 13). Although not specifically stated, it is programmatic harm that Complainant argues resulted from the violations. "Programmatic harm is the damage done to the integrity of the NPDES program..." In the Matter of Atlantic Beach, Docket No. CWA-IV-93-520, Decision and Order of the Regional Administrator. Although the ability to rely upon timely and complete permit applications is critical to the NPDES program, as Respondent describes it, "[t]his is not a case where someone commenced discharging pollutants that could not be lawfully discharged even if a permit had been sought, or even a situation where someone was discharging pollutants that could arguably be lawfully discharged, but the Agency was not afforded the opportunity to review the nature of the operations and the nature of the discharge before the discharge was commenced...Complainant has on many occasions reviewed our discharge and routinely reauthorized it for at least 15 years..." (See Response and Statement of Position, p. 5)

Extent: This factor, rather than the nature of the violation, appears to be what most heavily influenced the EPA's determination that the violation was egregious. Complainant's

position is that, at least in this case, "[t]he nature of the discharge is not relevant to the character of the violation". Brief in Support of Motion to Accelerate, p. 1. The fact that the discharge was unpermitted for such a lengthy period, combined with the Permittee's failure to make any effort to correct the violation during the entire period, are what make the offense grievous. Respondent's assertions that it corrected the "oversight" as soon as it learned of it are inaccurate. See Respondent's Statement of Position Regarding the Remedy, citing AR 9. A review of the Administrative Record indicates that as to extent, Respondent should have come into compliance much earlier than it had. By letter dated September 8, 1992, EPA notified Mr. Stark, Vice President, Battelle, of the deficiencies in its permit application, and returned the application requesting that it be resubmitted. (AR 7) Respondent provides no explanation for this notice having been overlooked as well. The record further reflects that it was only after Administrative Order No. 94-003 (AR 8) was issued on November 16, 1993, that Respondent took swift action to correct the omissions. (AR 9) Although Battelle recognizes and accepts responsibility for the initial "oversight" in providing the information on BOD, TOC and TSS, no explanation is provided for the failure to respond as early as September, 1992.

The factor to keep in mind, however, in considering extent as one of the factors of the gravity component of the penalty, is that submittal of the permit application is a one-time event. In

other words, compliance involved the single instance of submitting a completed form. Furthermore, it appears from its having submitted the DMR's correctly, and having been in compliance with the limitations of its expired permit, that the cause of the violation could not have been anything but ministerial oversight. It is not reasonable to assume some purposeful or intentional withholding of the information each month. Although 19 months to submit the completed information while discharging without a permit was certainly too long, thereby making the duration of the violation grave, developing an appropriate penalty in this case is not contingent upon adopting either party's calculation of a monthly penalty for each month the lapse in submittal occurred.[3]

Gravity: As discussed elsewhere in this decision, discharging without a permit is considered a grave matter. I would have considered it to be even more flagrant had Battelle simply begun discharging never having had a permit, rather than having had a long history of falling under the purview of the EPA's permitting program. Noting Battelle's compliance history, its failure to correct the deficiency in its application initially as well as subsequent to receiving notice, appears inexcusable. Therefore, it is the duration of this violation

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[3]Both parties rely upon EPA Civil Penalty Policy on the Clean Water Act (February l[sic], 1986). However, as § 28.26(h) of the Consolidated Rules mandates, the Presiding Officer shall not consider settlement policy. However, the arguments set forth in the pleadings were considered, irrespective of the policy they may have been based upon.

that would characterize it as grave, rather than the degree and type.

Respondent's Ability to pay: Battelle represents its post-tax profits for the past three years as averaging much less than $25,000 (Response of Respondent to Motion for Accelerated Recommended Decision and Statement of Position Regarding the Remedy, p. 11) However, Respondent's burden of going forward with its inability to pay is not met by these assertions. The more detailed information contained in the record, indicates the ability to pay a civil penalty in this case. (AR 16)

Prior history of such violations: There is no history of noncompliance evident in the record. See "Notes on the Proposed Penalty Assessment" attached to the Administrative Complaint containing Complainant's statement regarding this factor. (AR 13)

Degree of culpability: There is no evidence of any intent to commit a violation in this case. Although Complainant rightfully assumes all responsibility for its failure to submit a complete permit application, it defies reason to consider the failure to do so anything other than a lack of attention to the necessary filing responsibilities of the company. Apparently, somewhere breakdown occurred within Battelle's environmental permits tracking system. (AR 11)

Economic benefit or savings (if any) resulting from the violation: Complainant arrives at a figure of $140 in savings to Battelle in having discharged without a valid NPDES permit, in violation of Section 301(a) of the CWA, 33 U.S.C. §1311. EPA

based that estimate on a $1,000 cost of applying for a new permit. See Notes on the Proposed Penalty Assessment. (AR 13) EPA's assessment is accepted.

Other factors as justice may require: Great consideration must be given to this statutory factor in assessing an appropriate penalty in this case. Although many other factors, to wit: lack of environmental harm resulting from its violations; its environmentally beneficial activities; its affirmative action to correct management deficiencies, its otherwise full compliance with the expired NPDES permit as well as the State of Florida discharge permit, were not factors that bore on the determination of Battelle's liability, they are certainly those other factors to be considered in determining the penalty assessed under § 309(g)(3) of the Clean Water Act, 33 U.S.C. §1319(g)(3).

The Policy on Civil Penalties, EPA General Enforcement Policy #GM-21, refers to deterrence as the first goal of penalty assessment. It notes that, "...the penalty should persuade the violator to take precautions against falling into noncompliance again (specific deterrence) and dissuade others from Violating the law (general deterrence)". The penalty in this case should serve to deter Battelle as well as other such members of the regulated community from becoming negligent or careless in their record keeping responsibilities. Battelle has already taken steps toward that process by removing both the individual employee and manager responsible for the timely submission of permit applications and making systems changes to better track the

process.

The second pertinent goal of any penalty assessment, according to the aforementioned policy, is the fair and equitable treatment of the regulated community. Specifically, "... any system for calculating penalties must have enough flexibility to make adjustments to reflect legitimate differences between similar violations." Id. p.4. In this instance, although the violation was discharging without a permit, as discussed elsewhere in this decision, there are inherent differences between this case and those in which there were no previous permits, submittal of DMRs, and compliance with other existing discharge permits.

As Complainant indicated, the case Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc., 897 F.2d 1128 (11th Cir. 1990), sets the maximum fine for which the Respondent must be held liable as a starting point to determine penalty. Under a class I penalty order, $25,000 is the maximum amount that can be imposed. However, based upon the statutory factors, the maximum will not be imposed and with reduction made in accordance with those factors set forth above, the appropriate penalty in this case is $10,000.

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:

A. Respondent is hereby assessed a civil penalty in the amount of 10,000 and ORDERED to pay the civil penalty as directed in this ORDER.

B. Pursuant to § 28.28(f) of the Consolidated Rules, this ORDER shall become effective 30 days following its date of issuance unless the Environmental Appeals Board suspends implementation of the ORDER pursuant to § 28.29 of the Consolidated Rules (relating to Sus 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 $10,000. Respondent shall mail the check by certified mail, return receipt requested, to:

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

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

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

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

U.S.C. § 1319(g)(9).

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

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

JUDICIAL REVIEW

Respondent has the right to judicial review of this ORDER. Under subsection 309(g)(8) of the Clean Water Act, 33 U.S.C. § 1319(g)(8), Respondent may obtain judicial review of this civil penalty assessment in the United States District Court for the District of Columbia or in the United States District Court for the Middle District of Florida by filing a notice of appeal in 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: September 7, 1995

/s/
Patricia M. Tormi
for JOHN H. HANKINSON
Regional Administrator

Prepared by: Susan B. Schub, Presiding Officer

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV

IN THE MATTER OF:	)	
	)	DOCKET NO. CWA-IV-94-509
BATTELLE MEMORIAL INSTITUTE	)	
	)	
Respondent	)	
	)	

CERTIFICATE OF THE PRESIDING OFFICER

In accordance with the requirements of proposed 40 C.F.R. § 28.27(a)(1) I hereby certify the administrative record, consisting of the documents listed in the attached INDEX TO THE ADMINISTRATIVE RECORD, as complete to date and in compliance with all the requirements of proposed 40 C.F.R. Par 28.

Date: September 7, 1995

/s/
Susan B. Schub
Presiding Officer

EPA DOCKET NO. CWA-IV-94-509 BATTELLE MEMORIAL INSTITUTE

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18.	Answer, Objections to Proposed Penalty and Request for Hearing (facsimile)	10/31/94
19.	Status Report	11/16/94
20.	Answer, Objections to Proposed Penalty and Request for Hearing (hard copy)	11/2/94
21.	Designation of Presiding Officer	11/17/94
22.	Motion for Summary Determination	11/18/94
23.	Notice and Order	11/22/94
24.	Amended Notice and Order	12/1/94
25.	Respondent's Response to Complainant's Motion and counter Motion for Summary Determination and Brief in Support	12/15/94
26.	Report of Prehearing Conference	12/19/94
27.	Amended Report of Prehearing Conference	12/22/94
28.	Region IV's Reply and Response to Center-Motion	1/5/94
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31.	Report of Prehearing Conference	1/27/95

32.	Order Granting Complainant's Motion for Summary Determination of Liability and Denying Respondent's Cross Motion for Summary Determination of Liability	1/5/95
33.	Motion for Accelerated Recommended Decision	6/8/95
34.	Response of Respondent to Motion for Accelerated Recommended Decision and Statement of Position Regarding the Remedy	6/26/95
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