

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

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IN THE MATTER OF:)	
Tri-County Water)	DOCKET NO. CWA-4-93-529
Conditioning, Inc.)	Proceeding to Assess Class I
)	Civil Penalty Under
Respondent)	Subsection 309(g) of the Clean
)	Water Act, 33 U.S.C. § 1319(g)

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 4 of EPA (Complainant) first initiated this action on September 8, 1993, issuing to Tri-County Water Conditioning, Inc. (Respondent or Tri-County) 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 an unnamed creek thence to the St. Johns River, a water of the United States, without authorization by a National Pollutant Discharge Elimination System ("NPDES") permit; and in violation of Section 308 of the Act, 33 U.S.C. § 1318, and its implementing regulation at 40 C.F.R. § 122.41, by failing to submit Discharge Monitoring Reports ("DMRs") in a timely manner. The complaint more specifically alleged that Respondent had been issued NPDES Permit No. FL0031755 (the permit), effective October 1, 1987, with an expiration date of September 30, 1992. The permit required the Respondent to periodically submit DMRs. During the period from July 1990 through October 1, 1991, inclusive, and during the period from October 10, 1991 through September 1992, inclusive, the Respondent failed to timely submit DMRs. The complaint further alleged, that the NPDES permit expired on September 30, 1992, and Respondent had not timely applied for or received an NPDES permit renewal or new permit for discharge of a pollutant from the facility. Therefore, during the period from October 1992 through December 1992, inclusive, and on May 25, 1993, Respondent discharged pollutants from the facility without authorization by an NPDES permit.

After having been granted a motion to amend the complaint, Complainant, on September 6, 1995, filed an amended administrative complaint naming as a Respondent, James W.

Collins, President of Tri-County Water Conditioning. The amended complaint alleged that James W. Collins was also liable as owner and operator of the facility that was the subject of the initial complaint. Thereafter on February 2, 1996, Complainant filed a Motion for Summary Determination on the issue of liability, pursuant to 40 C.F.R. proposed Part 28. By Order of the Presiding Officer dated June 3, 1996, Respondent, Tri-County Water Conditioning, Inc., was found summarily liable for the violations set forth in the amended administrative complaint while summary determination of liability as to Respondent James W. Collins was denied without prejudice. That Order of Summary Determination of Liability dated June 3, 1996, is hereby incorporated in full and constitutes in part a consideration of the nature, circumstances and gravity of Respondent's violation. On July 10, 1996, an Order was issued denying a Motion filed by Complainant for reconsideration of liability on the part of James W. Collins. The parties were also directed to exchange information pertaining to issues of liability on the part of James W. Collins and issues of remedy as to both Respondent James W. Collins and Tri-County Water Conditioning, Inc. Thereafter, based upon a Notice filed by complainant seeking voluntary dismissal of James W. Collins as a Respondent and requesting that the penalty stage of the hearing progress with regard to Respondent Tri-County, the Presiding Officer, on September 26, 1996, issued an Order amending the administrative complaint by deleting Respondent James W. Collins, thereby reinstating the

initial administrative complaint. Furthermore, having summarily determined that EPA was entitled to judgment as to liability on the part of the only remaining Respondent, the matter would be ripe for an accelerated recommended decision, pursuant to section 28.25(a)(3) of the Consolidated Rules.

In accordance with the September 26, 1996 Order and Section 28.21(c) of the Consolidated Rules, Complainant submitted a written argument ("Penalty Justification", Administrative Record [AR] 35) regarding the assessment of an appropriate civil penalty, addressing the nature, circumstances, extent and gravity of the violation and, with respect to Respondent, ability to pay, prior history of such violations, the degree of culpability, and the economic benefit or savings Respondent enjoyed resulting from the violation. Complainant consolidated its argument regarding nature, circumstances, extent and gravity of the violations. Each is addressed independently here.

Respondent has failed to respond to any portion of the schedule set forth in the aforesaid September 26, 1996 Order. The remedy phase of this proceeding is now 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 seeks a penalty of \$16,190, against the Respondent. In proposing this penalty, Complainant attributed \$33,000 to the nature, circumstances, extent and gravity components of the penalty, and \$190 to economic benefit gained by Respondent in failing to timely renew its NPDES permit 180 days before expiration. (AR 35) However, in Complainant's view, based upon other matters as justice may require, such as the quality and quantity of wastewater discharged from the facility, the proposed penalty could be decreased by \$17,000.¹

A review of the record in this case indicates that Respondent, represented throughout this proceeding by the corporation's President, James W. Collins, never fully addressed what it considered to be an appropriate penalty. Although there were numerous opportunities to do so, Respondent was nowhere more clearly provided the opportunity than in the Order scheduling the penalty phase of the proceedings. In numerous communications, including several prehearing telephone conferences, the content of which are summarized in the Reports of Prehearing Conferences

¹The wastewater from the facility required no treatment, was intermittent, and averaged approximately six hundred gallons per day. (AR 35) Respondent ceased discharging from the facility on June 30, 1994 as evidenced by the No Discharge Certification (AR 16:15). NPDES Permit No. FL0031755 that is the subject of this proceeding was therefore inactivated on November 8, 1994 (AR 16:16).

and made part of the administrative record, (AR 15 and 26) Respondent only raised general assertions regarding inability to pay. These assertions are discussed more fully below.

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: The violations committed by this Respondent were failure to timely submit DMRs as well as the application for permit renewal. DMRs were not submitted during the period from July 1990 through October 1, 1991, inclusive, and then during the period from October 10, 1991 through September 1992, inclusive. Upon request made by representatives of EPA during a show cause telephone conference held with the Respondent on February 25, 1992, the DMRs for the period from July 1990 through December 1992, were eventually submitted. (AR 16:11) However, there were no effluent violations apparent on those DMRs. With respect to the violations of discharging without a permit, as set forth in the findings of fact and conclusions of law contained in the Order on Complainant's Motion for Summary Determination on the Issue of Liability (AR 28), Respondent discharged without a permit during the period from October 1992 through December 1992, and on May 25, 1993. Eventually, Respondent submitted a permit renewal application (AR 16:12), but then on October 26, 1994, requested a No Discharge Certification (AR 16:14).

There is no allegation nor any finding of environmental harm in the record of this proceeding. Respondent's violations can be

characterized as "programmatic harm. "Programmatic harm is the damage done to the integrity of the NPDES program..." In the Matter of Battelle Memorial Institute, Docket No. CWA-4-94-509, Decision and Order of the Regional Administrator, citing In the Matter of Atlantic Beach, Docket No. CWA-4-93-520, Decision and Order of the Regional Administrator. The integrity of the NPDES program is heavily dependent on timely, complete effluent monitoring as well as permit application.

Circumstances: Perhaps the one extraneous circumstance pertaining to Respondent's violations that if further substantiated, would have merited some consideration, is the claim that Respondent was notified by a representative of the Florida Department of Environmental Regulation that it did not need to renew the permit upon expiration. (AR 11) However, there was no substantiation of this. This allegation was of no consequence in finding Respondent liable for failing to submit a timely application for permit renewal, and similarly, neither serves to mitigate nor buttress the appropriate penalty in this case.

Extent: Not only are there numerous periods of non-compliance with the permit requirement to submit DMRs, but what can be characterized as quite severe is the Respondent's recalcitrance in coming into compliance despite many efforts made by Complainant. It is especially noteworthy that five separate Notices of Violations (NOVs) (AR 16:3,5,6,7,8) were sent to Respondent between November 1991 and July 1992, which went

unanswered, and that compliance was not forthcoming until after the February 25, 1993 show cause meeting.

The duration of Respondent's discharge without a permit was a relatively shorter three month period, from October to December 1992 and on one date in May, 1993.

Gravity: The relative gravity of the violations at hand depends on the type, degree and duration. The duration and type of the violations have already been discussed. Although Respondent's failure to submit DMRs is quite critical to the NPDES program, there should be some distinction drawn between the failure to submit DMRs indicating discharges in compliance with a permit, and those reporting discharges in excess of permit limitations. It is the former for which Respondent has been found liable. The DMRs eventually submitted, albeit much later than required, showed that Respondent was indeed monitoring its effluent, and that the discharges themselves were in compliance with the permit limitations. There were neither allegations nor evidence to support a finding of environmental harm as a result of Respondent's violations.

Prior history of such violations: There is no prior history of violations in the record. Although Complainant considers the numerous NOV's sent to Respondent as reflecting a history of violations of the Act, (AR 35) such NOV's pertain to those violations that are the subject of this proceeding and were already considered in evaluating the extent and duration of Respondent's violations.

Degree of Culpability: Although there is no evidence of any intent to commit a violation, there certainly is evidence that Respondent was put on prior notice that DMRs were due. In addition to failing to respond to those notices by submitting the missing past due DMRs, Respondent then again failed to send in DMRs subsequently due. However, it appears that Respondent assumes all responsibility for failing to submit the necessary DMRs. With respect to the failure to submit a permit renewal application, Respondent, to no avail, has attempted to show a lesser degree of culpability through allegations that a representative of the State assured the Respondent that one was not needed. However, this argument has already been considered, and for the reasons set forth, already rejected.

Economic benefit or savings (if any) resulting from the violation: Complainant calculated an economic benefit to Respondent of \$190 for failure to renew the NPDES permit when required. (AR 35) Respondent did not refute this assumption. EPA's assessment is accepted.

Ability to pay: Respondent submitted income tax returns at an early stage of these proceedings. (AR 27) These tax returns, and questions regarding whether they were properly signed and submitted, were the subjects of a great deal of discussion between the parties. However, there appears to be nothing on the face of these corporate tax returns, made part of the administrative record, to support a finding of an inability to pay the proposed penalty. Furthermore, Respondent failed to take

any advantage of the ample opportunity to elaborate on these assertions and to explain the basis for them as supported by these tax returns. In a proceeding under the Consolidated Rules, the Respondent is to bear the burden of going forward to present exculpatory statements as to liability and statements opposing the complainant's request for relief: See 40 C.F.R.

§ 28.10(b)(1). The complainant does not have the burden of persuading Agency decisionmakers of a Respondent's inability to pay if the Respondent has failed to come forward with such information by the applicable deadline. The schedule set forth by the Presiding Officer specifically directed that no later than November 11, 1996, Respondent was to provide written response to the information provided by Complainant regarding an appropriate penalty, and further directed that it address Tri-County's inability to pay the penalty proposed by Complainant, with specific attention to the tax returns previously provided. Not having responded by that date, there is insufficient evidence in the administrative record of inability to pay the proposed penalty.

Other factors as justice may require: The Respondent's excessive recalcitrance, and delinquency, in submitting DMRs in compliance with Section 308 of the Act, 33 U.S.C. § 1318, and its implementing regulation at 40 C.F.R. § 122.41, is the factor bearing most on imposition of a higher penalty in this case. Respondent displayed disregard for the reporting requirements of the Act. However, this is not a case in which the discharge,

once reported, reflected violations of the limitations contained in the permit. The Policy on Civil Penalties, EPA General Enforcement Policy #GM-21, refers to deterrence as the first goal of penalty assessment. (AR 36) This includes both "specific" deterrence, which would apply to this particular Respondent, as well as "general" deterrence, dissuading others from violating the law. Since Tri-County Water Conditioning, Inc., ceased discharging on September 30, 1994, specific deterrence is not of relevance here. However, the penalty assessed in this case should at least deter others in the regulated community from becoming neglectful of their responsibilities to follow all requirements of the NPDES permit program.

Taking into consideration all of the above factors, the administrative record and the applicable law, I determine a civil penalty of \$9,000 is appropriate.

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 \$9,000 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 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 \$9,000. Respondent shall mail the check by certified mail, return receipt requested, to:

United States Environmental Protection
Agency - Region 4
Atlanta Federal Center
100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

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 4
Atlanta Federal Center
100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

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 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 fifteen (\$15) dollars will be imposed after 30 days, with an additional charge of fifteen (\$15) dollars for each subsequent month 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).

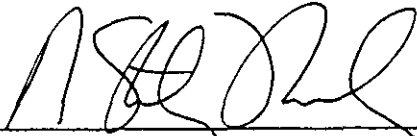
JUDICIAL REVIEW

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: 1/31/97



JOHN H. HANKINSON, JR.
Regional Administrator

Prepared by: Susan B. Schub, Presiding Officer

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV

IN THE MATTER OF:)
)
Tri-County Water) DOCKET NO. CWA-IV-93-529
Conditioning, Inc.)
)
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. Part 28.

Date: 1/27/97

Susan B. Schub
Susan B. Schub
Presiding Officer

EPA DOCKET NO. CWA-IV-93-529 TRI-COUNTY WATER CONDITIONING, INC.

INDEX TO THE ADMINISTRATIVE RECORD

<u>ITEM</u>	<u>DESCRIPTION</u>	<u>DATE FILED</u>
1.	Administrative Complaint	9/08/93
2.	Answer and Contest to the Amount of Penalty	10/07/93
3.	Designation of Presiding Officer (Andrew Harrison)	2/15/94
4.	Redesignation of Presiding Officer (Susan Schub)	4/19/94
5.	Notice and Order	9/23/94
6.	Order Extending Prehearing Conference	10/06/94
7.	Status Report	11/30/94
8.	Notice and Order	4/20/95
9.	Notice and Order	5/22/95
10.	Complainant's Notice as Required by Report of Prehearing Conference and Order for Information Exchange	6/21/95
11.	Complainant's Motion for Clarification and Correction Regarding Report of Prehearing Conference and Order for Information Exchange	6/21/95
12.	Notice of Unavailability of Counsel for Complainant	6/26/95
13.	Notice and Order	6/27/95
14.	Complainant's Motion to Amend the Complaint	7/11/95
15.	Report of Prehearing Conference and Order	7/17/95
16.	Notice of Filing Supplement of the Administrative Record with attached documents numbered 1-16 incorporated herein	7/25/95
17.	Letter from James W. Collins Objecting to Amendment of the Complaint to Include his name	8/08/95
18.	Notice of Unavailability of Counsel for Complainant	8/22/95

19.	Decision and Order on Complainant's Motion to Amend the Administrative Complaint	8/31/95
20.	Amended Administrative Complaint	9/06/95
21.	Answer and Request for Hearing	11/20/95
22.	Letter from Susan Schub to Parties Scheduling Conference Call	1/12/96
23.	Notice to the Court in Accordance with January 23, 1996 Conference Call	1/31/96
24.	Complainant's Motion for Summary Determination as to Liability	2/02/96
25.	Complainant's Memorandum of Law in Support of Its Motion for Summary Determination as to Liability	2/02/96
26.	Report of Prehearing Conference and Order	2/06/96
27.	Receipt of Tax Returns for James W. Collins	3/04/96
28.	Order on Complainant's Motion for Summary Determination as to Liability	6/05/96
29.	Complainant's Motion for Reconsideration	6/11/96
30.	Order Denying Complainant's Motion for Reconsideration and Setting Prehearing Exchange of Information	7/10/96
31.	Notice of Unavailability and Request to Toll Timeframes	7/16/96
32.	Notice and Order	8/05/96
33.	Notice of Voluntary Dismissal of James W. Collins as a Respondent and Request for Penalty Stage of Hearing to Progress with Regard to Respondent Tri-County Water Conditioning, Inc.	8/14/96
34.	Order Amending the Administrative Complaint and Scheduling the Penalty Phase of the Proceedings	9/26/96
35.	Complainant's Penalty Justification	10/21/96

- 36. EPA General Enforcement Policy #GM-21
dated February 16, 1994 1/27/97
- 37. Recommended Decision of Presiding Officer 1/27/97

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing DECISION AND ORDER OF THE REGIONAL ADMINISTRATOR in the matter of TRI-COUNTY WATER CONDITIONING, INC., Docket No. CWA-IV-93-529, on each of the parties listed below in the manner indicated:

James W. Collins, President
Tri-County Water Conditioning, Inc.
P. O. Box 100
East Palatka, FL 32131

(via Certified Mail - Return
Receipt Requested)

Environmental Appeals Board
U. S. Environmental Protection
Agency (Mail Code 1103B)
401 M Street, S.W.
Washington, D. C. 20460

(via Certified Mail - Return
Receipt Requested)

Mary E. Greene, Esquire
Assistant Regional Counsel
U. S. Environmental Protection
Agency, Region 4
Atlanta Federal Center
100 Alabama Street, S.W.
Washington, D. C. 20460

(via Hand-Delivery)

Susan B. Schub
Presiding Officer
U. S. Environmental Protection
Agency, Region 4
Atlanta Federal Center
100 Alabama Street, S.W.
Atlanta, GA 30303

(via Hand-Delivery)

Date: 2/5/97

Julia P. Mooney
Julia P. Mooney
Regional Hearing Clerk
U. S. Environmental Protection
Agency, Region 4
Atlanta Federal Center
100 Alabama Street, S.W.
Atlanta, GA 30303