IN RE ADVANCED ELECTRONICS, INC.

CWA Appeal No. 00-5

FINAL DECISION

Decided March 11, 2002

Syllabus

Advanced Electronics, Inc. ("Advanced") appeals an Initial Decision of the presiding Administrative Law Judge ("Presiding Officer"), arising out of an administrative enforcement action against Advanced for alleged violations of section 307(d) of the Clean Water Act ("CWA"), 33 U.S.C. § 1317(d).

The Director of the Water Division, United States Environmental Protection Agency Region V (the "Region"), filed a complaint alleging that Advanced had committed 107 violations of CWA section 307(d), 33 U.S.C. § 1317(d), and applicable regulations at 40 C.F.R. parts 403 and 433. The complaint alleged that Advanced: (1) discharged to the City of West Chicago's ("West Chicago") publicly-owned treatment works ("POTW"), effluent containing prohibited levels of copper and lead, and having prohibited levels of acidity and alkalinity (as measured on the pH scale); and (2) failed to monitor its effluent so as to demonstrate continued compliance with applicable pretreatment standards. The complaint proposed a penalty of $137,500.

At issue during the prehearing phase of the proceeding before the Presiding Officer was whether Advanced's request for other discovery (discovery beyond that which was provided for by the Presiding Officer's prehearing exchange order) should be granted. The Region filed a motion in opposition to Advanced's request for other discovery, arguing that Advanced's request: (1) did not demonstrate the "substantial necessity" for other discovery; (2) was premature; (3) failed to present facts necessary to support the motion; (4) failed to establish that the information was not otherwise obtainable; and (5) would result in unreasonable delay if granted. The Presiding Officer denied Advanced's request for other discovery on the basis that Advanced had failed to demonstrate that the documents sought had significant probative value as required by section 22.19(f) of the Consolidated Rules of Practice ("CROP"), 40 C.F.R. § 22.19(f)(1999).

After an evidentiary hearing, the Presiding Officer ruled that Advanced was liable for violating the CWA in each of the 107 instances cited by the Region in the complaint. However, the Presiding Officer reduced the penalty amount requested by the Region by $22,500 due to the Region's failure to prove the seriousness of all the violations, and assessed a civil penalty of $115,000 against Advanced.

Advanced does not contest liability on appeal. Rather, Advanced's appeal raises two issues: (1) whether the Presiding Officer erred in denying Advanced's motion for other

discovery; and (2) whether the Presiding Officer erred by assessing a civil penalty against Advanced.

Held: (1) The Board affirms the Presiding Officer's ruling that Advanced's request for other discovery failed to satisfy section 22.19(f)'s probative value standard, because it failed to specify the relevant issue of fact on which the information was believed to be probative. Among other things, Advanced failed to establish how the requested results of the Region's investigation of West Chicago and an audit of other industrial users would tend to prove or disprove Advanced's liability for exceeding certain daily effluent limits and failing to monitor its effluent.

(2) (a) The Board affirms the Presiding Officer's penalty assessment for the 34 violations alleged in Count I , which involve the Permit's daily copper effluent limitation.

(b) The Board affirms the Presiding Officer's penalty assessment for the two violations alleged in Count I, which involve the Permit's daily lead effluent limitation.

(c) The Board affirms the Presiding Officer's penalty assessment for the 38 violations alleged in Count I, which involve the Permit's daily limitation on the pH of Advanced's effluent.

(3) The Board affirms the Presiding Officer's penalty assessment for 15 of the 33 monitoring violations alleged in Count II of the Region's complaint, which involve the sampling component of the Permit's monitoring requirements.

(4) The Board reverses the Presiding Officer's penalty assessment for 18 of the 33 monitoring violations alleged in Count II of the Region's complaint, which involve the reporting component of the Permit's monitoring requirements. Based on ambiguous Permit language and West Chicago's tacit approval of Advanced's reporting activities, Advanced was denied fair notice of West Chicago's and the Region's interpretation of the Permit's monitoring requirements. Accordingly, the Board reduces the Presiding Officer's civil penalty to $95,650.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge McCallum:

I. *INTRODUCTION*

This matter concerns an appeal from the Initial Decision of Administrative Law Judge Carl C. Charneski ("Presiding Officer") arising out of an administrative enforcement action brought by the Director of the Water Division, United States Environmental Protection Agency Region V (the "Region") against Advanced Electronics, Inc. ("Advanced") for 107 violations of the Clean Water Act ("CWA") section 307(d), 33 U.S.C. § 1317(d).

The Presiding Officer imposed a civil penalty of $115,000 against Advanced for discharging to a publicly-owned treatment works ("POTW"), effluent

containing prohibited levels of copper and lead, having prohibited levels of acidity and alkalinity (as measured on the pH scale), and failing to monitor its effluent so as to demonstrate continued compliance with applicable pretreatment standards over a three-year period. Advanced appeals from the Presiding Officer's Initial Decision issued on August 15, 2000. For the reasons discussed below, we reverse the portion of the Presiding Officer's Initial Decision assessing a penalty for Count II as it relates to the Permit's reporting requirements, but affirm the portion of the Initial Decision assessing a penalty for Count I, and Count II as it relates to the Permit's sampling requirements. Accordingly, we reduce the Presiding Officer's civil penalty assessment from $115,000 to $95,650.

II. *BACKGROUND*

A. *Factual Background*

Advanced is an Illinois corporation[1] that manufactures printed circuit boards. Hearing Transcript ("Tr.") at 32, 156, 334. Advanced has operated its plant in the City of West Chicago, Illinois ("West Chicago") since 1995, and prior to that, operated a plant in Elk Grove Village, Illinois, which discharged to the Bensenville POTW. Tr. at 335. In the course of manufacturing printed circuit boards, Advanced engages in metal finishing operations. *Compare* Complaint ¶ 14 *with* Respondent's Amended Answer And Affirmative Defenses To Amended Complaint ("Amended Ans.") ¶ 14. Such metal finishing operations result in the discharge of effluent containing copper, lead, and having varying pH values to the West Chicago POTW, a municipally-owned facility that treats domestic sewage, as well as industrial and commercial wastewater. Advanced is classified as an "industrial user"[2] of the West Chicago POTW. Tr. at 156.

The West Chicago POTW discharges effluent to the West Branch of the DuPage River pursuant to Permit No. IL0023469 issued by the Illinois Environmental Protection Agency ("IEPA") under the authority of CWA section 402, 33 U.S.C. § 1342. *See* Complainant's Exhibit ("C Ex")16. The West Chicago

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[1] Advanced is, thus, a "person" as that term is defined at section 502(5) of the CWA, 33 U.S.C. § 1362(5).

[2] The term "industrial user" means a "source of indirect discharge." *See* 40 C.F.R. § 403.3(h). The term "indirect discharge" is defined as "the introduction of pollutants into a POTW from any non-domestic source regulated under section 307(b), (c) or (d) of the Act." *See* 40 C.F.R. § 403.3(g).

POTW has adopted a pretreatment program[3] that was approved by the Region[4] on September 30, 1985. *See* C Ex 19. As such, under the applicable regulatory regime, West Chicago is considered the "control authority" and the Region is considered the "approval authority." Tr. at 59; *see also* 40 C.F.R. § 403.12 ("Reporting requirements for POTW's and industrial users"); 40 C.F.R. § 414.10 ("General definitions").[5]

In 1994, West Chicago issued Industrial Waste Discharge Permit No. 0218 (the "Permit") to Advanced. *See* C Ex 1. The Permit authorized Advanced to discharge industrial wastewater from its circuit board manufacturing plant to the West Chicago POTW, subject to effluent limitations on copper, lead and pH. *Id.* The Permit required Advanced to sample its effluent for copper on a daily basis and to report those results to the West Chicago POTW on a weekly basis,[6] and to sample its effluent for lead and test for pH levels on a monthly basis and to report those results monthly.[7] The Permit was renewed by West Chicago in 1997 without modifications to the effluent limitations[8] or monitoring requirements. *See* C Ex 2. There is no evidence in the record that Advanced expressed confusion or sought clarification from West Chicago or the Region, regarding any of the Permit's provisions.

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[3] A pretreatment program implements requirements imposed on an industrial user of a POTW. The requirements are designed to reduce, eliminate, or change the properties of pollutants in the user's wastewater before the wastewater is introduced into the POTW. *See* 40 C.F.R. § 403.3(q)-(r). In this case, the pretreatment program includes effluent limits for copper, lead, and pH that are more stringent than the federal categorical pretreatment standards for metal finishers. Tr. at 435. Pursuant to 40 C.F.R. § 403.5(d), "[w]here specific prohibitions or limits on pollutants or pollutant parameters are developed by a POTW in accordance with [§ 403.5(c)] such limits shall be deemed Pretreatment Standards for the purposes of § 307(d) of the [CWA, 33 U.S.C. § 1317(d)]."

[4] Although Illinois was approved to administer the National Pollutant Discharge Elimination System ("NPDES") program within its borders on October 23, 1977, *see* 42 Fed. Reg. 58,566 (Nov. 3, 1977); 46 Fed. Reg. 24,295 (Apr. 30, 1981), it was not delegated the authority to administer pretreatment programs pursuant to 40 C.F.R. § 403.10. *See* Tr. at 54.

[5] These two sections, which contain almost identical language, define pretreatment control authority as: (1) The POTW if the POTW's submission for its pretreatment program has been approved in accordance with the requirements of 40 C.F.R. § 403.11, or (2) The Approval Authority if the submission has not been approved. *See* 40 C.F.R. § 403.12(a).

[6] According to the Permit, "[c]opper shall be monitored five times per week and the results will be FAXed (708) 293-3577 to the City weekly * * *." C Ex 1, at 3.

[7] According to the Permit, "This industry is required to test [lead and pH] monthly and submit the results on the semi annual report form. These monthly reports are due by the fifteenth of the following month." *See* C Ex 1 at 3. Since Advanced in actual practice monitored the pH more often than required by the Permit, Count II of the Region's Complaint does not include allegations of pH monitoring violations.

[8] *See supra* note 3.

On September 29, 1997, West Chicago sent seven Notices of Violation ("NOV") to Ken Sheladia of Advanced, alerting Mr. Sheladia to effluent limitation and monitoring violations that occurred between January 19, 1996, and January 15, 1997. *See* C Ex 6D. In addition, between June 27, 1996, and February 27, 1998, Advanced sent four "Notices of Noncompliance" to West Chicago, notifying West Chicago that Advanced had violated the Permit with respect to the effluent limitations on copper. *See* C Ex 6E. West Chicago apparently never initiated an enforcement action against Advanced regarding these matters.

On August 26-28, 1997, the Region conducted a pretreatment audit of West Chicago's POTW. *See* C Ex 30. On March 16, 1998, the Region notified Advanced's President, Mr. Prem Chaudhari, that during the pretreatment audit of West Chicago, the Region had learned that Advanced had not maintained full compliance with the Permit's monitoring requirements, and correspondingly, West Chicago's pretreatment standards, and requested information pertaining to Advanced's facility pursuant to section 308 of the CWA, 33 U.S.C. § 1318. *See* C Ex 3.[9]

In response to the Region's December 16, 1998 request for information, Advanced submitted a December 28, 1998 letter, in which it stated that "monthly monitoring reports for categorical parameters for the requested months were not completed[,]" and "weekly monitoring for copper from August 25, 1995[,] to September 17, 1995[,] were not submitted due to malfunction of an equipment (atomic absorption)." C Ex 10; *see also* Tr. at 347.

B. *Procedural Background*

On September 30, 1998, the Region issued a Complaint charging Advanced with 107 violations of the CWA, 33 U.S.C. § 1317(d), and applicable regulations at 40 C.F.R. parts 403 and 433. *See* Complaint ¶ 1.[10] The Region sought a civil

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[9] On April 11, 1998, Advanced submitted a partial response to the Region's March 16, 1998 document request, and sought an extension of the deadline for the remaining information. *See* C Ex 5. Advanced sought another extension of the deadline to respond to the Region's March 16, 1998 document request on April 23, 1998. *See* C Ex 7. On May 1, 1998, Advanced submitted the remaining documents requested by the Region. C Ex 8.

In a letter dated December 16, 1998, the Region requested that Advanced clarify its response to the March 16, 1998 information request, by providing weekly monitoring data and monthly monitoring reports for categorical parameters for July and September through December, 1995; February through June and August through November, 1996; and February through May, 1997. *See* C Ex 9.

[10] Count I alleged that over a period of three years, Advanced violated CWA § 307(d), 33 U.S.C. § 1317(d), on 74 occasions by discharging effluent to the West Chicago POTW containing copper, lead, or pH values in excess of the daily effluent limits contained in the Permit.

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penalty of $137,500.[11] *Id*. The Region filed its Motion to Amend Complaint Through Interdelineation Instanter[12] on April 28, 1999, which was granted by the Presiding Officer on May 7, 1999.[13]

On April 7, 1999, the Presiding Officer issued an order setting prehearing procedures, including discovery, consisting of an exchange of witness lists (with a brief summary of the expected testimony) and an exchange of all documents and exhibits that each party intended to introduce into evidence. *See* Order Setting Prehearing Procedures (April 7, 1999). On May 6, 1999, Advanced filed a motion requesting, *inter alia*, discovery beyond that which was provided by the prehearing exchange order. *See* Respondent's Motion for Authorization to Conduct Limited Discovery and to Extend Time to File its Reply to the Opening Prehearing Exchange. Since Advanced's request went beyond the prehearing exchange order, it constituted a request for "other discovery" under the applicable regulations, discussed below.

On May 14, 1999, the Region filed a motion in opposition to Advanced's request for other discovery, arguing that Advanced's request: (1) did not demonstrate the "substantial necessity" for other discovery; (2) was premature; (3) failed to present facts necessary to support the motion; (4) failed to establish that the information was not otherwise obtainable; and (5) would result in unreasonable delay if granted. *See* Response Of The United States Environmental Protection Agency To Respondent's Motion For Authorization To Conduct Limited Discovery (May 14, 1999).

On May 21, 1999, the Presiding Officer denied Advanced's request for other discovery on the basis that Advanced had failed to demonstrate that the documents sought had significant probative value as required by section 22.19(f) of

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Count II alleged that over a period of three years, Advanced violated CWA § 307(d), 33 U.S.C. § 1317(d), and 40 C.F.R. § 403.12(e) and (g) on 33 occasions by failing to perform required monitoring of its effluent so as to demonstrate continued compliance with applicable pretreatment standards.

[11] The Region's proposed penalty calculation of $137,500 represents the maximum allowable penalty that can be assessed for a violation in an enforcement action brought under section 309(g)(2) of the CWA, 33 U.S.C. § 1319(g)(2). *See* 40 C.F.R. § 19.4 (Table 1 — Civil Monetary Penalty Inflation Adjustments). The maximum penalty for any single day during which a violation occurs is $11,000. *Id.*

[12] The modifications to the Region's Amended Complaint did not affect Count I or change the total number of violations alleged in Count II. Instead, Count II was adjusted with respect to the specific months during which Advanced was alleged to have violated the monitoring requirements of 40 C.F.R. § 403.12(e) and (g). *See* Amended Complaint ¶ 26.

[13] Advanced filed its Answer to the Amended Complaint on May 27, 1999. *See* Amended Answer.

the Consolidated Rules of Practice ("CROP"), 40 C.F.R. § 22.19(f) (1999).[14] *See* Order Denying Respondent's Motion to Conduct Discovery at 2 (May 21, 1999). Parenthetically, we note that, notwithstanding the discovery dispute, Advanced acknowledges that the Region "supplement[ed] its prehearing exchanges with documents that Advanced sought to obtain" three weeks prior to the evidentiary hearing. *See* Brief of Appellant Advanced Electronics, Inc. ("Appellant's Br.") at 27.

The evidentiary hearing was held in Chicago, Illinois, on August 18 through August 20, 1999. The Presiding Officer issued his Initial Decision on August 15, 2000, finding Advanced liable for violating the CWA in each of the 107 instances cited by the Region in the Complaint. However, the Presiding Officer reduced the penalty amount requested by the Region by $22,500, and assessed a civil penalty of $115,000 against Advanced. Initial Decision ("Init. Dec.") at 2, 21, 25. According to the Presiding Officer, the reduction was attributable to the Region's failure to prove "the seriousness of all the violations." *See* Init. Dec. at 20. The Region did not appeal the Initial Decision.

C. *The Appeal Filed by Advanced*

Advanced timely filed a Notice of Appeal with the Environmental Appeals Board (the "Board") on September 18, 2000,[15] from the Initial Decision of the Presiding Officer, and filed its appellate brief and amended notice of appeal on November 13, 2000.

Advanced's appeal raises two issues: (1) whether the Presiding Officer erred in denying Advanced's motion for other discovery beyond the prehearing exchanges provided for by the CROP; and (2) whether the Presiding Officer erred by assessing a civil penalty against Advanced. *See* Appellant's Br. at 16-24, 26-40. The Region filed its Reply Brief on January 22, 2001. *See* Response Brief of the Appellee the United States Environmental Protection Agency ("Appellee's Br.").[16]

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[14] The version of the CROP in effect at the time of the Presiding Officer's discovery ruling appeared in the 1999 edition of the Code of Federal Regulations. *See infra* note 18. The CROP was amended on July 23, 1999, following publication of the 1999 edition. *Id.*

[15] Advanced also simultaneously filed a motion for extension of time through October 20, 2000, to file both its appellate brief and an amended notice of appeal. The Board granted Advanced's first motion for extension of time by Order dated September 25, 2000. Advanced filed a second motion for extension of time dated October 18, 2000, which requested a further 21-day extension of time for Advanced to file its appellate brief and amended notice of appeal. The Board granted Advanced's second motion by Order dated October 19, 2000.

[16] Pursuant to the CROP, the Region's response brief should have been submitted 25 days after service of Advanced's Appeal Brief. *See* 40 C.F.R. §§ 22.30(a)(2), 22.7(c). However, the Region

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III. *DISCUSSION*

We turn now to the issues presented on appeal. First, we will consider whether the Presiding Officer erred in denying Advanced's motion for other discovery beyond the prehearing exchanges provided for by the CROP. Second, we will consider whether the Presiding Officer erred by assessing a civil penalty against Advanced. The Board generally reviews the Presiding Officer's factual and legal conclusions on a de novo basis. *See* 40 C.F.R. § 22.30(f).[17]

A. *The Presiding Officer Did Not Err in Denying Advanced's Motion to Conduct Other Discovery*

1. *Advanced Failed to Identify the Significant Probative Value of the Requested Documents*

Under the rules governing this proceeding, there are two ways for a party to obtain discovery of relevant information from another party. First, section 22.19(b) directs each party to make available to the other party at the prehearing conference a list of witnesses expected to be called at the hearing, a brief narrative summary of their expected testimony, and copies of all documents and exhibits that the party intends to introduce into evidence. 40 C.F.R. § 22.19(b) (1999). Second, any other discovery must be obtained under section 22.19(f) ("Other discovery"), which provides that:

> (1) Except as provided by paragraph (b) of this section, further discovery, under this section, shall be permitted only upon determination by the Presiding Officer:
>
> > (i) That such discovery will not in any way unreasonably delay the proceeding;
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> > (ii) That the information to be obtained is not otherwise obtainable; and

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filed an unopposed motion for extension of time to file its response brief, *see* Unopposed Motion of the Appellee, The United States Environmental Protection Agency, for Extension of Time to File Appellee's Response Brief (Oct. 23, 2000), which was granted by the Board on October 31, 2000. *See* Order Regarding Region's Motion For Extension Of Time (Oct. 31, 2000).

[17] Although the Board generally reviews the Presiding Officer's factual and legal conclusions on a de novo basis, the Board may apply a deferential standard of review to issues such as the Presiding Officer's findings of fact where the credibility of witnesses is at issue, *see In re Tifa Ltd.*, 9 E.A.D. 145, 151 n.8 (EAB 2000); and decisions regarding discovery, *see In re Chempace Corp.*, 9 E.A.D. 119, 135 (EAB 2000).

> (iii) That such information has significant probative value.[18]

40 C.F.R. § 22.19(f) (1999).

Advanced argues that the Presiding Officer's denial of Advanced's request for other discovery "constitutes a gross abuse of discretion" and was a denial of due process.[19] Advanced seeks a reversal of the Initial Decision and a new hearing. Appellant's Br. at 26, 40.

The Presiding Officer's decision to deny Advanced's request for other discovery was premised on his finding that Advanced failed to identify the signifi-

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[18] Although this regulation was revised soon after the entry of the Presiding Officer's order denying Advanced's request for other discovery on May 21, 1999, *see* 64 Fed. Reg. 40,138 (Jul. 23, 1999), the new regulation, 40 C.F.R. § 22.19(e) (2001) ("Other Discovery"), maintains the essential features of the earlier meaning of "other discovery." Specifically, 40 C.F.R. § 22.19(e) provides that the Presiding Officer may order 'other discovery' only if it:

> (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
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> (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
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> (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

40 C.F.R. § 22.19(e) (2001). All references to this regulation will be to the pre-amendment rules because they were in effect at the time of Advanced's request for other discovery and when the Presiding Officer ruled on Advanced's request.

[19] As explained in *In re ICC Indus., Inc.*, TSCA Appeal No. 91-4, at n.9, 1991 WL 280349, at *17 (CJO, Dec. 2, 1991):

> "[N]either the constitution nor the Administrative Procedure Act confer a right to discovery in federal administrative proceedings." *Kenrich Petrochems., Inc. v. NLRB*, 893 F.2d 1468, 1484 (3rd Cir. 1990), *reh'g granted in part*, 907 F.2d 400 (3rd Cir. 1990), *cert denied*, 498 U.S. 981 (1990). Even though agencies cannot be compelled to provide procedural rights beyond those detailed in the Administrative Procedure Act, "[a]gencies are free to grant additional procedural rights in the exercise of their discretion." *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978). Thus, the extent of discovery available in an agency proceeding is determined by the agency's procedural rules. *Pacific Gas & Elec. Co. v. FERC*, 746 F.2d 1383, 1387 (9th Cir. 1984).

As discussed more fully in our opinion, we find that the Agency's procedural rules respecting discovery were applied by the Presiding Officer in a reasonable and lawful manner. Hence, we reject Advanced's contention that it was denied due process and that the Presiding Officer abused his discretion.

cant probative value of the documents it requested. *See* Order Denying Respondent's Motion To Conduct Discovery at 1 (May 21, 1999). Specifically, the Presiding Officer found that the information sought by Advanced,[20] (such as cor-

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[20] Specifically, Advanced requested:

> 1. Any documents pertaining to any alleged or actual damage to the environment caused by Respondent's conduct which is the subject of the instant litigation.
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> 2. Any communications between the USEPA and IEPA regarding the enforcement authority and the categorical limits that are at issue in the instant litigation.
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> 3. Any communications between the USEPA and the City of West Chicago regarding the delegation of authority to enforce the categorical limits that are at issue in the instant litigation.
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> 4. Any documents pertaining to the enforcement of the permit or categorical limits enforced by the City of West Chicago or the setting of limits for wastewater discharged by the City of West Chicago wastewater treatment plant.
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> 5. Any communications between the USEPA and the City of West Chicago pertaining to the matters at issue in the instant litigation.
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> 6. Any documents pertaining to other persons or entities who have allegedly violated the permit or categorical limits in the same manner as Respondent.
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> 7. Any documents relating to alleged exceedencies [sic] of permit or categorical limits by the wastewater treatment plant located in West Chicago, IL, including, but not limited to, all documents regarding discharges by the City of West Chicago for copper and pH for the period covered in the complaint.
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> 8. Any documents relating to the City of West Chicago's alleged inadequate monitoring of wastewater discharged to the City's wastewater treatment plant. This request includes (1) the maundering [sic] of Respondent and any other industrial users such as Electronic Support Systems, L.P.; Mapei Corp.; Northwestern Flavors, Inc.; Wincup; General Mills Operations, Inc.; Vlasic Farms, Inc., formerly known as Campbell's Fresh, Inc.; Alumax Extrusions, Inc,; Masonite Corp.; and Viktron West Chicago, L.P. and any damages caused by said industrial users.
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> 9. Any documents pertaining to the alleged discharge of excess amounts of pollutants to the West Branch of the DuPage River including, but not limited to, oxygen-demanding pollutants, total suspended solids, ammonia nitrogen, fecal coliform bacteria, copper and chlorine.
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> 10. Any documents pertaining to the USEPA's investigation of the City of West Chicago's wastewater treatment plant.
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> 11. Any documents which support the allegations contained in the Complaint or the First Amended Complaint filed by USEPA.

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respondence between IEPA and Chicago, and information pertaining to parties or chemicals unrelated to the hearing) failed to satisfy the probative value standard and were so overly broad that they "likewise must be rejected." *Id.* at 1-2.

The phrase "probative value" denotes the tendency of a piece of information to prove a fact that is of consequence in the case. *In re Chautauqua Hardware Corp.*, 3 E.A.D. 616, 622 (CJO 1991)*; see also In re Tenn. Valley Auth.*, 9 E.A.D. 357, 375 n.16 (EAB 2000) (denying motions to compel other discovery for failure to identify the significant probative value of the documents requested).

The evidence in the record supports the Presiding Officer's conclusion that the information sought by Advanced lacked significant probative value. First, Advanced stated in its discovery request that:

> [I]t is Respondent's understanding that the [Region] has conducted an investigation into the City of West Chicago wastewater treatment plant, and based upon certain findings of that investigation, to which Respondent is not privy, the USEPA audited Respondent and found exceedencies [sic] in pH and copper. Those audit results formed the basis for the instant litigation in which the USEPA is seeking the maximum amount of damages. The results of the investigation of the City of West Chicago and the audits of other industrial users would likely have a high degree of probative value in relation to the propriety of the damages sought by the USEPA.

Advanced's Request for Other Discovery at 3. In addition, during the evidentiary hearing, counsel for Advanced, Mr. Cary Fleischer, stated:

> The reason for the discovery is to see their entire files and see everything they have so that we can see what's in those files that may help my client.

Tr. at 143. It is not clear — and Advanced does not explain — how the results of the Region's investigation of West Chicago and audit of other industrial users would tend to prove or disprove Advanced's liability for exceeding certain daily effluent limits and failing to monitor its effluent. The Region's investigation of West Chicago and audit of other industrial users did not serve as a basis for the Region's complaint. Rather, those events merely prompted the Region to conduct a separate audit of Advanced which, as Advanced concedes, revealed that Ad-

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See Advanced's Request for Other Discovery at Attach. D.

vanced had exceeded certain effluent limitations and failed to monitor as required by the Permit. *See* Advanced's Request for Other discovery at 3; *see also* C Exs 5, 8; Tr. at 347.

Second, it also is not clear how the information sought by Advanced would be relevant to the propriety of the penalty sought by the Region against Advanced given that penalty assessments are fact- and circumstance-dependent. *Chautauqua*, 3 E.A.D. at 627 n.14; *see also infra* Section III.B.7. It is not enough to assert that a document request seeks "probative" information without specifying the relevant issue of fact on which the information is believed to be probative. *In re Tenn. Valley Auth.*, Dkt No. CAA-2000-04-006, Rulings and Guidelines on Discovery, 2000 WL 968329, at *6 (ALJ, June 29, 2000), *aff'd*, 9 E.A.D. at 475 n.16 ("TVA's motions also seek documents that go beyond Judge Pearlstein's Rulings and Guidelines on Discovery * * *. We accord significant deference to an Administrative Law Judge's discovery rulings, * * *and are unpersuaded by TVA's arguments for additional discovery."). Advanced did not explain how the information it sought would tend to disprove its liability for the alleged violations, or how the information would demonstrate that the penalty sought by the Region was incorrect.[21]

Third, it will be recalled that Advanced has acknowledged that the Region "supplement[ed] its prehearing exchanges[22] with documents that Advanced sought to obtain" via its request for other discovery. *See* Appellant's Br. at 27.[23]

Finally, at the time of Advanced's May 6, 1999 request for other discovery, neither it nor the Presiding Officer had yet received the Region's opening prehearing exchange. *See* Respondent's Motion for Authorization to Conduct Limited Discovery and to Extend Time to File its Reply to the Opening Prehearing Exchange at 2 ("The [Region] purports to have filed and mailed its Opening Prehear-

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[21] The penalty is discussed inSection III.B.4, *infra*.

[22] The Region's portion of the parties' prehearing exchange was conducted in four separate filings. *See* Opening Prehearing Exchange of the United States Environmental Protection Agency (April 30, 1999); First Supplemental Prehearing Exchange of the United States Environmental Protection Agency (July 1, 1999); Second Supplemental Prehearing Exchange of the United States Environmental Protection Agency (July 15, 1999); Third Supplemental Prehearing Exchange of the United States Environmental Protection Agency (July 28, 1999).

[23] Advanced argues that the Region's action in supplying the very information Advanced sought undermines the Presiding Officer's finding that the information lacked probative value. *See* Appellant's Br. at 27. We disagree. As discussed above, Advanced's request for other discovery failed to satisfy 40 C.F.R. § 22.19(f)'s probative value standard, because it failed to specify the relevant issue of fact on which the information was believed to be probative. That the Region later supplied documents responsive to Advanced's broadly-worded request for other discovery does not serve to cure the deficiencies identified in that request. Accordingly, we reject Advanced's argument on this issue.

ing Exchange on May 3, 1999, but as of the date of this motion, Respondent has not yet received said exchange."). Moreover, the deadline for the completion of the prehearing exchanges had not lapsed. *See* Order Setting Prehearing Procedures (Apr. 7, 1999) at 1 (establishing May 3, 1999, as the deadline for the Opening Prehearing Exchanges, and May 13, 1999, as the deadline for Reply Opening Prehearing Exchanges). Thus, the Presiding Officer was faced with Advanced's request for other discovery, which failed to specify the relevant issue of fact on which the information was believed to be probative, at a time when he could not possibly ascertain whether Advanced's request was justified, due to the incomplete prehearing exchange process. *See In re U.S. Dep't of the Navy, Kingsville Naval Air Station*, Dkt. No. TSCA VI-736C(L), at 6 (ALJ, Feb. 18, 1999) (denying request for other discovery because the prehearing exchange was not complete, and permitting respondent to file another motion for discovery after completion of the prehearing exchange), *rev'd on other grounds*, 9 E.A.D. 19 (EAB 2000); *See also In re Rogers Corp.*, Dkt. No. TSCA-I-94-1079, at 2 (ALJ, Nov. 8, 1996) ("[u]ntil the prehearing exchange has occurred, a proper evaluation cannot be made as to whether a request for other discovery meets the criteria set out in [40 C.F.R.] section 22.19(f) justifying further discovery beyond the prehearing exchange."), *aff'd on other grounds*, 9 E.A.D. 534 (EAB 2000).

Indeed, we note that in his Order denying Advanced's request for other discovery, the Presiding Officer stated that Advanced was seeking "information that, *at least at this point*, lacks significant probative value" and that "given *the present state of the record*, respondent has failed to show that it is entitled to the information requested." Order Denying Respondent's Motion to Conduct Discovery (May 21, 1999) (emphasis added). We interpret the Presiding Officer's references to "at least at this point" and "given the present state of the record" as an acknowledgment that Advanced's motion for other discovery was premature, and as not precluding Advanced from refiling that request at an appropriate time. Thus, for all the reasons discussed above, we affirm the Presiding Officer's decision to deny Advanced's request for other discovery.

2. *The Presiding Officer Did Not Err By Declining to Address All of the Prerequisites of Other Discovery*

Although the Presiding Officer's denial of Advanced's motion for discovery was based upon his finding of lack of probative value, both Advanced and the Region address the other two prerequisites of other discovery: whether the information sought was otherwise obtainable, and whether granting discovery would lead to significant delay.[24]

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[24] With respect to the issue of whether the information sought was otherwise obtainable, Advanced argues that the information was not otherwise obtainable because it would not have had "ample
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As discussed previously, a valid request for other discovery must satisfy three elements: (1) no resulting unreasonable delay; (2) information that is not otherwise obtainable, *and* (3) information having significant probative value. *See* 40 C.F.R. § 22.19(f) (1999). Thus, Advanced's failure to satisfy just one element of its other discovery request was sufficient reason for the Presiding Officer to deny that request. *See, e.g., In re Chempace Corp.*, 9 E.A.D. 119, 135 (EAB 2000) (finding no abuse of discretion by Presiding Officer in denying discovery request based solely on a finding of lack of probative value). As a matter of law, no finding regarding the other two elements was necessary to sustain the denial of Advanced's request for other discovery. Accordingly, we see no need to address these two issues.

Finally, as noted previously, Advanced has conceded on appeal that it received the information it sought more than three weeks prior to the hearing before the Presiding Officer, when the Region provided that very information during the prehearing exchange process. *See* Appellant's Br. at 27-28. As such, Advanced does not have a basis for a due process claim. *See Silverman v. Commodities Futures Trading Comm'n*, 549 F.2d 28, 33-34 (7th Cir. 1977) (holding that no denial of due process in denial of discovery where appellant was provided in advance of hearing, information it sought via discovery request). Advanced has failed to demonstrate a need for the documents it requested and, as such, we deny its request to set a new hearing. *See Silverman*, 549 F.2d at 33 ("Administrative proceedings would become a shambles if they could be reopened upon a mere request and without a supportive showing of need."). Accordingly, for all the reasons discussed above, we find no error in the Presiding Officer's decision to deny Advanced's request for other discovery.

B. *The Presiding Officer Did Not Commit an Abuse of Discretion in Assessing a Penalty Against Advanced*

Advanced states that it "is not contesting liability in this appeal." Appellant's Br. at 28. Rather, Advanced alleges that the Presiding Officer erred in assessing a civil penalty against Advanced, because he ignored mitigating factors such as no actual harm to the environment, no economic benefit derived from

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time to serve Freedom of Information Requests and receive responses before the first prehearing exchange was due." Appellant's Br. at 28. The Region disagreed, maintaining that the information could have been obtained by a Freedom of Information Act ("FOIA") request and, thus, was otherwise obtainable. Appellee's Br. at 26-27.

The parties also disagree on the issue of whether granting the discovery request would have led to unreasonable delay. Advanced maintains that granting the request would have created "at most, a three week delay in the scheduling of the hearing," which is "not unreasonable." Appellant's Br. at 28. The Region, however, argues that the discovery process "would have resulted in unreasonable delay and prejudiced U.S. EPA's ability to prosecute the matter." Appellee's Br. at 25.

operating in the City of West Chicago, confusing Permit language, West Chicago's failure to initiate an enforcement action, and the assessment of lower civil penalties in similar cases. *Id*. at 28-40.

1. *Statutory Factors For Assessing A Civil Penalty*

The Clean Water Act sets forth general factors for assessing a civil penalty:

> In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, 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.

CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3).

The CWA does not prescribe a precise formula by which the foregoing penalty factors must be computed, and the Agency has not developed a penalty policy specific to section 307(d) of the CWA. *See In re City of Marshall, Minn.*, 10 E.A.D. 173, 189 n.29 (EAB 2001); *In re Pepperell Assocs.*, 9 E.A.D. 83, 107 (EAB 2000) ("[a]s is evident from the foregoing language, these terms prescribe no precise formula by which these factors must be computed."); *see also Tull v. United States*, 481 U.S. 412, 426-27 (1987)("highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the [CWA].").

In such circumstances, it is appropriate for the Presiding Officer to analyze each of the statutory factors, *see In re Britton Constr. Co.*, 8 E.A.D. 261, 278-79 (EAB 1999), and the Board generally gives deference to a presiding officer's penalty determination. *See In re Slinger Drainage, Inc.*, 8 E.A.D. 644, 669 (EAB 1999) ("[w]e see no obvious errors in the Presiding Officer's penalty assessment and, therefore, we see no reason to change his penalty assessment.").

2. *The Nature, Circumstances, Extent, and Gravity of the Violation*

Relying on the testimony of its expert witness, James Huff,[25] Advanced argues that the size of the penalty does not reflect the harm to the environment

[25] We note that much of Mr. Huff's testimony was excluded from the record. Specifically, the Presiding Officer stated that while "Mr. Huff was accepted as an expert in the area of wastewater
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which was "trivial." *See* Appellant's Br. at 31. Specifically, Mr. Huff testified that water quality standards are set conservatively, and that he did not believe that any of Advanced's alleged discharge violations exceeded those standards. *See* Tr. at 468; *see also*, Expert Report of James E. Huff, P.E. Regarding Alleged Wastewater Discharge Violations at Advanced Electronics West Chicago, Illinois ("Huff Report") at 22 ("Advanced Electronic's permit excursions have caused no damage to the environment.").

Mr. Huff also claimed that by applying a statistical analysis that accounts for a "confidence value,"[26] the number of effluent violations dropped from 74 to 18. *See* Huff Report at 18-19. Mr. Huff further testified that, if such statistical analysis were employed and results were compared to federal categorical standards, rather than the stricter standards chosen by West Chicago, the number of alleged violations drop to only two. *Id*. at 19.

Advanced's statistical argument is inconsistent with its decision to not contest its liability, because the core of the argument is based on the assertion that there were fewer violations than the Presiding Officer actually found. By virtue of Advanced's conceding the Presiding Officer's liability determination, the Board must assume that the number of violations that occurred equals the number of violations found by the Presiding Officer. Therefore, to the extent that Advanced is arguing that the penalty should be reduced because the number of violations is less than that found by the Presiding Officer, the Board will not entertain that argument.

Advanced's characterization of its violations as "trivial" ignores two salient facts: (1) the effluent violations were large in number and scale, and occurred over a sustained three-year period; and (2) Advanced exceeded the Permit's limits on copper and lead, which are two of the 126 priority pollutants regulated by the CWA because of their toxicity, *see* 40 C.F.R. § 131.36. In addition, evidence in the record suggests that Advanced's copper excursions caused West Chicago to violate its NPDES permit for copper by causing pass-through[27] of copper to the

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treatment, * * *[he] was not accepted as an expert in the areas of statutory penalty factors and the involved regulations." Init. Dec. at 13 n.17; *see also* Tr. at 401. Mr. Huff is a registered professional engineer and vice-president of Huff & Huff, Inc., an engineering consulting firm. *See* Tr. at 387-88, 373-74.

[26] The "confidence value" refers to the probability that a specific value derived from sampling is likely to fall into a given range of values. *See* Tr. at 442-43.

[27] "Pass through" is defined as:

> [A] discharge which exits the POTW into waters of the United States in quantities or concentrations which, alone or in conjunction with a dis-
> Continued

West Branch of the DuPage River. *See* Tr. at 224, 240.

Consequently, while the Presiding Officer concluded that the Region did not prove that the effluent violations actually caused significant environmental harm, *see* Init. Dec. at 21, he determined that, inasmuch as the effluent violations concerned toxic metals and these violations were numerous and occurred over a long period of time, Advanced had demonstrated "widespread noncompliance with the Clean Water Act." *Id.* at 20.

Specifically, the Presiding Officer determined that Advanced's failure to monitor deprived West Chicago of information necessary to ensure that it complied with its own NPDES permit. As the Board has consistently held, the failure to monitor as required deprives the Agency and other regulators of information that is necessary to ensure the safety of the public and the environment. *In re Safe & Sure Prods., Inc.*, 8 E.A.D. 517, 530 (EAB 1999); *In re Woodcrest Mfg., Inc.*, 7 E.A.D. 757, 781 (EAB 1998) ("[w]e have consistently held that failure to comply with the reporting or registration requirements of environmental statutes can cause significant harm to the applicable regulatory scheme and may be grounds for imposition of a substantial penalty."); *see also In re Sav-Mart, Inc.*, 5 E.A.D. 732, 738 n.13 (EAB 1995).

Thus, we find no error in the Presiding Officer's holding on this point, as it is consistent with our prior decisions in which we affirmed penalty assessments based on their "potential for harm, regardless of whether actual harm occurred. Proof of actual harm to the environment need not be proven to assess a substantial penalty." *In re V-1 Oil Co.*, 8 E.A.D. 729, 755 (EAB 2000); *In re Everwood Treatment Co.*, 6 E.A.D. 589, 602-03 (EAB 1996), *aff'd Everwood Treatment Co. v. EPA*, No. 96-1159-RV-M, 1998 WL 1674543 (S.D. Ala., Jan. 21, 1998). Accordingly, we affirm the Presiding Officer's decision to assess a civil penalty against Advanced based on the potential for harm of Advanced's violations.

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> charge or discharges from other sources, is a cause of a violation of any requirement of the POTW's NPDES permit (including an increase in the magnitude or duration of a violation).

40 C.F.R. § 403.3(n).

3. *Degree Of Culpability*

a. *West Chicago's Decision to Not Initiate an Enforcement Action Against Advanced Does Not Eliminate Advanced's Culpability*

Advanced relies heavily on West Chicago's decision to not initiate an enforcement action against it to buttress its argument that the Presiding Officer's penalty determination was erroneous. Specifically, Advanced argues that since it enjoyed a cordial working relationship with West Chicago, since it was never told of a violation until 1997, and since West Chicago did not initiate an enforcement action, Advanced was ignorant of its violations and, as such, the Presiding Officer erred in imposing a civil penalty of $115,000. *See* Appellant's Br. at 24. The Presiding Officer, however, determined that Advanced's defense was "misplaced." Init. Dec. at 24.

The Presiding Officer's determination is supported by the provisions of 40 C.F.R. § 403.8(f)(1)(vi)(B), which expressly authorize the approval authority (here, the Region) to use its administrative penalty authority when enforcement by the POTW is deemed insufficient.[28] This regulation demonstrates a recognition on the part of the Agency that local authorities may occasionally fall short in some enforcement activities and, as a consequence, the Agency should retain the ability to enforce approved pretreatment programs against violators such as Advanced.

Moreover, Advanced's alleged ignorance of the regulatory requirements it is charged with violating does not mitigate its culpability. As the Board has consistently held, a violator's lack of knowledge about its responsibilities does not excuse its culpability. *See In re Pepperell Assocs.*, 9 E.A.D. 83, at 109 ("claimed ignorance of the * * * regulations * * * does not support a reduction in the company's penalty."); *In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 201 (EAB 1997) ("[c]itizens, including corporate citizens who regularly deal with the government, are charged with full knowledge of the applicable law * * *"). Thus, we find no error in the Presiding Officer's refusal to consider West Chicago's failure to initi-

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[28] Pursuant to 40 C.F.R. § 403.8(f)(1)(vi)(B):

> The approval authority shall have authority to seek judicial relief and may also use administrative penalty authority when the POTW has sought a monetary penalty which the approval authority believes to be insufficient.

Id. The evidence in the record shows that West Chicago fined Advanced $100 during the period Advanced exceeded its effluent limits on 74 occasions, and failed to conduct required monitoring on 33 occasions. *See* Tr. at 71. As such, the Region (the approval authority) exercised its administrative penalty authority in an apparent response to West Chicago's minimal monetary penalty.

ate an enforcement action against Advanced as a mitigating factor in assessing a civil penalty against Advanced.

b. *Fair Notice*

Advanced's argument with respect to the Presiding Officer's assessment of a penalty for Advanced's failure to comply with the Permit's daily limitations on copper, lead, and pH, as well as the Permit's monitoring requirements, is that the Permit contained confusing language. *See* Appellant's Br. at 21-22, 33-34, 40. We interpret Advanced's argument as presenting the issue of lack of fair notice.[29]

Before a party may be deprived of property, for example, by having a penalty imposed on it, it must receive fair notice of the conduct required or prohibited by the Agency. *See In re CWM Chem. Servs., Inc.*, 6 E.A.D. 1, 20 (EAB 1995) ("where penalties are being sought, the principles of due process require that the language of the regulation itself * * * provide fair notice to the regulated entity of the conduct required or prohibited by the Agency."); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995) ("[d]ue process requires that parties receive fair notice before being deprived of property."); *see also U.S. v. Chrysler Corp.*, 158 F.3d 1350 (D.C. Cir. 1998) (the imposition of a fine deprives a party of property); *U.S. v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997) (because civil penalties are quasi-criminal in nature, parties subject to such administrative sanctions are entitled to notice similar to that required in the criminal context), *cert. denied*, 524 U.S. 592 (1998).

In addressing whether a party has received fair notice, courts look at the facts as they appear to the party entitled to the notice, not to the agency. *See Hoechst*, 128 F.3d at 226 (holding that corporation could not be held liable for a penalty assessed against it because it reasonably believed it was exempted from the requirements of national standards controlling benzene emissions); *see also In re Tenn. Valley Auth.*, 9 E.A.D. 357, 412 (EAB 2000) (explaining that although fair notice does not require that a regulation be altogether free from ambiguity, it does require that if the regulation is susceptible to more than one possible interpretation, the interpretation advanced by the regulator should be ascertainable to the regulated community). Accordingly, we will examine in turn each of Advanced's arguments to determine whether Advanced was denied fair notice of the Permit's requirements.

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[29] As Advanced has not contested on appeal its liability for the violations with which it is charged, the effect of any determination regarding an alleged lack of fair notice must necessarily be limited to the amount of the penalty imposed for the violation.

i. *Copper and Lead Effluent Limitations*

Thirty-four of the 74 violations alleged in Count I involve the Permit's daily[30] copper limitation of 2.0 milligrams per liter ("mg/l"), and two of the alleged violations involve the Permit's daily lead limitation of 0.5 mg/l. *See* Complaint at 4-5; C Ex 6G. In further support of its argument that it lacked culpability and, as a consequence, the Presiding Officer erred in his penalty determination, Advanced claims that the language in the Permit was confusing. *See* Appellant's Br. at 33-34. Specifically, with respect to the copper and lead effluent limitation violations, Advanced states:

> The permit is also confusing with respect to the lead and copper limits. For each pollutant, two values are listed, one being listed in parentheses directly next to the value which is not in parenthesis.

See Appellant's Br. at 22 (internal citations omitted). The applicable provisions of the Permit are as follows:

Table A

Maximum Allowable Objectionable Waste Which May Be Discharged into the Sanitary Sewer System

* * *

Copper	***2.0**(3.38)	mg/l

* * *

Lead, total	***0.5**(0.69)	mg/l

* * *

*These parameters are regulated under 40 CFR as Categorical concentrations for Metal Finishers. The more stringent limit will apply in all cases.

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[30] While the pretreatment standards for sources employing metal finishing processes limit a source's daily *and* monthly discharges of, *inter alia*, copper and lead, *see* 40 C.F.R. § 433.17, the Region is alleging that Advanced violated only its daily limitations. *See* Complaint.

See Permit No. 0218 at 2; C Ex 1 at 2 (emphasis in original). With respect to copper, Advanced argues that it believed that "the 2.0 figure was the monthly average and the 3.38 figure was the daily limit." Appellant's Br. at 11.

In truth, there is some facial ambiguity in the Permit, since the Permit does not indicate what the two figures represent. However, Advanced's conduct in reporting "non-complying discharges" demonstrates that the company, in fact, understood that it was subject to the 2.0 mg/l daily effluent limit on copper. Specifically, Advanced reported certain copper discharge values as non-complying discharges that it otherwise would not have reported had it been genuinely confused regarding which copper limit applied. For example, on June 27, 1996, Advanced sent a Notice of Noncompliance to West Chicago, in which it reported that on April 4, April 23, and April 29, 1996, its copper discharge values were 2.81, 2.29, and 2.29 respectively, which the company characterized as being "out of compliance limit[s] * * * due to intermittant [sic] malfunction of * * * [the] replenisher pump." *See* C Ex 6E. Similarly, on February 27, 1998, Advanced sent a Notice of Noncompliance to West Chicago, in which it reported a copper discharge value of 2.66, which it attributed to a "malfunction in [the] filtering system." *Id*.

That Advanced reported such copper discharge values is incongruous with its claim that it did not understand which limit applied. Advanced would not have reported copper discharge values ranging from 2.29 mg/l to 2.81 mg/l for specific days (as opposed to months), if it sincerely believed that the daily effluent limitation on copper was 3.38 mg/l. Rather, these Notices of Noncompliance suggest that Advanced, notwithstanding the facial ambiguity in the Permit, received fair notice of and/or clearly understood the provisions of the Permit with respect to copper and, correspondingly, to lead. We note that Advanced declined to offer an explanation for reporting these copper discharges in light of its alleged confusion over which limit applied, despite the fact that both the Presiding Officer and the Region cited this conduct as a demonstration of Advanced's own contradiction of its claim. *See* Init. Dec. at 15; Appellee's Br. at 55.

Furthermore, if, notwithstanding the foregoing, Advanced were genuinely confused about which figures represent the daily effluent limitations, it could have sought clarification from the West Chicago Code, since the Permit clearly informed Advanced that it was authorized to discharge industrial wastewater "in accordance with Chapter 18 of the City Code of West Chicago," and that "noncompliance with any term of the Permit shall constitute a violation of the West Chicago City Code, Chapter 18." *See* C Ex 1, at 1; C Ex 2, at 1. Specifically, the Permit explicitly states that "Section 18-64 of the City Code governs the maximum allowable discharge limits of pollutants to the City wastewater collection system. Specific parameters and limits are found in Table A." *See* C Ex 1, at 1;

C Ex 2, at 2. Table A at section 18-64.3 of the West Chicago Code provides as follows:

Table A

Maximum Allowable Objectionable Waste Which May Be Discharged into the Sanitary Sewer System

PARAMETER	LIMIT
* * *	
Copper	2.0 mg/l
* * *	
Lead, total	0.5 mg/l
* * *	

Discharges from each separate discharge of a user, as measured under the provisions of this Code, shall not contain in excess of the permitted allocation of the pollutants *based upon a twenty-four-hour composite sample* * * *.

Id.; C Ex 17 (emphasis added). As can be seen, the West Chicago Code leaves no doubt that the daily limitation (as established by the requirement that the discharge be based on a 24-hour composite sample) on copper was 2.0 mg/l.

The Permit also provides that "these parameters are regulated under 40 CFR as Categorical concentrations for Metal Finishers." Permit No. 0218 at 2; C Ex 1, at 2. The categorical standards of 40 C.F.R. part 433, show that the daily allowable categorical standards for copper and lead are identical to the figures in parentheses for copper and lead appearing in Table A of the Permit. *See* 40 C.F.R. § 433.17(a). Thus, if Advanced had consulted the referenced C.F.R., it would have learned that the numbers in parentheses were daily allowable federal categorical standards, and thus, by the terms of the Permit, were not controlling because they were less stringent.

Speaking in reference to the copper limitation, Advanced's witness, Mr. Huff, conceded during the evidentiary hearing that, while he was confused on his first reading of the Permit, the intent of the Permit was nonetheless discernable:

> [U]pon closer reading and reading the footnote, the footnote says "These parameters are regulated under 40 C.F.R. as categorical concentrations for metal finishers. The more stringent limit will apply in all cases." So I believe the intent of this permit was that these both would — they would be basically maximum limits.

Tr. at 434. Mr. Huff's interpretation is consistent with that of the Region: the two numbers for the copper limitation in the Permit represented maximum limits — one being derived from the federal regulations and the other from the West Chicago Code[31] — but Advanced was required to comply with the more stringent West Chicago limit. *See* Appellee's Br. at 55.

Finally, we find it dubious that Advanced would wait until the initiation of an enforcement action — four years after it first received the Permit — to articulate its alleged confusion regarding the daily effluent limit on copper, especially in light of the NOVs it received from, and the Notices of Noncompliance it submitted to West Chicago as early as June 1996, regarding its copper excursions. *See* C Ex 6E. For all of these reasons, we affirm the Presiding Officer's finding on this issue.

ii. *pH Discharges*

Thirty-eight of the 74 violations alleged in Count I involve levels of pH that were either less than 6.0 standard units ("S.U.") or greater than 9.0 S.U. *See* Complaint ¶ 1. Advanced asserts that it should not be penalized for these violations because:

> The permit is contradictory with respect to the City of West Chicago ordinance because the ordinance has a prohibition for pH discharges less than 6.0 or greater than 9.0, but the permit states that an industrial user must discharge less than 6.0 [S.U.], not greater than 9.0 mg/l [S.U.] * * *.

Appellant's Br. at 21. In other words, Advanced appears to argue that it believed the Permit prohibited it from discharging wastewater having a pH higher than 6.0

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[31] The 3.38 mg/l figure represents the federal daily categorical standard, while the 2.0 mg/l figure represents the local daily categorical limit, *compare* 40 C.F.R. § 433 (Metal Finishing Point Source Category) *with* W. Chi. Code § 18-64, but, as per the note in Table A of the Permit, Advanced was required to comply with the more stringent 2.0 mg/l effluent limit.

S.U. — which would include wastewater having a neutral pH of 7.0 S.U.[32] — but required its discharge to have a pH of less than 6.0 S.U.

With respect to pH, Advanced's argument does not present a valid issue of fair notice. Rather, Advanced merely points out what the Region already conceded — that Table A of the Permit contained a typographical error. Specifically, the Permit provides that the maximum allowable level of pH in the discharge is limited to, "Less than 6.0 not greater than 9.0," *see* C Ex 1, at 2; C Ex 2, at 2, when it should state, "Not less than 6.0 nor greater than 9.0." *See* W. Chi. Code § 16-63.3. However, this typographical error is not sufficient to create a downward adjustment of the Presiding Officer's penalty adjustment, because there were clarifying statements in the Permit, as well as in the West Chicago Code, which provided Advanced fair notice of the Permit's effluent limitation on pH.

First, page four of the Permit ("General Prohibitive Standards"), states, in no uncertain terms, that Advanced was prohibited from discharging effluent having a pH lower than 6.0 S.U. or greater than 9.0 S.U.:

> The permittee shall comply with all the general prohibitive discharge standards in Chapter 18 of the City Code of Ordinances. Namely, the industrial user *shall not discharge waste water* to the sewer system: * * * f) *having a pH lower than 6.0 or higher than 9.0*[.]

C Ex 1, at 4; C Ex 2, at 8 (emphasis added). Even if one accepts Advanced's claim that it was confused regarding the Permit's pH provisions in Table A and the elementary principles of chemistry at the foundation of the alleged confusion,[33] one could only attribute that confusion to Advanced's own negligence in light of the clarifying statement on page four of the Permit. Advanced's negligence is compounded by the fact that Ken Sheladia, who as vice-president of operations was responsible for working with West Chicago on wastewater treatment issues at Advanced, *see* Tr. at 344, testified that he "read the permit, but not thoroughly. I read it about the limit for the metal requirement." *Id*. at 356.

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[32] We cannot ignore the absurdity of this argument. As anyone with a rudimentary knowledge of chemistry knows, substances having a pH of 0 — 6 are acidic and can corrode active metals, substances having a pH of 7, such as pure water, are neutral, and substances having a pH of 8 — 14 are alkaline and may have a caustic effect on plant and animal tissue. That a company engaged in metal finishing operations since 1989, *see* Tr. at 335, and whose president holds two master's degrees in chemistry, *see id.* at 334, could have reasonably believed that the Permit prohibited it from discharging wastewater having a pH of 7, while permitting it to discharge wastewater having a pH of less than 6, is simply implausible.

[33] *See supra* note 32.

That carelessness also, evidently, extended to Advanced's failure to consult the West Chicago Code, in spite of the fact that the Permit specifically cites to the West Chicago Code. Once again, if one accepts Advanced's claim that it was confused about the Permit's pH provisions, one is still left wondering why the company did not obtain clarification from the West Chicago Code. *See* W Chi. Code § 16-63.3 ("Not less than 6.0 nor greater than 9.0.").

In addition, we note that when Advanced operated a plant for six years in Elk Grove Village, Illinois, its discharge permit contained pH limits almost identical to those contained in the Permit. Specifically, Advanced's Elk Grove permit prohibited it from discharging waste water to the sewer system having a pH lower than 5.0 or higher than 9.0. *See* C Ex 42, at NOV No. 02. Thus, Advanced was presumably familiar with what constitutes reasonable pH permit limits.

Advanced's argument regarding the pH limit, like its argument regarding the copper and lead effluent limits, is porous and, at bottom, untenable. The evidence in the record simply does not support Advanced's position that the Permit was confusing with respect to the limitations on the pH of its effluent. Rather, the evidence demonstrates negligent conduct that is relevant to the calculation of a civil penalty. Accordingly, we see no error in the Presiding Officer's finding that the Permit was not confusing with respect to its limitation on the pH of Advanced's effluent. In other words, the Permit language was not ambiguous and, as such, Advanced was not denied fair notice of the limitation on the pH of its effluent.

iii. *Monitoring Violations*

Advanced's argument with respect to its monitoring violations (that is, effluent sampling and reporting violations),[34] which comprised the 33 violations in Count II of the Region's Amended Complaint,[35] is that the "reporting obligations under the permit are confusing." Appellant's Br. at 22. Specifically, Advanced argues that it believed it was only required to submit reports to West Chicago every six months, rather than every month. *Id*.

At the outset we note that Advanced's argument addresses only 18 of the 33 monitoring violations for which the Presiding Officer found Advanced liable and assessed a penalty. *See* Init. Dec. at 10-11. Specifically, while Advanced's argument addresses the 18 violations of 40 C.F.R. § 403.12(e) (failure to submit

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[34] "Monitoring" as used herein and by the parties, refers variously to periodic effluent samplingand/or reporting to the POTW the results of that sampling. *See, e.g.*, 40 C.F.R. § 403.12(g)(3); *see also* Appellant's Br. at 22; Appellee's Br. at 5.

[35] *See supra* note 12.

monthly reports), it does not address the 15 violations of 40 C.F.R. § 403.12(g) (failure to sample effluent). *See* Amended Complaint; Tr. at 241-42.

In the course of arguing that it believed it was only required to submit monitoring reports to West Chicago every six months, rather than every month, Advanced misquotes the language of the Permit in its Appeal Brief. Specifically, Advanced quotes the Permit as stating, "[t]hese monthly reports are due every six months." Appellant's Br. at 22. However, the Permit actually states:

> This industry is required to test each of the categorical parameters monthly and submit the results on the semi annual report form. These monthly reports are due by the fifteenth of the following month.

C Ex 1, at 3; C Ex 2, at 4.

The Region interprets this Permit provision as requiring Advanced to test on a monthly basis, and to submit reports on a monthly basis using a form called the "semi annual report form," *see* Appellee's Br. at 5 n.4, while Advanced alleges that it interpreted this requirement to test monthly and report on a semi-annual basis, *see* Appellant's Br. at 22.

We note that prior to September 1997, Advanced reported on a semi-annual basis without objection or any indication that West Chicago interpreted the provision in question to require monthly reporting. In September of 1997, however, West Chicago issued an NOV informing Advanced that it had violated the Permit's reporting requirements by not filing monthly reports. *See* C Ex 6D, 6F. Thereafter, Advanced began to report consistently on a monthly basis. Significantly, all of the reporting violations at issue occurred before West Chicago offered its interpretation of the provision with its NOV. Without that interpretation we find the Permit language sufficiently ambiguous that imposition of a penalty for the pre-September 1997 violations would be manifestly unfair.

With regard to Advanced's interpretation, the Permit's requirement that Advanced submit the results of the monthly tests on the semi-annual report form, could have caused Advanced to reasonably believe that it was required to report on a semi-annual basis. The meaning of the second requirement, on the other hand (whether the requirement is read alone or in conjunction with the first requirement), is woefully opaque, for there simply is no antecedent for the words "these monthly reports." In other words, when the second requirement commands that these monthly reports be submitted on the fifteenth of the following month, there is no basis for understanding what is meant by these monthly reports. Although there is an explicit reference in the first requirement to monthly testing, there is no comparable reference to monthly reporting. If the permit writer had intended Advanced to submit monthly reports — and to do so on a semi-annual

report form, as the Region argues — the choice of words was remarkably poor. As a consequence, the only clear message to emerge from the language of the Permit is the message contained in the first requirement, that of submitting monthly testing results on a semi-annual report form. Advanced complied with that requirement and should not incur a penalty for not submitting monthly reports of those results on a semi-annual report form. *See e.g. Rollins Envtl. Servs. Inc., v. EPA*, 937 F.2d 649, 653 (D.C. Cir. 1991) (reversing EPA's imposition of a $25,000 civil penalty against Rollins based on ambiguous language contained in the agency's PCB regulations, which did not make clear that solvents used to rinse PCB containers should be disposed of as PCBs).

Thus, given the ambiguous Permit language and West Chicago's tacit approval of Advanced's semi-annual reports, we find that Advanced was not given fair notice of West Chicago's or the Region's interpretation of the Permit's monitoring requirements. Therefore, we reverse the Presiding Officer's finding that Advanced should be assessed a penalty for these 18 violations, and reduce the penalty to $95,650.[36]

4. *No Question Exists as to Advanced's Ability to Pay the Penalty*

According to CWA § 309(g)(3), a respondent's ability to pay a proposed penalty should be factored into the penalty assessment. Accordingly, the Board has stated that, while the Region bears the initial burden of demonstrating that a penalty is appropriate and that ability to pay was considered, the respondent then bears the rebuttal burden of showing that it does not have the ability to pay the assessed penalty. *In re Britton Constr. Co.*, 8 E.A.D. 261, 290 (EAB 1999).

The Presiding Officer noted in the Initial Decision that "[t]here is no evidence in this case that Advanced would be unable to continue in business if it were assessed a civil penalty of $115,000." Init. Dec. at 23. Indeed, Advanced does not dispute the Presiding Officer's determination, and has not offered evidence to demonstrate that it is unable to pay the penalty. *See* Appellant's Br. Therefore, the Presiding Officer did not err in not adjusting the penalty to reflect Advanced's ability to pay.

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[36] The Presiding Officer assessed a civil penalty of $115,000 for 107 violations of CWA § 307(d). *See* Init. Dec. at 25. However, the Presiding Officer did not clearly demonstrate how he arrived at that figure. *See id.* Therefore, we will presume that he assessed a $1,074.76 per violation penalty for Counts I and II. Since Advanced deserves a downward adjustment in the penalty for 18 violations in Count II, the penalty is reduced to $95,650 ($115,000 — ($1,074.76 x 18)).

5. *Prior History of Violations*

Advanced's prior history of violating pretreatment standards for copper, lead, and pH at its Elk Grove Village plant, which the Presiding Officer characterized as "troubling," Init. Dec. at 23, also suggests that the company was aware of applicable regulatory requirements and the sanctions for violating them.

Specifically, the evidence shows that during the six years Advanced was located in Elk Grove Village, Illinois, and discharged its effluent to the Bensenville POTW, Advanced was the subject of a criminal enforcement action in which it was cited for 104 violations,[37] which were later reduced to 56 as part of a plea bargain arrangement. *See* Tr. at 97, 101-108, 113, 122-127; *see also* C Ex 42; C Ex 43; C Ex 46. In addition, Advanced concedes that it paid a fine to West Chicago in 1997 for failing to monitor as required. *See* Tr. at 335.

In making a penalty determination, a history of prior violations of a regulatory statute is relevant for determining whether a respondent was aware of the compliance required by the statute. *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 548 (EAB 1998). In addition, a history of prior notices not only is evidence that the respondent was aware of the required compliance, but also is evidence that the respondent was aware of the sanctions for noncompliance. *Id.*There is nothing in the text of the statute to suggest that since the prior violations occurred at a different facility, they are not relevant to the penalty determination in this case. *See* CWA § 308(g)(3) ("any prior history of such violations").

The evidence in the record firmly establishes that Advanced has a significant history of noncompliance with pretreatment standards. Based on the six years it operated in Elk Grove Village, and the extensive enforcement action taken by the Bensenville POTW against the company for violations that are almost identical to the violations in the instant case, Advanced was aware of both its requirements and the sanctions for noncompliance. Thus, the Presiding Officer properly considered Advanced's prior history in his penalty determination.

6. *The Economic Benefit Resulting From Violations*

With respect to the issue of an economic benefit resulting from its violations, the Presiding Officer determined that Advanced had derived an economic benefit of $4,000 by neglecting to perform the required monitoring procedures. *See* Init. Dec. at 24. Although Advanced does not directly challenge the Presiding Officer's finding with respect to the economic benefit of $4,000, Advanced argues that "the USEPA has provided no credible evidence on the key issue of

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[37] We note that 101 of the 104 violations charged involved excessive levels of copper, lead, or pH, and the three remaining violations involved various reporting requirements. *See* C Ex 42.

whether Advanced benefitted economically from the alleged violations at issue in this litigation." Appellant's Br. at 35.[38]

The Presiding Officer's finding was based on the Region's calculation that Advanced saved approximately $4,000 by failing to sample for copper and lead on 33 occasions, because each sampling event costs approximately $125. *See* Tr. at 248. Advanced, while making the general argument that it "derived no benefit," does not offer evidence to refute the Region's cost estimate and, in fact, does not dispute that it did not sample for copper and lead on 33 occasions.

The Board has held that for a complainant to meet its burden of demonstrating that an economic benefit was derived from a respondent's non-compliant behavior, it "need not show with precision the exact amount of the economic benefit enjoyed by the respondent. It is sufficient that the complainant establish a 'reasonable approximation' of the benefit." *In re B. J. Carney Indus., Inc.*, 7 E.A.D. 171, 217 (EAB 1997). In addition, the Board has recognized the difficulty of quantifying the entire economic benefit realized by a violator and stated that "courts have routinely opted to recover the partial benefit rather than ignore it merely because the entire benefit cannot be approximated." *Id.* at 219.

We see no error in the Presiding Officer's finding that $4,000 of economic benefit was derived from Advanced's violations. Accordingly, we affirm the Presiding Officer's finding that Advanced realized an economic benefit of at least $4,000 by failing to monitor its effluent as required by the Permit.

7. *Consideration of* "*Other Matters as Justice May Require*" *Does Not Support an Elimination of the Penalty*

Advanced argues that the penalty assessed by the Presiding Officer would not deter the type of behavior that EPA's policies are intended to affect. Appellant's Br. at 36. Rather, Advanced claims that imposing a fine on a company that relied on its local enforcement authority to inform it of any acts of non-compliance will create distrust between the regulated community and local enforcement authorities in general. *Id*. at 36. Advanced also maintains that this penalty will drive up the cost of compliance because companies will be forced to take additional precautionary measures to double check their own compliance. *Id*. at 37.

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[38] Advanced also argues that, as a result of relocating to West Chicago, the company actually suffered an economic loss due to the additional limitations placed on dischargers in the area. *See* Appellant's Br. at 34. However, as the Presiding Officer correctly found, Advanced voluntarily chose to locate in West Chicago and cannot expect this to be considered an economic *dis*advantage to be factored into the penalty determination. *See* Init. Dec. at 25.

Even assuming *arguendo* that Advanced was oblivious to the fact that it was not in compliance with the provisions of the Permit pertaining to the effluent limitations, Advanced's argument ignores the obvious point that if it had been sampling its effluent as the Permit required, it would have known when its discharges exceeded the Permit's limits and West Chicago's pretreatment standards, and would have taken corrective action, thereby reducing its potential liability.[39]

Advanced also argues that in other cases in which civil penalties were assessed, including "cases with facts that are much more egregious than the instant case," maximum penalties[40] were not imposed. Appellant's Br. at 38. Advanced claims that the Presiding Officer's penalty assessment was inappropriately large because it is not on scale with decisions made in other cases by other presiding officers.

Advanced's argument ignores prior Board precedents which emphasize the case-by-case nature of penalty assessments. *See e.g.*, *In re Newell Recycling Co., Inc.*, 8 E.A.D. 598, 642 (EAB 1999) ("[w]e continue to hold to the principle that penalty assessments are sufficiently fact- and circumstance-dependent that the resolution of one case cannot determine the fate of another."), *aff'd*, 231 F.3d 204 (5th Cir. 2000), *cert. denied*, 534 U.S. 837 (2001); *In re Schoolcraft Constr., Inc.*, 8 E.A.D. 476, 493-94 (EAB 1999) (holding that a penalty assessment that is higher than others is not grounds for finding clear error or abuse of discretion); *In re Spang & Co.*, 6 E.A.D. 226, 242 (EAB 1995) ("[g]enerally speaking, unequal treatment is not an available basis for challenging agency law enforcement proceedings.") (quoting Koch, 1 *Administrative Law and Practice* § 5.20, at 361 (1985)).

The Presiding Officer was correct to reject both Advanced's theory that such a penalty will not deter[41] non-compliant behavior, and its attempt to compare its own case with others in which a smaller penalty was assessed. The Board has expressly rejected such arguments in the past, and we see no reason to deviate from that position in the instant case.

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[39] While the control/approval authority system is designed to encourage a cooperative working relationship between the local enforcement authority and the regulated entity, such a system does not relieve the regulated entity of its duty to comply with the approved regulations.

[40] Contrary to Advanced's assertion, the Presiding Officer did not assess the maximum civil penalty for Advanced's violations of section 307 of the CWA. As explained *supra* note 11, the maximum civil penalty for Advanced's violations is $137,500.

[41] The Board has stated that "a primary purpose of civil penalties is deterrence." *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 548 (EAB 1997); *see also In re B. J. Carney Indus., Inc.*, 7 E.A.D. 171, 207 (EAB 1997) (holding that deterrence is one of the purposes vital to an effective enforcement program).

Accordingly, given the express authority granted to the Region to enforce regulations that are insufficiently addressed by West Chicago, the Board's consistent rejection of ignorance as an excuse for noncompliance, the lack of effort demonstrated by Advanced to understand its responsibilities, and its history of noncompliance, the Presiding Officer was correct to reject Advanced's argument that it deserved a downward adjustment in the penalty on these grounds.

IV. *CONCLUSION*

Upon consideration of the issues raised on appeal by Advanced, we reverse the portion of the Presiding Officer's Initial Decision assessing a civil penalty for Count II as it relates to the reporting component of the Permit's monitoring requirements. However, we affirm the portion of the Presiding Officer's Initial Decision assessing a civil penalty for Count I, and Count II as it relates to the sampling component of the Permit's monitoring requirements.

For these reasons a civil penalty of $95,650 is hereby assessed against Advanced. Advanced shall pay the full amount of the civil penalty within thirty (30) days after the filing of this Final Decision. Payment shall be made by forwarding a certified cashier's check payable to the Treasurer, United States of America, at the following address:

U.S. Environmental Protection Agency
Region V
Sonja R. Brooks, Regional Hearing Clerk
P.O. Box 70753
Chicago, IL 60673

So ordered.