

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

<b>IN THE MATTER OF:</b>	)	
	)	
<b>CITY OF SALISBURY, MARYLAND</b>	)	<b>DOCKET No. CWA-III-219</b>
	)	
<b>Respondent</b>	)	

**INITIAL DECISION**

**DATED:** February 8, 2000

**CWA:** Pursuant to Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), Respondent the City of Salisbury, Maryland, is assessed a penalty of \$16,000.00 for 42 violations arising from its failure to monitor its sludge for arsenic and selenium in the first quarter of 1996 in violation of 40 C.F.R. §§ 503.16 and 503.17; failure to report 1996 pollutant concentration data in violation of 40 C.F.R. § 503.18; and for land applying sludge in 1996 and 1997 containing pollutants in excess of the concentration ceilings in violation of 40 C.F.R. § 503.13.

**PRESIDING OFFICER:** CHIEF ADMINISTRATIVE LAW JUDGE SUSAN L. BIRO

**APPEARANCES:**

For Complainant:	Kerry Nelson, Esquire Assistant Regional Counsel U.S. EPA Region III 1650 Arch Street Philadelphia, PA. 19103-2029
For Respondent:	F. Paul Calamita, Esquire McGuire, Woods, Battle & Boothe, L.L.P. One James Center 901 East Cary Street Richmond, Virginia 23219-4030

## **I. PROCEDURAL HISTORY**

On July 15, 1998, Complainant initiated this administrative proceeding pursuant to Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g). Respondent, the City of Salisbury, Maryland, owns and operates a publicly owned treatment works ("POTW") in Salisbury that treats domestic sewage. The Complaint charges Respondent, in one undesignated count, with forty-two (42) violations of the sludge regulating provisions of CWA § 405 (33 U.S.C. § 1345), and its implementing regulations codified at 40 C.F.R. § 503. Complainant seeks assessment of an aggregated penalty in the amount of \$16,000.

Section 405(d)(1) of the CWA directs the Administrator to issue "regulations providing guidelines for the disposal of sludge and the utilization of sludge for various purposes." 33 U.S.C. § 1345(d)(1). The regulations governing the use or disposal of sewage sludge are found at 40 C.F.R. § 503 and impose upon persons engaging in use or disposal of sewage sludge specific requirements. The Complaint charges Respondent with violating the sludge regulatory requirements governing: (a) monitoring under 40 C.F.R. §§ 503.16/503.17; (b) data reporting under 40 C.F.R. § 503.18; and (c) pollutant concentration ceilings under 40 C.F.R. 503.13.

By Motion filed May 21, 1999, Complainant moved for accelerated decision on the issue of liability only, for each of the three types of violations described in the Complaint. Respondent vigorously opposed Complainant's Motion as to the data reporting and pollution concentration ceiling violations, but conceded liability as to the monitoring violations. In an Order issued July 30, 1999, it was held that the undisputed facts established Respondent's liability for the alleged

violations of 40 C.F.R. § 503.16 (monitoring) and 40 C.F.R. § 503.18 (data reporting).<sup>1</sup> The Order further held that Respondent had raised genuine issues of material fact as to its alleged violations of 40 C.F.R. § 503.13 (pollutant ceiling concentrations) and Complainant's Motion was denied as to those violations.

On August, 4, 1999, subsequent to this tribunal's Order on Complainant's Motion for Accelerated Decision, Respondent filed a Motion for Reconsideration of those elements of the Order granting accelerated decision to Complainant. Respondent argued that the part 503 regulations were not applicable to Respondent when the violations alleged in the Complaint occurred. Respondent's Motion for Reconsideration was denied in an Order issued August 23, 1999.

The Order on accelerated decision left two issues to be resolved at hearing: (1) whether Respondent land applied sludge that contained pollutant concentrations in excess of those allowed under 40 C.F.R. § 503.13; and (2) the appropriate penalty to be assessed for Respondent's violations.

At the hearing, Complainant called three witnesses in presenting its case in chief: Lisa Pacera, an environmental scientist and enforcement officer in EPA Region 3; Wilmer Elliott,<sup>2</sup> the

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<sup>1</sup> Specifically, Respondent was found liable for failing to monitor for arsenic and selenium in the first quarter of 1996 in violation of 40 C.F.R. §§ 503.16 and 503.17, and for failing in 13 instances to report sludge monitoring data collected in 1996 on its 1996 sludge Discharge Monitoring Report (DMR) in violation of 40 C.F.R. § 503.18. Unfortunately, the Order misstated the number of alleged violations as "24," rather than "42."

<sup>2</sup> Mr. Elliott was not named as a witness in Complainant's initial or rebuttal prehearing exchange. He was added as a witness pursuant to an Order, issued August 27, 1999, granting Complainant's Motion to Supplement its Prehearing Exchange, filed August 17, 1999. Complainant moved to add Mr. Elliott as a witness in response to statements attributed to him in an August 3, 1999 article in the Salisbury Daily Times. In fairness to Respondent, the Order

director of public works for the City of Salisbury; and Dr. Alan Rubin, a senior scientist at EPA responsible for developing, maintaining and amending the EPA's sludge regulations. Complainant also presented two rebuttal witnesses, Robin Costas, a chemist in EPA Region 3, and Yvonne Ciccone, a chemical engineer with Science Applications International Corporation. Complainant identified 32 exhibits at hearing, numbers 1 through 27 of which were received into evidence.

Respondent called four witnesses at the hearing: Robert Bastian, senior environmental scientist in EPA's office of wastewater management; David Winslow, superintendent of the Salisbury POTW; Alan Porianda, solids manager at the Salisbury POTW; and Clyde Wilber, member of a private engineering firm who assists municipalities with water and wastewater programs. Respondent identified 33 exhibits at hearing, 30 of which were received into evidence.

**II. RESPONDENT'S LIABILITY FOR VIOLATIONS OF 40 C.F.R. § 503.13  
DUE TO LAND APPLICATION OF SLUDGE CONTAINING POLLUTANTS ABOVE  
CEILING CONCENTRATIONS**

As established in the previously issued Order on Complainant's Motion for Accelerated Decision, Respondent, in its capacity as owner and operator of a publicly owned treatment works ("POTW"), generates sewage sludge during the treatment of domestic sewage.<sup>3</sup> Respondent's

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granting Complainant's Motion provided Respondent the opportunity to supplement its prehearing exchange in order to rebut any anticipated testimony by Mr. Elliott. Respondent availed itself of this opportunity, filing a supplemental prehearing exchange on September 3, 1999.

<sup>3</sup> A "treatment works" is a facility which treats waste water by various methods, including thickening, stabilizing, dewatering, in preparation for its disposal back into waterways, or its final use, *i.e.*, by being applied to land as a fertilizer. "Sewage sludge" is the solid/liquid residue generated during the treatment of sewage. Waste water is treated in order to reduce and/or control the levels of pollutants returned to navigable waters so as to maintain the quality of the water. See, CWA §§ 201(b), 212(2)(A); 40 C.F.R. § 503.9(aa) and (w).

POTW has a design flow capacity of one million gallons per day and is required to maintain an approved pretreatment program. In the years 1996 and 1997, Respondent applied to land 335.84 and 490.02 metric tons of sewage sludge, respectively. Respondent, therefore, was subject to the requirements of 40 C.F.R. §§ 503.13, 503.16 and 503.18 at all times relevant to the charges in this proceeding.

Under 40 C.F.R. § 503 land application of sewage sludge is prohibited “if the concentration of any pollutant in the sewage sludge exceeds the ceiling concentration for the pollutant in Table 1 of § 503.13.” Table 1 of part 503 lists ceiling concentrations for nine pollutants including arsenic, cadmium, molybdenum and nickel, the four pollutants at issue in this proceeding.<sup>4</sup> *See*, 40 C.F.R. § 503.10 (40 C.F.R. Part 503 Subpart B “applies to any person who prepares sewage sludge that is applied to the land [and] to any person who applies sewage sludge to the land . . .”).

The applicable burden of proof to establish liability is set forth in the Consolidated Rules of Practice, 40 C.F.R. Part 22, as amended, 64 Fed. Reg. 40176 (July 23, 1999), at § 22.24 as follows:

(a) The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint . . . . Following complainant’s establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint . . . .

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<sup>4</sup> Table 1 of 40 C.F.R. § 503.13 establishes the following pollutant ceiling concentrations measured in milligrams per kilogram:

Arsenic	75 mg/kg
Cadmium	85 mg/kg
Molybdenum	75 mg/kg
Nickel	420 mg/kg

The respondent has the burdens of presentation and persuasion for any affirmative defenses.

(b) Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence.

Complainant asserts that Respondent's liability is clearly established by the admissions Respondent made in the quarterly Discharge Monitoring Reports (DMRs) it submitted as well as the admissions the Respondent made in its response to a CWA § 308 letter<sup>5</sup> ("308 Response") issued to it by Complainant. Lisa Pacera testified that she reviewed these documents in the course of her investigation of Respondent's sludge land application program and found the violations which were subsequently alleged in the Complaint. Ms. Pacera's examination of Respondent's 1996 and 1997 sludge DMRs revealed that Respondent reported that a sludge sample taken on April 19, 1996 contained a concentration of 97 mg/kg of arsenic (Tr. 36), where the threshold is 75 mg/kg, and that a sludge sample taken on March 18, 1997 showed concentrations of 370 mg/kg of cadmium and 1100 mg/kg of nickel (Tr. 41-42), when the thresholds for those pollutants is 85 mg/kg and 420 mg/kg, respectively. *See also*, Complainant's Exhibits ("CX") 2 and 3 (DMRs for 1996 and 1997). Ms. Pacera further testified that information provided in Respondent's 308 Response established the dates on which the sludge sampled on April 19, 1996 and March 18, 1997 was applied to land. Tr. 44-46. Specifically, the sludge sampled April 19, 1996 was applied to land on April 19, May 2 and May 15, 1996, and the sludge sampled on March 18, 1997 was applied to land on March 18 and 24 and April 7-9, 1997. CX 5 (308

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<sup>5</sup> CWA § 308 (33 U.S.C. § 1318) authorizes the EPA Administrator to request owners or operators of point sources of pollution, such as POTWs, to provide information necessary to carry out the purposes of CWA § 405.

Response).

Ms. Pacera's examination of Respondent's 308 Response also revealed a concentration of 2100 mg/kg of nickel in a sludge sample taken on June 25, 1996 from Respondent's facility (where the threshold is 420 mg/kg) (Tr. 38), and a concentration of 150 mg/kg of molybdenum in a sample taken August 26, 1996 (where the threshold is 75 mg/kg) (Tr. 40). CX 5. Ms. Pacera testified further that the 308 Response showed that the sludge sampled June 25, 1996 and August 26, 1996 was applied to land. Tr. 44-46. Specifically, the sludge sampled on June 25, 1996 was applied to land June 26 and 27 and July 2, 8-11, 17, 18 and 22, 1996, and the sludge sampled August 26, 1996 was applied to land on August 26, September 20, 23 and 24, 1996.<sup>6</sup>

Respondent's DMRs for 1996 and 1997, and its 308 Response are reports required by law and as such "may be used to establish a [respondent's] liability." *Sierra Club v. Simkins Inds., Inc.*, 847 F.2d 1109, 1115, n. 8 (4<sup>th</sup> Cir. 1988), *cert. denied*, 491 U.S. 904 (1989); *Chesapeake Bay Foundation v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 451 (D. Md. 1985); *Public Interest Research Group of New Jersey v. Yates Industries, Inc.*, 757 F. Supp. 438, 447 (D.N.J. 1991), *on reconsideration*, 1993 WL 118195 (D.N.J. April 12, 1993)(DMRs may be deemed admissions when establishing liability in summary judgment motions); *see also U.S. v. Ward*, 448 U.S. 242 (1982).

The DMR reports must be signed, and Respondent's DMRs were signed, with the following certification:

I certify under penalty of law that I have personally examined and am familiar with the information submitted herein; and based on my inquiry of those individuals

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<sup>6</sup> Due to a scrivener's error, the additional land application date of July 17, 1996 was inadvertently omitted from the Accelerated Decision.

immediately responsible for obtaining the information, I believe that the submitted information is *true, accurate and complete*. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment. \* \* \* (emphasis added). CX 2, 3.

Respondent argues that the signed certification was “qualified” or conditional, due to the comments on the DMRs and attachments thereto and, therefore, the DMRs cannot be used as admissions to show that exceedances occurred. Respondent’s Post-Hearing Brief at 4-5.

Specifically, Respondent stated in the “Comments” section of the DMRs at issue that reported levels of arsenic, nickel and cadmium are “uncharacteristic” or “atypical” of Respondent’s sludge (CX 2, 3), and explained in a cover letter that Respondent believed that the level of arsenic was due to either a contaminated sample or analysis interference. RX 14. However, data reported on DMRs may be deemed admissions of liability even where the DMRs are submitted with comments disputing the accuracy of the reports. *Yates Industries*, 757 F. Supp. at 447 (Liability established for exceedances reported on DMRs where DMR cover letters stated that the data reported are believed to be a “bad sample,” “mistakenly switched or cross-contaminated”). Moreover, reliance on DMRs “to establish liability is consistent with the legislative history and avowed policy of the [CWA].” *Chesapeake Bay Foundation v. Bethlehem Steel*, 608 F. Supp. at 451-52. Quoting legislative history, the District Court stated,

The discussion in Congress regarding monitoring and enforcement reveals that Congress intended to keep enforcement actions simple and speedy. Monitoring and reporting requirements were added because of a recognized need to obtain accurate information and were designed to be enforceable. . . . “One purpose of these requirements is to avoid the necessity of lengthy fact-finding, investigations, and negotiations at the time of enforcement. Enforcement of violations of requirements of this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay. . . . the factual basis for enforcement of requirements would be available at the time enforcement is sought, and the issue before the courts would be a factual one of whether there

had been compliance.” S. Rep. No. 92-414, 92<sup>nd</sup> Cong. 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 3745, 3746. *Id.*

If enforcement of exceedances of pollutant limits could be avoided by merely “qualifying” the certification on the DMR, then the intent of Congress of streamlined enforcement would be severely frustrated. Moreover, the availability of “qualifying” the certification would render it a nullity, and would create the perverse result of rewarding sloppy laboratory practices.

Respondent argues further that the “qualified” analytical results may establish a *prima facie* case of failure to *monitor* rather than of land applying sewage sludge which exceeds regulatory limits of pollutants, because Respondent merely failed to appropriately certify the validity of the sampling data at issue. However, Federal case law supports a finding of liability for a monitoring violation rather than for a discharge violation *only* where laboratory error has been *shown*, by sufficient credible evidence. *PIRG of New Jersey v. Elf Atochem North America, Inc.*, 817 F.Supp. 1164, 1179, 1180 (D. N.J. 1993). The sufficiency of Respondent’s evidence is discussed below.

Thus, by presenting Respondent’s DMRs and 308 Response, Complainant has carried its burden of coming forward with evidence that Respondent land applied sludge containing concentrations of pollutants in excess of the regulatory limits in violation of 40 C.F.R. § 503.13.

With Complainant having established its *prima facie* case, the burden shifts to Respondent to rebut that evidence by showing that the sludge it applied to land on the dates detailed in the Complaint did not, *in fact*, contain concentrations of pollutants in excess of the regulatory ceilings found in table 1 of part 503.13. Respondent maintains that it has carried its burden by presenting evidence at the hearing demonstrating that the lab results reported from the four sampling dates in

question showing the exceedance levels were incorrect, and argues, therefore, *a priori*, that the sludge it applied to land on the dates listed in the Complaint did not contain pollutants in excess of regulatory limits.

Respondent offers several arguments as to why the lab results in question must be wrong. As a preliminary matter, Respondent seeks to show that as a result of the various processes involved in generating, storing and dredging sludge, the sludge in its lagoons is homogeneous. The process by which sludge is generated begins when solids are thickened and filtered out of the plant's wastewater, after which they are pumped to an anaerobic digester. Tr. 409-11. At all times relevant hereto, Respondent had two 400,000 gallons capacity digesters operating at its sludge plant. The digesters contain organisms that feed on, and thereby break down, the organic matter in the sludge. Tr. 411. Mr. Winslow testified that as the sludge is processed in the digesters it is completely mixed. Tr. 414-15. The nearly "complete mix" provided by the digesters has been verified by taking samples every ten feet to the bottom of the digester, Mr. Winslow stated. Tr. 415.

Once the sludge has passed through the digesters it goes to a holding tank and is then pumped once a week into lagoons where it is stored until it is removed for land application. Tr. 412. The process of adding sludge to the lagoons causes more mixing, Respondent maintains, because the sludge is pumped into the lagoons through several pipes in the bottoms of the lagoons. Tr. 427 (Winslow). When this is done the added sludge can be seen coming up from the bottom and spreading across the top of the lagoons. Tr. 427-28 (Winslow), 598-601 (Porianda).

In the lagoons further mixing occurs, according to Respondent. First, wind acts on the

lagoons, which are above ground, churning up and moving around the top layer of sludge. Tr. 424-27 (Winslow), 602-605 (Porianda), 964 (Wilber). Second, the dredge, which pumps sludge from the lagoons into tanker trucks for land application, makes a track several feet wide by several feet deep as it moves across the lagoon, which the remaining sludge fills in as the dredge passes. Tr. 427-30 (Winslow), 611 (Porianda). Third, as the sludge sits in the lagoon, additional anaerobic activity occurs, causing further mixing as the gases created by the biological action of the bacteria bubble to the surface. Tr. 607 (Porianda). All of this yields a lagoon of sludge that is thoroughly mixed and homogeneous, Respondent asserts. Tr. 517, 651 (Porianda), 970 (Wilber).

Respondent represents that in a homogeneous lagoon any metals present should be more or less evenly distributed and therefore should show up consistently in any samples, yet this is not the case with Respondent's sample results. That Respondent's historical results, as well as results obtained from resampling, do not show levels of metals approaching those found in the samples from the four dates listed in the Complaint is reason to question them, Respondent contends. Mr. Wilber characterized the sampling results detailed in the Complaint as "outliers." Tr. 931-32.

"Outlier" is a statistical concept that describes a data point that does not fit with the rest of a data set, being either much higher or much lower than the majority of the data points in that set.

Outliers may be the result of lab error, sampling error, administrative error or they may not be the result of any error, but in fact represent correct data. *Id.* Mr. Wilber testified that in his opinion, and employing EPA guidance in comparing the results at issue with the rest of the sludge data collected by Respondent between 1993 and 1997, the data points that are the focus of this case are far from the norms indicated by Respondent's data set and thus are outliers. Tr. 941-44, 949.

Where such outliers are encountered, Mr. Wilber testified, the next step is to examine the sample test results in the context of other indicators of lab test reliability including whether there was digester inhibition, whether there were any subsequent tests done on the sludge, and the quality assurance and quality control (“QAQC”) procedures and data from the lab performing the tests. Tr. 944-45. Respondent contends that an examination of available information on these other factors leads to the inescapable conclusion that the arsenic, nickel, cadmium and molybdenum results referenced in the Complaint do not represent true data, but rather are the result of lab error.

The absence of digester inhibition between 1996 and mid 1997 is one indicator that the tests results at issue here were erroneous, Respondent argues. Digester inhibition occurs when the living organisms in the digester are exposed to substances that are toxic to them, like the metals involved here, causing the organisms to die and the digester either to work at a slower rate or to shut down altogether, depending on the amount of toxins to which it is exposed. Respondent points to Mr. Wilber’s conclusions, based on his analysis of digester inhibition levels, that the level of arsenic found in the April 19, 1996 sample, and the level of nickel found in the June 25, 1996 sample, which is twelve times the inhibition level, could not have been correct as the levels found would have caused inhibition. Tr. 975, 982. The level of cadmium found in the March 18, 1997 sample would likely not on its own have caused inhibition but in combination with the level of nickel found in the same sample, which was seven times the inhibition level, inhibition would have occurred. Tr. 976, 1165. In reaching his conclusions Mr. Wilber used the

digester inhibition figures found in Respondent's Exhibit (RX) 7<sup>7</sup>, and made certain conservative assumptions about how the metals entered the digesters and the amount of sludge mixing that occurred. Tr. 1163. Respondent states that despite the levels of metals reported from Respondent's contract lab, CT & E Environmental Services Incorporated ("CT & E"), Respondent had no documented difficulties with its digesters due to high levels of metals in 1996 or 1997.<sup>8</sup> Tr. 417-18 (Winslow). This is proof that the results returned by CT&E must be wrong, Respondent asserts.

This conclusion is buttressed, Respondent argues, by results from subsequent sampling of its lagoons. These later samples did not contain metals in amounts that the results from the four samples at issue here would suggest, Respondent maintains.<sup>9</sup> Mr. Wilber testified that based on

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<sup>7</sup> Respondent's Exhibit 7 presents the following list of digester inhibition levels, as measured in milligrams per liter ("mg/l"), from the Water Pollution Control Federation (Tr. 1059):

Nickel – 2 mg/l soluble; 10 mg/l total  
Arsenic – 1.6 mg/l soluble  
Cadmium – 0.02 mg/l soluble or less than 20 mg/l total.

These numbers are the same as those found in EPA's "Prelim" program according to Mr. Wilber. Tr. 954, 1054. The "Prelim" program is a computer program or guidance document for determination of whether to impose local limits on industries to prevent toxins from impacting a wastewater treatment plant. Tr. 954-955. The value for soluble nickel is the same as that stated in EPA's 1979 Process Design Manual for Sludge Treatment and Disposal. CX 32.

<sup>8</sup> As for molybdenum, which has no known inhibition level, Mr. Wilber testified that either the test finding high levels had to be wrong or the test finding low levels had to be wrong; both could not be correct. Tr. 1041-42.

<sup>9</sup> Respondent makes the following representations as to follow-up sample results and changes in the sampled lagoons between the original sample date and the follow-up sample date:

1) The lagoon that showed an arsenic exceedance on April 19, 1996 was resampled on June 24, 1996 and showed a nondetectable amount of arsenic; and that

his calculations, which included an assumption that the lagoon was more or less completely mixed, the nickel resample value from the lagoon that produced the 2100 mg/kg result should have been approximately 700 mg/kg, not non-detect. Tr. 986. Mr. Wilber also testified that if the sampling results at issue were correct, his calculations for the resample results from the lagoon yielding the cadmium and second nickel exceedance, as well as the lagoons yielding the arsenic and molybdenum exceedances, should have shown higher levels of these metals. Tr. 988-89.

Moreover, the resample results were in keeping with the historical results of its sludge sampling, and these historical results show a low degree of variation, Respondent represents. Tr. 1050. The relatively large number of sampling events also indicates, in Mr. Wilber's opinion, that any "hot spots," or areas with high concentrations of metals in the lagoons, would have been discovered. Tr. 1121.

Respondent avers that further support for its argument that laboratory errors explain the

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between April 19 and June 24, 1996, only 130,000 gallons, or 7% of the total volume, was removed.

2) The lagoon that showed a nickel exceedance on June 25, 1996 was resampled on October 22, 1996 and showed a nondetectible amount of nickel; and that between June 25 and October 22, 1996, only 365,000 gallons, or approximately 17% of the total volume, was removed.

3) The lagoon that showed a molybdenum exceedance on August 26, 1996 was resampled on May 18, 1998 and showed a concentration of 5.84 mg/kg of molybdenum; and that between August 26, 1996 and May 18, 1998, only 115,000 gallons, or approximately 6% of the total volume, was removed.

4) The lagoon that showed cadmium and nickel exceedances on March 18, 1997 was resampled on April 9, 1997, and showed nondetectible amounts of those pollutants; and that between March 18 and April 9, 1997, only 80,000 gallons, or approximately 4% of the total volume, was removed.

RX 8 and 9.

pollutant concentration results at issue here is found in the investigation report prepared by the Maryland Department of the Environment (MDE) addressing problems at Respondent's contract lab, CT&E . The report details a variety of analytical, personnel and QAQC problems at CT&E and concludes that National Pollutant Discharge Elimination System (NPDES) metals data generated by the lab may be viewed by MDE as "inaccurate or unacceptable." RX 10. The report, dated July 12, 1996, was completed after two of the four sample dates for which lab tests showed Respondent's sludge to contain metals in excess of the regulatory ceilings. RX 10. Respondent asserts that the problems documented in this report, especially when considered in light of other evidence presented at hearing, shows that its sludge did not contain the levels of metals indicated in the four sample results returned by CT&E.

Respondent also argues that several additional facts presented at hearing support its position that CT&E returned erroneous results from the four samples in question. First is the absence of evidence that any industrial user subject to the pretreatment program is responsible for the levels of metals allegedly found in Respondent's sludge. RX 6; Tr. 997. Second, MDE took field measurements in and around the fields on which sludge was applied and did not find elevated levels of metals. Tr. 997-99. Third, analytical results for metals concentrations in sludge obtained by three other users of CT&E in May and August of 1996 were unusually high. RX 11; Tr. 679, 800-01. Examining the evidence presented in this case as a whole, Respondent contends, it is clear that CT&E's results were erroneous and that Respondent's sludge did not contain concentrations of any pollutants in excess of the regulatory limits.

While Respondent has presented credible evidence calling into question the reliability of test results from its contract lab, Respondent's arguments are ultimately unavailing. Respondent

reported the data, certifying it as “true, accurate and complete” on the DMRs, albeit with “qualification” or reservation manifested in the comments on the DMRs and cover letters. CX 2, 3.<sup>10</sup> However, Respondent did not have such reservations about its data as to make immediate efforts to resample as soon as the results were received, and cannot now take advantage of its failure to do so.<sup>11</sup> Legislative history of the CWA, as noted above, and the required certification on the DMRs, emphasize the need for accurate reporting and simple enforcement, and evidence Congress’ and EPA’s intent to place heavy reliance on data reported on DMRs in the context of enforcement. Thus, in order to balance such heavy reliance, and notwithstanding its “qualification” of reported data, Respondent bears a heavy burden to show laboratory error, in order to prevail under the preponderance of evidence standard of 40 C.F.R. § 22.24.<sup>12</sup> *Yates Industries*, 757 F. Supp. at 447 (“in light of the strong evidentiary emphasis placed on DMRs, defendant has a heavy burden to establish faulty [laboratory] analysis,” even where DMR cover letters indicated defendant’s belief that samples were bad); *Elf Atochem*, 817 F. Supp. at 1178

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<sup>10</sup> See, Tr. 613, 833-34 (testimony of Mr. Porianda that he did not believe the data was correct, and that he “disqualified” his certification in the “comments” section of the DMRs).

<sup>11</sup> Although Respondent contacted its laboratory to retest the nickel sample from June 25, 1996 (Tr. 581-82), and sampled a lagoon within 15 days from receipt of sampling results which showed cadmium and nickel exceedances on March 18, 1997, Respondent did not sample the lagoons showing arsenic exceedances on April 19, 1996, nickel exceedances on June 25, 1996, and molybdenum exceedances on August 26, 1996, until two months, four months and 21 months, respectively, after the original samples were taken. CX 5; RX 8, 9.

<sup>12</sup> See, definition of “preponderance of evidence”: “Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it” and “evidence which is more credible and convincing to the mind.” Black’s Law Dictionary 616 (Abridged 5<sup>th</sup> ed. 1983). Upon receipt of a DMR showing exceedances that are “qualified,” the obligation cannot reasonably be placed on EPA to determine whether the exceedances are valid or not; the submitter of the data has the access to relevant information and to resampling.

(“‘heavy burden’ imposed on defendants seeking to prove laboratory error is consistent with one of the purposes behind the Act [CWA] as reflected in legislative history”).

To meet that burden, Respondent must show “that there were errors in the actual tests performed.” *Id.*; *SPIRG v. Tenneco Polymers*, 602 F. Supp. 1394, 1400 (D. N. J. 1985).

Federal courts have required “direct evidence of reporting inaccuracies.” *Yates Industries*, 757 F. Supp. at 447. Direct evidence was held sufficient to find liability for discharge violations where parallel testing at another laboratory of the samples at issue produced results that did not constitute a violation, and where a letter from the laboratory acknowledged that the results were inaccurate due to a testing error and that retesting of samples showed non-detectable levels of the pollutant. *Elf Atochem*, 817 F. Supp. at 1179-1180. However, circumstantial evidence of laboratory error was held sufficient to deny a motion for summary judgment as to liability for discharge violations, where defendant submitted (1) results of split sampling conducted over a six-month period showed numerous divergences from measurements obtained from other laboratories; (2) reports of two independent audits of the laboratory identifying deficiencies in the laboratory’s operations; and (3) and EPA report on the laboratory’s performance on a DMR Quality Assurance Program conducted during the time the sampling results at issue were obtained, finding measurements were beyond the acceptable range of error. *Id.* at 1180-81.

Respondent’s evidence does not meet the level of evidence produced by the defendant in *Elf Atochem*. Respondent did not present any direct evidence that the sampling results were erroneous. Mr. Wilber’s expert testimony that the data at issue were “statistical outliers,” raises a critical red flag as to their validity, Respondent argues. Tr. 847, 848, 944; see, RX 5; Respondent’s Post- Hearing Brief at 7. However, as Mr. Wilber conceded, “outliers” are not *per*

se invalid. Tr. 932, 944; see, *Sierra Club v. Union Oil Co. of California*, 813 F.2d 1480, 1490 (9<sup>th</sup> Cir. 1987)(CWA and regulations promulgated thereunder “make no provision for ‘rare’ violations”; finding that district court erred in excusing exceedances based on the number of acceptable readings), *vacated and remanded on other grounds*, 485 U.S. 931 (1988), *reinstated and remanded*, 853 F.2d 667, *on remand*, 716 F. Supp. 429, (N.D. Cal. 1988). While the report on CT&E produced by MDE raises general questions about the lab’s reliability, it says nothing directly about the test results at issue here.<sup>13</sup> Particularly noteworthy is that the MDE report examined CT&E’s NPDES metals testing procedures, but not its sludge metals testing procedures.

Direct evidence could have been presented to prove that the lab results at issue were erroneous. According to Ms. Costas, when a POTW or other lab customer thinks it has received incorrect results from its lab, the first step to take is to ask the lab to reanalyze the sample. Tr. 182. The second step is to examine the lab’s quality assessment and quality control (QAQC) data. The QAQC data provides a step by step look at the handling and processing of a sample including checks, in the form of quality control samples, on the results of the analyses run on a sample. Tr. 1184-85. A third strong, direct indicator of possible errors in a specific test result is the result from a split sample. A split sample represents a portion of the original sample that is then analyzed separately from the rest of the sample, typically by a separate lab. If the labs involved produce markedly different results, this is an indication that one of the labs may be

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<sup>13</sup> The same is true of the school sludge results provided in Respondent’s Exhibit 11. As to the field tests conducted by MDE on the sites where Respondent applied its sludge, both Mr. Wilber and Dr. Rubin testified that the information from such tests does not provide a basis from which to draw any positive conclusions. Tr. 271-73, 306-07(Rubin); 998-999 (Wilber),

producing unreliable results. Tr. 1194. Significantly, Respondent did not present any of these types of direct evidence of erroneous lab results at hearing. *See*, Tr. 1087.

Respondent also did not present any direct evidence showing that, *in fact*, the four samples in question *did not* contained concentrations of the pollutants at issue *above the regulatory ceilings*.<sup>14</sup>

As to the circumstantial evidence presented by Respondent, Complainant's rebuttal witnesses, Ms. Costas and Ms. Ciccone, offered persuasive testimony challenging the testimony and conclusions of Respondent's witnesses. Ms. Ciccone testified that, contrary to the contentions of Respondent, sludge, which is composed of a combination of water and solids, is not by its nature very uniform and does not mix readily. Tr. 1252, 1263-64. As such, any mixing that occurs in the digester is imperfect at best. Tr. 1259. Ms. Ciccone added that this expectation was further confirmed in this instance by the fact that when Respondent emptied its digesters at least one of them had a substantial amount of grit on its bottom. *Id.*

As to mixing that may occur after the sludge leaves the digesters, Ms. Ciccone testified that, while taken together, the effects of pumping the sludge into the lagoons, dredging, wind, and bubbling from ongoing anaerobic activity would produce some additional mixing, the sludge in Respondent's lagoons, like that in other lagoons she has had experience with, would likely be nonuniform. Tr. 1263-64. Ms. Ciccone also noted that because sludge does not mix readily, it is

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<sup>14</sup> It is important to keep in mind that while the tests results may be in error, merely showing that they are erroneous does not lead unequivocally to the conclusion that Respondent's sludge did not contain pollutants in excess of the ceiling concentrations. *Elf Atochem*, 817 F. Supp. 1164 n. 15 ("Even direct proof that laboratory results are erroneous does not necessarily prove that a discharge violation did not occur"). The tests results could be erroneously high, and another accurate test could still show that Respondent's sludge contained pollutants above the regulatory threshold, although perhaps not to the level of the erroneous test results.

likely that some of it had accumulated in certain areas of the lagoon. *Id.*

The nonuniform nature of sludge presents difficulties for sludge sampling and resampling. For example, because it is nonhomogeneous, the chance that a single sample taken from a tanker truck might contain metals in amounts not previously detected is “pretty good,” Ms. Ciccone testified. Tr. 1265. For the same reason, the fact that previous sampling results did not show metals at the levels found in the April 19, June 25, and August 26, 1996 and March 18, 1997 samples does not show that the samples at issue here did not have the levels of metals found by the tests performed by CT&E.

In addition to the sampling difficulties presented by its nonuniformity, the addition and subtraction of sludge from the lagoons raises further doubts about attaching any meaning to the results obtained from resampling the sludge, Ms. Ciccone and Ms. Costas testified. Tr. 1282-86 (Ciccone), 1197-98 (Costas). Ms. Ciccone testified that as a result of these problems no meaningful comparisons could be made between the results returned by CT&E and the results of Respondent’s resampling. Tr. 1282-87.

Moreover, Ms. Ciccone questioned the reliability of Respondent’s historical averages given the inconsistent detection levels in CT&E’s lab analyses. Tr. 1269. Detection levels are the levels below which the test cannot determine the presence of the pollutant. Her examination of the available lab data sheets for testing conducted in 1996 indicated that “in a significant amount of the cases the detection limits for the parameters in question, especially for cadmium and nickel, were so high that I feel it’s somewhat misleading” to treat all the nondetect readings as zeros. *Id.* In at least one instance the non-detectible limit was *above* the federal regulatory ceiling rendering the “non-detect” test result legally meaningless. Tr. 906.

Ms. Ciccone also discussed ways in which significant amounts of metals may have entered Respondent's lagoons without causing digester inhibition. First, she noted that Respondent takes in septage and that the septage is treated with lime before it is added to the lagoons. Tr. 1265, 1267. According to Ms. Ciccone, treating septage with lime has the effect of concentrating any metals that may be present in the septage by changing the metals from a soluble form to an insoluble form. Tr. 1267-68. In addition, while septage is typically tested before it is added to the lagoons, the tests done are not designed to pick up metals.<sup>15</sup> Tr. 533, 561.

Ms. Ciccone's testimony also calls into question Respondent's argument that the POTW's industrial users could not have been the source of elevated levels of metals because records show no pretreatment violations during 1996 or 1997. Specifically, she observed that two of Respondent's regulated industrial users, both of which are permitted as metal finishers, are only required to monitor two to three times a quarter, and that they could potentially be releasing metals at other times that would not be detected through monitoring. Tr. 1274-75. The POTW also has unregulated industrial users and combined sewers that could contribute metals to the wastewater stream. Tr. 1254-55.

Waste from these industries, unlike septage sludge, passes through the treatment plant, but the fact that the waste caused no digester inhibition does not prove that it was free of metals, Ms. Ciccone testified. While Ms. Ciccone testified that the digester inhibition figures compiled by Respondent "have been around for a long time," and "you do keep running across the same set of numbers" in relevant reference materials, she and Mr. Wilber testified that there are other

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<sup>15</sup> Mr. Winslow testified that in certain instances the septage was not tested before it was placed in the lagoons. Tr. 530.

accepted numbers that vary significantly from those used by Respondent. Tr. 1277(Ciccone); 1059-60 (Wilber). Ms. Ciccone testified further that no one full scale study of digester inhibition has been done and, based on research she has done on the issue of digester inhibition levels, the source of some of the inhibition numbers is somewhat obscure and their precise impact on any particular digester uncertain. Tr. 1277-79. As to the numbers found in the Prelim program, Ms. Ciccone testified that when a user obtains a metal value that should have caused inhibition but did not, the Prelim program directs that its inhibition value be disregarded. Tr. 1279-80. Ms. Ciccone concluded that in her opinion inhibition is not a number that can be calculated in isolation, and that she considers published inhibition numbers to be guidelines rather than explicit limits. Tr. 1362-63, 1365.

Complainant's rebuttal witnesses, in challenging the testimony and conclusions of Respondent's witnesses, called into question the reliability of Respondent's evidence and witnesses' testimony. The proponent of witnesses' testimony and evidence has the burden of proving that, by a preponderance of evidence, it is reliable. *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 744 (3<sup>rd</sup> Cir. 1994). Federal courts' examination of the reliability of evidence in determining admissibility under Federal Rule of Evidence 702 may provide useful guidance in determining the weight of evidence presented in an administrative proceeding. In the landmark case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 593-94 (1993), the Supreme Court listed four factors to consider:(1) whether the theory or technique can be tested, (2) whether it has been subject to peer review, (3) whether the technique has a high known or potential rate of error, and (4) whether the theory has attained general acceptance within the

scientific community.<sup>16</sup> Respondent's theory that the data could not be correct because the digesters were not inhibited is not very reliable in light of the *Daubert* factors, considering that it has not been fully tested and considering the potential rate of error.

In sum, after full consideration of all of the evidence submitted in this matter, it is found that Respondent has failed to present evidence sufficient to rebut the information evidencing violations contained in its sludge DMRs and 308 Response. Accordingly, Respondent is liable for 27 violations of 40 C.F.R. § 503.13.

### **III. PENALTY**

Administrative penalties for violations of CWA § 405 are determined in accordance with CWA § 309(g). Section 309(g)(2)(A) provides for class I civil penalties of up to \$10,000 per violation and a maximum class I penalty of \$25,000. Section 309(g)(3) directs that "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" are to be considered in determining the amount of any penalty to be assessed. In addition, Consolidated Rule of Practice 22.27(b) (64 Fed Reg. 40187 (July 23, 1999)) provides that "[i]f the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant,

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<sup>16</sup> Other factors courts have considered are anecdotal evidence, temporal proximity, and improper extrapolation. *Allison v. McGhan Medical Corporation*, 184 F.3d 1300, 1312 (11<sup>th</sup> Cir. 1999). The soil samples taken from fields on which the sludge at issue was applied were taken more than a year later after the application (Tr. 632-33), and thus its evidentiary weight is diminished. The fact that a retest by the laboratory of a sludge sample with an initial result showing high level of copper found a much lower value (CX 5) is of very little weight.

the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease."<sup>17</sup>

Complainant argues that its proposed penalty of \$16,000, which was calculated with reference to EPA General Enforcement Policies GM 21 and 22, is appropriate based on its application of the statutory penalty factors to the facts of this case. Respondent responds in opposition that it made efforts in good faith to comply, that it had a well-managed NPDES program headed by experienced professionals, that there was no threat to human health or the environment, that it reported every analytical result of its sludge to EPA or MDE, and that it gained no economic benefit of any non-compliance.

*Nature, Circumstances, Extent and Gravity of the Violations*

In calculating its proposed penalty, Complainant considered together the statutory factors of nature, circumstances, extent and gravity (hereinafter "gravity"). Ms. Pacera testified that based on her consideration of the facts, and after considering the \$10,000 maximum penalty per violation that could be sought in a class I administrative proceeding, she proposed an amount of \$1,000 per violation under the gravity factors, for a total of \$42,000.

In evaluating the circumstances, extent and gravity of Respondent's monitoring and reporting violations, Ms. Pacera took account of the following factors. First, Respondent did not report required data for one year. Tr. 59. This is significant, Ms. Pacera testified, because data is

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<sup>17</sup> Consolidated Rule 22.27(b) also directs that the presiding officer consider, in addition to the factors enumerated in the statute, any civil penalty guidelines issued under the statute. The Agency has not issued any civil penalty guidelines for assessment of penalties for violations of CWA § 405. Accordingly, the statutory penalty factors alone will guide assessment of the penalty in this case.

the way EPA determines compliance with the CWA sludge regulations. *Id.* Second, Ms. Pacera took into consideration that 80% of the time Respondent reported only the lower value of sampling results, and that in two instances the unreported results exceeded the regulatory ceilings. Tr. 59.

In evaluating the gravity of Respondent's 27 violations of 40 C.F.R. § 503.13 regarding land applications, Ms. Pacera took into consideration several facts. First, she considered that, with the exception of the arsenic level, which was 1.5 times the regulatory ceiling, Respondent's samples showed levels of pollutants two to four times above the regulatory ceiling. Tr. 57-58. Second, she considered the number of land applications at issue. Third, she factored in the potential for environmental harm presented by the application to agricultural land of sludge with high pollutant concentrations, specifically, the possibility that humans or animals might come in contact with the pollutants. Tr. 57.

I find Complainant's calculation of \$1,000 for the gravity of each of Respondent's 15 monitoring and reporting violations is reasonable and is hereby adopted. However, Complainant's proposed penalty for the gravity of Respondent's land application violations, does not seem sufficient. As Complainant points out, there is a potential for environmental harm when sludge with pollutants in excess of the regulatory limits is applied to land. Such violations are therefore generally considered more "serious" than monitoring and reporting violations. *Elf Atochem*, 817 F. Supp. at 1180 (citing *Yates Industries*, 757 F. Supp. at 454 (reporting and monitoring violations do not "produce the kind of direct environmental impact" that is the primary target of the CWA)). Moreover, an approach to penalty assessment under the CWA that treats violations involving the discharge of pollutants to the environment more seriously is supported by

the testimony of Dr. Rubin. Dr. Rubin testified that each of the pollutants involved here presents particular risks to humans and the environment. For example, arsenic presents a special hazard to children under the age of six (Tr. 262-63), cadmium is a kidney toxicant, (Tr. 265), nickel can suppress the growth of plants, and molybdenum, by interfering with the body's absorption of copper, can cause gastrointestinal and growth problems ( Tr. 268).

Accordingly, Respondent is assessed a penalty of \$2,000 for each of its 27 land application violations for a total gravity amount of \$54,000. Adding this to the \$15,000 assessed for Respondent's monitoring and reporting violations yields a total penalty of \$69,000 under the nature, circumstances, extent and gravity factors.

#### *Ability to Pay*

Ms. Pacera testified that a penalty of \$16,000 was within Respondent's ability to pay based on her calculation of approximately \$2 for each of the 8,155 households that 1990 census data showed Salisbury to contain. Tr. 76-77. In addition to this, there was evidence presented at hearing indicating that Respondent's wastewater treatment program has a budget of approximately one million dollars and, that as of July 1, 1999, it raised the rate it charges its residents for water treatment services from \$1.74 per thousand gallons, which was one of the lower rates in the state, to \$2.24 per thousand gallons of water. Tr. 245, 927. Given this evidence, and the fact that Respondent has presented no evidence and made no argument to the contrary, Respondent is deemed able to pay at least the \$16,000 penalty proposed by Complainant.

### *History of Prior Violations*

Ms. Pacera testified that Respondent *has* a history of prior CWA violations. Specifically, MDE issued a complaint/order to Respondent in May of 1997 for failure to submit monthly reports related to its combined sewer overflow system, and data provided by Respondent to MDE showed 22 violation of the effluent limits in Respondent's NPDES permit in the period 1993 to 1998. Ms. Pacera also testified, however, that she did not assess any additional amount under this factor because she was not aware of these prior violations at the time she drew up her penalty calculation. Respondent's history of prior violations justifies an increase of 15% of the amount assessed for the gravity of Respondent's violations, or \$10,350.

### *Culpability*

Complainant proposes an amount of \$5,000 for what it characterizes as lack of good faith under the culpability factor. Tr. 68. This lack of good faith is evident, Complainant represents, in the fact that all of Respondent's 42 violations could have been prevented because none of them were the consequence of factors beyond its control. Tr. 69. Respondent could have prevented its land application violations by having its sludge analyzed before it was sent out for land application. Tr. 68. As to Respondent's monitoring and reporting violations, Complainant contends that Respondent could easily have monitored for arsenic and selenium in the first quarter of 1996 but did not, and that Respondent was responsible for knowing what its data reporting requirements were under 40 C.F.R. part 503.18. Tr. 69.

Complainant also asserts that Respondent acted slowly in dealing with its exceedances;

specifically, that it took Respondent a year from the date of its arsenic exceedance to take corrective action and that if Respondent had acted sooner it could have prevented many later violations. Tr. 69. Complainant also maintains that applying contaminated sludge to land is evidence of a lack of concern for the environment or laws and regulations. Tr. 72. Finally, Complainant considered the certification statements contained on the DMRs. Complainant argues that these statements are important to determining compliance under the self-monitoring regime of the CWA. Tr. 70-71.

Respondent makes several arguments in opposition to Complainant's proposed \$5,000 increase under the culpability factor. With regard to its land application violations, Respondent asserts that it was unaware that its sludge contained pollutant concentrations that exceeded the regulatory limits when that sludge was applied to land. In addition, Respondent argues that it relied on MDE, albeit erroneously, in continuing to land apply its sludge despite the high pollutant values it received from CT&E. Tr. 444, 620, 675, 744-745.

Turning to its monitoring violations, Respondent maintains that it was not bad faith that led to its failure to monitor for arsenic and selenium in the first quarter of 1996; rather, it was bad weather and the protocol established by Mr. Porianda for monitoring its sludge for the pollutants listed in table 1 of part 503.13, a protocol based on an incorrect understanding of the part 503 rules. According to Mr. Porianda, the protocol he created for complying with the part 503 rules involved monitoring for the nine required pollutants in the first month of each quarter. Tr. 582-3, 593. In January of 1996 Respondent's lagoon was frozen over, making sampling impossible in that month. When the lagoons unfroze in February or March and Respondent resumed sampling it did not monitor for arsenic and selenium because, under the protocol, Respondent was not due

to monitor for those pollutants in those months. Tr. 680, 831-832.

Respondent's first argument, that it did not know it was land applying contaminated sludge is without merit. Respondent had a duty to learn the concentration of pollutants in its sludge before it applied that sludge to land. 40 C.F.R. § 503.7. Respondent's other arguments, in particular its reliance on MDE, as well as the overall testimony provided by Mr. Winslow and Mr. Porianda, weigh against assessing the \$5,000 increase proposed by Complainant for culpability. Accordingly, Respondent is assessed a penalty increase in the amount of \$2,000 based on its culpability.

#### *Economic Benefit*

Complainant contends that an economic benefit of \$7,925 accrued to Respondent as a consequence of its violations in this case. For Respondent's sludge application violations Complainant made the following calculations. The cost of expedited sampling in order to learn the concentration of pollutants before land applying sludge was estimated by Ms. Pacera to be \$150 based on EPA lab information. Tr. 62. Multiplying this number by four sampling events yielded an amount of \$600. Tr. 63. Complainant calculated an amount of \$200 per week for rental of a tanker truck to hold the dredged sludge until the expedited sample results were returned by the lab. Tr. 64. This figure was arrived at based on search of sources on the internet. *Id.* Multiplying \$200 by four sampling events yielded an amount of \$800. *Id.* Complainant then added the projected cost of landfilling the sludge that contained exceedances. This number was calculated based on number of tons of sludge applied multiplied by a \$40 per ton tipping fee. Tr. 66. The estimated tipping fee was based on information from MDE. The total cost of landfilling

would have been \$6,375, Complainant avers. *Id.*

As to Respondent's reporting violations, Complainant calculated an amount of \$100 based on the personnel time needed to gather the necessary information and submit it to EPA. Tr. 67. For the monitoring violations, Complainant estimated \$50 based on EPA lab information concerning cost of analysis for the metals arsenic and selenium.

Adding all of these numbers together yields a total economic benefit of \$7,925. Complainant's calculation of Respondent's economic benefit is reasonable and will be adopted with one amendment. Complainant proposed the amount of \$200 per week, for a total of \$800 for four sampling events, for rental of a tanker truck to store dredged sludge while Respondent awaits its sample test results. Testimony at hearing established that Respondent owns the tanker trucks it uses to transport sludge to the farms where it is applied and thus would not have incurred any rental costs while awaiting its test results. Tr. 679-80. Accordingly, the economic benefit amount will be reduced by \$800 for a total of \$7,125.

*Other Factors as Justice May Require*

Complainant reached its ultimate proposed penalty figure of \$16,000 after reducing the penalty in consideration of Respondent's status as a municipality with limited financial resources. Tr. 61, 75-76. While there is little support in the record for such a reduction, I find that it is not unreasonable based on the facts of this case and in light of the \$25,000 penalty cap on class I administrative actions under CWA § 309(g)(2)(A), and it is within the Agency's enforcement discretion to so reduce the penalty, and therefore, the reduced penalty will not be disturbed.

## **CONCLUSION**

In light of all of the factors of this case, I find appropriate the imposition of a civil penalty in the amount of \$16,000 against Respondent, the City of Salisbury, Maryland, for its failure to monitor sludge in violation of 40 C.F.R. § 503.16; for its failure to report data regarding the land application of sludge in violation of 40 C.F.R. § 503.18 and for land applying sludge containing pollutants in excess of the concentration ceilings in violation of 40 C.F.R. 503.13.

## ORDER

1. Respondent is assessed a civil penalty of \$16,000.00.
2. Payment of the full amount of this civil penalty shall be made within 60 days of the service date of this Order by submitting a certified or cashier's check in the amount of \$16,000.00, payable to the Treasurer, United States of America, and mailed to:

EPA - Region III  
P.O. Box 360515  
Pittsburgh, PA 15251
3. A transmittal letter identifying the subject case and the EPA docket number, as well as Respondent's name and address must accompany the check.
4. If Respondent fails to pay the penalties within the prescribed statutory period after entry of this Order, interest on the penalty may be assessed.
5. Pursuant to 40 C.F.R. §22.30(a) (64 Fed. Reg. 40186 *et seq.* (July 23, 1999)), this Initial Decision shall become the Final Order of the Agency, unless an appeal is taken within thirty (30) days from the service date of this Order or the Environmental Appeals Board elects on its own initiative to review this decision.

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Susan L. Biro  
Chief Administrative Law Judge

Date: February 8, 2000  
Washington, D.C.