

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

**In the matter of** )  
 )  
**Tri-County Builders Supply,** ) **Docket No. CWA-9-2000-0008**  
 )  
**Respondent** )

**Initial Decision**

By: Carl C. Charneski  
Administrative Law Judge

Issued: May 19, 2003  
Washington, D.C.

**Appearances**

For Complainant: Marcela von Vacano, Esq.  
Elizabeth La Blanc, Esq.  
U.S. Environmental Protection Agency  
Region IX  
San Francisco, California

For Respondent: Robert L. McCord, Jr., Esq.  
Taylor, McCord & Praver  
Ventura, California

**I. Statement of the Case**

This enforcement proceeding arises under the Clean Water Act (“the Act”). 33 U.S.C. § 1251 *et seq.* It involves the land application of “biosolids,” *i.e.*, treated “sewage sludge,” for agricultural purposes. The United States Environmental Protection Agency (“EPA”) filed a complaint alleging that Tri-County Builders Supply (“Tri-County”) violated Section 405(e) of the Act, 33 U.S.C. § 1345(e), by failing to comply with the sewage sludge regulations promulgated at 40 C.F.R. Part 503 (“Standards for the Use or Disposal of Sewage Sludge”). Specifically, EPA charges that Tri-County committed the Section 405(e) violation by land applying biosolids in an amount greater than the applicable “agronomic rate,” contrary to the provisions of

40 C.F.R. 503.14(d).<sup>1</sup> EPA proposes that, pursuant to Section 309(g) of the Clean Water Act, a civil penalty of \$137,500 be assessed against respondent for this violation. 33 U.S.C. § 1319(g).

Tri-County answered the complaint denying its allegations and challenging the penalty proposal. Thereafter, a hearing in this matter was held on November 13-16, 2001, in Ventura, California.

For the reasons that follow, it is held that Tri-County violated Section 405(e) of the Clean Water Act, as alleged by EPA, by failing to comply with 40 C.F.R. 503.14(d) in land applying biosolids at a rate greater than the applicable agronomic rate. A civil penalty of \$59,591 is assessed against respondent for this violation.<sup>2</sup>

## **II. The Statute and Regulations**

Tri-County is charged with violating Section 405(e) of the Clean Water Act. Section 405(e) provides:

The determination of the manner of disposal or use of sludge is a local determination, except that it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established pursuant to subsection (d) of this section, *except in accordance with such regulations.*

33 U.S.C. § 1345(e). Emphasis added.

Pursuant to Section 405(d) of the Act, 33 U.S.C. § 1345(d), the United States Environmental Protection Agency promulgated the Standards for the Use or Disposal of Sewage

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<sup>1</sup> The agronomic rate has been described as the optimal amount of nitrogen that will be taken up by the planted crop. Thus, by applying biosolids at the proper agronomic rate, it is the crop that will use the nitrogen as fertilizer and excess nitrogen will not leach into the soil and pollute the groundwater. Tr. 97, 242. In other words, the agronomic rate is intended to provide sufficient nitrogen to the crop while minimizing the amount of nitrogen that remains in the soil. Tr. 876.

<sup>2</sup> Respondent interprets the complaint as also possibly alleging violations of 40 C.F.R. 503.14(c)(bulk sewage sludge not to be applied within 10 meters of the waters of the United States) and 40 C.F.R. 503.32(b)(5)(v)(animals shall not be grazed on land for 30 days after application of sewage sludge). Resp. Br. at 3-8. In response, EPA submits that only one violation is alleged here and that is the Section 405(e) charge based upon the failure to comply with the agronomic rate. Compl. R.Br. at 2. See Compl. ¶¶ 25 & 26.

Sludge. These are the regulations appearing at 40 C.F.R. Part 503. Section 503.1(a) sets forth the purpose of these regulations as follows:

(1) This part establishes standards, which consist of general requirements, pollutant limits, management practices, and operational standards, for the final use or disposal of sewage sludge generated during the treatment of domestic sewage in a treatment works. *Standards are included in this part for sewage sludge applied to the land, placed on a surface disposal site, or fired in a sewage sludge incinerator....*

40 C.F.R. 503.1(a). Emphasis added.

The “management practices” referred to in Section 503.1(a) are set forth in Section 503.14. The specific management practice at issue in this enforcement proceeding involves the agronomic rate requirement of Section 503.14(d). This section provides:

Bulk sewage sludge shall be applied to agricultural land, forest, a public contact site, or a reclamation site at a whole sludge application rate *that is equal to or less than the agronomic rate for the bulk sewage*, unless, in the case of a reclamation site, otherwise specified by the permitting authority.

40 C.F.R. 503.14(d). Emphasis added

### **III. Facts**

#### **A. Introduction**

Because “biosolids,” also known by the less attractive name “sewage sludge,” contain nutrients, they have an agricultural use as a fertilizer. Over the past several years, however, there has been growing public concern in Southern California over possible environmental and health hazards presented by the land application of biosolids. For example, biosolids can deplete oxygen in a water body, thereby adversely affecting aquatic organisms that need oxygen to function normally. Biosolids can also cause an increase in the turbidity of the water. In addition, there are health issues presented by the presence of pathogens in sewage sludge which is used as a fertilizer. Tr. 48-49. The public’s concern over the use of biosolids as a fertilizer has resulted in several Southern California counties banning its land application. Tr. 45-46, 48. The events of this case involve the use of biosolids as a fertilizer. These events took place in Ventura County, California, which, at the time, had no such prohibition against the agricultural use of biosolids.

#### **B. Biosolids**

In general, biosolids are produced when a wastewater treatment plant takes the wastewater and separates the water from the solids. The treatment plant stabilizes the biosolids by meeting certain metal criteria. The pollutants that are of the most concern are heavy metals such as lead, cadmium, molybdenum, nickel, and mercury. Tr. 239. The treatment plant also stabilizes the biosolids by reducing the pathogens that are present. *Id.*

The sewage sludge involved in this case is a Class B biosolid. This means that while it has been treated by a wastewater treatment plant, pathogens are still detectable. Some of the pathogens that may be found in Class B sewage sludge are salmonella, shigella, Norda viruses, and E-coli. Tr. 240. These pathogens, however, have been reduced to levels in Class B sewage sludge that do not pose a threat to the public health and to the environment as long as certain precautionary measures are taken to prevent exposure to the sewage sludge. *See* Stipulation 12; *see also*, 40 C.F.R. 503.32(b).

The United States Environmental Protection Agency recognizes that when properly applied to the soil, however, biosolids have a beneficial agricultural use as a fertilizer. In the government's view, the proper land application of biosolids is preferable to their being disposed of in a land fill. Tr. 48, 50, 240-241, 438.<sup>3</sup> Along this line, in *City of Salisbury*, CWA Appeal No. 00-01, 2002 EPA App. LEXIS 6, (EAB Jan.16, 2002), 10 E.A.D. \_\_, the EPA Environmental Appeals Board commented:

Given the potential unhealthful mix of chemicals and organisms that might be present in sewage sludge, EPA was, at the time it issued the part 503 regulations, very concerned that the material be treated with caution. However, the Agency also recognized that sewage sludge contains nutrients and could be beneficially used to enrich agricultural and forest lands and to landscape and reclaim strip-mined land. EPA explained, "The organic and nutrient content of sewage sludge (biosolids) makes it a valuable resource to use both in improving marginal lands and as a supplement to fertilizers and soil conditioners. [58 Fed. Reg.] at 9257. Thus, EPA set forth specific rules by which parties can safely and beneficially apply municipal sewage sludge to land.

2002 EPA App. LEXIS 6, at \*10-11.

The biosolids in this case were being applied to the land for their nitrogen. Nitrogen is essential for green growth, *i.e.*, "for a plant to grow leaves, to elongate, to photosynthesize." Tr. 840. There are three main forms of nitrogen that occur in the soil. They are organic nitrogen, ammonium-form nitrogen, and nitrate nitrogen. Ammonium and nitrate nitrogen are

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<sup>3</sup> *See* CX 8 (58 Fed. Reg. at 9249 (Feb. 19, 1993)); *see also*, *Leather Industries of America, Inc. v. EPA*, 40 F.3d 392, 395 (D.C. Cir. 1994).

used by crops. Organic nitrogen can also be used by crops, but only after it has been mineralized.  
Tr. 102-103.

### **C. Respondent's Farming Operation at Rancho Canada Larga**

The actual land application of the biosolids at issue in this case occurred in Rancho Canada Larga, which is located in Ventura County, California. Tr. 254; CX 10. This is where, in 1966, Shawn Campbell, the owner of respondent Tri-County Builders Supply, leased 382 acres from the Bonsall family. Tr. 658, 878; RX 29 & CX 10. Campbell, a farmer and a rancher, intended to grow "oat hay," a forage crop, on this land. Tr. 92, 887. The Canada Larga tract leased by Tri-County contained several fields. It is the events occurring on Field 15 which are the focus of this case.

Rancho Canada Larga is located in the Canada Larga Canyon. Campbell described the Canada Larga Canyon as being anything but fertile. The land had not been actively farmed for a number of years, there were several dead walnut trees in the fields, and the soil was "very hardpanned." Tr. 892. Indeed, insofar as Field 15 was concerned, Campbell testified that even weeds didn't grow well there. *Id.* Hence, the need to fertilize these fields in preparation for the planting of the oat hay crop.

Tri-County chose to fertilize Fields 4, 15, and 16 of the Canada Larga site with treated municipal sludge. Respondent received these biosolids from the City of Ventura. The biosolids were "Class B." CX 9; RX 20.<sup>4</sup>

Field 15 consisted of 33 to 35 acres. A total of 8,240 metric tons of biosolids were applied to 26 acres of Field 15.<sup>5</sup> The first of the biosolids were applied in December of 1996, and the last of the biosolids were applied in September of 1997. Tr. 265; CX 9. This field was planted by respondent in December, 1997, and harvested in May of 1998. The harvest yielded an oat hay crop of 4-1/2 tons per acre. Tr. 926. Thereafter, a "volunteer crop" of oat hay was harvested by respondent in February of 1999, yielding 4 tons per acre. Tr. 926.<sup>6</sup>

On May 27, 1997, Field 15 was visited by EPA Inspector Lauren Fondahl. Fondahl, an environmental engineer, was the biosolids coordinator in Region IX's Clean Water Act

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<sup>4</sup> As noted, Class B sewage sludge is sewage sludge which has been treated, but which still contains some pathogens. Tr. 240.

<sup>5</sup> The biosolids were applied on a wet-weight basis, *i.e.*, they contained moisture. Tr. 184, 266-267.

<sup>6</sup> Because cattle were not permitted to graze on Field 15 after the first harvest, the nitrogen in the stem of the plant produced a second crop of oat hay, otherwise known as a volunteer crop. Tr. 962.

Compliance Office. Tr. 235-237.<sup>7</sup> On this visit, Fondahl was accompanied by two County of Ventura environmental health specialists. Tr. 295, 496, 525.

Fondahl's inspection was prompted by her review of the records which Tri-County was required to keep pursuant to 40 C.F.R. Part 503. These records were forwarded to EPA by respondent's waste management consultant. CX 9.<sup>8</sup> These records pertain to the loading of biosolids on parcels of land, the crop that is to be grown, and the metals that are applied to the land. According to Fondahl, these records indicated that Tri-County was not meeting the applicable agronomic rate requirements. Tr. 238.

During this visit, Fondahl observed approximately 20 piles of biosolids that had not yet been spread out. As for the sewage sludge that had been spread, Fondahl testified that it was between three to five inches thick. In addition, Inspector Fondahl observed that there were cows nearby with no fencing separating the cows from the sewage sludge. It also appeared to Fondahl that the biosolids had been spread to within 10 meters of the Canada Larga Creek. Tr. 307-309, 314; CX 15.<sup>9</sup>

Consistent with Fondahl's observations, respondent had marked Field 15 with flags to indicate where the biosolids obtained from the City of Ventura wastewater treatment plant were to be deposited. The flags measured the field by acres. After the biosolids were unloaded, they were spread onto Field 15 by a bull dozer. The biosolids were then allowed to dry for approximately two weeks before being disked into the soil with a 28-inch blade. Tr. 788-792.

#### **IV. Discussion**

##### **A. Liability**

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<sup>7</sup> She described her work as dealing with wastewater treatment plants that generate sewage sludge, as well as other sludge treatment facilities such as compost operations. Tr. 238.

<sup>8</sup> The City of Ventura is responsible for providing annual reports relative to the sewage sludge. Tri-County is responsible for maintaining this information and providing it to EPA upon the Agency's request. Tr. 392.

<sup>9</sup> There seems to be some question as to whether the name of the creek is the Canada Larga Creek or the Lions Canyon Creek. Whatever the actual name, it is the creek just to the southeast of Field 15. *See* Tr. 261-264, 376.

## **1. Determining the “Agronomic Rate”**

Insofar as the term “agronomic rate” is concerned, and consistent with the regulatory provisions of 40 C.F.R. 503.11(b), the parties have stipulated that “[t]he ‘agronomic rate’ is the whole sludge application rate (dry weight basis) designed (1) to provide the amount of nitrogen needed by the food crop, feed crop, fiber crop, cover crop, vegetation grown on the land; and (2) to minimize the amount of nitrogen in the sewage sludge that passes below the root zone of the crop or vegetation grown on the land to the ground water.” Stipulation 11.

As noted, Lauren Fondahl explained that the agronomic rate is “a rate that’s designed to provide the amount of nitrogen that will be taken up by the crop that’s to be grown, the optimal amount, and also designed to not add excess nitrogen such that the excess leaches down through the ground and eventually down to ground water.” Tr. 242.

Marsha Campbell Mathews, EPA’s agronomic rate expert, likewise explained the agronomic rate concept.<sup>10</sup> She testified:

An agronomic rate is the proper application of crop nutrients at the proper time to - - taking into consideration all the different factors that that crop will see, and the -- topography, the soil type, all the different factors that go into making a decision on what -- how much nutrients that crop is going to take up and when they’re going to take them up. It’s basically prudent farming.

And while there is no specific number for an agronomic rate, but there’s generally a feeling among -- you can calculate what would be a pretty good idea.

I guess my point is that the agronomic rate is specific for a specific situation, and you can look at that situation and say, “Yeah, this is about what it ought to be.” And you might want to quibble a little bit on 25 pounds on this side, 25 pounds on that side, but there is a ballpark number for -- that any prudent farmer can say, “This is what my crop is going to need.”

Tr. 97.

Mathews concluded that while the agronomic rate is site-specific, it nonetheless still falls within general guidelines. “You tweak the numbers a little bit this way or a little bit that way

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<sup>10</sup> Mathews is a farm advisor with the University of California. She has worked with the University of California Cooperative Extension for 25 years. Mathews holds a masters in agronomy with a minor in soils from the University of California, Davis. She was accepted as an agronomic rate expert. Tr. 89-93.

depending on your site. But, in general, there's a range that -- that you obviously should fall into." Tr. 97-98.

But what is the agronomic rate here? There are no tables which list the appropriate agronomic rate for a particular crop, in this case oat hay. For example, while Section 503.14(d) sets forth an agronomic rate requirement, and while Section 503.11(b) defines the term "agronomic rate," nowhere in 40 C.F.R. Part 503 are the specific agronomic rates set forth. Rather, the agronomic rate is, as both Fondahl and Mathews explained, site-specific. In other words, the agronomic rate for the crop of oat hay, which Tri-County planted in this case, can only be determined taking into account the unique characteristics of the sewage sludge obtained from the City of Ventura, along with the unique characteristics of Rancho Canada Larga Field 15, and the nutrient requirements of the oat hay crop.

EPA Inspector Fondahl identified the variables that must be factored into the agronomic rate calculation. These variables include the concentration of the nitrogen in the sewage sludge,<sup>11</sup> the type of sewage sludge applied, the soil type and the amount of nitrogen expected to be taken up by the planted crop. Tr. 242-243. Mathews similarly testified that these are the site-specific factors that one would consider in calculating the agronomic rate. Tr. 95, 97.

In addition, both Fondahl and Mathews identified EPA's "Land Application Guide For Sewage Sludge,"<sup>12</sup> and the "Western Fertilizer Handbook," as sources for obtaining a recommendation on the nitrogen need for a particular crop. It was also noted that an agronomic calculation worksheet could be obtained from each of these publications. Tr. 100, 246.<sup>13</sup>

## **2. Tri-County Exceeded the Agronomic Rate for the Oat Hay Crop Planted in Rancho Canada Larga Field 15**

The events leading to the enforcement action in this case began with a report on sewage sludge application at the Rancho Canada Field 15 filed with EPA by Sheri Eiker-Wiles, a waste management consultant hired by Tri-County. Tr. 581; CX 9. As noted earlier, in December of

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<sup>11</sup> Wastewater treatment plants test the sludge for nitrogen. This information is provided to the land applier of the biosolids. Tr. 247.

<sup>12</sup> This document also is referred to as EPA's Land Applier's Guide.

<sup>13</sup> Mathews testified that guidelines published by the National Resource Conservation Service were another resource available to growers to determine a crop's nitrogen need, as well as farm advisors from the University of California extension service, who are present in every county. According to Mathews, the Western Fertilizer Handbook is what most farmers, crop consultants, and fertilizer suppliers will have available. Tr. 100, 131-132.

1996, Tri-County began applying to Field 15 sewage sludge obtained from the City of Ventura. This application continued until September of 1997, and it resulted in the application of 8,240 metric tons of biosolids to 26 acres, or 10.52 hectares. Tr. 265.

Following the submission of the Wiles sewage sludge application report, EPA Inspector Lauren Fondahl conducted her May 27, 1977, inspection of Field 15. As noted, during this visit, Fondahl observed approximately 20 stockpiles of biosolids which had not yet been spread out onto the field. In those areas of Field 15 in which the biosolids had been spread, Fondahl estimated the thickness of this material at between three to five inches. Tr. 307-308. While Fondahl's observations during her May 27, 1997, inspection add some background to this case, Tri-County has not been cited by EPA for any one event observed during this inspection. Rather, the Section 405(e) Clean Water Act violation charged here resulted from the agronomic rate determination made by Fondahl regarding Field 15 and Tri-County's exceeding that rate, a determination made by Fondahl on the basis of information received prior to her inspection.<sup>14</sup>

Inspector Fondahl's agronomic rate calculation is set forth in Complainant's Exhibit 6. It is titled, "Calculation of agronomic rate for application of San Buenaventura biosolids to oat hay." In making these calculations, Fondahl used EPA's "Land Application of Sewage Sludge – A Guide for Land Appliers on the Requirements of the Federal Standards for the Use or Disposal of Sewage Sludge, 40 CFR Part 503." CX 5. Fondahl used the worksheet appearing on page 6 of Appendix E of Complainant's Exhibit 5 to determine the agronomic rate for Field 15. Tr. 270. Her methodology is set forth below.

There are nine steps in the calculation process followed by Fondahl.<sup>15</sup> The first four steps are as follows: (1) "Total available nitrogen from sewage sludge;" (2) "Available nitrogen in the soil;" (3) "Nitrogen supplied from other sources;"<sup>16</sup> and (4) "Total nitrogen available from existing sources." Step four represents the addition of the nitrogen amounts in steps two and three. The next step is (5), "Available nitrogen loss to denitrification."<sup>17</sup> Subtracting the nitrogen amount in step five from the nitrogen amount in step four gives you the "Adjusted nitrogen available," Step 6. Next is Step 7, "Total nitrogen requirement of crop." According to the worksheet, the information here is to be obtained from "agricultural extension agents or other

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<sup>14</sup> During her inspection, Fondahl also observed that cattle were near the sewage sludge and that the biosolids were applied to within approximately 10 meters of a creek. Tr. 308-309. These observations will be discussed in the penalty section, *infra*.

<sup>15</sup> Mathews stated that there are a number of ways to calculate the agronomic rate. Tr. 98. She also stated that determining the agronomic rate is "not rocket science," and that, in any event, there are numerous crop consultants available who can make that determination. Tr. 101, 133.

<sup>16</sup> Step 3 is listed as "optional, but recommended."

<sup>17</sup> Step 5 is listed as "optional."

agronomy professionals.” Subtracting the total nitrogen available from existing sources, as determined in step four, from the total nitrogen requirement of the crop as set forth in step seven, results in Step 8, the “Supplemental nitrogen needed from sewage sludge.” The final calculation appears in Step 9, titled, “Agronomic loading rate.” This number is achieved by dividing the supplemental nitrogen needed from sewage sludge in step eight by the total available nitrogen from sewage sludge in step one. *See* Tr. 270-272.

Following this nine-step process, Inspector Fondahl determined that the agronomic loading rate for the application of biosolids to oat hay in Field 15 was 16.6 dry metric tons per hectare (“mt/ha”). Tr. 281; CX 6.<sup>18</sup> *See* Tr. 273-281. In view of this calculation, Fondahl testified that in order to apply the biosolids to Field 15 at the appropriate agronomic rate, Tri-County would have needed 223 acres, instead of only the 26 acres which it utilized. Tr. 282. In other words, Fondahl concluded that Tri-County applied the biosolids at a rate of nine times the proper agronomic rate. Tr. 283. This is clearly a violation of 40 C.F.R. 503.14(d).<sup>19</sup>

Subsequently, in a March 2, 1998, letter to the County of Ventura Resource Management Agency, the City of Ventura acknowledged, “we appear to have exceeded the maximum EPA recommendation for Nitrogen loading rates.” CX 11. Following the same agronomic rate formula used by EPA Inspector Fondahl, the City of Ventura likewise reached an agronomic dry loading rate of 16.6 mt/ha. *Id.*<sup>20</sup> In addition, the City of Ventura concluded that the amount of sewage sludge actually applied to Field 15 by Tri-County was 142 dry mt/ha. CX 11 at 2-3. EPA’s agronomic rate expert, Marsha Campbell Mathews also confirmed the accuracy of Fondahl’s agronomic rate calculation. Tr. 152-153.

### **3. Respondent’s Reclamation Site Defense is Rejected**

Tri-County argues that Field 15 is a reclamation site and that because it is a reclamation site, the agronomic rate restrictions of 40 C.F.R. 503.14(d) do not apply. Thus, in its view, there is no violation. Respondent states: “Field 15 was not an operating, functional pasturage when this application began; it was dead. A reclamation site is a site which requires the application of

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<sup>18</sup> CX 6 contains the following conversions:

1 hectare = 2.471 acres  
1 metric ton = 1.1025 tons

<sup>19</sup> Inspector Fondahl considers this calculation sheet to provide a general estimate of the ammonia rate. She recommends that the grower then contact the agricultural extension agent for the county or a certified agronomist. According to Fondahl, in some cases, an adjustment may have to be made to the nitrogen rate because the crop grows better, or not as well, in that particular area. Tr. 246.

<sup>20</sup> The City of Ventura’s calculation was actually 16.68 mt/ha.

biosolids at a high rate, on a one-time basis, to re-establish the soil and the nutrients.” Resp. Br. at 11.

Tri-County’s reclamation site argument is contrary to the plain language of the regulation at issue. The agronomic rate requirement of Section 503.14(d) specifically applies to “agricultural land, forest, a public contact site, or a *reclamation site*.” (Emphasis added.)<sup>21</sup> Thus, according to the plain wording of Section 503.14(d), the agronomic rate regulation, it doesn’t matter whether Field 15 was, in the words of respondent, a “functional pasturage,” or a reclamation site. In either case, the agronomic rate requirement of Section 503.14(d) applies.

Nonetheless, Section 503.14(d) does allow for one exception to the agronomic rate requirement. That exception centers on the language, “unless, in the case of a reclamation site, *otherwise specified by the permitting authority*.” (Emphasis added.) In other words, if Tri-County wished to apply biosolids to Field 15 at a rate greater than 16.6 mt/ha, it had to get EPA’s permission to do so. Despite this regulatory exception, there has been no showing by Tri-County that it requested and obtained EPA’s permission to apply sewage sludge to Field 15 at a rate that exceeded the applicable agronomic rate for oat hay. In fact, respondent admits that its consultant, Sheri Eiker-Wiles, did not submit to EPA a formal application to designate this field as a reclamation site. Resp. Br. at 12.

Despite not formally seeking a reclamation exemption, Tri-County asserts that conversations between its waste management consultant, Wiles, and EPA Inspector Fondahl establish that EPA essentially consented to Tri-County’s treatment of Field 15 as a reclamation site. In that regard, respondent states that Fondahl gave no indication to Wiles that respondent was wrong in believing that Field 15 was such a site. Nor did Fondahl, according to Wiles, indicate that there was a procedure to be followed to have Field 15 formally designated by EPA as a reclamation site. Resp. Br. at 12.<sup>22</sup>

As the biosolids coordinator for Region IX, Fondahl handles reclamation sites. Tr. 237, 415. Fondahl testified that respondent did not submit a request to EPA asking that Field 15 be treated as a reclamation site. As noted above, Tr-County concedes this to be the case. According to Fondahl, 40 C.F.R. 503.14 requires that the sewage sludge land applier, such as Tri-County, obtain EPA’s approval before a parcel of land can be considered a reclamation site. Tr. 334-335. While Fondahl testified that EPA does not have a manual specifically addressing the matter of reclamation sites, she added that “if somebody wanted to get permission to operate a site as a reclamation site, they would contact me.” Tr. 415. The record shows that no one on behalf of respondent sought permission from EPA to treat Rancho Canada Larga Field 15 as a

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<sup>21</sup> The term “reclamation site” is defined as “drastically disturbed land that is reclaimed using sewage sludge.” 40 C.F.R. 503.11. Examples of reclamation sites are “strip mines and construction sites.” *Id.*

<sup>22</sup> When respondent uses the term “reclamation site,” it is in the context of a reclamation site that is exempt from the provisions of 40 C.F.R. 503.14(d).

reclamation site exempt from the agronomic rate requirement of Section 503.14(d). Nor does the record show that EPA implicitly gave Wiles the “go ahead” to treat Field 15 as a reclamation site exempt from the agronomic rate requirement.

## **B. Civil Penalty**

Section 309(g)(2)(B) of the Clean Water Act provides for the assessment of a civil penalty against Tri-County for the Section 405(e) violation found in this case. 33 U.S.C. § 1319(g)(2)(b). EPA seeks the statutory maximum penalty of \$137,500.<sup>23</sup> EPA bears the burden of proof on the penalty issue. For the reasons set forth below, a civil penalty of \$59,591 is assessed against Tri-County.<sup>24</sup>

The factors to be considered in assessing a civil penalty under the Clean Water Act are listed in Section 309(g)(3). This section states:

In determining the amount of any penalty assessed under this subsection, the Administrator ... 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.

33 U.S.C. § 1319(g)(3).

### **1. Nature, Circumstances, Extent, and Gravity of the Violation**

Because Class B biosolids contain pathogens and metals, they present a potential threat to human health and to the environment, particularly in the event of over-application. Thus, compliance with the Part 503 biosolids regulations is important as “contaminated or improperly handled sludge can result in pollutants in the sludge re-entering the environment, and possibly contaminating a number of different media through a variety of exposure routes.” *City of Salisbury*, CWA Appeal No. 00-01, 2002 EPA App. LEXIS 6, at \*10 ( EAB Jan.16, 2002), 10 E.A.D. \_\_, *quoting* 58 Fed. Reg. 9250. There, as noted earlier, the EPA’s Environmental Appeals Board also commented, “[g]iven the potentially unhealthful mix of chemicals and

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<sup>23</sup> Section 309(g)(2)(B) provides that the Administrator may assess a Class II civil penalty not to exceed \$125,000 for a violation of the Act. Pursuant to the Debt Collection Improvement Act, 28 U.S.C. § 2461, this maximum penalty amount has been increased to \$137,500. *See* 40 C.F.R. Part 19 (“Adjustment of Civil Monetary Penalties for Inflation”).

<sup>24</sup> Of this amount, \$19,591 is based upon the economic benefit penalty criterion and \$40,000 is based upon the remaining penalty criteria. These statutory penalty factors are discussed above.

organisms that might be present in sewage sludge, EPA was, at the time it issued the part 503 regulations, very concerned that the material be treated with caution.” *Id.*

Thus, the sewage sludge regulations contained in 40 C.F.R. Part 503 fulfill a key role in protecting the public health and the environment from the potential hazards associated with the use of biosolids. Violations of these regulations, therefore, are not to be taken lightly. Moreover, the extent of the violation in this case, in terms of size, is fairly considerable. Respondent applied 8,240 metric tons of biosolids to 26 acres. Also, laboratory results dated September 22, 1997, prepared by the Fruit Growers Laboratory, show soil nitrate-nitrogen levels in Field 15 at concentrations of 180 parts per million (“ppm”). This far exceeds the recommended level of 10-40 ppm. Tr. 292-294, 307; CX 13. While one of respondent’s witnesses, a former employee of Fruit Growers Laboratory, testified that 180 ppm would not constitute a “red flag,” the fact of the matter is that this soil analysis does show a considerable over-application of nitrogen to the soil.

In addition to the number of acres and the number of tons of biosolids involved here, the extent by which respondent exceeded the agronomic rate is also a consideration to be taken into account in assessing a penalty. In that regard, EPA argues that Tri-County applied biosolids to Field 15 at a rate nine times the applicable agronomic rate. EPA submits that Tri-County land applied the biosolids at a rate of 142 mt/ha (dry weight) rather than at the applicable agronomic rate of 16.6 mt/ha (dry weight). Compl. Br. at 19. Tri-County, however, argues that Inspector Fondahl erred in her agronomic rate calculation. As a result, respondent argues that, at most, it exceed the agronomic rate in this case “by a factor of 5.4.” Resp. R.Br. at 10.

In arguing that it exceeded the agronomic rate, if at all, by 5.4 times instead of the 9 times represented by EPA, respondent argues that Inspector Fondahl applied the wrong “volatilization rate” to compute the “Plant available ammonium nitrogen” in her agronomic rate calculation. Resp. R.Br. at 10. *See* CX 6.<sup>25</sup> Respondent argues that Fondahl should have used a 90% volatilization rate rather than the “standard” 50% volatilization rate.<sup>26</sup> In advancing this argument, respondent relies on handwritten notes of Inspector Fondahl (RX 73), as well as the testimony of Fondahl (*see* Tr. 408-409), regarding the agronomic rate views of Dr. Ben Faber.<sup>27</sup> Even though Dr. Faber did not testify in this case, Tri-County believes that in calculating the agronomic rate for Field 15, EPA should have used a 90% volatilization rate. Resp. Br. at 10.

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<sup>25</sup> The term “volatilization” refers to “the ammonia-form nitrogen that would tend to go off as ammonia gas.” Tr. 185. *See* Tr. 270.

<sup>26</sup> The volatilization rate of 50% (.5) which was used by Fondahl is a standard number appearing in EPA’s Land Applier’s Guide. Tr. 280. It was also used by the City of Ventura in its agronomic rate calculation. Tr. 287-288.

<sup>27</sup> Dr. Faber is associated with the University of California Extension Service. Tr. 532.

Respondent's reliance upon Respondent's Exhibit 73 and the testimony of Fondahl is misplaced. In that regard, the handwritten notes of Fondahl concerning the views of Dr. Faber are unclear. Read alone, these notes do not support respondent's volatilization argument. In fact, neither does the testimony of Inspector Fondahl. At transcript pages 408 and 409 she testified that she is not sure what Dr. Faber was talking about when he referred to the 85-90% volatilization.<sup>28</sup> Also unpersuasive is respondent's reliance upon another notation made by Fondahl, this time on a hotel notepad in 1996. According to Fondahl, Tri-County's waste management consultant, Sheri Eiker-Wiles, informed her that "[Dr. Faber] had said he thought it was four times over the agronomic rate, the rate of application." Tr. 401. Even assuming that this note correctly reflects the opinion of Dr. Faber, and even assuming that it relates to the agronomic rate for Field 15, this simply does not show that Inspector Fondahl's use of a 50% volatilization rate was wrong.

Nonetheless, Tri-County does make some interesting points. For example, according to the EPA Land Applier's Guide, the volatilization rate will vary depending upon soil pH, application method, application rate and soil moisture. CX 5 at E-2. In addition, the denitrification rate also will vary with soil moisture, soil type, carbon source, and nitrate levels. CX 5 at 2-3. Finally, respondent argues that not only was Fondahl wrong in using a 50% volatilization rate, but it submits that there is no such rate in EPA's Land Applier's Guide. Resp. R.Br. at 11. Accordingly, Tri-County concludes, "[t]he approach taken by the EPA's employees and consultants here essentially ignores the EPA's own 'Land Application Guide' in favor of 'one size fits all' approach which may make the calculation easier, but which does little to assist a sludge applier who is, in good faith, attempting to meet his regulatory obligations." *Id.*

While respondent's points may be interesting, ultimately its arguments must fail. First, inspector Fondahl acknowledged that the determination of the agronomic rate results in a "ballpark figure," *i.e.*, a "general estimate." She testified that after the agronomic rate is determined by formula, it is best to consult with a county agricultural extension agent or a certified agronomist to see if any adjustments have to be made. Tr. 243, 246. Likewise, EPA's agronomic rate expert, Marsha Campbell Mathews, testified that the agronomic rate calculation is intended only to give the grower "a pretty good idea" regarding the amount of nitrogen to be applied. She too likened it to a "ballpark number" that could be adjusted. Tr. 97. Accordingly, the fact that the agronomic rate may be subject to some variation does not render EPA's agronomic rate calculation in this case suspect.

Second, Inspector Fondahl was the only witness in this case to specifically testify about her agronomic rate calculation. She was the only one to deal with actual numbers and explain her methodology. Fondahl also testified that the 50% volatilization rate that she used is found in Complainant's Exhibit 5, the EPA Land Applier's Guide. Tr. 279. Respondent had ample opportunity to question Fondahl on cross-examination as to the accuracy of some of the data

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<sup>28</sup> While respondent submits that the volatilization rate should be 85-90%, EPA's agronomic rate expert, Mathews, was of the opinion that the 50% volatilization rate used by Fondahl is "a pretty generous number." Tr. 198.

upon which she relied, but it did not do so. Instead, it seeks to question the reliability of her agronomic rate calculation after the hearing and offer an alternative calculation based, in part, on obscure data generated by an individual who did not testify.

Finally, it is curious that respondent now finds the volatilization rate opinion of Dr. Faber so reliable when, at the hearing, it objected to an EPA witness's reference to Dr. Faber's comparison of the agronomic rate with the actual rate of application. Tr. 532. In making the objection, counsel for Tri-County commented: "[T]o the extent that this Dr. Faber would be giving this gentleman information, that hearsay information is probably okay. The problem when you're dealing with a technical area is that of reliability." *Id.* Moreover, immediately thereafter, counsel for respondent successfully challenged the entry of a portion of Complainant's Exhibit 27 on the ground that "[i]t relies upon hearsay of a technical person who is not going to be called to testify." Tr. 536 (Emphasis added). It is clear that respondent was objecting to the views of Dr. Faber.

Accordingly, while recognizing that the agronomic rate of 16.6 mt/ha is somewhat of a "ballpark" figure, this figure nonetheless does provide a reliable indication as to the extent of the violation in this case.

While EPA has shown that the extent of the violation is considerable, and while it has shown that the 40 C.F.R. 503.14(d) violation in this case presented the potential hazards to human health and to the environment, it has not established the specific threats that it alleges existed as a result of this violation.

For example, EPA asserts that "due to Tri-County's excessive application of sewage sludge in Canada Lagra Field #15, animals may have been exposed to pathogens in the sewage sludge." Compl. Br. at 28. EPA then points to Fondahl's testimony that the biosolids were stockpiled on Field 15 and that cows were nearby and there was no barrier between the cows and the biosolids. *Id.* Even if this assertion were true, however, it has nothing to do with this case. EPA charged Tri-County with land applying biosolids in excess of the applicable agronomic rate. It did not charge respondent with any violation relating to keeping cattle off of Field 15 and away from the stockpiled sewage sludge. EPA made this point clear in its post hearing reply brief. Accordingly, the fact that the cattle were observed near Field 15, and the fact that they could have come into contact with the stockpiled biosolids, has nothing to do with this agronomic rate issue presented in this case. In that regard, the potential for the cattle to come into contact with the stockpiled sewage sludge on Field 15 would have been the same had respondent piled only that amount of biosolids that would have been the equivalent of the proper agronomic rate. In short, if this condition presented a violation of the Clean Water Act, it involved a regulation not brought into issue in this proceeding.

Next, EPA argues that the over application of sewage sludge on Field 15 resulted in increased potential harm to the aquatic environment, in particular threatening the Canada Larga Creek which flows into the Ventura River. Compl. Br. at 28-29. As noted earlier, it is the

finding of this Tribunal that the violation in this case presented a potential threat to aquatic life, as well as to ground and surface water. Aside from this potential threat, EPA has not documented any specific harm to human health or to the environment occurring as a result of the violation.

In that regard, a number of respondent's witnesses testified that a six-inch berm was carved into Field 15 in order to prevent water runoff from reaching the nearby creek. Harvey Hooten constructed this berm that ran along the southern boundary of Field 15, approximately 50 feet from the edge of the creek. Tr. 787-788; *see* RX 38. This berm separated the biosolids from the creek. *See* Tr. 899 (Respondent's owner testifying that at no point was the berm closer than 140-150 feet on the normal high water flow of the stream.)<sup>29</sup> Shawn Campbell likewise testified as to the existence of this berm, as did Dan Rayburn, who inspected the field on behalf of the City of Ventura and verified that the berm (also referred to as a "ditch") was constructed before the biosolids were applied. Tr. 804, 896.

In addition, while the period of time that the biosolids were applied to Field 15 included the rainy season, and while Hooten further testified that the "rains came pretty good that year," there is no evidence in the record showing that the berm failed to keep water runoff from reaching the Canada Larga Creek and eventually the Ventura River. Tr. 319, 793. Inspector Fondahl's belief that the berm was not substantial enough to prevent water runoff lacks evidentiary support. Tr. 320.<sup>30</sup>

Finally, the Fruit Growers Laboratory collected water samples, both upstream of Field 15 and downstream of Field 15. Nitrate nitrogen and nitrite nitrogen analyses were performed by Fruit Growers Laboratory on February 11, 1998. This was after the last application of biosolids to Field 15, which occurred in September of 1997. Elevated nitrate levels were not detected, thus showing that there was no impact on the stream. Tr. 425-426.<sup>31</sup> Specifically, regarding the

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<sup>29</sup> Accordingly, the record does not support Fondahl's observation that the biosolids were applied to within 10 meters of the creek.

<sup>30</sup> Fondahl did not notice the berm while she was on site. Tr. 320. Apparently her opinion as to the berm is based upon her viewing a photograph of the berm at the hearing. Tr. 394-395.

<sup>31</sup> In a letter to the California Regional Water Quality Control Board, dated April 6, 1998, the City of Ventura concluded that "[p]reliminary analysis of water samples from Canada Larga Creek above and below the two sites where calculated application maximums were exceeded indicate that there is no evidence of impact on the stream from the application of the Biosolids." CX 22. However, the City further stated: "Soil analysis of the fields receiving Biosolids indicate that conversion of Organic Nitrogen to plant available forms and specifically to Nitrate is occurring at a rate significantly slower than the calculations of the USEPA Land Application Guide predict." *Id.* Accordingly, the City agreed with the Board "that it is prudent to monitor the stream and, because of this apparent delay in Nitrogen conversion, to continue

nitrate levels, 8 parts per million were detected upstream, but only 7.4 ppm downstream of Field 15. According to James, formerly an agronomist with the Fruit Growers Laboratory, this amount is substantially below the maximum nitrate level allowed in drinking water. Tr. 831, 853-855.<sup>32</sup>

Insofar as the threat to the groundwater is concerned, EPA's case lacks specific evidentiary support. Certainly, respondent's non-compliance with Section 503.14(d) presented a potential threat to the groundwater, and that hazard has been taken into account in assessing the penalty in this case. Still, EPA's agronomic rate expert, Marsha Campbell Mathews, testified only that she could not imagine a scenario where there would not be groundwater contamination in this case. Tr. 225. Also, the only testimony offered by Fondahl on this point was that she did not have any information as to whether there were groundwater wells in Canada Larga. Tr. 387.

Finally on to the issue of gravity of the violation, EPA asserts that the duration of the violation should be considered. Complainant argues that the violation existed for a 10-month period. Compl. Br. at 30. What the record shows is that respondent first land applied the biosolids in December of 1996 and last applied them in September of 1997. Sometime after the application of the biosolids began, the agronomic rate was exceeded and a violation occurred. Also, while EPA was aware of this violation as early as April of 1997, it apparently did not inform respondent of the violation until after all the biosolids had been land applied.

## **2. Ability to Pay**

The "ability to pay" pay criterion has not been well developed in this case. First, in its answer to the complaint, respondent did not raise inability to pay the penalty as an issue in this matter. Nor did respondent include in its prehearing exchange any documentation to show an inability to pay all, or even some, of the penalty proposed by complainant. For its part, all that EPA did prior to the hearing was to submit a penalty assessment analysis which concluded, with no discussion, that Tri-County had the ability to pay the penalty. EPA did note, however, that "Tri-County did not submit any information regarding this issue." Opp. to Mot. for Discovery, Attach. C.

At the hearing, only slightly more attention was paid to this penalty criterion. In that regard, at one point respondent sought to introduce into the record the corporate income tax returns (Schedule C) for Tri-County Builders Supply for the years 1996, 1997, and 1998. Respondent, however, withdrew its request to submit those documents into evidence upon EPA's insistence that it be allowed to do an ability-to-pay analysis which would include the years 1997, 1998, 1999, and 2000. Tr. 927-931. Despite this turn of events, respondent still cites to the testimony of Shawn Campbell that Tri-County experienced relatively small profits for the years

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monitoring for some extended period of time, in particular to cover periods of lower flow." *Id.*

<sup>32</sup> EPA environmental scientist Thomas Huetteman stated that if there were an impact on surface water from a pollutant, "you would expect it to be higher downstream from the site." Tr. 81.

1996 through 1998. There is, however, no financial documentation in the record to support the profit numbers offered by Campbell. *See* Resp. Br. at 18. In any event, the profit figures for the years 1996 through 1998 are dated and they would not appear to add much to this case.

In addition, Tri-County cites to Campbell's testimony that "[a]s a whole, that operation probably lost about \$125,000 a year." Resp. Br. at 18; *see* Tr. 970. While Campbell's testimony on this point is not clear, the fact is that this statement also lacks documentary support. Essentially, respondent asserts that it lost money in the Rancho Canada Larga operation, but again it produces no evidence to support this assertion. Moreover, even accepting as fact that Tri-County lost money here, respondent has not shown that because of this loss it is unable to pay the penalty assessed in this case.

On balance, therefore, it is held that the respondent has the ability to pay the \$59,591 penalty assessed in this case. *See New Waterbury Ltd.*, 5 E.A.D. 529, 542 (EAB 1994) (responsibility of respondent to timely raise inability to pay claim and to submit supporting evidence).

### **3. History of Violations**

EPA submits that it is not aware of any previous non-compliance by Tri-County with the Clean Water Act. Compl. Br. at 34. Fondahl testified that the Agency had not issued any complaints previously to respondent. Tr. 355. Accordingly, this is respondent's first instance of non-compliance with the Act.

### **4. Degree of Culpability**

In land applying sewage sludge at an excessive agronomic rate, Tri-County was moderately negligent. In that regard, by his own admission Shawn Campbell, the owner of Tri-County, is an experienced farmer and rancher. Indeed, he has considerable experience in growing oat hay. Tr. 887, 895. Campbell also has experience in land applying biosolids as a fertilizer. He testified that in the three years preceding the Rancho Canada Larga operation, he had applied biosolids at three locations. Tr. 893. In fact, Campbell testified that he has been involved with biosolids since 1993. Tr. 958. In that regard, Fondahl testified that Tri-County operated a compost site in 1994, and that in 1996, she observed respondent placing the composite in fields. Tr. 352. Still, despite his experience in growing oat hay and in land applying biosolids, Campbell testified that he was unfamiliar with the term "agronomic rate." Tr. 893.

In preparation for farming the Rancho Canada Larga fields, Campbell did not hire an agronomist to advise him on matters such as crop fertilization. He did, however, have the Canada Larga soil tested for nitrogen content and he did hire a waste management consultant,

Sheri Eiker-Wiles. Tr. 893-893. Wiles was hired by Tri-County to provide guidance on the regulations. Tr. 646.<sup>33</sup>

Like Campbell, Wiles testified that in 1994, she attended a governmental meeting on the proper application of composted biosolids. At this meeting, the subject of agronomic rate came up, but in a “general sense” only. She explained, “[i]t was brought up similar to the way it is listed in the 503 regulations, that the agronomic rate must not exceed the crop that’s grown on the land which the biosolids are applied.” Tr. 594. In addition, while stating that Campbell wanted her “guidance” on the regulations, Wiles noted that Campbell knew something about the Part 503 regulations. She testified, “[h]e had been involved with the application on several other sites earlier, so yes, and in the meetings and in follow-ups that I had conducted for Dan Rayburn.” Tr. 646.<sup>34</sup> In fact, when asked whether the 503 regulations were discussed at any of the meetings attended by Campbell, Wiles responded, “[v]ery much so.” Tr. 647; *see* Tr. 940.

Moreover, Wiles further testified as to warning signs she received regarding the necessity to comply with the agronomic rate. She stated, “[w]hether it was Ms. Fondahl or another regulating agency kept reiterating, ‘If you’re going to plant on there, you cannot exceed the agronomic rate.’” Tr. 659.

Somehow, however, Wiles concluded that respondent did not need to comply with the agronomic rate requirement of 40 C.F.R. 503.14(d) if it designated itself as a reclamation site. While Wiles is correct that reclamation sites may be exempt from this agronomic rate requirement, she is incorrect in concluding that an entity can become an exempt reclamation site by way self-proclamation. *See* Tr. 684 (Campbell and Wiles agreeing that Field 15 is a reclamation site.) As discussed earlier, only EPA can designate a parcel of land as a reclamation site exempt from the agronomic rate provision of Section 503.14(d).<sup>35</sup> Here, however, it is undisputed that Tri-County did not submit a written request to EPA seeking a reclamation site exemption. Tr. 422.

Respondent’s explanation for not seeking a reclamation site exemption from EPA is simply not persuasive. In that regard, Wiles’ telephone conversation with Fondahl concerning the characteristics of Field 15 and how it compares with the description of a reclamation site does not constitute an Agency determination that Field 15 was exempt from the agronomic rate requirement. *See* Tr. 663-666, 674. Nor, given the specific provisions of 503.14(d), can this

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<sup>33</sup> Campbell hired Wiles upon the recommendation of the City of Ventura. Tr. 882.

<sup>34</sup> Dan Rayburn formerly was the Sanitation Superintendent for the City of Ventura. Tr. 801. Wiles once worked for the City of Ventura. Tr. 577.

<sup>35</sup> Indeed, there is good reason for EPA’s oversight as to what land may qualify as an exempt reclamation site. For example, Fondahl testified in reviewing such applications, she is concerned with groundwater issues, the actual rate of application of the biosolids, and the reasons why the land applier is seeking an exemption from the regulation. Tr. 421.

conversation be viewed as offering a reasonable excuse for respondent's non-compliance with Section 503.14(d).

In sum, given Tri-County's experience in handling biosolids, in applying biosolids to oat hay, in discussing the agronomic rate issue with various governmental entities, and given the plain language of Section 503.14(d) regarding exempted reclamation sites, its explanation for its non-compliance in this case fails to show that it was something less than moderately negligent.

## **5. Economic Benefit**

EPA argues that Tri-County achieved a \$19,591 economic benefit by its failure to comply with Section 405(e) of the Clean Water Act. In making this argument, complainant cites to the testimony of Gerald Klug, an environmental engineer with the Clean Water Act Compliance Office, EPA Region IX. Tr. 434, 436.<sup>36</sup> Employing what is referred to as a "BEN" analysis, Klug essentially concluded that in order to land apply the sewage sludge at the lawful agronomic rate, respondent would have had to lease an additional 197 acres.<sup>37</sup> Klug first determined that the economic benefit for non-compliance here was \$19,700 by multiplying the 197 acres that would be needed for compliance by the \$100 an acre that Tri-County paid to the Bonsall family to lease Rancho Canada Larga. He then reduced the economic benefit from \$19,700 to \$19,591 upon application of EPA's computerized BEN analysis. Tr. 439-442. *See* Compl. Br. at 23-26.<sup>38</sup>

EPA has proven that Tri-County received an economic benefit in this case in the amount of \$19,591. Despite the fact that with the application of the biosolids to Field 15 respondent harvested an initial 4-1/2 ton per acre crop of oat hay, with an additional volunteer crop of 4 ton per acre, it still failed to comply with the agronomic rate requirement of 40 C.F.R. 503.14(d).

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<sup>36</sup> Klug testified that "economic benefit" is the cost that the respondent has avoided as a result of its non-compliance. Also, along the same lines, EPA cites to the case of *Atlantic States Legal Foundation, Inc., v. Tyson Foods, Inc.*, 897 F.2d 1128, 1141 (11th Cir. 1990), for the proposition that "[i]nsuring that violators do not reap economic benefit by failing to comply with the statutory mandate is of key importance if the penalties are successfully to deter violations." Compl. Br. at 23.

<sup>37</sup> This conclusion is based upon EPA Inspector Fondahl's agronomic rate calculations. *See* Tr. 282.

<sup>38</sup> The fact that EPA chose to determine the extent of the economic benefit on the basis of the number of acres needed to accommodate the extra biosolids that were applied to Field 15, as opposed to determining the actual amount paid by the City of Ventura to Tri-County to haul away the excess sewage sludge, would appear to be more advantageous to respondent. The record shows that Tri-County hauled 8,240 metric tons of sewage sludge from the City of Ventura to Field 15. The record also shows that respondent was paid \$25 per ton by the City to haul the sludge. Tr. 948.

That is what EPA has charged in this case and that is what it has proven. Thus, it can be said that respondent experienced an economic benefit from land applying sewage sludge at a rate above the applicable agronomic rate of 16.6 mt/ha.

Also, the fact that respondent leased a total of 382 acres from the Bonsall family at Rancho Canada Larga by itself does not establish that it already had the available land for the application of the excess biosolids, and thus that there was no economic benefit. Tr. 912. In fact, Wiles testified that “[s]ome of this acreage is on very hilly area and it just wasn’t practical to apply biosolids to it.” Tr. 658. In sum, respondent simply failed to show what portion of that acreage was available for the application of the excess biosolids from Field 15.

#### **6. Other Matters As Justice May Require**

There are no other considerations which would justify an adjustment to the civil penalty assessed against respondent. The fact that, in respondent’s view, “[a] previously barren agricultural parcel was returned to production,” is not a sufficient reason for reducing the penalty for non-compliance with the Clean Water Act. *See* Resp. Br. at 22.

## **ORDER**

It is held that Tri-County Builders Supply violated Section 405(e) of the Clean Water Act, 33 U.S.C. § 1345(e), by failing to comply with the agronomic rate provisions contained in 40 C.F.R. 503.14(d). For this violation, respondent is assessed a civil penalty of \$59,591, pursuant to Section 309(g) of the Act. 33 U.S.C. § 1319(g). Tri-County is directed to pay this penalty within 60 days of the date of this order.<sup>39</sup>

Unless an appeal is taken to the Environmental Appeals Board pursuant to 40 C.F.R. 22.30, or unless a party acts pursuant to 40 C.F.R. 22.27(c), this decision shall become a Final Order as provided in 40 C.F.R. 22.27(c).

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Carl C. Charneski  
Administrative Law Judge

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<sup>39</sup> Payment of the civil penalty may be in the form of a cashier's or certified check, made payable to the Treasurer of the United States, and addressed to Mellon Bank, EPA Region 9 (Regional Hearing Clerk), P.O. Box 360863M, Pittsburgh, Pennsylvania, 15251.