UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the matter of:	)	
	)	
	)	
Mike Vierstra	)	DOCKET NO. CWA-10-2009-0268
d/b/a Vierstra Dairy,	)	
	)	
Twin Falls, Idaho	)	COMPLAINANT'S BRIEF
	)	REGARDING PROPOSED PENALTY
	)	
Respondent.	)	
	)	

Pursuant to 40 C.F.R. § 22.19(a)(4), and the Presiding Officer's Prehearing Order dated January 13, 2010, Complainant Environmental Protection Agency ("EPA") submits this Brief Regarding Proposed Penalty as a supplement to its Prehearing Exchange that was exchanged with Respondent on March 15, 2010. The $30,000 penalty proposed below is based both on the facts known to EPA prior to the prehearing exchanges, and on the minimal information Respondent provided in his prehearing exchange.

In accordance with Section 22.14 of the Part 22 Rules, 40 C.F.R. § 22.14(a)(4)(ii), the Complaint in this matter did not include a specific penalty demand in its Prehearing Exchange. Pursuant to 40 C.F.R. § 22.19(a)(4), Complainant now submits this proposed penalty. The following discussion outlines the legal and factual framework Complainant will employ in proposing this specific penalty amount.

Section 309(g) of the CWA authorizes the assessment of an administrative civil penalty for a Section 301 violation of up to $10,000 per day for each day the violation continues, with a

maximum penalty of $125,000. Pursuant to the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, the statutory maximum administrative penalty amounts have been increased to $16,000 per day, with a maximum penalty of $177,500. 40 C.F.R. § 19.4, Table 1. The Complaint in this matter alleges that Respondent illegally discharged CAFO wastes without a CWA Section 402 permit on at least two occasions: March 25, 2009 and May 31 to June 1, 2009, for a total of at least four days of discharge. The statutory maximum penalty for four days of violation is $64,000.

Complainant proposes that the Presiding Officer assess a penalty of $30,000 against Respondent for the violations alleged in the Complaint. The proposed penalty is based on the applicable statutory penalty factors in section 309(g)(3) of the CWA. These factors are "[1] the nature, circumstances, extent, and gravity of the violation, or violations, and, with respect to the violator, [2] ability to pay, [3] any prior history of such violations, [4] the degree of culpability, [5] economic benefit or savings (if any) resulting from the violation, and [6] such other matters as justice may require." 33 U.S.C. § 1319(g)(3). Each of these six factors is discussed briefly below.

A. Nature, Circumstances, Extent, and Gravity of Violation

The nature, circumstances, extent, and gravity of the violation reflect the "seriousness" of the violation. *In re Urban Drainage and Flood Control District, et al.*, Docket No. CWA-VIII-94-20-PII, 1998 EPA ALJ Lexis 42, at *56 (Initial Decision, June 24, 1998). The seriousness of a particular violation depends primarily on the actual or potential[2] harm to the environment

[2] In analyzing the degree of harm posed by a violation, it is not necessary to establish that the violation caused actual harm in order to justify imposition of a substantial civil penalty; the fact

resulting from the violation, as well as the importance of the violated requirement to the regulatory scheme. *See id.*

Complainant believes that the nature, circumstances, extent, and gravity of the violations in this case are significant and justify a substantial penalty. An unpermitted discharge into waters of the United States is a serious violation which significantly undermines the Clean Water Act's regulatory scheme. *See United States v. Pozsgai,* 999 F.2d 719, 725 (3rd Cir. 1993) (noting that "[u]npermitted discharge is the archetypal Clean Water Act violation, and subjects the discharger to strict liability"). The evidence in this matter will establish that Respondent discharges CAFO wastewater to the Low Line Canal on at least two different occasions without a permit.

Respondent has approximately 1,000 head of milking cows in his Facility, and his history of noncompliance shows that he has very poor controls to prevent cattle wastes from entering the nearby Low Line Canal. Respondent's poor management of his wastewater resulted in the discharge of large volumes of manure-contaminated feedlot wastewater to waters of the United States. Such discharges contain significant levels of both fecal coliform and *Escherichia coli* (*E. coli*) bacteria. The presence of these bacteria indicates the possible presence of a number of

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that the violation posed potential harm may be sufficient. *See United States v. Gulf Park Water Company, Inc.*, 14 F. Supp. 2d 854, 860 (S.D. Miss. 1998) ("The United States is not required to establish that environmental harm resulted from the defendants' discharges or that the public health has been impacted due to the discharges, in order for this Court to find the discharges 'serious'. . . . Under the law, the United States does not have the burden of quantifying the harm caused to the environment by the defendants"); *United States v. Municipal Authority of Union Township*, 929 F. Supp. 800, 807 (M.D. Pa. 1996) ("It must be emphasized, however, that because actual harm to the environment is by nature more difficult and sometimes impossible to demonstrate, it need not be proven to establish that substantial penalties are appropriate in a Clean Water Act case."), *aff'd* 150 F.3d 259 (3d Cir. 1998); *Urban Drainage,* 1998 EPA ALJ Lexis 42, at *65 ("A significant penalty may be imposed on the basis of potential environmental risk without necessarily demonstrating actual adverse effects") (citing *United States v. Smithfield*

pathogens (such as *E. coli 0157:H7* and *Salmonella*) as well as parasites (such as *Cryptosporidium*). Illnesses caused by these microorganisms can result in gastroenteritis, fever, kidney failure, and even death. Animal wastes are also typically high in nutrients which can cause decreased oxygen levels in receiving waters. These decreased oxygen levels can adversely impact many species of fish indigenous to the Pacific Northwest (including salmon species listed as endangered or threatened under the Endangered Species Act) during their developmental stages as well as at maturity. The Snake River, which is downstream from Respondent's Facility, is listed by the State of Idaho as impaired for excessive nutrients and bacteria.

Respondent has failed for a number of years to control discharges of dairy wastes into the Low Line Canal in violation of both state and federal law. EPA will demonstrate at hearing that this failure has compounded the seriousness of Respondent's violations. For all of these reasons, Complainant believes that the violations at issue in this case are serious and warrant a substantial civil penalty.

Complainant recognizes, however, that the seriousness of the violations at issue in this case would not, standing alone, warrant assessment of the maximum administrative civil penalty. For examples, the March 25, 2009 discharge was to a dry canal, and much of the manure was removed from the canal before water was put back into the canal. For this reason, EPA's proposed penalty is less than half of the maximum penalty available under the Act.

B. Respondent's Ability to Pay

In its 1994 *New Waterbury, Ltd.* decision, the Environmental Appeals Board ("EAB") set forth a now well-established process for considering and proving in the context of an

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Foods, Inc. 972 F. Supp. 338, 344 (E.D. Va. 1997), *aff'd*, 191 F.3d 516 (4th Cir. 1999)).

administrative hearing a violator's ability to pay a civil penalty.

> Where ability to pay is at issue going into a hearing, the Region will need to present some evidence to show that it considered the respondent's ability to pay a penalty. The Region need not present any *specific* evidence to show that the respondent *can pay* or obtain funds to pay the assessed penalty, but can simply rely on some *general* financial information regarding the respondent's financial status which can support the *inference* that the penalty assessment need not be reduced. Once the respondent has presented *specific* evidence to show that despite its sales volume or apparent solvency it cannot pay any penalty, the Region as part of its burden of proof in demonstrating the "appropriateness" of the penalty must respond either with the introduction of additional evidence to rebut the respondent's claim or through cross examination it must discredit the respondent's contentions.

In re New Waterbury, Ltd., 5 E.A.D. 529, 542-430 (EAB 1994) (emphasis in original); *see also In re Chempace Corp.*, FIFRA Appeal Nos. 99-2 & 99-3, slip op. at 21 (EAB, May 18, 2000). Accordingly, while the Region has the initial burden of production to establish that the respondent has the ability to pay the proposed penalty, "[t]he burden then shifts to the respondent to establish with specific information that the proposed penalty assessment is excessive or incorrect." *Chempace Corp.*, slip op. at 22. Failure by a respondent to provide specific evidence substantiating a claimed inability to pay results in waiver of that claim. *In re Spitzer Great Lakes Ltd.*, TSCA Appeal No. 99-3, slip op. at 29 (EAB, June 30, 2000).

At any hearing in this matter, Complainant will establish that it has considered Respondent's ability to pay in proposing a civil penalty and will, at a minimum, present general financial information about Respondent that shows that he is financially solvent and controls substantial assets including a large dairy and farm. In his Prehearing Exchange, Respondent provided no information, no proposed testimony nor any documentation of any kind to substantiate an inability to pay a penalty in this case. Consequently, Respondent has put no

ability-to-pay evidence in the record to consider or rebut.

C. Prior History of Violations

In a case involving the application of EPA's Clean Air Act asbestos penalty policy, the EAB noted that

> [a] history of prior notices not only is evidence that the respondent was aware of the required compliance, but also is evidence that the respondent was aware of sanctions for noncompliance. . . . [A] compliance history that includes receipt of a prior [immediate compliance order or "ICO"] indicates that the party was not deterred by such knowledge of the sanctions for noncompliance. It, therefore, is appropriate for persons who have received such warning or an ICO to be subject to an increased penalty if a violation subsequently occurs in spite of the specific notice provided by the ICO.

In re Ocean State Asbestos Removal, Inc., 7 E.A.D. 522, 548-49 (EAB 1998) (footnotes omitted). Courts and presiding officers have reached similar conclusions in cases involving violations of the Clean Water Act. *See, e.g., Student Public Interest Research Group of N.J. v. Hercules, Inc.*, 29 ERC 1417, 1422-23 (D.N.J. 1989) (past unpunished violations considered as part of "history of violations" factor used in penalty assessments); *In re Donald Cutler*, 11 E.A.D. 622, 647 (EAB 2004) (violations older than five years may be considered under "prior history" factor); *In re C.L. "Butch" Otter and Charles Robnett*, Docket No. CWA-10-99-0202, slip op. at 24-25 (Initial Decision, April 9, 2001) (holding that two prior Cease and Desist Orders from Corps "weigh heavily in the assessment of the [$50,000] penalty in this case."); s*ee also In re Ketchikan Pulp Co.*, TSCA-X-86-01-14-2615 (ALJ Dec. 8, 1986) (holding that, under the Toxic Substances Control Act, unadjudicated notices of violation sent to respondent are relevant to the issue of respondent's good faith and commitment to comply).

Respondent has an extensive history of noncompliance with state dairy waste laws. The ISDA has fined Respondent at least twice for discharges wastewaters from his dairy into the Low

Line Canal. Most of the violations for which ISDA cited Respondent were for discharges of dairy wastes to the Low Line Canal, which also constitute violations of the Clean Water Act. Regardless of whether these notices are considered a "prior history of violations" or evidence of Respondent's "degree of culpability" (see following section of this prehearing exchange), they should weigh heavily in assessing a substantial civil penalty.

D. Degree of Culpability

In other CWA enforcement cases, presiding officers have noted "the respondent's willful disregard of the permit process or Clean Water Act requirements" as supporting the assessment of the maximum penalty allowed by statute. *See, e.g., In re Urban Drainage,* 1998 EPA ALJ Lexis 42, at *68. In this case, Respondent's disregard of CWA requirements has manifested itself in several unauthorized discharges of dairy manure wastes to the Low Line Canal.

The specific civil penalty proposed by Complainant reflects the fact that Respondent has shown a long-standing disregard for the laws against discharging feedlot wastes into surface waters. ISDA has initiated several enforcement actions against Respondent yet he continues to discharge manure and other dairy wastes to surface waters. Respondent's degree of culpability, as evidenced by all of these considerations, warrants a substantial civil penalty.

E. Economic Benefit

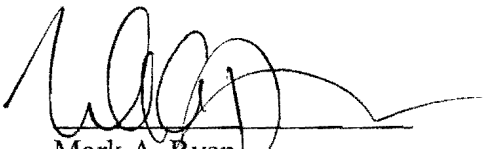
Complainant believes that Respondent's has realized at least a modest economic benefit as a result of the violations described above.

F. Other Matters as Justice May Require

Complainant is unaware of any "other matters as justice may require" that would warrant a downward adjustment to the proposed penalty. *See In re Spang & Co.,* 6 E.A.D. 226, 250

(EAB 1995) ("[U]se of the justice factor should be far from routine, since application of the other adjustment factors normally produces a penalty that is fair and just.").

RESPECTFULLY SUBMITTED this 26th day of March, 2010.



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CERTIFICATE OF SERVICE

I hereby certify that copies of Complainant's Brief re Proposed Penalty in the Matter of Mike Vierstra d/b/a Vierstra Dairy, Docket No. CWA-10-2009-0268, were sent to the following persons in the manner indicated:

A true and correct copy via pouch mail to:

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A true and correct copy by U.S. Mail to:

Honorable William B. Moran
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Dated: March 26, 2010

Kevin Brown
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