In the Matter of:	:	Proceeding to Assess Class I Administrative Penalty Under Section 309(g) of the Clean Water Act
University Area Joint Authority 1576 Spring Valley Road State College, Pennsylvania 16801	: : :	EPA Docket No. CWA-03-2010-0284
Respondent	:	

RESPONDENT'S ANSWER TO COMPLAINT

Respondent University Area Joint Authority, through its attorneys, Mette, Evans & Woodside, and Hall & Associates, hereby files the within Answer to the above-captioned complaint

I STATUTORY AUTHORITY

1. The allegations of paragraph 1 are legal conclusions to which no response is required. By way of further Answer, Respondent is without information as to whether the Administrator has delegated CWA § 309(g)(3)(A) authority to the Regional Administrator and whether such authority has been redelegated to the Director of the Water Protection Division and, as such, such allegation is Denied. The Complaint does not allege, and it is therefore Denied, that the person who signed the Complaint, Victoria P. Benitti, is delegated such authority and Respondent objects to the Complaint as facially improper in that is not alleged to have been issued by a delegated authority. To the extent an answer is required, the Respondent Denies the allegations for the reasons stated in paragraphs 2, 9, 15, 16, 20–25, and 31 below.

2. The allegation of paragraph 2 is a legal conclusion to which no response is required. However, because the averments of fact and law are false and render this Complaint illegal and void, the Respondent Denies the allegation. Specifically:

A. Respondent points to the violations of § 14(a)(2) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits* (40 CFR Chapter I, Part 22, hereinafter "*Consolidated Rules of Practice*")*Consolidated Rules of Practice* (40 CFR § 22.14(a)(2)) as set forth in Answers 15 and 20 below.

B. The *Consolidated Rules of Practice* state that "a copy of [the] Consolidated Rules of Practice shall accompany each complaint served." 40 CFR § 22.14(b). EPA did not provide a

copy of the *Consolidated Rules of Practice* to the Respondent with the Complaint or at any other time. Accordingly, the allegation of paragraph 2 that the Complaint is "in accordance with the enclosed Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ('Consolidated Rules'), 40 C.F.R. Part 122" [emphasis added] as stated in this paragraph is false.

By way of further Answer, Respondent refers to 40 CFR § 22.13(a), "[a]ny proceeding subject to these Consolidated Rules of Practice is commenced by filing with the Regional Hearing Clerk a complaint conforming to Sec. 22.14." [Emphasis added.] Because EPA has not complied with the mandatory provisions of 40 CFR § 22.14 (a)(2) and (b), this Complaint should be dismissed with prejudice.

3. The allegation of paragraph 3 is Denied. To the contrary, Section 301(a) of the Clean Water Act (33 U.S.C. § 1311(a) states, in its entirety,

> (a) **Illegality of Pollutant discharges except in compliance with law**.
>
> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

4. The allegation of paragraph 4 is a legal conclusion to which no response is required. To the extent a response is required, the statute speaks for itself. To the extent the averment is inconsistent with the statute it is Denied.

5. The allegation of paragraph 5 is a legal conclusion to which no response is required. To the extent a response is required, the statute speaks for itself. To the extent the averment is inconsistent with the statute it is Denied.

6. The allegation of paragraph 6 is a legal conclusion to which no response is required. To the extent a response is required, the statute speaks for itself. To the extent the averment is inconsistent with the statute it is Denied.

7. The allegation of paragraph 7 is a legal conclusion to which no response is required. To the extent a response is required, the statute speaks for itself. To the extent the averment is inconsistent with the statute it is Denied.

II. FINDINGS OF FACT

8. The allegation of paragraph 8 is a legal conclusion to which no response is required. To the extent a response is required, the allegation is Denied to the extent the averment is inconsistent with the statute

9. Denied. By way of further answer, upon information and belief, the Pennsylvania Department of Environmental Protection ("PaDEP") issued an NPDES permit to the Respondent on February 15, 2008, authorizing the discharge of pollutants under authority of State law, the Pennsylvania Clean Streams Law, 35 P.S. § 691.1 *et seq.* Respondent has no information to support the averment in paragraph 9 that the Commonwealth of Pennsylvania has the authority to issue permits under Section 402 of the Clean Water Act, but rather understands, on information and belief, that EPA has approved the Commonwealth's NPDES program and has ceased issuing Federal permits under the provisions of 33 U.S.C. § 1342(c). By way of further Answer, see subparagraphs 31.1.A (7) – (9) and 31.1.B (1) below.

10. Admitted.

11. The allegation of paragraph 11 is a legal conclusion to which no response is required. To the extent a response is required, the statute speaks for itself. To the extent the averment is inconsistent with the statute it is Denied.

III. FINDINGS OF VIOLATIONS

Count I—Failure to Submit Reevaluation of Local Limits

12. Admitted.

13. Admitted

14. Admitted. By way of further answer, the Respondent reported its evaluation of the need to revise its local limits based on an evaluation of pass through and interference to EPA on March 27, 2009.

15. To the extent a response is required the allegation is Admitted in part and Denied in part. It is admitted that failure to submit the reevaluation of local limits based on a headworks analysis by the date required is a violation of Part C, Section V.D of the Permit. With regard to the allegation of violation of Section 301 of the Act, Respondent is unable to provide a response

because the Complaint does not comply with the requirements of the *Consolidated Rules of Practice* in that there is no "specific reference to each provision of the Act, implementing regulations, permit, or order which Respondent is alleged to have violated." 40 C.F.R. § 20.14(a)(2). The referenced statutory provision, "Section 301 of the Clean Water Act," contains sixteen subsections and occupies some 18 pages of small type. After thorough review of the entire section, Respondent is unable to identify any section of the Clean Water Act (in Section 301 or otherwise) that requires the holder of an NPDES permit to submit any reports regarding a "reevaluation of local limits based on a headworks analysis" within any specific time frame or at all. As noted above, the Respondent did submit an evaluation of the need to revise its local limits on March 19, 2009, as required by applicable federal regulations. Therefore, the allegation of paragraph 16 regarding violation of "Section 301" of the Act is Denied as impossible to understand, not asserted with the specificity required by the *Consolidated Rules of Practice*, and as facially false.

16. The allegations of paragraph 16 are legal conclusions to which no response is required. To the extent a response is required, the statutes and regulations speak for themselves. To the extent the averment is inconsistent with the statute and regulations it is Denied. By way of further answer, since upon the facts as stated no violation of the Act has occurred, no penalty may be assessed in any amount under the cited statutory provisions. The conclusion that the Respondent is a "violator" is Denied as unsupported by any averment in the Complaint; the averment that the Respondent is "subject to civil penalties" is also Denied since no violation has been credibly alleged.

Count II—Failure to Submit Sampling Plan

17. Admitted.

18. Admitted.

19. Admitted.

20. The allegation of paragraph 20 is a legal conclusion to which no response is required. To the extent a response is required the allegation is Admitted in part and Denied in part. It is admitted that failure to submit the sampling plan by the date required is a violation of Part C, Section V.D of the Permit. With regard to the allegation of violation of Section 301 of the Act,

Respondent is unable to provide a response because the allegation does not comply with the requirements of the *Consolidated Rules of Practice* in that there is no "specific reference to each provision of the Act, implementing regulations, permit, or order which Respondent is alleged to have violated." 40 C.F.R. § 20.14(a)(2). The referenced statutory provision, Section 301 of the Clean Water Act, contains sixteen subsections and occupies some 18 pages of small type. After thorough review of the entire section, Respondent is unable to identify any section of the Act that requires the holder of an NPDES permit to submit a sampling plan for the reevaluation of local limits within any specified time period, or, for that matter, at all. Therefore, the legal allegation of paragraph 20 with regard to Section 301 of the Act is Denied as impossible to understand, not asserted with the specificity required by the *Consolidated Rules of Practice*, and as facially false.

21. The allegations of paragraph 21 are legal conclusions to which no response is required. To the extent a response is required, the statute and regulations speak for themselves. To the extent the averment is inconsistent with the statute and regulations it is Denied. By way of further answer, on the facts as stated no violation of the Act is alleged to have occurred, therefore no penalty may be assessed in any amount under the cited statutory provisions. The conclusion that the Respondent is a "violator" is Denied as unsupported by any averment in the Complaint; the averment that the Respondent is "subject to civil penalties" is also Denied since no violation has been credibly alleged.

IV PROPOSED CIVIL PENALTY

22. No response is required to the proposed issuance of a Final Order. By way of further Answer, Respondent notes that since the Complaint does not allege any facts which could be construed as a violation of sections 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of the Clean Water Act, it is improper and illegal to issue an order imposing any administrative penalty under Section 309(g)(2)(A) of the Act. In further answer, whether the proposed civil penalty constitutes a "demand" is a legal conclusion for which no response is required. To the extent a response is required to any of the allegations of paragraph 22, the allegations are Denied.

23. Denied. The facts recited in the Complaint can be summarized as an alleged failure to timely submit a "sampling plan" and an alleged failure to timely submit a report regarding reevaluation of local limits based on a headworks analysis. For such alleged violations EPA, as a

matter of law, is required to consider the following factors in determining the amount of an administrative penalty: nature, circumstances, extent and gravity of the violation and, with respect to the violator, the ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and other such matters as justice may require." 33 U.S.C. § 1319(g)(3). Assuming, *arguendo*, that violations of the Clean Water Act are credibly alleged, no facts are alleged in this Complaint to support any of these factors in any but the most *de minimis* amount. Therefore, the proposal to impose the maximum allowable penalty *per se* evidences the fact that EPA violated its statutory duty to consider the statutorily mandated factors in determining an appropriate penalty. The Respondent objects to the EPA's false statement that it complied with this duty and to EPA's arbitrary and capricious actions in failing to comply with its legal obligations, thereby prejudicing the Respondent and violating its due process rights.

24. The allegations of paragraph 24 are legal conclusions to which no response is required. To the extent a response is required, the Respondent notes that because EPA has violated at least two mandatory procedural requirements in issuing this Complaint, it has no authority to issue a Final Order Assessing Administrative Penalties and any such order would be *ultra vires* and illegal. The averment is therefore Denied.

25. The allegations of paragraph 25 are legal conclusions to which no response is required and are therefore Denied. By way of further answer, the Respondent has consistently complied with the Act.

V. ANSWER TO COMPLAINT AND OPPORTUNITY TO REQUEST HEARING

26 – 30 The averments of paragraphs 26 through 30 are legal conclusions to which no response is required and are therefore Denied to the extent they are inconsistent with applicable law.

31. Section 22.15(b) of the *Consolidated Rules of Practice* sets forth the contents of an answer and Respondent Denies the averments in paragraph 31 to the extent they are inconsistent with § 22.15(b). By way of further answer, Respondent asserts the following information in accordance with 40 C.F.R. § 22.15(b):

1. Circumstances And Arguments Which Constitute The Grounds Of Defense.

A. Circumstances.

(1) Respondent has no history of NPDES permit violations related to industrial wastes. While a few minor effluent violations have been reported, these have not been due to pass through or interference. In 2009 only two effluent violations occurred, both for total dissolved phosphorus, an element which is not contributed in significant quantities by industrial users.

(2) The failure to submit the sampling plan by the due date was an administrative oversight based on a misunderstanding of the permit requirement and not due to any malicious or wrongful intent.

(3) The Authority determined that special testing methods were required for the element mercury as part of the sampling plan and required additional time to develop and publish a competitive bid for this work so that the methods proposed by the successful bidder could be incorporated into the sampling plan (see, *e.g.*, Table 2 of the Sampling Plan, which includes a separate sampling schedule for mercury).

(4) Respondent generated the sampling plan using Authority employees and enjoyed zero economic benefit by not submitting the sampling plan by the date due.

(5) The Respondent generated the local limits reevaluation using Authority employees, which required more time than the use of a contractor. Since it is possible that the use of a contractor might have resulted in additional costs, it is possible that the Respondent may have enjoyed a minor economic benefit as a result of performing the work itself. The amount of such benefit cannot be reliably estimated since no estimate of costs was obtained from any contractor.

(6) The Respondent provided the sampling plan to EPA on October 10, 2008, only five months from the PaDEP-imposed "due date".

(7) Clean Water Act ("CWA") § 402(n), 33 U.S.C. § 1342(n), provides that States such as Pennsylvania may have partial approval of its NPDES program (*e.g.*, without pretreatment program approval) only if the State submits and the EPA Administrator approves a plan for the State to assume administration of the remainder of the program by a specified date not more than 5 years after

submission of the partial program and agrees to make all reasonable efforts to assume administration by such date. 33 U.S.C. § 1342(n)(4)(B).

(8) Pennsylvania's NPDES program was approved in 1977 without including a pretreatment program. Since 1987, when CWA § 402(n) was enacted, Pennsylvania has continued to have a partial program and has not been on a schedule as required by § 402(n)(4)(B).

(9) Since 1987 (*i.e.*, when CWA §402(n) was enacted), EPA amended its approval of Pennsylvania's NPDES program and did not require Pennsylvania to be on a schedule as required by CWA §402(n)(4)(B). For example, EPA public noticed modification of Pennsylvania's NPDES program on or about August 30, 2002 and approved such modification on or about January 7, 2004, yet EPA continued to ignore the mandates of § 402(n)(4)(B).

(10) There is no Federal law, regulation, or permit requiring the submission to EPA of a "sampling plan" for conducting local limits reevaluation. Since evaluation of the need to revise local limits (40 CFR § 122.44(j)(2)(ii)) can easily be accomplished without additional sampling, a sampling plan is not a necessary element of such an evaluation. Moreover, the submission of such a plan is not a requirement of the Respondent's EPA-approved pretreatment program. The requirement to submit this information is contained solely in a State NPDES permit issued by the PaDEP under authority, if any, of state law (specifically, the Pennsylvania Clean Streams Law, 35 P.S. § 691.202).

(11) Requirements in approved State programs that are beyond the scope of the federal program include recordkeeping or reporting requirements. *See, Memorandum* from William A. Sullivan, Jr., EPA Enforcement Counsel to Regional Administrators and Regional Counsels, EPA Enforcement of RCRA-Authorized State Hazardous Waste Laws and Regulations (March 15, 1982), ("EPA Enforcement Memorandum"), available at **http:/www/epa.gov/rcraonline**.

(12) The *EPA Enforcement Memorandum* further declares:

(a) . . . State requirements which are greater in scope of coverage than the federal regulations are generally those for

which no counterpart can be found in the federal requirements.

(b) State program requirements that are greater in scope of coverage than the federal program are not a part of the federally-approved program. . . Therefore, EPA may not enforce that portion of a state program which is broader in scope of coverage than the federal program.

(13) Although Mr. Copeland of EPA Region III notified the Authority on October 31, 2008, that he "approved" the Authority's sampling plan, no such "approval" is required of EPA or PaDEP in response to submission of the sampling plan. As there is no regulation requiring submission of a sampling plan there are no criteria for approval and no such approval or disapproval is required. The information is required by PaDEP to be submitted, but the Permit does not provide for approval or disapproval of the sampling plan by either agency and the Respondent's reevaluation of the local limits based on a headworks analysis is not conditioned on any response by EPA or PaDEP to the sampling plan. The permit provides that the reevaluation of local limits based on a headworks analysis is a separate activity and is to proceed whether or not the sampling plan is submitted and without regard to whether any review or comments are received from PaDEP or EPA. (Note that the sampling plan was also submitted to PaDEP and no comments were received from that agency.)

(14) Hence, there are no consequences attendant on a late submission of a sampling plan. That is, no pass through or interference, no environmental harm, no effluent violations, no operation/maintenance recordkeeping deficiency, and no other defect in either the Authority's Pretreatment Program or permit compliance can arise from the failure to submit the sampling plan.

(15) There is no reference in the Clean Water Act or its regulations to the "reevaluation of local limits" or the performance of a "Headworks analysis" at all. The only arguably applicable regulatory reference is found at 40 CFR § 122.44(j)(2)(ii). That section merely requires "a written technical evaluation of

the need to revise local limits under 40 CFR 403.5(c)(1), following permit issuance or reissuance." [Emphasis added.] Notably, no date is established by the regulation, nor does it require it to be "based on a headworks analysis."

(16) The requirement of 40 CFR § 122.44(j)(2)(ii) is explained in the Preamble to the Final Rulemaking dated July 24, 1990. That Preamble provides that "The Agency intends the formal evaluation to be a written technical evaluation by the Control Authority determining whether or not there is a need to revise the existing local limits." 55 Fed. Reg. 30117. [Emphasis added.]

(17) Respondent submitted to EPA its *Annual Report* for calendar year 2008 on March 27, 2009. That report states, based on extensive data collection, "other than influent mercury levels discussed above [*in which additional research had showed that the detected levels were probably due to sample contamination*], we have no pollutants in our influent or effluent that approach our local limits. Nor do we have any pollutants in our biosolids that would threaten our ability to make and market exceptional quality biosolids through our composting program." *2008 Annual Report*, page 8. The *2009 Annual Report*, submitted in 2010, has similar information.

(18) To the extent the information in the 2008 and 2009 *Annual Reports* reflects the Authority's evaluation of the effectiveness and lack of need for changes to local limits, these reports, which were submitted to EPA following issuance of the NPDES permit, constitute compliance with the regulatory requirement regarding reporting on the "need to revise" local limits.

(19) As correctly stated in Paragraph 12 of the Complaint, the NPDES Permit requirement is to submit a "reevaluation of [Permittee's] local limits based on a headworks analysis of its treatment plant within 1 year of permit issuance." This requirement is substantively different from the regulatory requirement to provide a "technical evaluation of the need to revise local limits."

(20) In fact, since the Authority had already determined that there was no need to revise the local limits, as reported to EPA on March 27, 2009, the additional effort to produce a "reevaluation of local limits based on a headworks analysis" was a

separate activity mandated by PaDEP and unrelated to any actual need to reevaluate local limits.

(21) The two NPDES permit requirements to (1) undertake a headworks analysis and (2) proceed to reevaluate the local limits themselves are unrelated to and in addition to the requirement to determine if there is a "need to revise" the local limits and are therefore are not encompassed by the requirement of 40 CFR § 122.44(j)(2)(ii). Hence, the reevaluation required by the Permit is a State requirement beyond the scope of the Federal requirement, is imposed by the State only, and is not enforceable by EPA. See 40 C.F.R. § 123.1(i)(2).

(22) Respondent hereby avers that the reevaluation of the Local Limits, which is ongoing, has so far not identified any current Local Limits that are inadequate to prevent pass through or interference, as reported to EPA in the 2008 and 2009 *Annual Reports*. Hence, even if changes in the local limits are ultimately determined to be worthwhile, any delay that may occur in the submission or approval of the reevaluation of the local limits has had and will have no adverse effect on the environment.

(23) The local limits reevaluation is submitted for substantive review to EPA Region III. Historically, EPA has not undertaken a review of such reports within any reasonable time frame. In some instances EPA has taken over a year to review and provide comments on proposed local limits modifications.

(24) The Respondent is not authorized to revise its EPA-approved pretreatment program by changing local limits until EPA approves the proposed revision.

(25) Hence, assuming that any change in the local limits will be recommended as a result of the reevaluation, any delay in submitting the "reevaluation of local limits" has no substantial effect on the time in which the Respondent's industrial pretreatment program would be revised. It is reiterated that the effect of revising the local limits is merely administrative and that no change in environmental risk is associated with the proposed local limits revisions since there is currently no risk of pass through or interference as a result of continuing to apply the current local limits, as reported to EPA in the 2008 and 2009 *Annual Reports*.

(26) EPA has violated the law and Respondent's due process rights thereunder by failing to adhere to the mandatory procedural provisions of 40 CFR Part 22. In particular, by:

(a) Failing to include a copy of Part 22 with the Complaint served on the Respondent, as required by § 22.14(b); and

(b) Failing to include a "specific reference to each provision of the Act, implementing regulations, permit, or order which respondent is alleged to have violated."

(26) EPA has violated substantive law by failing to calculate a proposed penalty taking "into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and other such matters as justice may require." 33 U.S.C. § 1319(g)(3).

(27) In light of the fact that Pennsylvania does not have an approved pretreatment program under CWA § 402(b)(8), 33 U.S.C. § 1342(b)(8), the pretreatment permit conditions included in NPDES permits issued in Pennsylvania are drafted by EPA Region III.

(28) EPA Region III provides the permit language to PaDEP and requires that PaDEP include such permit conditions into the NPDES permits. When questions or issues arise regarding the appropriateness or meaning of such pretreatment permit conditions or potential challenges to the permit conditions, PaDEP refers the permittee to EPA Region III to resolve the issues. The permittee, in order to have PaDEP change the pretreatment permit condition in the permit, must have EPA Region III agree to the change. Direct contact with EPA for all other conditions included in the NPDES permit is not required.

(29) Among other things, the Paperwork Reduction Act ("PRA"), 44 U.S.C. §§3501 *et seq.*, requires the approval of the Office of Management and Budget regarding the "collection of information" from ten or more entities. 44 U.S.C. § 3507(a).

(30) The "collection of information," as defined in the PRA:

"means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for:

(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States;

44 U.S.C. § 3502(3).

(30) EPA Region III has provided identical pretreatment permit conditions as those in the Respondent's permit, requiring submission to EPA of a "sampling plan," a "list of pollutants to be evaluated," and a "reevaluation of local limits based on a headworks analysis" to PaDEP and required that these information collection requirements be incorporated into NPDES permits for significantly more than ten POTWs.

(32) The proposed action is subject to certain restrictions on challenges imposed by CWA § 509(b)(2), pursuant to the provisions of 40 CFR § 22.38(c), which paraphrases that section.

(33) CWA § 509(b)(2) provides that the restrictions on challenges apply "in any civil or criminal proceeding for enforcement."

(34) Accordingly, the procedure for the assessment of a civil penalty is a "civil proceeding."

B. Legal Arguments Constituting Grounds of Defense

The "Circumstances" recited in subsection "A," above, and the Answers to paragraphs 1 through 30 are incorporated as if fully set forth herein. The following grounds of defense include both absolute defenses and affirmative defenses.

(1) The Permit Conditions At Issue Are Not Clean Water Act Requirements

Since (as discussed in subparagraphs 31.1.A.7–9 above) Pennsylvania has not obtained approval of a pretreatment program as part of its NPDES program approval as required by the CWA, the inclusion **any** pretreatment requirements in NPDES permits issued by the PaDEP does not implement any of the CWA sections, including those itemized in § 309(g)(1)(A). At most, the permit conditions are state law permit

conditions where the state has **not** been granted the authority to implement the federal pretreatment program requirements. Essentially, all of the pretreatment program requirements stated in Part C, Section V of the Respondent's NPDES permit are purely state permit requirements and not subject to a penalty under CWA § 309(g).

(2) No Violation For Which EPA May Assess A Penalty Under The Clean Water Act Has Been Credibly Alleged In The Complaint.

(a) Clean Water Act ("CWA") Section 309(g) penalty authority only applies to a person who has "violated section 1311, 1312, 1316, 1317, 1318, 1328 or 1345" of USC Title 33 "or has violated any permit condition or limitation implementing such sections."

(b) Respondent has not violated any of the CWA sections delineated in § 309(g) in that:

(i) None of the pretreatment requirements in Part C, Section V of the Permit are imposed by the PaDEP under authority of the CWA.

(ii) No violation of the CWA occurred by the Respondent's failure to submit a "sampling plan" within the time limits established in the NPDES Permit because there is no such Federal requirement.

(iii) No violation of the CWA occurred by the Respondent's failure to submit a "reevaluation of local limits based on a headworks analysis" within the time limits established in the NPDES Permit because there is no such Federal requirement.

(c) The Respondent cannot be held to have violated the applicable Federal law with regard to local limits evaluation in that as long as it submits "a written technical evaluation of the need to revise local limits under 40 CFR 403.5(c)(1), following permit . . . reissuance" it will have fully complied. Respondent did submit such an evaluation on March 27, 2009 and therefore fully complied with the regulatory requirement.

(d) The permit conditions at issue—submission of a sampling plan and reporting on a reevaluation of local limits based on a headworks analysis—are "beyond the scope" of Federal regulations in that they are reporting activities not

encompassed by any CWA requirement or any requirement of any Federal Regulation. Since EPA may not enforce State requirements that are beyond the scope of federal law, these requirements are not enforceable by EPA. 40 CFR § 123.1(i)(2).

(3) The Permit Conditions At Issue May Not Be Enforced By EPA Since They Are State Provisions Beyond The Scope Of EPA Enforcement.

The permit conditions at issue are "beyond the scope" of Federal regulations in that they are activities not encompassed by any CWA requirement or any requirement of any Federal Regulation. Since EPA may not enforce State requirements that are beyond the scope of federal law, these requirements are not enforceable by EPA. 40 CFR § 123.1(i)(2).

(4) EPA Has Not Filed A Valid Complaint And Is Therefore Not Authorized To Assess An Administrative Penalty

(a) EPA may only assess an administrative penalty if it first files "a complaint conforming to Sec. 22.14." 40 CFR §§ 22.50, 22.13.

(b) Because the Complaint does not comply with §§ 22.14(a)(2) and (b), EPA has not filed a complaint that conforms to § 22.14.

(c) Therefore, the purported "complaint" must be dismissed with prejudice as improper and illegal and no further action may be taken by EPA.

(5) EPA Has Violated Respondent's Due Process Rights By Failing To Follow Required Procedures And By Failing To Adhere To Statutory Requirements Regarding Computation Of A Proposed Penalty In The Complaint

(a) The procedural requirements of 40 CFR § 22.14 are mandatory. 40 CFR §§ 22.50, 22.13.

(b) EPA did not adhere to the procedural requirements of § 22.14 by: (i) failing to provide a copy of the *Consolidated Rules of Practice* to the Respondent, and (ii) failing to include a "specific reference to each provision of the Act, implementing regulations, permit or order with respondent is alleged to have violated."

(c) EPA also violated Respondent's substantive due process rights by failing to propose an administrative penalty computed as required by statute.

(6) The Proposed Penalty Is Not In Accordance With Applicable Law And Cannot Lawfully Be Imposed

Assuming, *arguendo*, that an administrative penalty is appropriate under the facts pled (as corrected and amended by this Answer), all of the factors required to be considered by § 309(g) are either not present at all or else indicate a *de minimis* level of applicability, as set forth in detail in subparagraph 31.3 (*Basis For Opposing The Proposed Penalty*) below. Hence, any administrative penalty that might be due would be extremely small.

(7) No Penalty May Be Imposed For Violation Of Requirements Promulgated In Violation Of The Paperwork Reduction Act

(a) The EPA has not obtained the approval of the OMB to impose the reporting requirements imposed on dozens of Pennsylvania permittees, as required by the Paperwork Reduction Act ("PRA"), 44 U.S.C. §§3507(a).

(b) To the extent the two alleged violations are deemed to appropriately be federal requirements, the imposition of such requirements were undertaken in contravention of the Paperwork Reduction Act ("PRA"), 44 U.S.C. §§3501 *et seq.*

(c) Section 3512 of the PRA provides that no penalty shall be imposed, and that the protections provided by the PRA may be raised in the form of a complete defense, where the PRA collection of information requirements has not been complied with. 44 U.S.C. § 3512.

(8) EPA Has Not Joined PaDEP As Required By Law.

(a) The Respondent is a municipality authority chartered under the Pennsylvania Municipality Authorities Act, 53 P.S. § 5601 *et seq.*

(b) The regulations and the CWA establish that the proposed action is a "civil proceeding."

(c) CWA § 309(e) provides, "[w]henever a municipality is a party to a civil action brought by the United States under this section, the State in which the municipality is located shall be joined as a party."

(d) EPA has not joined the Commonwealth of Pennsylvania, or the Pennsylvania Department of Environmental Protection as a party to this action. Accordingly, EPA is in violation of applicable law and this matter must be dismissed.

2. Facts which Respondent Disputes

Various facts as set forth in the Complaint are incomplete and, therefore, inaccurate. The corrections, amendments, and additions to the facts are set forth *passim* in paragraphs 1 through 31 of this Answer, which are incorporated here as if fully set forth.

3. Basis for opposing the proposed Penalty

The averments of subsections 31.1.A and B above set forth in detail the basis for opposing the penalty. These include (in summary form):

A. EPA has not submitted a proper and lawful Complaint in that it has violated the applicable procedural regulations in 40 CFR Part 22 as set forth above. Accordingly, EPA has no legal authority to proceed to assess any penalty whatsoever.

B. EPA has no authority to assess a penalty for the failure to submit a "sampling plan" by a certain date because the requirement is solely a State requirement not implemented under Federal law or regulations, is beyond the scope of such law and regulations, and therefore may not be enforced by EPA as provided at 40 CFR § 123.1(i)2).

C. Respondent complied with the only applicable regulation by submitting a technical evaluation of the need to revise local limits following permit issuance.

D. EPA has no authority to assess a penalty for the failure to submit a "reevaluation of local limits" by a certain date because the requirement with regard to the date due is solely a State requirement not implemented

under Federal law or regulations, is beyond the scope of such law and regulations, and may not be enforced by EPA as provided at 40 CFR § 123.1(i)2).

E. EPA has no authority to assess a penalty for the failure to submit a "reevaluation of local limits based on a headworks analysis" because there is no federal law requiring that any such task be undertaken at any time. Hence, the requirement is solely a State requirement not implemented under Federal law or regulations, is beyond the scope of such law and regulations, and may not be enforced by EPA as provided at 40 CFR § 123.1(i)2).

F. EPA has not calculated a proposed penalty considering the various factors as required by statute, but has merely selected the maximum possible penalty, which action is unlawful and a violation of Respondent's due process rights.

G. EPA's failure to obtain approval of OMB for the information collection activities provides Respondent with a complete defense to this matter.

H. The mandatory statutory elements to be considered in establishing a Class I administrative penalty (assuming for purposes of this paragraph only that any penalty may be authorized at all) dictate that any penalty be extremely low, in that:

Nature Of The Alleged Violations

(1) The nature of the alleged violations is merely one of time, not substance;

(2) The nature of the alleged violations is not related to protection of water quality, the environment, or public health since the current pollutant loadings at the treatment plant are well below the current local limits, and the treatment plant has not experienced any pass through or interference due to industrial wastes;

(3) The nature of the violations is one related solely to records and reports of ancillary matters not directly related to effluent limitations or operation of the treatment system;

Circumstances Of The Alleged Violations

(4) The circumstances with regard to the sampling plan are that no EPA approval or disapproval is required and the submittal is for information only;

(5) The circumstances with regard to the sampling plan are that EPA did not object to the submitted sampling plan;

(6) The circumstances with regard to the determination of the need to revise the local limits are that the report was submitted to EPA as required on March 27, 2009.

(7) The circumstances with regard to the local limits reevaluation are that the extensive data collected throughout the system showed that no amounts of any pollutant are present in the system that would potentially violate any water quality standards or cause pass through or interference. Hence, the Respondent believes that no substantive changes to local limits are required in order to enhance protection of the environment, and that the current local limits have proven to be fully protective;

Extent Of The Alleged Violations

(8) The extent of the violations was of time only;

Gravity Of The Alleged Violations

(9) There being no possible environmental consequences and the sampling plan being submitted for information only, the gravity of the late submission of the sampling plan is minuscule;

(10) The technical evaluation of the need to revise the local limits having been submitted to EPA on March 27, 2009, the delay in completing the unnecessary (but PaDEP-mandated) "reevaluation of local limits based on a headworks analysis" is of no consequence;

(11) There being no possible environmental consequences based on data already submitted to EPA which show no risk of pass through or interference, the gravity of the late submission of the local limits reevaluation is minuscule;

Respondent's Prior History of Noncompliance

(12) The Respondent has had very few minor effluent exceedances, none of them related to industrial waste discharges;

Degree of Culpability

(13) The violations were the result of an administrative oversight, an abundance of care in crafting the sampling plan, and a misunderstanding of permit requirements, and not of malice or wrongful intent;

(14) The delay in submission of the sampling plan was caused by Respondent's care in selecting a qualified consultant to conduct specialized sampling for mercury;

Economic Benefit Of The Alleged Violations

(15) The Respondent enjoyed no economic savings or benefit by reason of compiling and submitting the sampling plan later than the due date.

(16) The Respondent enjoyed a very small economic savings by using Authority personnel instead of a consultant to undertake the reevaluation of local limits based on a headworks analysis.

4. Request for a Hearing

Given the gravity and extent of EPA's violations of both procedural and substantive law, and the lack of any colorable case to be made against the Respondent, the Respondent hereby requests that a hearing be scheduled if this matter is not first dismissed because of the several procedural defects.

32. The Respondent's request for a hearing is stated above.

33–36 No response to these paragraphs is required. To the extent the averments are inconsistent with applicable law, they are Denied.

VI. SETTLEMENT CONFERENCE

37–43 No response to these paragraphs is required. To the extent the averments are inconsistent with applicable law, they are Denied. Respondent will consider requesting a settlement conference and will communicate this to EPA separately.

VII. QUICK RESOLUTION

44–53 No response is required. To the extent the averments are inconsistent with applicable law, they are Denied.

VIII. PUBLIC PARTICIPATION

54–56 No response is required. To the extent the averments are inconsistent with applicable law, they are Denied.

Respectfully submitted,

METTE, EVANS & WOODSIDE

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Date: July 27, 2010

CERTIFICATE OF SERVICE

I certify that I am this day serving a copy of the foregoing document upon the person(s) and in the manner indicated below, which service satisfies the requirements of the Consolidated Rules of Practice by depositing a copy of same in the United States Mail at Harrisburg, Pennsylvania, with first-class postage, prepaid, as follows:

Regional Hearing Clerk (3RC00)
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Ms. Deane Bartlett, Esq.
Senior Assistant Regional Counsel (3RC20)
U.S. Environmental Protection Agency, Region III
1650 Arch Street
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By: _____

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Date: July 27, 2010