(125)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 CHESTNUT BUILDING
PHILADELPHIA, PENNSYLVANIA 19107

IN THE MATTER OF:	:	
	:	DOCKET NOS. CWA-III-127
Borough of Ridgway, Pennsylvania,	:	CWA-III-141
	:	Proceedings to Assess Class I
	:	Civil Penalties Under
NPDES Permit No. PA0023213	:	Section 309(g) of the Clean
	:	Water Act, 33 U.S.C. § 1319(g)
RESPONDENT		

ORDER ON MOTIONS FOR SUMMARY DETERMINATION AND ACCELERATED RECOMMENDED DECISION

These are unconsolidated proceedings for the assessment of Class I administrative penalties under Subsection 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g). The proceedings are governed by the Environmental Protection Agency's Proposed 40 C.F.R. Part 28--CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CLASS I CIVIL PENALTIES UNDER THE CLEAN WATER ACT, THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT, AND THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT, AND THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES UNDER PART C OF THE SAFE DRINKING WATER ACT, 56 Fed. Reg. 29,996 (July 1, 1991), issued October 29, 1991 as superseding procedural guidance for Class I administrative penalty proceedings under Subsection 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g) ("Consolidated Rules").

Under § 28.25(a) of the Consolidated Rules the parties have each moved for Summary Determination and Accelerated Recommended Decision in both cases. Each party opposes the other's motions.

The Presiding Officer has permitted the parties to exceed the page limitations on documents set forth in § 28.8 of the Consolidated Rules. Because the parties are identical and the issues are closely similar in the cases, the Presiding Officer has allowed counsel to combine their respective filings and will rule on the motions together, indicating differences between the cases as appropriate. For example, Complainant first moved for Summary Determination and Accelerated Recommended Decision in Docket No. CWA-III-127: Respondent moved first in Docket No. CWA-III-141. In Docket CWA-III-141 Respondent has also filed a Second Motion for Summary Determination and Accelerated Determination, the grounds of which are inapplicable to Docket No. CWA-III-127. Complainant opposes this motion as well. The Presiding Officer held oral argument on this latter motion on June 19, 1995; all other motions are to be decided on the parties' briefs.

CLEAN WATER ACT LIABILITY

The Clean Water Act's basic prohibition against pollution is set forth in Subsection 301(a), 33 U.S.C. § 1311(a): "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."

These two Administrative Complaints are brought under Subsection 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), which provides in relevant part: "Whenever on the basis of any information available the Administrator finds that any person has violated...any permit condition...in a permit issued under section 1342 of this title...by a State...the Administrator...may, after

consultation with the State in which the violation occurs, assess a Class I penalty...under this subsection."

Several of the elements of statutory liability were properly alleged by the Complainant and admitted by the Respondent, and these elements are therefore adopted as **Recommended Findings of Fact and Conclusions of Law:**

1. The Borough of Ridgway (Respondent), a person within the meaning of Section 502(5) of the Clean Water Act, 33 U.S.C. § 1362(5), owns and operates a wastewater treatment plant (Facility), located in Ridgway, Elk County, Pennsylvania, which discharges pollutants to the Clarion River. (Allegation 1. in the Administrative Complaints; Paragraph 1. in the Answers).

2. The Clarion River is a navigable water of the United States as set forth in Section 502(7) of the Act, 33 U.S.C. § 1362(7). Respondent is therefore subject to the provisions of the Act, 33 U.S.C. § 1251 et seq. (Allegation 2. in the Administrative Complaints; Paragraph 2. in the Answers).

3. On July 14, 1993, pursuant to Section 402 of the Act, 33 U.S.C. § 1342, and Pennsylvania's Clean Streams Law, as amended, 35 P.S. Section 691.1 et seq., the Pennsylvania Department of Environmental Resources (PADER) issued National Pollutant Discharge Elimination System Permit No., PA0023213 (Permit) to the Respondent for the discharge of pollutants from its Facility. The Permit expires on July 13, 1998. (Allegation 3. in the Administrative Complaints; Paragraph 3. in the Answers).

4. Part A, Page 2, of Respondent's Permit establishes certain specific effluent limitations for the discharge of pollutants from Outfall 001. (Allegation 4. in the Administrative Complaints; Paragraph 4. in the Answers).

5. Part B, Page 11, of the Permit requires Respondent to "...at all times maintain in good working order and properly operate all facilities and systems (and related appurtenances) for collection and treatment which are installed or used by the permittee for water pollution control and abatement to achieve compliance with the terms and conditions of the permit. Proper operation and maintenance includes but is not limited to effective performance based on designed facility removals..." (Allegation 5. in the Administrative Complaints; Paragraph 5. in the Answers).

Disputed Issues

Under § 28.25(a)(1) of the Consolidated Rules, summary determination as to liability allegations may be granted if there is no genuine issue of material fact presented by the administrative record and any exchange of information. There has been an information exchange in Docket No. CWA-III-127, but none has been ordered or conducted in Docket No. CWA-III-141. However, in both cases a good deal of relevant information has been introduced into the record in the form of exhibits attached to the parties' motions and responses.

An accelerated recommended decision may be granted if the Presiding Officer, having made a liability determination, also

determines that there is no compelling need for further fact-finding concerning remedy. If the Presiding Officer determines summarily some, but not all of the liability allegations, an interlocutory partial summary determination order may be issued with those determinations, narrowing the range of the issues in dispute for further proceedings. An accelerated recommended decision would not be appropriate under those circumstances.

COMPLAINANT'S CAUSES OF ACTION

In addition to the admitted elements of the Clean Water Act causes of action adopted above as recommended findings of fact and conclusions of law, the Administrative Complaints also contain allegations regarding Respondent's violations of the Permit and regarding Complainant's consultation with the Commonwealth of Pennsylvania sufficient to make out valid claims under § 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g). If Respondent had raised no defenses, Complainant would be entitled to judgment as to liability as a matter of law because there would be no material issue of fact to determine as to liability. In its responses to the Administrative Complaints and in its other filings, Respondent has raised a great many issues pertaining to liability and to the proposed penalty assessment:

Consultation with Pennsylvania:

The Administrative Record in each action contains a clear copy of Complainant's correspondence with the Commonwealth in which Pennsylvania's input on the proposed penalty actions was solicited.

There is no evidence that the Commonwealth ever responded to this correspondence. Complainant's letters satisfy the statutory requirement of state consultation, and since Respondent has presented no evidence on this issue, there is no genuine issue of material fact to be determined at hearing on this point.

Parameters are not pollutants

Respondent argues that the effluent parameters of Total Suspended Solids (TSS), Carbonaceous Biochemical Oxygen Demand-5 day measure ($CBOD_5$) and pH are not pollutants within the statutory definition of the term, and that the Administrative Complaints do not state proper Clean Water Act claims in alleging discharges in excess of the Permit limitations on these effluent parameters. Complainant has alleged, and Respondent has admitted, the discharge of pollutants to the Clarion River (Recommended Finding No. 1, above). The Administrative Complaints also allege that Respondent failed to comply with terms and conditions of the Permit (Allegation No. 7). It is well established that "to violate a NPDES permit is to violate the Act." Chesapeake Bay Foundation v Bethlehem Steel Corporation, 608 F. Supp. 440, 451 (D. MD. 1985). The next question is: in what manner, if any, did Respondent violate the Permit?

Discharge Monitoring Reports

The Administrative Records include legible copies of Respondent's Discharge Monitoring Reports (DMRs) for certain of the months during which Complainant alleges that Respondent discharged

pollutants in violation of terms and conditions of the Permit. Although a copy of the DMR for April, 1994 was not in the record of Docket No. CWA-III-127 at the time of Complainant's Motion for Summary Determination and Accelerated Recommended Decision, Complainant introduced a copy of the missing DMR into the record with its Second Prehearing Exchange. Respondent filed a Motion to Strike Complainant's Second Prehearing Exchange, citing §§ 28.24(e)(1)(i) and 28.2(b)(15)(ii) of the Consolidated Rules. Complainant indicated it would not respond to Respondent's Motion to Strike, and so the Presiding Officer has granted the Motion and Respondent's April, 1994 DMR is no longer part of the Administrative Record in Docket No. CWA-III-127. Accordingly, there is no evidence in the record supporting Complainant's Motion for Summary Determination as to the alleged April, 1994 violations, so Complainant is not entitled to summary determination as to that month. There remains a genuine issue of material fact as to this allegation, to be decided after further proceedings.

The DMRs that are in the record are clear evidence of Respondent's violations of the Permit, executed with required certifications as to accuracy by an authorized representative of the Respondent. In Clean Water Act enforcement proceedings, DMRs are usually treated as admissions of liability. In the Matter of Battelle Memorial Institute, Inc., EPA Docket No. CWA-IV 94-509 (CWA § 309(g) Presiding Officer's Order Granting Complainant's Motion for Summary Determination of Liability and Denying

Respondent's Cross Motion for Summary Determination of Liability, dated June 1, 1995]; Student Public Interest Research Group v Georgia Pacific, 615 F. Supp. 1149, 1129 (D. N.J. 1985); Student Public Interest Research Group v PD Oil & Chemical Storage, 627 F. Supp. 1074, 1090 (D. N.J. 1986); Student Public Interest Research Group v New Jersy Central Power & Light, 642 F. Supp. 103 (D. N.J. 1986); Public Interest Research Group v Yates Ind, (D. N.J. 1991); Public Interest Research Group v Rice, 774 F. Supp. 317, 325 (D. N.J. 1991).

Even where, as here, an NPDES permitee proffers affidavits with opinions purporting to undercut the reliability of information presented in DMRs (Buesink and Grafton affidavits of March 3 and March 6, 1995, as they relate to pH value for March, 1994, attached to Respondent's March 6, 1995 memorandum of law), summary judgment on liability is appropriate unless EPA would not consider the DMR information as conclusively showing permit violations. New Jersey Student Public Interest Research Group v Tenneco Polymers, 602 F. Supp. 1394, 1400 (D. NJ 1985). Respondent has introduced some evidence that an EPA inspector questioned TSS and $CBOD_5$ analytical procedures during a February 13, 1995 inspection of Respondent's facility. (Buesink affidavit of March 3, 1995, attached to Respondent's March 6 filing; Schuller supplemental affidavit of April 28, 1995, attached to Respondent's May 1, 1995 filing). Complainant has not addressed the February 13, 1995 EPA inspection in its subsequent filings. Although they are not very remote in

time from the alleged violations, and may be of some probative value, the inspector's statements do not constitute an adequate indication that EPA would not consider the information in the earlier DMRs as conclusively showing permit violations. To the contrary, Complainant's position is that the DMRs do conclusively show permit violations.

In some courts, a strong showing of proven faulty analysis, direct or reliable circumstantial evidence of reporting inaccuracies, may allow the drawing of an inference in favor of a non-moving party sufficient to raise a genuine issue of fact and so to defeat a motion of for summary judgment. Public Interest Research Group v Elf Atochem, 817 F. Supp. 1164, 1178 (D. NJ 1993). In other courts, a permittee "...may not now refute its own reports on the results of its testing...If an entity reports a pollution level in excess of the Permit limits, it is strictly liable, as Congress has manifested an intention that courts not reconsider the effluent discharge levels reported." Connecticut Fund for the Environment v Upjohn Co., 660 F. Supp. 1397, 1417 (D. Conn. 1987). In the latter case, evidence of reporting inaccuracies, while rejected for purposes of determining liability, were relevant to remedy.

Respondent has cited a case in which the judge declined to grant plaintiff's motion for summary judgement based upon the defendants's DMRs. In Friends of the Earth v Facet Enterprises, 618 F. Supp. 532 (W.D. N.Y. 1984), the court found that the

defendant had "offered a multitude of justifications for the alleged violations, along with convincing arguments why many of the alleged violations should not actually constitute violations (e.g. typographical mistakes in the DMRs)," but gave no details of the "justifications" or of the "convincing arguments." 618 F. Supp. at 536. Here there are neither justifications nor convincing arguments about the reliability of the data in the DMRs in the record, and the law in the Third Circuit, as demonstrated in the PIRG cases, leads to a result different from that reached by the court in the Facet Enterprises case.

Given the nature and quality of the evidence already in the record, this stage of the enforcement proceedings is not the proper point at which to consider Respondent's claim regarding the inaccuracies of DMRs. Chesapeake Bay Foundation v Bethlehem Steel Corporation, 608 F. Supp. 440, 452. The DMRs in the record entitle Complainant to summary determination as to the Permit violations they indicate as a matter of law.

Excursion

The secondary treatment regulation, 40 C.F.R. Part 133, contains a provision apparently allowing for an excursion from the pH limts of 6.0-9.0 if the publicly owned treatment works demonstrates that: (1) Inorganic chemicals are not added to the waste stream as part of the treatment process; and (2) contributions from industrial sources do not cause the pH of the effluent to be less than 6.0 or greater than 9.0. 40 C.F.R.

§ 133.102(c). With regard only to Docket No. CWA-III-127, Respondent made such a demonstration in evidence submitted for the record, relevant to the March, 1994 DMR that shows a pH level of 3.7. (Grafton affidavit of March 6, 1995; Buesink affidavit of March 3, 1995, both attached to Respondent's memorandum of March 6, 1995). The Permit contains no provision for pH excursions, and the Permit's terms and conditions are controlling in these enforcement proceedings. The affidavits raise no genuine issue of material fact, although they may pose an interesting technical question.[1]

Trickling Filters

Respondent's facility utilizes trickling filter technogy, which EPA has recognized as having limited treatment capability. The secondary treatment regulation, 40 C.F.R. Part 133, sets forth effluent limitations less stringent for "facilities eligible for treatment equivalent to secondary treatment," typically those with trickling filter or waste stabilization pond technology. 40 C.F.R. §§ 133.101(g), 133.105. These less stringent effluent limitations are not in Respondent's NPDES permit. Further, comparison of the table showing alleged violations of the Permit in Docket No. CWA-III-127 [Exhibit 2 to Complainant's January 31, 1995 memorandum of law) with the the less stringent effluent limitations for

---

[1] The Permit also requires Respondent to take effluent samples at "Outfall 001 (after the chlorine contact tank)." Respondent's evidence shows that there is no such tank. (Buesink affidavit of March 3, 1995, attached to Respondent's submission of March 6, 1995.) Another interesting technical question posed, but no genuine issue of material fact is raised.

"facilities eligible for treatment equivalent to secondary treatment" in 40 C.F.R. § 133.105 shows that every violation alleged in Docket CWA-III-127 (excluding the April, 1994 alleged violation) would also have been a violation of the less stringent effluent limitations![2] Respondent's trickling filters may be considered among the circumstances of the violation, but the evidence about them in the record does not raise a genuine issue of material fact as to liability.

Pretreatment

Pennsylvania does not administer the Pretreatment Program established under § 307 of the Clean Water Act, 33 U.S.C. § 1317, and 40 C.F.R. Part 403. Instead, EPA-Region III, through its Water Management Division Director, the Complainant in these actions, is responsible for assuring that the waters of the United States and publicly owned treatment works are protected from toxic water pollutants that may damage, interfere with or pass through those treatment works. As the pretreatment Control Authority, Complainant has regulatory and enforcement authority over publicly owned treatment works and over local Industrial Users who discharge pollutants to the sewers that convey their wastewaters to publicly owned treatment works. Complainant coordinates with PADER to incorporate Pretreatment Program implementation requirements into the NPDES permits of publicly owned treatment works.

---

[2] No comparison was made with the violations alleged in CWA-III-141 because the record does not contain a summary table of violations.

It is not uncommon for disagreements and disputes to break out among the Control Authority, PADER, a publicly owned treatment works and one or more of local Industrial Users, especially during the initial imposition of Pretreatment Program requirements in NPDES permits, local Industrial User permits or agreements and intermunicipal service contracts. These disputes may be resolved in various forums by negotiation, litigation or other forms of dispute resolution. It appears that such a dispute has arisen among the parties to these actions and PADER, and that it is well advanced toward resolution by negotiation. The Respondent avers that these actions were initiated by Complainant in retaliation for Respondent's invocation of administrative review rights in connection with Complainant's actions as pretreatment Control Authority, pointing to the temporal proximity of actions in the pretreatment dispute and the initiation of Docket No. CWA-III-127. A cynic might conclude that coincidence is the only way these events could have happened in such temporal proximity, but the fact of temporal proximity alone does not raise a genuine issue of material fact regarding retaliatory enforcement.

The alleged inadequacy of Complainant's enforcement of the Pretreatment Program requirements against Industrial Users connected to Respondent's sewer system is a red herring in these proceedings. Respondent does not contend that Industrial User discharges have caused the violations of the Permit involved in these cases. Instead, Respondent relies on findings made by EPA in

the context of its process of imposing a Pretreatment Program upon Respondent long before the discharges that are involved in these cases, to build its argument that EPA's allegedly inadequate Pretreatment Program enforcement constitutes a defense to liability. Evidence in the record regarding the enforcement of the Pretreatment Program does not raise a genuine issue of material fact.

Joinder of Pennsylvania

Respondent argues that § 309(e) of the Clean Water Act, 33 U.S.C. § 1319(e), requires the joinder of the Commonwealth of Pennsylvania as a party to these cases, and that Complainant's failure to join the Commonwealth as a party is a fatal defect in the cases. This argument fails to recognize the distinction between Clean Water Act civil enforcement actions under § 309(b) and administrative penalty enforcement actions under § 309(g). In civil judicial Clean Water Act actions involving municipalities, states are to be joined as parties to actions brought by the United States so that they may be ordered to pay any part of a judgment that a municipality is unable to pay due to state law. This requirement of § 309(e) makes good sense in civil judicial actions, where the United States often must seek very expensive capital improvements to complex sewage treatment plants as injunctive relief, in addition to significant civil penalties. Many states have constitutional municipal debt ceilings or other legal restrictions on municipalities' ability to raise capital. In

§ 309(g) administrative penalty proceedings injunctive relief is not available and penalties are limited by a statutory cap ($25,000 in Class I proceedings such as these). The state role contemplated in § 309(e) is therefor not present in § 309(g), and Pennsyvania is not a necessary party in these cases.

Preclusion

The Administrative Complaints allege violations of Permit effluent limitations in January, February, March, April (Docket No. CWA-III-127), May, June, July and August (Docket No. CWA-III-141) of 1994. They describe Respondent's 8-month continuous noncompliance with the Permit. The respective DMRs are a chain of documents (one link, the DMR for April, 1994, is missing from the record) that are evidence of the continuity of Respondent's Clean Water Act noncompliance. While the DMRs are discrete documents, the noncomplying discharge is a continuous event, or at least a regular series of connected similar events. There is no break in the continuity of the discharge from one month to the next.

Respondent has raised the defense of "claim-splitting" in Docket No. CWA-III-141, alleging that Complainant had the May DMR in hand when it filed the Administrative Complaint in Docket No. CWA-III-127 on July 14, 1994. Complainant has not challenged the allegation, forthrightly acknowledging its probable truth. The May, 1994 DMR was not date-stamped upon receipt by Complainant. Respondent's evidence (April 20, 1995 Affidavit of John Frederick) that the DMR was mailed more than five weeks before the filing of

Docket No. CWA-III-127, supports the allegation. Complainant asserts that at the time Docket No. CWA-III-127 was filed, Complainant was assessing Respondent's "trend" of discharges on a four-month periodic basis, and therefore was not at all focussed on the May DMR when it filed the administrative complaint in Docket No. CWA-III-127. The preponderence of the evidence in the record supports a finding that, focussed or not, Complainant had the May, 1994 DMR in hand when it filed the first Administrative Complaint.

The "claim-splitting" and "claim-preclusion" doctrines would preclude the initiation of a new action involving causes of action that could or should have been brought with a pending action. These doctrines operate to force litigants to bring all causes of action associated with a transaction or a series of related transactions in a single case in one forum. Thus, pending litigation in one forum precludes a new action involving the same parties and causes of action in the same forum or in a second forum, and once a transaction has been litigated between parties, those parties may not raise new causes of action involving that transaction in a new case in any forum.

Complainant overemphasizes the significance of the DMRs in suggesting that it would be allowable to have brought a separate action for each month of noncompliance: "EPA would have been perfectly within the realm of its enforcement discretion to file sequential penalty actions for each month's violations on a monthly basis." Complainant's May 12, 1995 Memorandum of Law in Response

to Respondent's Second Motion for Summary Determination etc. at 3. Complainant apparently assumes that the discreteness of the evidence supporting its claim, and the potential independence of its causes of action allow it to determine the scope of its claims as coterminous with its evidence. "One of the tests laid down for the purpose of determining whether or not the causes of action should have been joined in one suit is whether the evidence necessary to prove one cause of action would establish the other. Cripps v Talvande. 4 McCord, 20." [Quoted in Stark v Starr, 94 U.S. 477, 485 (1876)]. DMR evidence is important in most NPDES cases, and DMRs can prove separately actionable claims of NPDES permit violations. But when consecutively filed DMRs show substantially similar effluent violations, they are also proving continuous noncompliance, a much larger cause of action than that evidenced by any single DMR. "A plaintiff's claim consists of all rights against a particular defendant `with respect to all or any part of a transaction, or a series of connected transactions, out of which the action arose'." Alyeska Pipeline Service Co. v United States, 231 Ct. Cl. 540, 688 F.2d 765, 769 (1982), quoting Container Transportation International, Inc. v United States, 199 Ct. Cl. 713, 718, 468 F.2d 926, 929 (1970). New evidence of an ongoing release of a hazardous waste, known at the time the first action was initiated, does not support the initiation of a second action. Supporters to Stop Pollution v Heritage Group, 973 F. 2d 1320, 1326 (Seventh Cir. 1992). In an administrative penalty action under the

Toxic Substances Control Act, 15 U.S.C. § 2601 et seq., an EPA Administrative Law Judge rejected a respondent's claim-splitting argument, noting differences in the section of the statute, in the manner in which the alleged violations were discovered and in the manner in which the Complainant brought the claims. Wego Chemical and Mineral Corporation, EPA Docket No. TSCA-8(a)-88-0228, Initial Decision dated April 15, 1992. On appeal to the Environmental Appeals Board, Judge Vanderhayden's decision was affirmed. (TSCA Appeal 92-4, Final Decision dated February 24, 1993).

Although caselaw cited by the parties in their briefs was instructive, neither counsel nor the Presiding Officer have been able to identify cases precisely on point. Counsel for Respondent has cited to Restatement (Second) Judgments § 24 (1980), which puts the issue in clearer perspective:

> (a) The present trend is to see claim in factual terms and to make it coterminous with the transaction...the transaction is the basis of the litigation unit or entity which may not be split...
>
> (d) When a defendant is accused of...acts which though occurring over a period of time were substantially of the same sort and similarly motivated, fairness to the defendant as well as the public convenience may require that they be dealt with in the same action...
>
> (g)...The rule stated in this section as to splitting a claim is applicable although the first action is brought in a court which has no jurisdiction to give a judgment for more than a designated amount...

In Restatement terms, the "transaction" in these cases was the noncomplying discharge, an ongoing event. The DMRs are evidence of

the several Permit violations alleged: monthly and weekly TSS and $CBOD_5$ loading and concentration limits, and, for March, 1994, a pH "excursion" below the minimum allowable. Respondent is accused of these violations, which though occuring over a period of time, are substantially of the same sort and similarly motivated, and thus constitute a "claim," so they ought all to have been brought in the same action.

Separate administrative complaints for different effluent limitation violations shown in the same DMR would not be allowed; neither should separate complaints for different, but connected, time periods in the same continuous or connected act of noncompliant discharge be allowed. Nor should Complainant be allowed to bring more than one action involving continuous noncompliance were it to exercise its enforcement discretion and allege only violations documented in DMRs for every other month during an extended period. Of course, Complainant may not successfully assert that the striking of the April, 1994 DMR from the record in Docket No. CWA-III-127 "breaks the chain" so as to allow a second action with all later-submitted DMRs. Where does the "claim" end? With Respondent's complying discharge the transaction is completed. The records in these matters do not indicate whether Respondent has come into compliance.

Complainant had knowledge that the transaction was not completed when it filed the Administrative Complaint in Docket No. CWA-III-127: the May, 1994 DMR showed the continuation of the

noncompliant discharge. Counsel for Complainant alludes to the "cumbersome internal approval process imposed by EPA" as if it were some form of unstoppable enforcement juggernaut that precluded any reevaluation of its strategy upon receipt of the May DMR. But no claim would have been lost by delaying and rethinking the filing of the Administrative Complaint. To the contrary, it is the juggernaut that caused the loss of a part of Complainant's claim.

Complainant must bring all its Clean Water Act penalty claims arising out of the Respondent's continuous noncompliance with the Permit is a single action. As Respondent points out, several options were available to Complainant: Class I administrative penalties, Class II administrative penalties and civil judicial penalties. It is not for the Presiding Officer to indicate a preferred forum; Agency guidance and the enforcement chain of command presumably determine the forum as a matter of strategy. As counsel for Respondent noted during oral argument, EPA policy addressed claim-splitting in the administrative penalty context:

> ...EPA will be on the strongest legal ground by avoiding simultaneous administrative penalty actions against a single violator. Should EPA initiate separate administrative penalty actions for different sets of past violations by one violator, EPA may have to rebut the argument that it has split its claims in order to circumvent the Act's $125,000 cap on administrative penalties...

GUIDANCE ON "CLAIM-SPLITTING" IN ENFORCEMENT ACTIONS UNDER THE CLEAN WATER ACT, EPA Offices of Water and Enforcement, August 28, 1987.

If Complainant discovers it has selected a forum that cannot accommodate its claims due to jurisdictional limitations, it may be procedurally possible to switch the forum, depending on the stage of the proceeding and the cooperation of the opposing party. But Complainant cannot force a switch, because Complainant was the one who selected the forum. Supporters to Oppose Pollution v Heritage Group, 973 F. 2d 1235.

In Docket No. CWA-III-141, Respondent's 12th affirmative defense cites Section 309(g)(6)(A) of the Clean Water Act, 33 U.S.C. § 1319(g)(6)(A), as a basis for precluding Complainant from filing an action. That provision operates to preclude civil (judicial) penalty actions under § 309(d) and § 505 (citizen suits), and civil or administrative penalties under § 311(b), (relating to oil and hazardous substance liabilities) for violations subject to diligently prosecuted enforcement under § 309(g). In light of the discussion regarding "claim-splitting," this affirmative defense appears moot; in any event counsel for Respondent has not adequately articulated a legal theory that would present an genuine issue of material fact, so it will not be considered further.

As a matter of law, Respondent is entitled to summary determination as to liability and an accelerated recommended decision in Docket No. CWA-III-141: the Presiding Officer will recommend that the Regional Administrator withdraw the Administrative Complaint with prejudice.

Equitable defenses

Respondent's estoppel, res judicata, laches and unclean hands equitable defenses hinge in large part on the relevance of a January, 1990 Consent Order and Agreement between Respondent and the Pennsylvania Department of Environmental Resources (PADER), which was based on Respondent's violation of the Pennsylvania Clean Streams Law, 35 P.S. §§ 691.1 et seq., during 1988 and 1989. That action involved a different NPDES permit, since the permit involved in these actions was issued in July of 1993. Presumably, there was Clean Water Act liability as well as Pennsylvania Clean Streams Law liability under the prior permit because violation of a NPDES permit is a violation of both Pennsylvania and Federal law. The Pennsylvania action involved some, but not all, of the effluent parameters involved in these cases. There is no identity of claims, an inadequate identity of issues and no identity of parties between the present cases and the 1990 PADER action. The Pennsylvania case, also based primarily upon Respondent's DMRs, involved TSS and Biochemical Oxygen Demand (BOD) violations in 1988 and 1989, fecal coliform violations in 1988, failure to submit DMRs in 1988 and 1989, and failure to submit liftstation operational reports in 1988 and 1989. Thus, the claims PADER pursued predated Complainant's claims by several years, were brought under different statutory authority, and involved different terms of a different NPDES permit. PADER obtained both injunctive relief and a civil penalty in its 1990 action; in these cases Complainant may seek

only penalties. While PADER does administer the NPDES in Pennsylvania under EPA oversight, PADER is not Complainant's agent in any sense; Complainant could not have become a party to the PADER action; and the Consent Order and Agreement was, by its own terms, an Order of the Department. It was not an adjudication that resulted from litigation but rather the outcome of negotiation. The 1990 PADER action may be relevant to assessment of a penalty (the statute requires consideration of "prior such violations" in assessing a penalty), but it gives rise to no defense in these Federal actions.

Respondent also argues that Complainant affirmatively misled Respondent in correspondence while Respondent was negotiating the Consent Order and Agreement with PADER during 1989, inducing Respondent to pursue an expensive, long-term upgrade of the sewage treatment plant rather than a less expensive, short-term fix that might have avoided the violations involved in these cases. An objective reading of this correspondence does not support this argument, however, this matter, too, may be considered in connection with a penalty assessment.

Respondent apparently never benefitted from an EPA construction grant under Title II of the Clean Water Act. The funds appropriated by Congess for Title II are allocated among the states according to legislative direction, and each state prioritizes projects in need on its own. Grant funding is not a consideration in determining liability under the Clean Water Act.

It may be a penalty consideration.

Respondent has also introduced evidence of its efforts to comply with the Permit, and evidence that the sewage treatment plant is well operated and maintained. These matters could not constitute a defense to liability because the Clean Water Act is a strict liability statute. They may be considered in connection with penalty assessment, however.

Finally, Respondent disputes the manner in which Complainant has calculated the number of alleged Permit violations. Complainant has countered with arguments and explanations regarding the proposed penalties. As a general matter, these matters do not raise a genuine issue of material fact, and are more appropriate for legal argument at a later stage of the proceeding. Several comments are in order, however.

First, Respondent is gravely mistaken in asserting that "this matter addresses a maximum penalty liability of $ 200 per month of violation." (Respondent's March 6, 1995 memorandum of law, at p. 27, footnote 30). The statutory maximum penalty in a Class I Clean Water Act action is $25,000. The "per violation" maximum is $10,000. Accordingly, if three or more violations are alleged, maximum penalty liability is $25,000. Complainant has no power to limit liability except by limiting the number of violations alleged in the Administrative Complaint. The penalty proposal in the Administrative Complaint is not an assessment, regardless of its characterization by the Complainant ("EPA chose to assess a penalty

for violation of one monthly average limitation per parameter per month." Complainant's April 7, 1995 memorandum of law at p. 23). The penalty assessment, if there is to be one, will be performed by the Regional Administrator, following the submission of the Presiding Officer's recommendation. It will be based upon the record, and thus may be influenced by the arguments advanced by the parties, but it will not be limited by anything but the statute.

ORDER

Complainant's Motion for Summary Determination in Docket No. CWA-III-127 is GRANTED except as to the month of April, 1994; Respondent's Second Motion for Summary Determination and Accelerated Recommended Decision in Docket No. CWA-III-141 is GRANTED. All other aspects of these motions are DENIED.

Date: June 29, 1995

SIGNED
BENJAMIN KALKSTEIN
Presiding Officer