UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 3
Philadelphia, Pennsylvania 19103

In the Matter of:	:	
	:	
Frederick-Winchester Service Authority	:	**U.S. EPA Docket No. CWA-03-2024-0036**
9 West Piccadilly Street	:	
Winchester, VA 22601	:	**Proceeding under Section 309(g) of the Clean**
	:	**Water Act, 33 U.S.C § 1319**
Frederick County Sanitation Authority	:	
dba Frederick Water	:	
315 Tasker Road	:	
Stephens City, VA 22655	:	
	:	
Respondents.	:	
	:	
Crooked Run	:	
Wastewater Treatment Plant	:	
130 Crappie Court	:	
Front Royal, VA 22630	:	
	:	
Facility.	:	

COMPLAINANT'S RESPONSE TO PETITION TO SET ASIDE CONSENT AGREEMENT AND PROPOSED FINAL ORDER

Complainant, the Division Director of the Enforcement and Compliance Assurance Division, U.S. Environmental Protection Agency, Region 3, through counsel, hereby responds to the petition to set aside the Consent Agreement and proposed Final Order in the matter of Frederick-Winchester Service Authority and Frederick County Sanitation Authority, dba Frederick Water, EPA Docket No. CWA-03-2024-0036. Complainant respectfully presents this response to the assigned Petition Officer pursuant to Section 309(g)(4) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(4), Section 22.45(c)(4)(iv) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. § 22.45(c)(4)(iv), and the Petition Officer's Order dated October 25, 2024.

After careful review and consideration of the petition, Complainant respectfully requests that the Petition Officer find that the petition does not state an issue relevant and material to the Consent Agreement and proposed Final Order ("CAFO") and that the CAFO is an appropriate resolution of this matter by the parties without a hearing.

I. Background

A. CAFO and Administrative Order on Consent

Under 40 C.F.R. §§ 22.1(a)(6) and 22.13(b), where the parties agree to settlement of one or more causes of actions before the filing of a complaint, a class II administrative penalty proceeding under Section 309(g) of the CWA may be simultaneously commenced and concluded by the issuance of a consent agreement and final order pursuant to 40 C.F.R. § 22.18(b)(2) and (3). On March 14, 2024, Respondents signed the consent agreement in this matter, which is a class II administrative penalty proceeding brought under Section 309(g)(1)(A) of the CWA, 33 U.S.C. § 1319(g)(1)(A). (Ex. 1). Respondents, Frederick-Winchester Service Authority and Frederick County Sanitation Authority, dba Frederick Water, own and operate, respectively, the Crooked Run wastewater treatment plant located in Front Royal, Virginia (the "Facility"). As a part of its operations, Respondents discharge treated wastewater through an outfall into Crooked Run, a "navigable water" within the meaning of 33 U.S.C. § 1362(7), subject to the requirements of a National Pollutant Discharge Elimination System ("NPDES") permit issued under Section 402 of the CWA, 33. U.S.C. § 1342.

The CAFO would resolve without a hearing Respondents' liability for federal civil penalties for the EPA's allegations that Respondents discharged pollutants in violation of Section 301 of the CWA, 33 U.S.C. § 1311, and the terms and conditions of Respondents' NPDES permit. Respondents have agreed to pay a penalty of $12,000 to resolve these alleged violations.

Specifically, the CAFO alleges that Respondents violated their NPDES permit by exceeding permit effluent limits for nitrogen, chloride, and biochemical oxygen demand on 67 occasions from June 30, 2019 through January 31, 2024. The EPA identified these violations following a May 3, 2021 Information Request Letter sent to Respondents pursuant to Section 308 of the CWA, 33 U.S.C. § 1318. On May 26, 2021, Respondents provided the EPA a response to this letter.

Relatedly, on December 19, 2023, the EPA issued an Administrative Order on Consent ("AOC") to Respondents under Section 309(a) of the CWA 33 U.S.C. § 1319(a). (Ex. 2). The AOC was mutually agreed to by the EPA and the Respondents after engaging in a period of negotiations. The AOC requires Respondents to undertake compliance actions to address the violations alleged in the AOC through the implementation of an injunctive relief framework. Specifically, under the framework, Respondents must submit to the EPA the final settlement agreement between Respondents and relevant third parties confirming the plans to implement new wastewater collection and transmission infrastructure that connects the Facility to another wastewater treatment facility owned and/or operated by

Respondents. Additionally, Respondents must submit to the EPA projected timelines and schedules to complete the projects under the framework and must submit biannual reports until the completion of the projects. Respondents submitted the injunctive relief framework to the EPA on August 15, 2024, and the EPA is in the process of reviewing the framework.

B. Public Notice and Comment Period

From April 3, 2024 through May 13, 2024,[1] Complainant provided public notice of and opportunity to comment on the CAFO pursuant to Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4) and 40 C.F.R. § 22.45(b).[2] (Ex. 3). Complainant received a number of comments during the public comment period, including a comment from Petitioner. (Ex. 4). After careful review and consideration of the comments received, Complainant did not make any changes to the CAFO. Although not required to do so by the CWA or 40 C.F.R. Part 22, Complainant also prepared a response to the comments, which was signed on June 10, 2024. (Ex. 5). On June 25, 2024, Complainant mailed to the commenters via certified mail to addresses provided by commenters and via email a copy of the CAFO as required by 40 C.F.R. § 22.45(c)(4) and a copy of the response to comments.

C. Petition to Set Aside the CAFO

On July 16, 2024, Complainant received a timely petition to set aside the CAFO on the basis that certain material evidence was not considered, pursuant to Section 309(g) of the CWA and 40 C.F.R. § 22.45(c)(4)(ii). (Ex. 6). The petition was submitted by a citizen who commented on the CAFO. The citizen is a customer of Respondents. After carefully considering the issues raised in the petition, Complainant determined that Petitioner did not identify any relevant and material issues that had not already been considered with respect to issuance of the CAFO. Therefore, Complainant decided not to withdraw the CAFO pursuant to 40 C.F.R. § 22.45(c)(4)(iii). On September 18, 2024, the Regional Administrator of the EPA Region 3 requested that an Administrative Law Judge within the EPA's Office of Administrative Law Judges be assigned to consider and rule on the petition pursuant to 40 C.F.R. § 22.45(c)(4)(iii).

[1] On March 25, 2024, the EPA Region 3 mistakenly provided public notice of and opportunity to comment on the CAFO without Complainant's address as required by 40 C.F.R. § 22.45(b)(2)(ii). The corrected version of the public notice was posted on April 3, 2024, which restarted the 40-day commenting period.
[2] The EPA Region 3 posts public notices for CWA CAFOs on its website at https://www.epa.gov/aboutepa/epa-region-3-mid-atlantic#pn.

II. Regulatory Procedures and Standard of Review

Under Section 309(g)(4)(C) of the CWA, 33 U.S.C. § 1319(g)(4)(C), if no hearing is held under Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), before issuance of an order assessing a class II civil penalty, any person who commented on the proposed assessment may petition, within 30 days after issuance of such order, the EPA to set aside such order and provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the EPA shall immediately set aside such order and provide a hearing in accordance with Section 309(g)(2)(B) of the CWA.

Section 22.45(c)(4) of the Consolidated Rules of Practice implement the requirements of Section 309(g)(4)(C) of the CWA. Under 40 C.F.R. § 22.45(c)(4)(ii), within 30 days of receipt of the CAFO, a commenter may petition the Regional Administrator to set aside the CAFO on the basis that material evidence was not considered. If Complainant does not withdraw the CAFO to consider the matters raised in the petition within 15 days of receipt, the Regional Administrator assigns a Petition Officer to consider and rule on the petition pursuant to 40 C.F.R. § 22.45(c)(4)(iii).

The assigned Petition Officer shall review the petition and Complainant's response and issue written findings as to (1) the extent to which the petition states an issue relevant and material to the issuance of the proposed Final Order; (2) whether the complainant adequately considered and responded to the petition; and (3) whether a resolution of the proceeding by the parties is appropriate without a hearing. 40 C.F.R. § 22.45(c)(4)(v).

III. Complainant's Response to the Issues Raised in the Petition

The petition raises three issues that are not relevant and material to the issuance of the CAFO. Specifically, the petition asserts that in agreeing to the penalty set forth in the CAFO:

(A) Complainant relied upon allegedly false representations by Respondents that their revenue covered treatment costs.
(B) Complainant relied upon allegedly false representations by Respondents regarding the timing of a prohibition on the discharge of brine from water softeners into the wastewater system.
(C) Complainant relied in entering the CAFO upon certifications by Respondents in the AOC and CAFO regarding the accuracy of representations made in negotiations and assumed Respondents were in compliance with 18 U.S.C. § 1001.

As set forth above and in greater detail below, the matters raised in (A) and (B), above, are not relevant and material to the issuance of the CAFO, and accordingly, would not affect the penalty set forth in the CAFO. Item (C) is a re-packaging of the assertions in (A) and (B) and therefore also is neither relevant nor material to the issuance of the CAFO. Indeed, the petition provides virtually no discussion regarding how any of the issues would be relevant and material to the penalty set forth in the CAFO or how the information–even if accurate–would or should change the penalty.

Moreover, to the extent the gravamen of the petition could be interpreted as a concern that the costs of returning to compliance could be passed on to Respondents' customers, including Petitioner, that is not a relevant and material consideration to the issuance of the CAFO. Except as relevant to the statutory penalty factors, the nature and cost of actions necessary for return to compliance are beyond the scope of the CAFO which addresses penalties for violations.

A. Whether service charges are sufficient to cover the costs of water treatment service does not factor into the calculation of the economic benefit of noncompliance and is not relevant and material to the issuance of the CAFO.

Petitioner asserts that the CAFO should be set aside because in determining economic benefit for purposes of the penalty, the EPA purportedly relied upon allegedly inaccurate statements made by Respondents regarding whether their revenue sufficiently covers the cost of treatment. Specifically, Petitioner points to a letter from Respondents to the EPA where Respondents stated that the Facility serves only Petitioner's community, and that the community is charged an amount sufficient to cover the costs of service. According to Petitioner, this statement is false, because Respondents also have stated in multiple public forums and on their website that treatment costs at the Facility surpass the revenue generated by Petitioner's community. Petitioner asserts this "fact" would impact the EPA's calculation of the Facility's economic benefit of noncompliance.

This issue is not relevant and material to the issuance of the CAFO and does not warrant a hearing for resolution. Whether Respondents' revenue is sufficient to cover treatment costs is not a relevant consideration for the economic benefit component of a penalty assessment under the CWA. In determining the civil penalty, the Court must consider the "economic benefit (if any) resulting from the violation." 33 U.S.C. § 1319(d). The economic benefit component of the statutory penalty factors is intended to prevent a violator from profiting or gaining a competitive advantage from its wrongdoing. *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 529 (4th Cir. 1999); *United States v. Mun. Auth. of Union Twp.*, 150 F.3d 259, 263-64 (3d Cir. 1998). By recouping economic benefit, the penalty also removes the incentive for other companies to violate the CWA. *See, e.g.*, *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913

F.2d 64, 80 (3d Cir. 1990). Accordingly, the appropriate inquiry with respect to the "economic benefit (if any) resulting from the violation" is whether the violation resulted in avoided or delayed costs or expenditures, and/or whether the violator otherwise realized a saving or economic gain as a result of the violation.

Potential information regarding *how* the Respondents obtained *sufficient* funds to pay for ongoing expenditures for the Facility is not part of this inquiry for economic benefit and therefore is not relevant and material to assessment of the economic benefit component of the penalty.

Information regarding whether Respondents' revenue meets its treatment costs is not relevant and material to any other statutory penalty factor. Respondents have not asserted an inability to pay the penalty. *See United States v. Roll Coater, Inc*., 21 ELR 21073 (S.D. Ind. 1991). Petitioner's assertion is equally not relevant and material as "other matters as justice may require." 33 U.S.C. § 1319(d). To the extent Petitioner's real concern may relate to whether Respondents might increase rates as a result of the penalty, the $12,000 penalty is a relatively small amount. *Hawaii's Thousand Friends v. City and County of Honolulu*, 821 F. Supp. 1368 (D. Haw. 1993). Moreover, Respondents are in the same position as any utility provider who must pay a penalty as a result of violations. When a utility provider is penalized as a result of violations, there is always a concern that the penalty will be passed on to customers in the form of a rate increase. The petition points to no circumstances unique to these Respondents that would warrant different treatment in in this regard from any other violator who provides a utility.

Thus, this issue is not relevant and material and does not warrant setting aside the CAFO or conducting a hearing to resolve.

B. The timing of the Facility's prohibition of the discharge of brine into the wastewater system is not relevant and material to the issuance of the CAFO

Petitioner asserts that the CAFO should be set aside because Respondents allegedly falsely stated to the EPA that the discharge of brine from water softeners into the wastewater system was prohibited at the time that the penalty was being negotiated, while Petitioner asserts that such prohibition did not take effect until after negotiations on the CAFO were completed.

This issue of brine discharge is not relevant and material to the issuance of the CAFO because the underlying violations are predicated on exceedances of the effluent limits in Respondents' permit. To the extent the petition asserts that the presence of brine from water softeners was the cause of those exceedances, then the issue is captured within the violations addressed by the CAFO. To the extent the petition asserts that an

alleged delay in the effect of the prohibition meant that there were ongoing violations during and subsequent to the negotiations, those alleged violations are not part of the violations resolved by the CAFO and therefore are not relevant and material to the CAFO and do not warrant a hearing for resolution. Nothing in the CAFO would prevent Complainant from bringing an action to address violations subsequent to those identified in the CAFO.

C. Complainant's alleged reliance upon Respondents' certifications in the AOC and/or the CAFO regarding accurate and complete information is not relevant and material to the issuance of the CAFO.

Petitioner's arguments alleging that Respondents' certifications in the AOC and CAFO were inaccurate or a violation of 18 U.S.C. § 1001 are a re-packaging of issues A and B, and for the reasons stated above are neither relevant nor material to the issuance of the CAFO. The veracity of statements on treatment service costs or brine discharges are not relevant to the violations or penalty set in the CAFO. Moreover, the certifications did not induce the EPA into entering the CAFO to resolve the exceedance violations. The purpose of the certifications is to deter violators from providing false statements to the EPA and to reserve the EPA's rights.

Additionally, whether Respondents violated 18 U.S.C. § 1001 is immaterial to the issuance of the CAFO. 18 U.S.C. § 1001 provides for criminal fines against anyone who provides false statements to the United States. Any such false statement would be a matter outside the scope of this administrative proceeding and would not impact the issuance of the CAFO or the penalty set therein.

IV. A Resolution of this Proceeding is Appropriate Without a Hearing

Pursuant to 40 C.F.R. § 22.45(c)(4)(v)(C), the Petition Officer shall review the petition and Complainant's response and shall make a finding whether a resolution of the proceeding by the parties is appropriate without a hearing. As set forth above, the petition does not present any issues relevant and material to the issuance of the CAFO. Nor has Petitioner identified any document or witnesses to be introduced or description of additional information to be presented that are relevant and material to the allegations in the CAFO and which would necessitate a hearing on this matter.

V. Conclusion

For the reasons described above, Petitioner does not raise any issues relevant and material to the issuance of the CAFO. This Response demonstrates that the Complainant adequately considered and responded to the petition. Finally, the EPA maintains that a resolution of the proceeding by the parties is appropriate without a hearing.

Respectfully submitted,

By: PROMY TABASSUM Digitally signed by PROMY TABASSUM Date: 2024.11.25 12:44:23 -05'00'

[*Digital Signature and Date*]

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CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of the foregoing Complainant's Response to Petition to Set Aside Consent Agreement and Proposed Final Order for docket number CWA-03-2024-0036 in the following manner to the following addresses:

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Copy served via the Office of Administrative Law Judge's E-Filing System at https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf/amain_menu?OpenForm:

Honorable Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency

By: TANYA WILLIAMS Digitally signed by TANYA WILLIAMS Date: 2024.11.25 13:34:51 -05'00'
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Legal Assistant
U.S. EPA – Region 3

EXHIBITS

Exhibit 1. Consent Agreement and proposed Final Order, CWA-03-2024-0036

Exhibit 2. Administrative Order on Consent, CWA-03-2024-0035DN

Exhibit 3. Public Notice

Exhibit 4. Public Comments [Redacted]

Exhibit 5. Complainant's Response to Comments

Exhibit 6. Petition [Redacted]