5/14/96

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
MAHONING VALLEY	)	
SANITARY DISTRICT,	)	**Docket No. CWA-AO-08-09**
	)	
Respondent	)	

INITIAL DECISION

DATED: May 14, 1996

CLEAN WATER ACT: Pursuant to Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), Respondent Mahoning Valley Sanitary District is assessed a civil penalty of $24,300 for its discharge of lime sludge into navigable waters in violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a).

APPEARANCES:

For Complainant:	Robert S. Guenther, Esquire Sebastian Patti, Esquire for United States Environmental Protection Agency
For Respondent:	Mark I. Wallach, Esq. for Respondent Mahoning Valley Sanitary District

I. PROCEDURAL HISTORY

On June 8, 1990, Region V of the United States Environmental Protection Agency (Complainant), filed an Administrative Complaint alleging that Mahoning Valley Sanitary District (Respondent) violated Section 301(a) of the Clean Water Act (CWA or the Act), 33 U.S.C. § 1311(a), by discharging lime sludge into Meander Creek, a navigable water of the United States, without a National Pollution Discharge Elimination System (NPDES) permit. The Complaint alleged twenty-seven such violations of the Act and sought a penalty of $125,000.

Respondent filed its Answer on October 5, 1990, admitting most of the factual and legal allegations of the Complaint. However, the Answer, pp. 3, 4, claimed (1) that Respondent had derived negligible economic benefits from the violations, (2) that the gravity of the offenses was minor and (3) that Respondent was unable to pay a substantial penalty in connection with the alleged violations.

On September 23, 1991, following the filing of prehearing exchanges, Complainant filed a Motion for Accelerated Decision on the issue of liability and asked that the matter be set for hearing on the issue of penalty. Respondent did not oppose Complainant's motion. On December 22, 1993, the Presiding Judge issued an Order Granting Motion for Accelerated Decision on Liability and Setting Evidentiary Hearing Date, entering judgment in favor of Complainant on the issue of liability for the violations set out in the Complaint.

On March 14 and 15, 1994, the proceeding went to evidentiary hearing on the issue of the appropriate penalty for Respondent's violations, during which the decisional record was established. During the hearing, Complainant and Respondent each presented two witnesses. Of Complainant's exhibits, 11 were introduced into evidence; of Respondent's exhibits, 6 were

introduced into evidence. The transcript of the hearing is contained in one volume totaling 311 pages.[1] Following the hearing, the parties filed both Initial Briefs and Reply Briefs.

This initial decision will consist of an analysis of the issues relating to the appropriate amount of penalty to be assessed in this cause, including discussion as necessary of the positions taken by the parties on these issues, and an order setting the penalty in this proceeding. Any argument in the parties' briefs not addressed specifically herein is rejected as either unsupported by the evidence or as not sufficiently persuasive to warrant comment. Any proposed finding or conclusion accompanying the briefs not incorporated directly or inferentially into the decision, is rejected as unsupported in law or fact, or as unnecessary for rendering this decision.

II. DETERMINATION OF PENALTY

Section 309(g)(3) of the Act requires the Administrator to consider the following when assessing a penalty:

> [T]he nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

In assessing a civil penalty, Complainant urges that the maximum statutory penalty for each

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[1]The Complainant at hearing presented nine stipulated exhibits, which were numbered 1 through 9 and were admitted into evidence (Tr. 13). However, in its prehearing exchange Complainant had numbered exhibits differently from the stipulated exhibits. One of the prehearing exhibits, Ex. C-6, was the original penalty calculation and after substantial examination on that document, it also was admitted into evidence (Tr. 255). In view of this overlap, for clarity, the stipulated exhibits will be cited as Stip. Ex. C-1, etc. The other exhibits will be cited as "Ex.", with "C" and the appropriate number for Complainant's exhibits (e.g., Ex. C-6) and with "R" and the number for Respondent's exhibits (e.g., Ex. R-1). The transcript will be cited as "Tr." followed by the page number (e.g., Tr. 100). The briefs will be cited as Comp. Init. Br., Comp. Reply Br., Resp. Init. Br. and Resp. Reply Br. with appropriate page numbers.

violation should be the starting point and then the statutory adjustment factors should be applied (Comp. Init. Br., p. 27). In this regard, Complainant relies on Atlantic States Legal Foundation, Inc. v. Tyson Foods, 897 F.2d 1128, 1142 (11th Cir. 1990), where the Federal court set out this procedure in ruling on determination of a penalty under Section 309(d) of the CWA, the judicial companion to Section 309(g).

While the procedure of starting with the statutory maximum and then applying the adjustment factors may be followed in Federal courts, this methodology is not necessarily applicable in administrative proceedings. The EPA Environmental Appeals Board, in In re: Port of Oakland and Great Lakes Dredge & Dock Co., MPRSA Appeal No. 91-1, pp. 34, 35 (EAB, August 5, 1992), ruled that the maximum penalty is not the starting point if this penalty clashes with the penalty calculation under the applicable penalty policy. However, under the CWA, there is no EPA policy for assessing penalties in administrative proceedings, although there is a penalty policy for settlement purposes, Addendum to Clean Water Civil Penalty Policy for Administrative Penalties, dated August 28, 1987. In In re: Puerto Rico Urban Renewal & Housing Corp., Docket No. CWA-II-89-249, Initial Decision issued June 29, 1993, p. 19, the presiding judge pointed out that the method of calculating penalties in the CWA settlement penalty policy is at odds with starting at the statutory maximum and that the rationale of Port of Oakland case should apply. Following the reasoning of Puerto Rico Urban Renewal, it is determined that the procedure of starting with the statutory maximum penalty should not be followed in this case.

With this background, the aforementioned factors governing penalty assessment set out in Section 309(g)(3) of the Act can now be applied to the violations committed by Respondent.

A. Nature, Circumstances, Extent and Gravity of the Violations

1. Number of Days of Violation

With regard to the statutory factor evaluating the nature, circumstances, extent and gravity of the violations (hereinafter for simplicity the "gravity factor"), it is reasonable to begin by considering the number of days during which the violations took place. Section 309(g)(2)(B) of the CWA provides that the civil penalty herein may not exceed $10,000 per day for each day during which the violation continues, and limits the maximum amount of penalty to $125,000. The Complaint in paragraph numbered 11 on page 4 avers that the Respondent's discharges constitute 27 violations. However, Complainant now contends that 51 days of violation have been established (Comp. Init. Br., pp.5, 6). Respondent on the other hand suggests that there were only 7 occasions of violation, and argues that the Complainant arbitrarily selected the number of violations and manipulated the penalty amount to suit its purposes (Resp. Init. Br., pp. 6, 7; Resp. Reply Br. pp. 12, 13).

The evidence on the number of days of violation is somewhat confusing. Complainant bases its position that there were 51 days of violation on a Declaration of Mr. Sudhir Desai, an environmental engineer from EPA's Region V. The Desai Declaration was an attachment to the Complainant's Motion for Accelerated Decision and was admitted into evidence (Stip. Ex. C-2). The Declaration indicates that the periods of discharge were determined by a review by Mr. Desai of a response made by the Respondent to an EPA request for information made pursuant to Section 308 of the CWA. The Respondent's Section 308 response also was entered into evidence (Stip. Ex. C-6). The Desai declaration lists: 1) 3 days of violation in two incidents during 1983 through 1988 involving discharges because of a mechanical scraping breakdown; 2) 8 days of

violation during 1987 and 1988 involving discharges to facilitate sludge pump maintenance; and 3) 45 days of violation for discharges in April of 1986, 1987 and 1988 involving drainage of the screen well, the raw water well, 4 mixing basins, 6 clarifiers and miscellaneous flumes. This would total 56 days of violation and is inconsistent with the 51 days cited in Complainant's post hearing brief (Comp. Init. Br., pp. 5, 6). Perhaps this discrepancy relates to the fact that some of the discharges described in the Desai Declaration occurred as early as 1983, which predates February 1986, the date set out in the Complainant at paragraph numbered 9 on page 4, as the onset of the violations. The discrepancy was not, however, explained on the record.

More troubling, though, is that an analysis of the Respondent's Section 308 response (Stip. Ex. C-6), does not provide support for the number of days of violation listed in the Desai Declaration. The Respondent's Section 308 response does not specify how many days were involved in the mechanical scraping breakdown discharges, in the sludge pump maintenance discharges or in the April draining processes. Mr. Desai did not testify and, therefore, it is unknown whether he has the technical expertise to calculate days of discharge from the Section 308 information supplied, nor is there any way of knowing what methodology Mr. Desai used to determine the number of days of violation. In light of this, it is not warranted to rely on the number of days of violation set out in the Desai Declaration.

Nor is the Respondent helpful in suggesting only seven violations occurred (Resp. Init. Br., pp. 6, 7). This was based on an evaluation of the Desai Declaration and considers the three incidents of discharge described therein to be occasions. However, the three incidents clearly involved a certain number of days of discharge and that is the criteria that must be used to establish the number of violations.

However, to resolve this issue, it is helpful to turn to the December 22, 1993 Order Granting Motion for Accelerated Decision on Liability, p. 2, where judgment was entered in favor of Complainant on the issue of liability for the violations set out in the Complaint.[2] As noted above, the Complaint in paragraph numbered 11 on page 4 set out that the Respondent's discharges constituted 27 violations. This would appear to be a more accurate number and, indeed, has record support. In paragraph 10a of the Respondent's Section 308 response, it is indicated that the clarifiers would be down 1.5 days in connection with being drained once a year for maintenance (Stip. Ex. C-6, p. 3). This drainage of clarifiers clearly relates to the annual April maintenance drainage described in paragraph numbered 3 of the Section 308 response (id. at 1), and it seems reasonable to conclude that the other drainage set out in that paragraph (wells, mixing basins and flumes) could also be accomplished in the 1.5 day shutdown period. Therefore, since 6 clarifiers are involved (id.), this would translate into 9 days[3] of discharge (1.5 days x 6 clarifiers) for the annual maintenance. And, since the relevant time frame for the violations begins in 1986, and the April maintenance drainage stopped after 1988, three years of violation are involved (1986, 1987 and 1988), resulting in 27 days of violation (9 days per year x 3). As a result, it is hereby determined that the Respondent is liable for 27 days of violation of

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[2]While this Order at page 2 did adopt and incorporate by reference the details of the violations set out in the Complainant's Motion for Accelerated Decision (inadvertently referred to as a Motion to Dismiss) and the memorandum in support thereof, the analysis herein of the Desai Declaration in relation to the material it was based on, leads to the conclusion that the Desai declaration should not be relied on to establish the number of days of violation.

[3]It can be argued that each half day should be considered a separate day of violation rather than combining the half days to make one day of violation, as is being done in this calculation. However, since much more lime sludge is discharged in a full day than in a half day, it is warranted to combine the half days as one day of violation.

the CWA, in accordance with the allegations of the Complaint.

2. Seriousness of the Violations

Another aspect of the gravity factor involves assessing the seriousness of the violations. This entails review of certain issues raised by the parties, including Respondent's failure to obtain a permit, and the extent of harm to human health or the environment from the discharges.

Complainant argues that Respondent's failure to obtain a permit for its discharges of lime sludge to Meander Creek was offensive to the purposes of the Act. In this regard, Complainant contends that, when there is a discharge without an NPDES permit, the regulatory agencies have no mechanism to determine the quality and quantity of the effluent being discharged and, therefore, cannot assess the resulting impact on receiving rivers and streams (Comp. Init. Br., pp. 8, 9,). Such unregulated, unmonitored, and unreported discharges, Complainant asserts, are repugnant to the Congressional mandate of the CWA (id. at 10). Additionally, Complainant avers that Respondent's unpermitted discharges were contemptuous of EPA's authority in light of a May 24, 1982 consent decree between Respondent and the United States following earlier violations of the Act by Respondent (Stip. Ex. C-1). According to Complainant, Respondent's violations, which occurred despite the consent decree and a letter from an Assistant United States Attorney (Ex. C-9) reminding Respondent of the zero discharge requirement, demonstrate Respondent's cavalier attitude towards compliance (Comp. Init. Br., pp. 10-12).

Respondent has acknowledged its failure to apply for a permit. However, Respondent claims that even if it had applied for a permit, the Ohio Environmental Protection Agency (OEPA) had discouraged, if not rejected, applications by water treatment facilities (Tr. 248, 261-62, 282; Resp. Init. Br., p. 12). Further, Respondent contends that certain of the types of discharges

involved herein had taken place prior to the Consent Decree but were not specifically covered in the Consent Decree, leaving the Respondent to assume that those discharges could continue (Tr. 181-82, 238-245; Resp. Init. Br., p. 12). Also, Respondent notes that plans it submitted to EPA to come into compliance with the Consent Decree did not make any other provision for the discharges at issue here, and those plans were approved by EPA (Tr. 200; Resp. Init. Br., p. 12).

On analysis, the Respondent's failure to obtain a permit cannot be totally excused. However, the apparent reluctance of OEPA to grant permits to water treatment facilities and the Respondent's good faith misunderstanding that the discharges were permitted (the discharges were not specifically mentioned in the Consent Decree and the plans submitted to comply with the Consent Decree did not make other provision for the discharges) are mitigating factors. Of course, any discharge without a permit is offensive to the purposes of the CWA, and may leave the regulatory agencies unable to determine the quality and quantity of the effluent and its impact on the receiving waters. In the instant case, though, the Complainant was aware that the discharges consisted of non-toxic lime sludge, the information on the discharges was provided through the cooperation of the Respondent, the discharges were intermittent and of relatively short duration, and the Respondent stopped the discharges promptly after learning it was in violation of the Act. Moreover, Complainant, although it has the burden of proof to establish the amount of penalty, made no effort, after learning of the discharges, to evaluate the actual impact of the discharges on Meander Creek to determine how serious the violations should be considered. Therefore, the mitigating factors lead to the conclusion that, while the Respondent's failure to secure a permit cannot be excused, that failure to obtain a permit should be evaluated as minor in nature under the circumstances present in the instant case.

With regard to the environmental harm of the Respondent's discharges, Complainant argues that its evidence shows that the discharges into Meander Creek had the potential to and actually did cause significant environmental harm to the aquatic environment of Meander Creek (Comp. Init. Br., p. 12). First, Complainant cites testimony from its expert witness, Dr. Robert Davic, that Respondent's discharges of lime sludge would have affected the pH balance of the stream and that aquatic organisms are very sensitive to changes in pH. Second, Dr. Davic testified that the lime sludge would blanket the rocks and crevices on the bottom of the stream and thereby destroy benthic organisms, a key link in the food chain of streams (Tr. 146-49, 167-68).

On the issue of harm to the environment, Respondent argued that the discharges entered a creek already heavily degraded and not used by the public and that the discharges had no known or documented impact on the environment or risk to public health (Resp. Init. Br., pp. 8, 9). According to Respondent, no information has been developed regarding the aquatic life in the creek, before or after the discharges (id. at 10). Because there was no way to determine the condition of the creek preceding and following the discharges and therefore no way to quantify environmental harm, Respondent argues that the proposed penalty should be reduced (id.).

On analysis, it is warranted to conclude that no harm to human health or the environment was established and that, therefore, the violations should be considered minor in nature. The Respondent owns the riparian rights from the dam above the plant down to the Mahoning River. It also owns the land on both sides of Mahoning Creek to Salt Springs Road, and public access thereto is restricted since no trespassing, hunting or fishing is allowed. (Tr. 253.) In light of this and since no evidence was presented showing adverse health effects from the lime sludge being washed into the Mahoning River, no threat to human health was shown to result from the

discharges.

Regarding environmental harm, there was, as noted above, testimony from the Complainant indicating that the lime sludge discharged by Respondent theoretically could have adverse effects on the receiving creek's ecosystem. On the other hand, there was unrebutted testimony from the Respondent: that the lime sludge discharges involved herein were insignificant relative to the quantities of lime sludge discharged into Meander Creek from the beginning of operation of the facility in the 1932; and that the overall impact from the discharges of the small amount of lime sludge at issue would have been relatively insignificant (Tr. 180, 258-60).

Further, the testimony of Complainant's own witness on environmental harm suggested that the adverse environmental effects were temporary and reversible. Dr. Davic stated that he saw the coating of lime sludge on the stream bed during his inspection in 1988 but observed no lime sludge in the creek during subsequent visits in 1990 and 1993 (Tr. 128, 137-38). Dr. Davic stated that he thought that the sludge had been flushed down through the system by the action of the water flowing under higher flow events, such as rains and spring flooding (Tr. 138) and agreed that the creek has the ability to cleanse itself or flush itself out (Tr. 139). Complainant offered no evidence indicating that the harmful effects of the lime sludge persisted after the sludge itself had been washed away. The limited duration of the environmental damage caused by Respondent's violations is a significant mitigating factor in determining the appropriate penalty.

Additionally, the record reflects that the discharge of lime sludge involved herein should not be considered, if all other things are equal, as serious as a discharge of toxic materials into the receiving waters (Tr. 76).

To recapitulate, the record reflects that there were circumstances in this cause mitigating the adverse regulatory effects of discharging without the NPDES permit required by the CWA. Moreover, there was no actual harm to human health or the environment established at hearing, and the environmental impact of the violations on Meander Creek was temporary and reversible. Therefore, the overall evaluation in this area indicates that the violations should be considered minor in nature from a seriousness standpoint.

3. Overall Gravity Factor Assessment

In light of the above analysis showing the violations to be minor in nature, the appropriate penalty to be assessed in considering the statutory Gravity Factor is determined to be $750 per day of discharge. And, since there were 27 days of discharge, the statutory gravity factor would indicate that a total penalty of $20,250 should be entered against the Respondent.

Next, however, the remaining statutory penalty factors must be evaluated to determine whether the $20,250 penalty determined from considering the gravity factor should be increased or decreased.

B. Ability to Pay

The first penalty adjustment factor set out for consideration under Section 309(g)(3) of the CWA is the violator's ability to pay the penalty. In its Answer, p. 4, Respondent raised the issue of its ability to pay the proposed $125,000 penalty without an adverse impact on its ability to perform its legally required functions. Respondent cited a reduced ability to raise capital funds and to obtain rate increases.

Respondent argues that it would be seriously affected by a substantial penalty, especially in the amount proposed by Complainant (Resp. Init. Br., p. 14). At the hearing, Respondent offered

testimony it was projecting a deficit for the 1993-94 fiscal year but that this deficit would be covered by surplus operating money or funds from years in the past (Tr. 195). However, after the estimated $300,000-330,000 surplus from prior years had been applied to the expected $250,000-270,000 deficit in the current year, the Respondent would have $40,000 to $50,000 left at the end of 1994 (Tr. 196).

Complainant argues that Respondent has failed to demonstrate that it is unable to pay the penalty proposed (Comp. Reply Br., p. 4). Complainant criticizes the testimony offered by Respondent and claims that Respondent's witness was generally uninformed about fiscal matters and unable to answer basic questions about Respondent's finances (id. at 3). Complainant also argues that documents on this issue submitted by Respondent are not certified and therefore of questionable integrity (id.).

On analysis, the record herein includes Respondent's Annual Report for 1989-90, which shows average annual revenues for 1987-90 of about $4,000,000 (Ex. R-9, p. 14). Respondent's Detail of Revenues and Expenses shows that, at the time of the hearing, Respondent projected total operating revenues for 1993-94 at $4,647,350 (Ex. R-1, p. 1). A financial impact study prepared by Respondent's consultant notes bond issuances of $18,725,000 in 1991 and $7,900,000 in 1994 and describes possible future capital projects costing a total of $68,900,000 (Ex. R-4 at II.1-2). Respondent's Report on Estimated Cost of Operation and Maintenance (Ex. R-8), along with the Annual Report for 1989-90 describe a maintenance contingency fund that is made up of operating surpluses and depository interest (Ex. R-9, p. 18; Tr. 215-22). This fund is used to pay for irregularly occurring operating or maintenance expense or unforeseen contingencies (Ex. R-8, p. 8) and, from 1987 to 1990, the fund showed balances exceeding

$800,000 (Ex. R-9, p. 18). Further, it was established that the table describing this fund showed over $800,000 earned in interest income alone between 1982 and 1988 (Tr. 220).

Given the above described financial circumstances of the Respondent, it must be concluded that the Respondent has the ability to pay even the $125,000 civil penalty proposed by the Complainant. In any event, Respondent certainly has the ability to pay the reduced penalty being entered herein, since that penalty falls within the $15,000 to $35,000 range Respondent has admitted it has funds to pay (Resp. Init. Br., p.14; Tr. 308). Accordingly, the penalty to be assessed in this proceeding will not be adjusted on the basis of Respondent's claimed inability to pay.

C. Prior History of Violations

The next statutory factor to be considered under Section 309(g)(3) of the Act is whether the violator has any prior history of such violations. In this regard, Respondent concluded an earlier CWA law suit brought by the United States, by agreeing to a Consent Decree which was entered on May 24, 1982 in the United States District Court for the Northern District of Ohio (Stip. Ex. C-1). In this Consent Decree, Respondent agreed to pay a penalty of $8,000 and to construct pollution control facilities to capture and treat all sludge and backwash water emanating from the water treatment processes, so that all point source discharges from such processes would be eliminated (id. at 2).

Citing this earlier proceeding, Complainant argues that the violations alleged in this cause are repeat violations and the Respondent is a repeat offender (Comp. Init. Br., p. 2). Complainant contends that Respondent's history of violations should be weighed heavily in determining the penalty in this proceeding (id. at 24).

On its part, Respondent asserts that, since certain of the types of discharges which are the subject of this proceeding had taken place prior to the previous litigation, yet were not specifically mentioned in the Consent Decree, Respondent's employees understandably assumed that those discharges could continue (Resp. Init. Br., p. 12).

The prior history of violations criterion allows higher penalties for repeat offenders. See, e.g., In re: Puerto Rico Urban Renewal & Housing Corp., CWA-II-89-249, Initial Decision issued June 29, 1993, p. 22. As a prior violator of the Clean Water Act's permitting requirements, Respondent must be considered a repeat offender. In mitigation, Respondent did have a good faith misunderstanding that the discharges were permitted and did take prompt action to eliminate the discharges after learning that they were in violation of the Act (Tr. 98, 181-82, 197, 238-45). These mitigating factors operate to lessen the increase in the penalty that must be made to reflect Respondent's history of violations and make a 10% increase in penalty appropriate in evaluating this statutory factor. Therefore, the $20,250 penalty determined as warranted in the gravity factor analysis should be increased by $2,025, leaving the total penalty at $22,275.

D. Degree of Culpability

Section 309(g)(3) of the CWA provides that, as a further adjustment factor, the degree of the violator's culpability be taken into account.

Regarding culpability, Complainant argues that the above-discussed history of violations by the Respondent establishes that Respondent knew that the CWA prohibits the discharge of any pollutants without a valid NPDES permit (Comp. Init. Br., p. 22). According to Complainant, Respondent therefore had knowledge that the discharges were illegal prior to their

occurrence and an enhanced penalty is needed to deter future violations of the Act (id. at 22-23).

Respondent argues that its good faith efforts to comply are demonstrated by a compliance study initiated sixteen months before Respondent was aware of the violations (Resp. Init. Br., p. 11). Additionally, Respondent argues that its discharges were halted immediately after Respondent became aware of any problems (id. at 13).

Complainant replies that a repeat violation, particularly after a judicial action in Federal court, is a demonstration of bad faith almost by definition and that Respondent failed to make every effort to comply (Comp. Reply Br., p. 8). Respondent counters that the reason it had not eliminated its discharges earlier was that it did not know that the discharges were illegal (Resp. Reply Br., p. 9).

Several cases have examined the culpability penalty factor in CWA administrative cases. In In re: Sasser, 3 E.A.D. 703, 1991 CWA LEXIS 18 (CJO, Nov. 21, 1991), the Chief Judicial Officer upheld a statutory maximum penalty of $125,000 assessed following an administrative trial where Respondent had persistently refused to comply with federal wetlands requirements. In another case, the presiding judge found that Respondent was culpable in not submitting required reports and upheld an upward adjustment of 50 percent in the proposed penalty, In re: Universal Circuits, CWA-IV-88-001, Initial Decision issued Apr. 11, 1990, pp. 35-36. And, in In re: Rofor Plating Co., CWA-2-I-91-1112, 1993 CWA LEXIS 215, Order on Default issued Sept. 16, 1993, p. 6, the presiding judge found a high degree of culpability where Respondent had been entirely capable of complying with an EPA request for information and where providing the requested data should have been relatively easy for Respondent to do.

Respondent's compliance with the CWA distinguishes this case from Sasser and its

maximum penalty. While Universal Circuits and Rofor Plating suggest that some upward penalty adjustment for culpability here is appropriate, the mitigating factors involved herein indicate that the 50% increase levied in Universal Circuits is too much. As noted previously, Respondent herein mistakenly thought the discharges were permitted, its good faith effort to comply was demonstrated by a compliance study initiated sixteen months prior to Respondent becoming aware of the violations, and the discharges were halted promptly after Respondent became aware of the violations (Tr. 98, 181-82, 197, 238-45). However, in the present case, as in Rofor Plating, p. 6, compliance would have been relatively easy. Additionally, the Respondent had been notified in writing at the conclusion of the prior federal enforcement action that the requirements of zero discharge of sludge and filter backwash water to the waters of the United States contained in the Consent Decree remain in effect pursuant to the CWA (Stip. Ex. C-9). Therefore, in considering the statutory culpability factor, an upward adjustment of 10% in the gravity factor penalty appears appropriate. As a result, another $2,025 in penalty will be added for the culpability factor, making the total penalty to be assessed $24,300.

E. Economic Benefit

The next statutory adjustment factor to be considered under Section 309(g)(3) of the CWA is whether the Respondent gained any economic benefit or savings from the violations. Because the economic benefit resulting from Respondent's noncompliance was rather marginal, Complainant has not requested that any penalty increase be entered because of this factor (Comp. Init. Br., p. 23). Respondent argues that the economic benefit resulting from its delay in purchasing a pump that would have prevented the violations is small. According to Respondent,

the lack of any significant economic benefit is a mitigating factor in favor of reducing the penalty (Resp. Init. Br., p. 11).

While the parties apparently agree that no penalty increase should be assessed in connection with the economic benefit factor, Respondent contends that the absence of economic benefit should result in a reduction of the penalty. Such an approach must be rejected. To mitigate the penalty because of a lack of economic benefit would in effect give the violator a positive gain from the violation, which would certainly not advance the purposes of the CWA, which is intended to prevent violations and punish those who violate the Act. Such a result in assessing this factor would tend to give a reward for the violation, rather than to deter it. It is clear that the economic benefit consideration should only result in, if appropriate, an increase in the penalty to be assessed. In the present case, no increase is warranted because of economic benefit, so this element is a neutral factor and no adjustment to the penalty should be made because of economic benefit.

F. Such Other Factors as Justice May Require

The final statutory adjustment factor under Section 309(g)(3) of the Act entails evaluation of such other factors as justice may require. Neither party has suggested any adjustment to the penalty relating to this factor. As a result, no increase or decrease in penalty will be made in connection with this element.

G. Total Penalty Amount

Respondent had previously been found to have committed twenty-seven violations of the CWA as alleged in the Complaint. However, these violations have been evaluated above as being minor, so a penalty of $750 per violation for a total of $20,250, is determined to be

appropriate to reflect the nature, circumstances, gravity, and extent of the violations. And, in consideration of the Respondent's history of violations and its culpability, two statutory adjustment factors under the Act, the gravity factor penalty of $20,250 is increased by ten percent for each element, which makes the total penalty to be entered herein $24,300. No further increase or decrease in penalty is warranted based on the analyses of the other adjustment factors in Section 309(g)(3) of the CWA.

III. ORDER

Based on the analysis, rulings, findings and conclusions contained herein, it is ordered:

1. That, pursuant to Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), a civil penalty of $24,300 be assessed against Respondent for its discharge of lime sludge into navigable waters in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

2. That payment by Respondent of the full amount of the $24,300 civil penalty assessed shall be made within sixty (60) days of service of the final order of the Environmental Appeals Board[4] by submitting a certified or cashier's check payable to Treasurer, United States of America. Said check shall be mailed to:

US Environmental Protection Agency
Region V
P.O. Box 70753
Chicago, IL 60673

Daniel M. Head
Administrative Law Judge

Dated: May 14, 1996
Washington, DC

[4]Under Section 22.30 of the Consolidated Rules of Practice (Rules), 40 C.F.R. § 22.30, the parties may file with the Environmental Appeals Board a notice of appeal of this decision and an appellate brief within 20 days of service of this initial decision. This initial decision shall become the final order of the Environmental Appeals Board within 45 days after its service, unless an appeal is taken by the parties or unless the Environmental Appeals Board elects, sua sponte, to review the initial decision pursuant to Section 22.30(b) of the Rules. After any appeal or sua sponte review, the order of the Environmental Appeals Board shall be the final order in this case.