UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
KETCHIKAN PULP COMPANY,	)	Docket No. CWA-1089-12-22-309(g)
	)	
Respondent	)	

INITIAL DECISION

DATED:

CWA: Pursuant to Section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g), the Respondent, Ketchikan Pulp Company, is assessed civil penalties totaling $23,000 for two discharges not permitted by a National Pollution Elimination Discharge (NPDES) permit, and one discharge prohibited by a condition in its NPDES permit, all of which discharges occurred at Respondent's Ketchikan, Alaska pulp processing plant and were in violation of Section 301(a) of CWA, 33 U.S.C. § 1311(a).

APPEARANCES:

For Complainant: Mr. Keith E. Cohon, Esq.
Mr. Mark A. Ryan, Esq.
for Region X, United States
Environmental Protection Agency

For Respondent: Mr. Bert P. Krages, II, Esq.
for Ketchikan Pulp Company

I. PROCEDURAL HISTORY

In this proceeding, the Complainant, Region X of the U.S. Environmental Protection Agency ("EPA" or "Agency"), seeks the assessment of $40,000 in civil penalties against the Respondent, Ketchikan Pulp Company (Respondent or KPC), for four alleged violations subject to penalties under Section 309(g) of the Clean Water Act (CWA or the Act), 33 U.S.C. § 1319(g).[1] The original Complaint alleged, inter alia, unpermitted bypasses of the KPC wastewater treatment facility. However, Complainant moved to amend the Complaint to delete all allegations of unpermitted bypass, and to add in lieu thereof: that KPC twice discharged waste without a National Pollution Discharge Elimination System permit (NPDES permit or permit); that KPC once discharged waste in violation of its NPDES permit; and that KPC failed to report a discharge of waste in violation of its permit. The Complainant's motion to amend was granted by Order issued October 23, 1990, and the Amended Complaint was approved for filing.[2]

KPC filed an Amended Answer denying any discharges of pollutants without a permit and denying any discharge or reporting violations of its NPDES permit. Additionally, KPC in its Amended Answer contested the appropriateness of the proposed

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[1] The Clean Water Act shall for simplicity purposes hereinafter be cited by the section number in the original statute and the reference to U.S. Code section will be omitted.

[2] The Complainant also moved to amend the Amended Complaint at the end of the evidentiary hearing (Tr. 294-95), but this motion was withdrawn by Complainant in its Initial Post-Hearing Brief, p. 1.

$40,000 penalty.

After cross motions for accelerated decision were denied, an evidentiary hearing was held in this case on October 20 and 21, 1992, during which the following decisional record was established.[3] Complainant presented three witnesses and introduced fourteen exhibits, numbered C-1 through C-14. All were admitted into evidence except C-14. Respondent presented one witness and offered twelve exhibits, numbered R-1 through R-11 and R-15. These exhibits were all admitted except for R-3.

Following the hearing an order was issued to admit C-14 for the limited purpose of rebutting Respondent's witness concerning testimony on the alleged discharge in violation of the permit. Moreover, exhibits R-3 and R-3a were admitted to determine EPA's position on spill technology involving one of the alleged unpermitted discharges. Initial briefs and reply briefs were submitted according to the schedules established.

In addition, the Presiding Judge on May 12, 1993, issued an order requiring supplemental briefing by the parties on the effect that the requirements of the Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501 et. seq., might have on the disposition of this case. The parties in June 1993 duly filed supplemental briefs on this issue.

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[3] The Complainant's exhibits hereinafter will be cited by letter and number designation as C-1, C-2, etc. and the Respondent's exhibits will be similarly cited as R-1, R-2, etc. Also, the transcript will be cited as Tr. followed by the page number and the briefs will be cited by party with appropriate abbreviations and page numbers, such as Comp. Init. Br., p. 10.

This initial decision will consist of: an overview of the KPC plant operation and the charges, to place the alleged violations in context; a description of the positions of the parties with regard to the matters at issue; an analysis and resolution of the matters at issue; a determination of any penalties to be assessed; and an order disposing of the issues. 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. OVERVIEW

To place the alleged violations in context, it is helpful to take a brief review of the overall KPC plant operation. KPC manufactures pulp from wood chips, which are the raw material that supplies the fiber that is turned into the final pulp product (Tr. 6, 60).

The mill uses a large amount of water, with about 38 to 40 million gallons a day first being drawn from Lake Connell to the water treatment facility at the mill, where that water is treated so it can be used in the pulp manufacturing process. The incoming water flows into a rapid mix tank where flocculent chemicals are added. That mixture is then piped to 3 one million gallon settling tanks where the material is given time for the

heavier particles to settle out as flocculent. However, some particles are light and in suspension and will not settle out, so the water with these particles is sent through sand filters to remove the suspended particles. The finished water then goes to the plant to be used in the manufacturing process. Since the sand filters become clogged with the suspended solids they remove, they have to be cleaned. This cleaning is done by backwashing the filters with fresh water which suspends the solids, agitates them, and discharges them with the backwashing water through outfall 003 into Ward Cove. Since the sand filters cannot be operated and backwashed at the same time, KPC takes the one filter out of service at a time to backwash it, while the other filters keep operating. The flocculent that had settled out in the settlement tanks is periodically discharged from the bottom of the tanks through outfall 003 into Ward Cove, since continuous removal of the flocculent in the settlement tanks is not necessary for efficient operation of the settlement tanks. Of the solid material involved in the water treatment process about one-third is discharged as filtration backwash and two-thirds settles in the settlement tanks. (Tr. 24, 51-54, 227; Ex. R-5.)

A chemical process is used to free the fiber from the wood chips and produce the pulp. This is done by using a digester, which is a large pressure cooker where heat and pressure is applied to the wood chips to free the cellulose material and produce the pulp. The two ingredients used in the digester are

the chips and cooking acid. The digester is allowed to cook for a period of time and, when done, the digester is blown out at the bottom to separate the fiber from the cooking acid, which is magnesium bisulfite. There are nine of these batch digesters at the KPC facility. (Tr. 60, 61.)

Three types of wastewater are generated in the pulp production at the KPC plant. A large portion of this wastewater is discharged without treatment into outfall 001. This includes cooling water with low amounts of pollutants, and some bleach plant wastewater, especially from the acid side of the bleach plant. These discharges comprise about half the discharge from the KPC facility, involving about 18 million gallons of wastewater per day. (Tr. 24, 25.)

The other wastewater, some containing high amounts of solids, is routed to a primary clarifier, which is used to separate the solids from the wastewater. The discharge from the primary clarifier can go either directly to the receiving water through outfall 002 or a portion of this wastewater can be routed through a secondary treatment facility. In addition, other wastes generated in the facility are high in organic matter and have low solid content, so they are not sent through the primary clarifier but go directly to the secondary treatment facility. (Tr. 25.)

The secondary treatment facility is composed of two units, an aeration basin and 2 settling tanks. The discharge from the secondary treatment facility is about 6 million gallons a day

through outfall 002. (Tr. 26.)

This KPC facility is subject to an NPDES permit issued by EPA, which permit governs certain discharges from the facility, prohibits other discharges and sets reporting requirements (Ex. R-2).

With this background, the four violations alleged in the October 9, 1990 Amended Complaint can be reviewed. The first violation alleges that the Respondent, on August 16, 1989, discharged flocculent from the plant's water treatment facility and that that discharge was not covered by the KPC NPDES permit, so it constituted a discharge of pollutants in violation of Section 301(a) of the CWA (Amended Complaint, pp. 2, 3). The second violation asserts that, on September 13, 1989, KPC spilled 4,450 gallons of cooking acid inside the facility and then hosed this material through floor drains and discharged it through the main sewer into Ward Cove. The Amended Complaint avers that this discharge of cooking acid was not covered by the Respondent's NPDES permit and, therefore, was a violation of Section 301(a) of the CWA. (Id. at 3.) As a third violation, the Amended Complaint alleges that, on August 16, 1989, KPC discharged sludge from the secondary wastewater treatment facility in violation of Section III F of Respondent's NPDES permit, which also constituted a violation of Section 301(a) of the CWA (id. at 2, 3). The fourth violation asserts that KPC failed to notify EPA of the August 16, 1989 discharge of sludge from the secondary wastewater treatment facility, as required by Section II D of the

NPDES permit. The Amended Complaint avers that this failure to notify is a violation of Section 301(a) of the CWA. (Id. at 3, 4.) For the four alleged violations, the Complainant seeks a total civil penalty of $40,000, and asks that, under Section 309(g) of the CWA, $10,000 be assessed per violation (id. at 4, 5; Comp. Init. Br., p. 23).

Next, the positions of the parties on the four alleged violations will be reviewed insofar as is necessary for a reasonable disposition of the matters at issue in this cause.

III. POSITIONS OF THE PARTIES

1. COMPLAINANT'S POSITION

a. Discharge of Flocculent

On August 16, 1989, KPC discharged flocculent from the settling tank of its primary water treatment plant into Ward Cove. Complainant argues that this discharge was unpermitted. According to Complainant's view of the NPDES permit regulations, the scope of KPC's permit turns upon what is disclosed in the permit application as intended discharges, and whether the permit writer grants approval or limits such discharges. Hence, full disclosure in the permit application on intended discharges is essential in order for EPA to evaluate the proposed discharges and limit those posing risk to the environment. Since KPC did not disclose flocculent as an intended discharge in its permit application (Ex. R-2), KPC's permit does not authorize this discharge. As such, the discharge of flocculent is subject to regulation and enforcement under the CWA. (Comp. Init. Br., pp.

21-23.)

To emphasize that what is disclosed in the permit application affects the permit scope, Complainant states that KPC requested to discharge only filtration backwash from the primary water treatment plant. As filtration backwash is derived from the rapid sand filters, this request did not include the discharge of flocculent from the settling tank. (Ex. R-2; Tr. 51-52, 56.) Therefore, KPC's permit to discharge filtration backwash does not impliedly grant approval to discharge flocculent from the settling tank. (Comp. Init. Br., pp. 21-23.)

Complainant offered testimony that the potential impact of this discharge on Ward Cove was significant. First, Mr. Danforth Bodien, an expert in developing effluent guidelines for the paper and pulp industry, testified that flocculent is a settleable solid which deposits along the Cove's floor and may threaten organisms living in the bottom sediment (Tr. 53). Second, Ms. Amy Crook, a fisheries biologist studying the effect of pulp in receiving waters, stated that the primary pollutant for flocculent is suspended solids, which can adversely impact upon fish and plant life (Tr. 172). Complainant alleges that Respondent achieved an $11,000 benefit from noncompliance. For this amount, the flocculent could have been land disposed rather than simply discharged into the Cove. (Comp. Init. Br., pp. 28-29; Tr. 57.)

b. <u>Discharge of Cooking Acid</u>

On September 13, 1989, KPC discharged 4,450 gallons of

cooking acid into Ward Cove. Again, Complainant argues that the cooking acid discharge was unpermitted. This situation occurred when a digester valve was left open after electrical maintenance and an employee, unaware that the valve was open, filled the digester with cooking acid (Ex. C-1). To clean up, the cooking acid spilled onto the floor was washed by hose down the floor drains which flow into main outfall and then into Ward Cove.

As with flocculent, Complainant argues that the cooking acid discharge is affected by its undisclosed nature in the permit application. However, unlike the conceivable request for discharging flocculent, Complainant contends that cooking acid spills do not constitute something expected in effluent during normal operations. Rather, Complainant avers that spill containment was envisioned as part of normal operations. Thus, according to Complainant, EPA never ratified cooking acid spills as acceptable discharges. (Comp. Init. Br., pp. 13-15.)

Complainant considered this discharge environmentally harmful because cooking acid has a low pH and is highly acidic (Tr. 61). For this discharge, Complainant alleged that Respondent reaped a benefit of $170,000. Complainant averred that spill containment was customary practice at pulp mills and that Respondent could have instituted technology to prevent the cooking acid discharge for the above figure. (Tr. 64-66.)

c. <u>Discharge of Sludge from the Aeration Basin</u>

Complainant alleges that KPC discharged sludge in violation of the Removed Substances provision of the NPDES permit (Ex. R-1,

Section III F., p.10), which prohibits the discharge of sludge removed during wastewater treatment. Complainant avers that KPC violated this condition when it discharged sludge from the aeration basin on August 16 through August 23, 1989. Complainant argues that Section III F of the permit is an absolute bar to the discharge of sludge removed from wastewater regardless of whether the plant is operating or the source of the wastestream. (Comp. Init. Br., pp. 4-10, 23-24.)

Under normal operations, solids generated in the aeration basin flow into the settling tank where the heavier solids are separated and settle at the bottom as sludge. Complainant argues that Respondent unnecessarily bypassed the settling tank of the secondary wastewater treatment plant. The settling tank is where sludge is ordinarily removed before discharging effluent into Ward Cove. Complainant contends that, under the bypass provision of the NPDES permit (Ex. R-1, Section III G, p. 10), a bypass can only be applicable in this case if it is "necessary for maintenance." Yet, in Complainant's opinion, the bypass cannot be considered necessary, since there were alternatives available to drain the aeration basin other than discharging the contents into Ward Cove. For example, Mr. Bodien testified that Respondent could have obtained pumps to empty the aeration basin for a cost of $2,000 (Tr. 49). Hence, the discharge in this instance should have been avoided where the technological means exist to prevent it. (Comp. Init. Br., pp. 4-10.)

Complainant stated that this type of discharge can have a

serious negative effect on Ward Cove. Mr. Bodien testified that sludge is settleable in nature, thereby having an impact on the bottom dwellers of the Cove (Tr. 38-39). Also, Ms. Crook pointed out that the primary pollutants of concern with sludge are suspended solids and biological oxygen demand (BOD) (Tr. 168-69). BOD has the ability to reduce oxygen in the receiving water when it decomposes. As such, BOD can deprive plant and fish life of their required oxygen intake (Tr. 168). Complainant asserts that this deleterious impact is especially harmful because Ward Cove is already on the State of Alaska's impaired quality list for dissolved oxygen problems (Tr. 166).

d. Notification of Sludge Discharge

Complainant alleges that KPC violated Section II J of its NPDES permit (Ex. R-1, p. 8) because of its failure to notify EPA of the alleged noncompliance with Section III F of the permit, in connection with the discharge of sludge from the secondary wastewater treatment facility's aeration basin. Under Section II J, KPC must submit a notice of noncompliance at the time it submits its monitoring reports but no noncompliance notice was sent with KPC's monitoring reports. (Comp. Init. Br., p. 10.)

Complainant further argues that this reporting violation is not barred by the PRA because Section II J is based on Section 122.41(l)(7) of the EPA NPDES Regulations, 40 C.F.R. § 122.41(l)(7), which Section had a current Office of Management and Budget (OMB) approval number at the time of the alleged violation for discharging sludge (Comp. Supp. Br. pp. 1, 2).

2. RESPONDENT'S POSITION

a. Flocculent and Cooking Acid

Respondent alleges that the discharges of flocculent and cooking acid which occurred were in compliance with its NPDES permit. KPC contends that Section 1 A 1 of its permit places no limits on the internal wastestreams it can discharge from outfalls 001, 002 and 003, except for restrictions on discharges into outfall 001 of fecal coliform and chlorine residual associated with the plant's domestic waste (Ex. R-1, pp. 3-5). Therefore, Respondent argues that the plain language of the permit allows it to discharge any other pollutant into its three outfalls, as long as permit limits are not exceeded. (Resp. Init. Br., p. 18.)

In this regard, the permit does restrict the amount of biological oxygen demand (BOD), total suspended solids (TSS) and pH that may be discharged (Ex. R-1, p. 3). While the pollutant of concern for flocculent is TSS (Tr. 172) and for cooking acid is pH (Tr. 61), Respondent asserts that there are no specific discharge limitations for flocculent and cooking acid as such. Since it is uncontested that neither the TSS nor the pH limits in the permit were exceeded, KPC avers that EPA cannot take enforcement action for the discharges of flocculent and cooking acid, since the language of the permit does not prohibit such discharges. (Resp. Init. Br., pp. 18, 19.)

To buttress its position, the Respondent relies on Section 402(k) of the CWA which provides that a permittee is in

compliance with the CWA, if it meets the limitations and requirements of its permit. Therefore, KPC asserts that pollutants not prohibited or limited by the permit can be discharged unless and until the permit is modified, and cites in support thereof the National Pollutant Discharge Elimination System Permit Regulations: Final Rule, 49 Fed. Reg. 37998, 38002 (September 26, 1984). Accordingly, Respondent alleges that, since it is in compliance with its permit, it is also in compliance with the CWA pursuant to Section 402(k) and not subject to an enforcement proceeding. (Id. at 18, 28-34.) This argument by Respondent is the so-called "permit as a shield" defense.

Moreover, as to the spill of cooking acid, KPC asserts that Section IV K of its NPDES permit prohibits spills of certain substances designated in Section 311 of the CWA but does not forbid spills of non-designated substances. The substances included in Section 311 are oil and other hazardous substances none of which are discharged by the Respondent. KPC argues that, by specifically limiting certain discharges in the permit but not others, the Agency implicitly allowed the discharge of substances such as cooking acid, which is not a designated substance under Section 311 of the CWA. (Id. at 20, 21.)

Respondent also contends the discharge of flocculent was disclosed to the extent required by the permit application. First, according to KPC, the permit application regulations only request a general description of the processes and operations

contributing to wastewater effluent. Respondent avers that it met this requirement as to flocculent because filtration backwash represents the aggregate of effluent from all sources in the primary water treatment plant. Second, Respondent alleges that flocculent is the same material as filtration backwash. Thus, while not explicitly listing flocculent, this discharge was revealed. (Id. at 13-16, 18-26.)

As to the cooking acid spill, Respondent contends that language in Section II C of the permit application form (Ex. R-2, p. 5) instructs the applicant to exclude spills when describing the plant effluent discharges as intermittent or seasonal, as required by Section 122.21(g)(4) of the EPA NPDES Regulations, 40 C.F.R. § 122.21(g)(4). Therefore, KPC asserts that it was not required to set out a cooking acid spill as a discharge, since it complied with the application requirements. (Resp. Reply Br., pp. 2-5.)

Additionally, Respondent contends that EPA's development documents on effluent guidelines for the paper and pulp industry (Exs. R-3[4] and R-3a[5]), illustrate that spill control technology was not practicable under Best Practicable Control Technology

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[4] Development Document for the Interim Final and Proposed Effluent Limitations Guidelines and Proposed New Source Performance Standards for the Bleached Kraft, Groundwood, Sulfite, Soda, Deink, and Non-Integrated Paper Mills Segment of the Pulp, Paper and Paperboard Mills Point Source Category, January 1976.

[5] Development Document for Effluent Limitations Guidelines for the Bleached Kraft, Groundwood, Sulfite, Soda, Deink and Non-Integrated Paper Mills Segment of the Pulp, Paper and Paperboard Mills Point Source Category, December 1976.

(BPT) limits. Moreover, these documents exemplify that EPA knew spills were possible but placed no limit on them in the permit. (Resp. Reply Br., pp. 8-10.)

b. Discharge of Sludge from the Aeration Basin

Respondent argues that the discharge of sludge from the aeration basin in the secondary wastewater treatment system did not violate its NPDES permit because the aeration basin was drained for necessary maintenance. On August 16, 1989, because of a drought, the KPC mill was shut down and no more influent was flowing to the secondary water treatment facility. When the treatment facility was shut down, Respondent decided to drain the aeration basin to perform maintenance on the aeration system, to prevent a failure of this system. (Tr. 231-33.) Section III F of the KPC permit prohibits the discharge into navigable waters of sludge removed in the course of treatment. Respondent contends that the aeration basis discharge did not involve sludge removed during the course of treatment because the treatment facility had already closed. Thus, the discharge from the basin was done as necessary maintenance, not during the course of treatment. And, because Section III F of the permit restricted the discharge of sludge removed in the course of treatment, KPC urges that the permit should not be interpreted as prohibiting sludge incidently removed in the course of necessary maintenance since Section 1 A 1a of the permit allows the Respondent to discharge other solids not removed in the course of treatment. (Resp. Init. Br., pp.34-37; Resp. Reply Br., pp. 11-13.)

Respondent also takes the position that the contents of the aeration basin represented a separate wastestream not subject to CWA regulation. Respondent alleges that not all wastestreams require regulation if they are within the effluent limitations of the permit. Moreover, auxiliary systems to prevent discharges are not warranted in instances like this under the Act where the discharges are within effluent limits. (Id.)

c. Notification of Sludge Discharge

Respondent argues that it was not required to notify EPA of the sludge discharge because there was no violation of its NPDES permit involved in the discharge from the aeration basin. Also, KPC contends that the Complainant failed to present evidence that the Respondent did not report a violation of the permit, and that this alleged violation must be rejected on evidentiary grounds. (Resp. Init. Br., p. 37.)

Further, KPC avers that no penalty can be sought for this alleged violation because its NPDES permit did not display either a current OMB control number or a disclaimer that the permit was not subject to the Paperwork Reduction Act. Accordingly, Respondent takes the position that Section 3512 of the PRA bars the Complainant from collecting any penalty for the alleged failure to notify the Agency of the permit violation. (Resp. Supp. Br., pp. 2, 3.)[6]

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[6] KPC also argues that the Agency cannot impose any penalties for the alleged unpermitted discharges of flocculent and cooking acid since information as to these discharges was not asked for pursuant to a request that displayed a current OMB control number or a disclaimer that the request was not subject

d. Environmental Harm and Economic Benefit

Regarding the cooking acid spill, the Respondent points out that, in comparison to the flow in the outfall through which the cooking acid was discharged, the 4,450 gallons of spilled cooking acid represented a very small, almost indistinguishable part of the total discharge of 18 million gallons a day through outfall 001 (Tr. 245-47; Exs. R-8 and R-9). Additionally, before being discharged into the Cove, this spill merged with other wastestreams and was diluted. Thus, as pH neutralizes easily and no pH limits were exceeded, Respondent contends that no environmental harm was established from the cooking acid spill. (Resp. Init. Br., pp., 16-18.)

Concerning flocculent, Respondent argues that Complainant's witnesses have never examined flocculent or how it reacts in the environment. Thus, they lack the required knowledge to estimate how flocculent will affect Ward Cove. Moreover, these witnesses have not established any concrete environmental harm from this discharge. (Id. at 7-12, 38; Resp. Findings of Fact, pp. 5-7.)

As for economic benefit, Respondent disputes the benefit of land disposal of the flocculent that was discharged. According to Mr. Higgins, KPC's plant manger, this flocculent is very difficult to dewater. Thus, without adequate technology to

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to the PRA (Resp. Supp. Br., pp. 1, 2). However, the alleged violations involving flocculent and cooking acid relate to their unpermitted discharge, not to any failure to report these wastestreams as part of the permit application. Therefore, the Respondent's reliance on the PRA on this issue is misplaced and is hereby rejected.

dewater, the feasibility of land disposal is doubtful. (Tr. 229.)

III. ANALYSIS AND RESOLUTION

As can be gleaned from the preceding discussion in this decision, there are various major issues in this cause. First, there is the question of whether the discharges of flocculent from the water treatment plant and of cooking oil from the digester area were not allowed under KPC's NPDES permit, and therefore constituted discharges of pollutants without a permit in violation of Section 301(a) of the CWA. This issue relates to the scope of KPC's permit and the disclosures in the Respondent's application for the permit. Intertwined with the permit scope and application disclosure issue is the permit as a shield defense set out in Section 402(k) of the Act. In pertinent part, Section 402(k) provides that compliance with an NPDES permit issued pursuant to Section 402(a) of the Act, is deemed compliance with Section 301(a) of the CWA, which makes the discharge of any pollutant without a permit unlawful. If the flocculent and cooking acid discharges are allowed under KPC's permit, the permit has been complied with and, therefore, under Section 402(k), the Respondent has complied with the CWA.

A second substantial issue is whether the discharge of sludge from the secondary water treatment facility while the plant was shut down, was in violation of the prohibition on discharging sludge set out in Section III F of the Respondent's NPDES permit. Ancillary to this is the dispute as to whether the

failure of KPC to notify EPA of this discharge was a violation of the reporting requirement in Section II.D of the permit. This reporting violation is directly affected by whether the discharge of sludge was a permit violation. Moreover, another issue relating to this alleged reporting violation is whether the Agency is barred from assessing any penalty for the failure to report because of the provisions of the Paperwork Reduction Act.

The above set out issues will be analyzed and resolved as necessary in this section of the initial decision.

a. The Flocculent and Cooking Acid Discharges

Section 402(a)(1) of the CWA governs permits and provides that the Agency may issue a permit for the discharge of any pollutant, notwithstanding the ban on the discharge of pollutants in Section 301(a) of the Act, upon condition that the discharge will meet all applicable requirements of the CWA or such conditions as the Agency determines are necessary to carry out the provisions of the Act. KPC was issued its NPDES permit pursuant to this statutory provision, and it is the interpretation of that permit and the Respondent's application for the permit that is critical in determine whether the discharges are violations of the CWA.

As noted above, the basic question presented is whether the discharges of flocculent and cooking acid were allowed by the Respondent's NPDES permit. If so, under Section 402(k) of the Act, KPC has complied with the CWA and these discharges are not violations of the Act.

The authorities relating to the scope of an NPDES permit and the permit as a shield defense are mixed and do not provide clear guidance on this matter. In a holding favorable to KPC's position, the court in Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co. (hereinafter "Eastman Kodak"), 809 F. Supp. 1040, 1049 (W.D.N.Y. 1992), aff'd 37 ERC 1857 (2d Cir. 1993), dismissed a citizen's suit seeking enforcement of the CWA for the discharge of pollutants not listed in the Kodak NPDES permit. In doing so, the court found that liability must be determined not in light of the Act's general prohibition of the discharge of pollutants in Section 1311(a) [301(a)], but on whether a violation the permit conditions could be established, id. at 1045.

In affirming the trial court, the appellate court in Eastman Kodak, 37 ERC at 1858, noted that there was extensive disclosure in the permit application, which described estimated discharges of 164 substances, from which it was necessary to establish effluent limitations for only 25 pollutants. Although no limitation was placed on the large majority of the substances listed in the application, the appellate court pointed out that these substances received specific regulatory inquiry, id. at 1859, n. 7. Given these circumstances, the appellate court indicated that, once within the NPDES scheme, the permittee may discharge pollutants not specifically listed in the permit, as long as appropriate reporting requirements are complied with and any new limitations imposed on such pollutants are met. It also

set out that, under the regulatory scheme, the permit is designed to identify and limit only the most harmful pollutants while leaving control of the vast number of other pollutants to disclosure requirements. Id. at 1860.

In contrast, in Atlantic States Legal Foundation, Inc. v. Reynolds Metals Co., 31 ERC 1156 (N.D.N.Y. 1990), the court declared that the CWA prohibits all discharges that are not authorized by a permit. In that case, the defendant was found to be discharging PCB's without disclosing this pollutant in its application. The court indicated that the plain language of Section 301(a) fosters the proposition that discharging pollutants not referenced in a permit is unlawful under Section 301(a). Id. at 1158.

In U.S. v. Tennessee Gas Pipeline Co., Ruling issued October 8, 1991, pp. 4, 5 (W.D. La.), another case dealing with the permit as a shield defense, the court denied the defendant's motion to dismiss and pointed out that the controlling language of the CWA is unambiguous that any discharge except pursuant to a permit is illegal. The court cited with approval the holding in U.S. v. Tom-Kat Development, Inc., 614 F. Supp. 613, 614 (D. Alaska 1985) that a plain reading of Section 402 reveals a congressional intent to create a limited liability shield for alleged violators who properly applied for the required NPDES permit, id.

Also, directly in point is the court's ruling in U.S. v. Ketchikan Pulp Co., Order From Chambers issued October 5, 1993,

pp. 1, 2 (D. Alaska). This case involved, inter alia, the unintentional discharge of cooking acid by KPC into Ward Cove from the same pulp plant that is the subject of the instant proceeding. KPC relied on the same permit as a shield defense that it is urging herein. However, the court rejected the KPC argument. Noting that the permit does not specifically address cooking acid, the court held that:

> . . . . Section 402(k) is clearly to be read in conformity with the other parts of § 402 which limit the Secretary's power to issue permits. Since it is unlikely that the precise discharge at issue here could have been permitted expressly, it would be unreasonable to interpret the statute to permit it implicitly.
>
> More reasonable is the suggestion that § 402 is intended solely to protect permit holders against attempted retrospective changes in regulations. Since no change in the regulations is at issue here, § 402 would appear not to be controlling. See, e.g., Inland Steel Co. v. Environmental Protection Agency, 574 F.2d 367, 372-74 (7th Cir. 1978). [Id.]

Given the conflicting authority, the conclusion that seems most reasonable is that an analysis of the NPDES permit and permit application is critical in determining whether the shield defense applies. If the discharges can reasonably be considered as part of the operation for which the permit application was made, then grant of the permit would shield the discharges from being illegal.

The initial consideration is whether either substance is specifically covered in the permit or permit application. A review of the permit indicates that neither cooking acid (magnesium bisulfite) nor flocculent is mentioned as part of the discharge (Ex. R-1), so attention must be turned to the permit

application.

An argument was advanced by KPC that cooking acid, which is comprised of magnesium bisulfite, could have been considered as disclosed in the application since discharges of maganese and sulfite were covered in the KPC application (Ex. R-2, p. 12). However, this argument is rejected since the evidence established that magnesium and sulfite are different chemical compounds than magnesium bisulfite. And, while the permit application did list maganese and sulfite as part of the effluent, it is not warranted to combine the two to conclude that the application sought permission to discharge magnesium bisulfite, a distinct compound. (Tr. 105-07, 123-25.) Therefore, it must be determined that the permit application did not specifically request permission to discharge cooking acid, which is magnesium bisulfite.

Similarly, Respondent contended that filtration backwash, which was disclosed in the application (Ex. R-2, p. 4), is the same substance as flocculent (Tr. 227-28). While the evidence was in conflict on this (Tr. 51-53, 228-29, 277), it is more reasonable to conclude that filtration backwash and flocculent are different. The flocculent is not discharged by backwashing but is drained directly through a separate line as shown on Ex. R-5. And, in resolving the conflicting testimony, it is warranted to find that flocculent is a heavier, more settled substance than the suspended filter backwash solids that are backflushed into the outfall. It follows from this analysis that flocculent was not specifically covered as part of the discharge

in the permit application.

Since neither substance is specifically covered in the KPC permit or permit application, attention can now be focused on whether the disclosures by KPC in applying for the permit provide support for determining that the flocculent and cooking acid discharges were implicitly covered by the permit. In connection with this determination, consideration must be given to the EPA NPDES Regulations, 40 C.F.R. Part 122,[7] which govern the issuance of a NPDES permit. Section 122.21(g) of the NPDES Regulations lays out the application requirements for Respondent, a manufacturing discharger. Since the discharge of flocculent and cooking acid involve distinct determinations, they will now be considered separately in assessing the permit application implicit disclosure issue.

1. Flocculent

The application requirement covering a discharge such as the flocculent discharge involved herein is contained in Section 122.21(g)(3) of the NPDES Regulations, governing average flows and treatment, which prescribes:

> A narrative identification of each type of process, operation, or production which contributes wastewater to the effluent for each outfall...the average flow which each process contributes; and a description of the treatment the wastewater receives.

And, since it has been established that flocculent discharge

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[7] In citing the NPDES Regulations hereinafter, for brevity the reference to the Code of Federal Regulation volume, "40 C.F.R." will be omitted.

from the settlement tanks is not a continuous discharge, Section 122.21(g)(4) of the NPDES Regulations covering intermittent flows, also applies. That Section requires, for intermittent flows, a description of the frequency, duration and flow rate of each discharge occurrence.

When Respondent submitted its original permit application (Ex. R-2), EPA's comments on the final rule relating to Section 122.21(g)(3) stated:

> [P]rocesses and operations may be described in general terms, in response to commenters who feared that this requirement would reveal trade secrets. This general identification of processes contributing to wastewater effluent is necessary to identify the standards and limitations applicable to the discharge. [45 Fed. Reg. 33534 (May 19, 1980)].

The Respondent's NPDES permit application covers the disclosure requirement of Section 122.21(g)(3) of the NPDES Regulations in Section II B, where KPC lists filtration backwash under the heading of Water Treatment Plant (Ex. R-2, p. 4). Respondent alleges that it met this disclosure requirement by characterizing all discharges from the water treatment plant as filtration backwash.

However, Respondent's position is not persuasive. The NPDES Regulations demand extensive factual information on effluent characteristics and treatment processes, N.R.D.C., Inc. v. EPA, 822 F.2d 104, 117 (D.C. Cir. 1987). As the above quoted comments on the final rule stated, the purpose of the general description was in response to fears about divulging trade secrets. Moreover, those final rule comments noted that the identification

of the processes contributing to wastewater effluent is necessary to identify the standards and limitations applicable to the discharge. Thus, although processes contributing to the discharge may be described in general terms, each area adding effluent to the discharge must be disclosed to identify the applicable effluent standards and limitations.

In the instant case, the only discharge listed in Section II B of the permit application (Ex. R-2, p. 4) for the water treatment plant is filtration backwash. It has already been found, supra, that filtration backwash is not the same as the flocculent discharged from the settlement tanks. The filtration backwash contains lighter, suspended solids and is discharged on a continuing basis, whereas the flocculent is heavier particles that have settled in the settlement tanks and is intermittently discharged through the flocculent line. Since the flocculent discharge is not part of the filtration backwash, it cannot be considered as implicitly disclosed by KPC listing filtration backwash in its permit application.

With the above analysis, it is warranted to conclude that the flocculent discharge from the settlement tanks at the water treatment plant was not disclosed either specifically or implicitly in the KPC permit and that, therefore, the flocculent discharge was not covered by the KPC permit. The flocculent discharge is, accordingly, found to be an unpermitted discharge in violation of Section 301(a) of the CWA.

In addition, two other argument made by KPC merit brief

comment. Respondent contends that no violation should be found for the flocculent discharge because the concern at issue regarding flocculent is TSS and the discharge was not shown to have exceeded the effluent limitations for TSS contained in Section 430.112 of the EPA Regulations on the Dissolving Sulfite Pulp Subcategory (hereinafter the "Pulp Regulations"), 40 C.F.R. § 430.112. The fact that an effluent limitation violation has not been established does not of itself relieve KPC of liability. The permit process allows the Agency to assure that the applicant meets any applicable water quality standards, treatment standards or schedule of compliance standards, in addition to basic effluent limitations, Carr v. Alta Verde Industries, Inc., 931 F.2d 1055, 1060 n.3 (5th Cir. 1991). As mentioned above in the EPA comments on the final rule involving Section 122.21(g)(3) of the NPDES Regulations, disclosure of the processes contributing to the effluent is necessary to identify the standards and limitations applicable to the discharge. However, in the instant case, Respondent's permit was issued based upon the disclosed discharge of only filtration backwash at the water treatment plant. Without further disclosure, the mandates of the Act would be thwarted by allowing discharges from operations such as the settling tanks that might need to be prohibited or treated differently before discharge.

Respondent's argument that no liability is applicable because Complainant failed to establish environmental harm from the flocculent discharge is also without merit. Enforcement

actions under the CWA do not require establishing a correlation between the discharge and the quality of the body of water where effluent was discharged, Mumford Cove Ass'n, Inc.,v. Town of Groton, 640 F. Supp. 392, 395; Hooker Chemicals & Plastics Corp. v. Train, 537 F.2d 620, 623 (2d Cir. 1976). Accordingly, Respondent's argument is rejected that violations of the CWA require a causal link between the discharges and environmental harm to Ward Cove, id.

2. Cooking Acid

It has already been established, supra, that cooking acid, magnesium bisulfite, is not the same compound as maganese and sulfite, so it is clear that the permit application did not specifically disclose the discharge of cooking acid. However, KPC argues that, since the cooking acid discharge resulted from a spill, the discharge should be considered as covered because EPA was aware that spills could occur during plant operation but placed no spill control requirements in the permit.

Had the cooking acid spill resulted from normal plant operation, this position by the Respondent might be more persuasive. However, the cooking acid spill did not result from normal plant operation but occurred on September 13, 1989 when a digester valve was left open after electrical maintenance and an employee, unaware that the valve was open, released the 4,450 gallons of cooking acid into the digester (Ex. C-1). Cooking acid is a recyclable material that is not expected to be discharged since it is not in the interest of KPC to discharge

this reusable material. (TR. 60, 65, 67.)

It is not necessary, therefore, to sort through the parties' arguments on the nuances in the NPDES Regulations and the background documents relating to spills and spill technology, because the cooking acid spill in this cause was not one that could be reasonably anticipated or defended against. Had the discharge occurred in a normal plant operation that might have been foreseen and provided for through spill technology, such a regulatory and background analysis might have been in order. However, under the circumstances, where unexpected human error caused the spill, no viable argument can be made that such a spill could have been foreseen and taken into account as part of the application process, thereby making the discharge one allowed implicitly under the permit.

As with flocculent and the TSS limitations, Respondent contends that no violation should be found for the cooking acid discharge because the concern at issue regarding cooking acid is pH and the discharge was not shown to have exceeded the effluent limitations for pH contained in Section 430.112 of the Pulp Regulations, 40 C.F.R. § 430.112. For the same rationale set out on this argument as it related to flocculent, the Respondent's position is rejected insofar as the argument relates to cooking acid. Similarly, the KPC contention that no violation should be found because no environmental harm resulted from the cooking acid spill is not well taken for the same reasons set out in rejecting this position with regard to the flocculent discharge.

Based on the above analysis, it must be found that the cooking acid spill was not implicitly covered by KPC's permit and therefore constitutes an unpermitted discharge in violation of Section 301(a) of the CWA. This finding is buttressed by the above quoted well-reasoned ruling by the court in U.S. v. Ketchican Pulp Co., Order from Chambers issued October 5, 1993, pp. 1. 2 (D. Alaska), where it was held regarding a cooking acid discharge from the KPC plant involved herein that:

> . . . . Since it is unlikely that the precise discharge at issue here could have been permitted expressly, it would be unreasonable to interpret the statute to permit it implicitly.

3. Violation Conclusions

In light of the findings set out above in this section on the flocculent and cooking acid discharges, it must be, and hereby is, concluded that neither discharge was permitted either expressly or implicitly by the Respondent's permit. Therefore, both the flocculent discharge and the cooking acid discharge are unpermitted discharges in violation of Section 301(a) of the CWA.

b. Discharge of Sludge from the Aeration Basin

This alleged violation involves whether the sludge discharge is prohibited by Section III F of Respondent's permit (Ex. R-1, p.10), which provides:

> Solids, sludge, filter backwash, or other pollutants removed in the course of treatment or control of wastewaters shall be disposed of in a manner such as to prevent any pollutant from such materials from entering navigable waters.

Respondent alleges that Section III F is not triggered by

the discharge from the aeration basin because the discharge did not occur in the course of treatment. At the time the aeration basin was drained no wastewater was flowing into the basin because the system was closed due to drought conditions. This argument is not persuasive. The sludge in the aeration basis would not have been there had the wastewater it settled from not been sent through the aeration basin as part of the secondary wastewater treatment. It follows, therefore, that the sludge was removed from the wastewater in the course of treatment or control of the wastewater. Accordingly, Section II F of the permit is applicable and KPC should have disposed of the sludge in the aeration basin in a manner that would have prevented it from entering Ward Cove, a navigable water.

Respondent also asserts that this sludge discharge was done as essential maintenance, which makes the bypass of the secondary treatment plant's settling tanks permissible under Section III G 1 of the KPC permit (Ex R-1, p.10). Section III G 1 provides that the permittee may allow a bypass of a treatment facility to occur if the discharge does not exceed effluent limitations and if the bypass is done for essential maintenance to assure efficient operation.

The bypass provisions of the permit are based on Section 122.41(m) of the NPDES Regulations. In the EPA comments on the final rule adopting Section 122,41(m), 49 Fed. Reg. 38037 (Sept. 26, 1984), essential maintenance is as described as maintenance that cannot wait until the production process is not in

operation, in contrast to routine maintenance that can be performed during periods of non-process operation. In the instant case, the sludge discharge occurred when the plant was in a non-process operation mode since the plant was shut down due to a drought. KPC did not show that the sludge discharge maintenance was one that could not wait until the production process was not in operation. Rather, the plant was not in operation because of the drought, and it was fortuitous for the Respondent to perform this maintenance with the plant in a shut down condition. The facility was not shut down for the purpose of performing the sludge discharge maintenance to assure efficient operation. Therefore, this maintenance must be considered routine, rather than essential and Section II G 1 of the permit cannot be used by KPC to justify its bypass of the use of the settlement tanks in the secondary treatment system in making the aeration basin discharge.

Respondent also relies on Section III G 3(2) of the permit (Ex. R-1, p. 10) as allowing the bypass in connection with the sludge discharge. Under Section III G 3(2) a bypass is prohibited unless:

> There were no feasible alternatives to bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance.

Section II G 3(2) is based on Section 122.41(m)(4)(B) of the NPDES Regulations. In its comments on the adoption of a final rule on this Section, EPA concluded that the term "reasonable engineering judgment" by its nature requires a case specific determination and should not be defined by regulation because of the complex circumstances that arise in individual cases, 49 Fed. Reg. 38037 (September 26, 1984).

Respondent contends that it did not have any feasible alternatives to the bypass involved in the sludge discharge. KPC relies on its testimony that, while the mill now has the capacity to re-route material from the aeration basin, the technology to achieve this modification was not available during August 1989 (Tr. 267, 292). Moreover, Respondent argues that auxiliary systems are not warranted when effluent limits are not exceeded. It is uncontested that the effluent limitations involved, those for BOD and TSS, were not exceeded by the sludge discharge.

However, the Complainant's testimony on this issue was more credible. In this regard, it was brought out that portable pumps could have been used to prevent the bypass. These pumps could have been shipped from Seattle to the plant in four days and could have emptied the aeration basin into the settling tanks in another four days. The cost to secure the portable pumps was a moderate sum of $2000. (Tr. 47-50.) As a result, there existed an inexpensive, readily available means to empty the sludge from the aeration basin into the settling tank, and, in the exercise of reasonable engineering judgment, KPC should have used portable

pumps as back-up equipment to prevent the bypass. Consequently, Respondent's reliance on Section III G 3(2) of the permit is misplaced and the KPC argument that that Section can be used to justify the sludge discharge is rejected.

Respondent further argues that discharge of the contents of the aeration basin constituted a separate wastestream, which is not subject to regulation, if it is within effluent limits. As noted above, it is uncontested that the effluent limitations involved, those for BOD and TSS, were not exceeded. Despite this, KPC cannot be relieved of liability for the violation involved in the sludge discharge. This is the same argument advanced by KPC in connection with the TSS effluent limitations relating to flocculent discharge and the pH limitations relating to the cooking acid spill. For the same reasons set out above rejecting this argument in connection with the flocculent and cooking acid discharges, this KPC argument is likewise rejected insofar as it is advanced relating to the aeration basin sludge discharge.

Based on the above analysis, it must be concluded that KPC's discharge of sludge from the aeration basin which bypassed the use of the settling tank in the secondary treatment system, was not a bypass justified by Section III G of the permit. Rather, it was a discharge of sludge removed in the course of treatment into Ward Cove, a navigable water, in violation of Section III F of the KPC permit. As such, the sludge discharge constituted a violation of Section 301(a) of the CWA.

c. Failure to Notify EPA of Sludge Discharge

Respondent argues that, under Section 3512 of the PRA, 44 U.S.C. § 3512, a penalty cannot be assessed for the alleged violation of KPC failing to report the aeration basin sludge discharge, as required by Section II J of its permit (Ex. R-1, p. 8). In this regard, KPC contends that the permit is an information request within the meaning of the PRA and that the permit did not display a current OMB control number or a disclaimer that the request was not subject to the PRA (hereinafter "disclaimer"). The argument is that Section 3512 of the PRA bars EPA from collecting any penalty for the Respondent's failure to report the sludge discharge violation because of the lack of a current OMB control number or disclaimer on the permit.

In response, the Complainant's asserts that the lack of an OMB control number on Respondent's permit is immaterial because Section 122.41(l)(7) of the NPDES Regulations, the Regulation upon which the notification provision is based, contained a valid OMB control number. This argument must be rejected. Section 3512 of the PRA is clear that any penalty is barred if the information collection request does not have a current control number or disclaimer. Under the PRA, there is no question that a permit requirement to notify EPA of noncompliance with a permit condition, constitutes an information collection request. Section 3502(11) of the PRA includes all reporting requirements in the definition of "information collection request".

In the instant case, it is uncontested that the Respondent's

permit contains neither an OMB control number nor a disclaimer. The fact that the permit condition is derived from a regulation with a valid control number does not constitute compliance with the PRA because the plain language of Section 3512 specifically requires that the information collection request display a current OMB number or disclaimer, TRW, Inc., Dkt. No. TSCA-V-C-33-891, Initial Decision, p. 8, issued April 20, 1995; Tower Central, Inc., Dkt. No. CAA-III-030, Order Disposing of Outstanding Motions, p. 2, issued July 28, 1994.

The above result must also be reached since Complainant is alleging a violation of a permit condition, and not the regulation. As such, without any current control number or disclaimer on the permit, no penalty can be assessed for this alleged violation.

IV. 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 factors as justice may require.

In assessing a civil penalty, Complainant urges that the maximum statutory penalty for each violation should be the starting point and then the statutory adjustment factors should be applied. 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 Port of Oakland and Great Lakes Dredge & Dock Co., MPRSA Appeal No. 91-1, Opinion issued August 5, 1992, pp. 34, 35, 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 Agency policy for assessing penalties in administrative proceedings, although there is a penalty policy for settlement purposes.[8] In 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 cause.

While the statutory maximum may not be the beginning point, a prime purpose of assessing a civil penalty is to act as a

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[8] Addendum to Clean Water Civil Penalty Policy for Administrative Penalties, dated August 28, 1987.

deterrent to future violations. Thus, the penalty must be high enough to ensure that the discharger cannot write the penalty off as an acceptable environmental trade-off and simply absorb the penalty as a cost of doing business, Hawaii's Thousand Friends v. Honolulu, 821 F. Supp. 1368, 1394 (D. Hawaii 1993); Public Interest Research Group of New Jersey (PIRG), Inc. v. Powell Duffryn Terminals, Inc. (hereinafter "PIRG"), 720 F. Supp. 1158, 1166 (D.N.J. 1989), rev'd on other grounds, 913 F.2d 64 (3d Cir. 1990).

With this background, the aforementioned specific factors governing penalty assessment set out in Section 309(g)(3) of the Act can now be applied to the three violations found to have been committed by KPC herein. The penalty assessments for the three violations will be covered seriatim.

1. Flocculent

The first penalty assessment factor relates to the nature, circumstances, extent and gravity of the violations. The August 16, 1989 discharge of flocculent from the water treatment plant at the KPC facility involved the emptying of flocculent from one of the three one million gallon settling tanks. While the exact amount of flocculent released was not established, it must be concluded that it was extensive because of the noticable effects of scum, foam, discoloration and sheen on the water surface, resulting at least in part from this discharge. (Ex. C-2, p.1; Tr. 275-77). On balance, it is reasonable to conclude that the flocculent discharge was a substantial physical intrusion into

Ward Cove. Further, this discharge occurred during extreme low tide when the tide was running into Ward Cove. As a result, scum and foam were carried into the mouth of Ward Creek and concentrated on the north shore of the stream where salmon were gathering and swimming through the discharge. The flocculent discharge was combined with the sludge discharge from the secondary treatment plant and on August 17, 1989, many floating sludge mats were observed floating on the water in the area of Ward Creek and throughout Ward Cove. (Ex. C-2, p. 1.) Despite the fact that no specific environmental harm to Ward Cove resulting from this discharge was shown, it is warranted to conclude that the nature, circumstances and extent of this violation make it a significant violation from a gravity standpoint.

Moreover, establishing measurable environmental harm is not necessary for a penalty to be appropriate. As long as a potential adverse impact exists on waterways, penalties are deemed to be proper, N.R.D.C., Inc. v. Texaco, 800 F. Supp. 1, 24 (D. Del. 1992), modified, 2 F.3d 493 (3d Cir. 1993), PIRG, supra, 720 F. Supp. at 1167. In the present case, the testimony showed that flocculent is a settleable solid that may threaten organisms living in the bottom sediment of Ward Cove and that the suspended solids involved with the flocculent can have an adverse impact on fish and plant life in the cove (Tr. 53, 172).

Regarding the first adjustment factor, the ability to pay, KPC has raised no issue on this point and it cannot, therefore,

be used to reduce the amount of any penalties assessed herein.

On the next adjustment factor, the prior history of violations, Complainant cites various previous violations under the CWA involving the KPC pulp plant (Comp. Init. Br., Appendix A). Complainant notes that a Federal court Consent Decree was entered as a result of a U.S. Justice Department suit brought on behalf of EPA for violations of KPC's NPDES permit at the Ketchikan pulp plant, and that $166,950 in penalties have been paid by the Respondent pursuant to that Consent Decree. Further, in that Consent Decree, the court found three violations of an Agency compliance order and six violations of the NPDES permit. (Id. at 1, 2.) As to other environmental violations by KPC not involving the pulp plant, Complainant points to: a 1987 notice of violation issued by EPA under the Clean Air Act that resulted in a consent compliance order; a 1986 administrative proceeding brought by EPA against the Respondent under the Toxic Substances Control Act (TSCA) that resulted in a $5,500 civil penalty being entered; and a second proceeding brought by the Agency under TSCA that resulted in KPC paying a $255 penalty pursuant to a settlement (id. at 3-5). Given this extensive history of prior violations, a substantial upward adjustment toward the maximum penalty is warranted with regard to the flocculent discharge violation.

The third adjustment factor is the degree of culpability. In this regard, the flocculent discharge was not only unpermitted but was also most inopportune since it occurred at low tide and

in an uncontrolled fashion (Tr. 276). This indicates careless management given Respondent's numerous years in the pulp industry and experience with permit violations. Accordingly, KPC has a high degree of culpability in connection with the flocculent discharge violation and an upward adjustment toward the maximum penalty is warranted.

The fourth adjustment factor is whether the Respondent received any economic benefit or savings from the violation. Complainant's testimony reflected that, for $11,000, Respondent would have been able to deposit the flocculent on land. Respondent countered by contending that the plant's flocculent cannot be land disposed due to its inability to dewater. Complainant's position appears more credible because land disposal is the traditional method of disposal (Tr. 55), and it is reasonable to conclude that KPC obtained substantial economic benefit for the flocculent discharge. Thus, the civil penalty assessment should be adjusted upward because of the economic benefit factor.

The final penalty adjustment consideration is such other factors as justice may require. As to the flocculent discharge, no such other factors were brought out on the record, and this element does not warrant any adjustment to the penalty assessment.

Overall in evaluating an appropriate penalty for the flocculent discharge violation, it was established that the discharge was significant in nature, and that KPC's prior history

of violations requires an upward adjustment as does the Respondent's degree of culpability and the economic benefit that accrued to KPC as a result of the discharge. Therefore, the maximum penalty of $10,000 should be, and hereby is, assessed for this violation.

2. Cooking Acid

The discharge of 4,450 gallons of cooking acid on September 13, 1989, constituted a very small part of the total discharge into outfall 001, which is about 18 million gallons of wastewater per day (Tr. 24, 25, 245-47; Exs. R-8 and R-9). Further, the presence of the cooking acid on the digester floor was dangerous and its clean up resulted in six KPC employees going to the hospital and two of the six requiring medical attention the next day (Ex. C-1). This was clearly an emergency situation where action by the Respondent to discharge the cooking acid promptly was in order. It was not shown that other methods of clean up were feasible nor was it established that any harm resulted from this relatively small discharge. Therefore, a reasonable assessment of the nature, circumstances and extent of this incident indicates that it should be evaluated as a minor violation.

As to the adjustment factors relating to the cooking acid spill, the ability to pay and history of violations involve the same evaluation made in connection with the flocculent discharge violation. Therefore, no adjustment is warranted for ability to pay and a substantial upward adjustment is called for because of

the extensive history of violations by the Respondent.

Regarding the degree of culpability, the cooking acid spill resulted from inadvertent human error where clearly there was no specific intent to violate the Act. Because of the emergency situation occasioned by the spill, KPC had little alternative to taking prompt action to wash the cooking acid into the outfall and neutralize its deleterious effects on human safety. Therefore, the Respondent does not have a high degree of culpability for the cooking acid spill violation.

Nor did KPC secure any economic benefit from the cooking acid discharge. The Complainant asserts that the Respondent could have installed spill control technology and, therefore, saved $170,000 by not doing so. This argument is not persuasive. The cooking acid spill occurred because of inadvertent human error associated with electrical maintenance, and such an occurrence does not appear to be susceptible to elimination by spill control technology. Moreover, KPC subsequently established coordination of communication between maintenance personnel and operators in an effort to prevent future spills such as this cooking acid spill. Under these circumstances, no increase in the penalty assessment is in order for the economic benefit factor.

Regarding the element of other factors as justice may require, no such factors were presented that warrant adjustment of the penalty assessment for the cooking acid discharge violation.

Overall, the cooking acid spill discharge was minor in nature and was inadvertent, resulting in no economic benefit to the Respondent. However, the extensive history of violations by KPC requires an upward adjustment of the penalty. When all the relevant factors are weighed, a civil penalty of $3000 should be, and hereby is, assessed for the cooking acid discharge violation.

3. Aeration Basin Sludge

The August 16, 1989 discharge of sludge from the aeration basin in the secondary treatment plant must be considered substantial. The normal operating discharge into outfall 002 from the secondary treatment facility is 6.4 million gallons a day (Ex. R-9), so the facility makes a large contribution to the overall plant discharges. Given this large contribution, it must be concluded that a very large amount of sludge settled in the aeration basin and was discharged into Ward Cove while the plant was shut down because of drought on August 16, 1989. The sludge discharge contributed to the scum and foam seen at the mouth of Ward Creek and to the floating sludge mats observed in Ward Cove on August 17, 1989. (Ex. C-2, pp. 1, 2.) As a result, this sludge discharge must be considered as an extensive intrusion into Ward Cove.

Further, as with the flocculent, the fact that no specific environment harm was shown does not mean that this discharge should not be considered as significant. Moreover, the testimony did establish that the sludge is settleable in nature, with an potentially adverse impact on bottom dwellers in the Cove (Tr.

38, 39). And, it was shown that a primary pollutant of concern with sludge is BOD, which can reduce oxygen in the receiving waters when it decomposes and deprive plant and fish life of the required oxygen intake (Tr. 168-69). Also, this potential deleterious impact from BOD is of special concern because Ward Cove is on Alaska's impaired quality list for dissolved oxygen problems.

With the above findings, it must be concluded that the sludge discharge should be placed in the significant gravity category when the nature, circumstances and extent of the violation are taken into account.

Concerning the adjustment factors, again the ability to pay and history of violations elements involve the same evaluation for the sludge discharge as were made in connection with the flocculent discharge violation. Therefore, no adjustment is warranted for ability to pay and a substantial upward adjustment is called for because of the extensive history of violations by the Respondent.

With regard to the degree of culpability, KPC either knew or should have known that the sludge discharge was in direct violation of Section III F of its NPDES permit, which specifically prohibits such a discharge. Moreover, as with the flocculent discharge, the sludge discharge was intentionally done and was most inopportune since it occurred at low tide. Further, this sludge discharge could have readily been prevented by the use of inexpensive portable pumps. As a result, the Respondent

must be assigned a high degree of culpability in connection with the sludge discharge violation.

With regard to economic benefit from the discharge of sludge from the aeration basin, the testimony showed that Respondent could have obtained pumps to drain the aeration basin for a total cost of $2,000, including transportation. Therefore, KPC did secure a positive economic benefit from the sludge discharge violation.

The final penalty adjustment element relating to the sludge discharge violation involves other factors as justice may require. In this regard, KPC has implemented new technology to pump material from the aeration basin to the settling tanks, and should receive some minor credit for this.

Overall, the sludge discharge violation was significant, the Respondent's history of prior violations calls for an upward adjustment of the penalty as does the high degree of culpability associated with the violation and the positive economic benefit to KPC from this discharge. These factors more than offset the minor credit to the Respondent for installing new technology to pump material from the aeration basin into the settling tanks. As a result, a maximum penalty of $10,000 should be, and hereby is, assessed against KPC for the sludge discharge violation.

V. ORDER

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

1. That any penalty for the violation alleged in the

Complaint that the Respondent failed to report to EPA the aeration basin sludge discharge violation is barred by Section 3512 of the PRA, 44 U.S.C. § 3512. Therefore, that alleged violation is hereby dismissed with prejudice.

2. That, pursuant to Section 309(g) of the CWA, the Respondent is assessed a civil penalty of $10,000 for the August 16, 1989 discharge, without a NPDES permit, of flocculent from the water treatment facility at the KPC pulp producing plant in Ketchikan, Alaska, into Ward Cove, in violation of Section 301(a) of the CWA.

3. That, pursuant to Section 309(g) of the CWA, the Respondent is assessed a civil penalty of $3,000 for the September 13, 1989 discharge, without a NPDES permit, of cooking acid from the digester area at the KPC pulp producing plant in Ketchikan, Alaska, into Ward Cove, in violation of Section 301(a) of the CWA.

4. That, pursuant to Section 309(g) of the CWA, the Respondent is assessed a civil penalty of $10,000 for the August 16, 1989 discharge, in violation of its NPDES permit, of sludge from the aeration basin of the secondary treatment facility at the KPC pulp producing plant in Ketchikan, Alaska, into Ward Cove, in violation of Section 301(a) of the CWA.

5. That payment by the Respondent of full amount of the $23,000 in civil penalties assessed herein shall be made within sixty days (60) of service of the final order of the

Environmental Appeals Board,[9] by submitting a certified or cashier's check payable to Treasurer, United States of America. Said check shall be mailed to:

EPA - Region X
(Regional Hearing Clerk)
P.O. Box 360903M
Pittsburgh, Pennsylvania 15251

Daniel M. Head
Administrative Law Judge

Dated: November 22, 1995
Washington, DC

[9] Under Section 22.30 of the EPA 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.