UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
B. J. CARNEY INDUSTRIES, INC.	)	**[CWA] Docket No. 1090-09-13-309(g)**
	)	
Respondent	)	

INITIAL DECISION

DATED: MAR 11 1996

Clean Water Act: Pursuant to Section 309(g) of the Clean Water Act (CWA or the Act), 33 U.S.C. § 1319(g), Respondent B.J. Carney Industries, Inc. is assessed a civil penalty of $9,000 for its introduction of process waste waters containing PCP into the Sandpoint POTW, in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a), and Section 429.75 of the EPA Timber Products Regulations, 40 C.F.R. § 429.75.

APPEARANCES:

For Complainant:	Mark A. Ryan, Esq. Timothy Hamlin, Esq. for United States Environmental Protection Agency
For Respondent:	Jeffrey L. Supinger, Esq. for B.J. Carney Industries, Inc.

I. PROCEDURAL HISTORY

This proceeding involves an Amended Administrative Complaint filed October 12, 1990, by Region X of the U. S. Environmental Protection Agency (Complainant), against B.J. Carney Industries, Inc. (Respondent or Carney). The Amended Complaint charges that the Respondent violated Section 301(a) of the Clean Water Act (CWA or the Act), 33 U.S.C. § 1311(a), by introducing pentachlorophenol (PCP) into the publicly owned treatment works (POTW) located in Sandpoint, Idaho, in violation of the requirements of Section 429.75 of the EPA Regulations on Timber Products Processing Point Source Category (Timber Products Regulations), 40 C.F.R. § 429.75.[1] The Amended Complaint in paragraph numbered 2 alleges that Respondent discharged PCP to the Sandpoint POTW from at least February of 1986 until July 1990, from an oil/water separator on the Carney property, and avers that these discharges constituted process wastewater pollutants under Section 429.75 of the Timber Products Regulations and pollutants within the meaning of Section 502(6) of the Act, 33 U.S.C. § 1362(6). For the violations of the Act alleged in the Amended Complaint, Complainant requests that a penalty of $125,000 be imposed.

Respondent in due course filed its Answer, Affirmative Defenses and a Counterclaim. After completion of the prehearing procedures and the disposition of various interlocutory motions, including dismissal of the Respondent's Counterclaim, the proceeding went to evidentiary hearing on October 19-22, 1993, during which the decisional record was established. During the hearing, Complainant presented 5 witnesses and Respondent presented 2 witnesses. Of Complainant's exhibits, 27 were introduced into evidence; of Respondent's exhibits, 21 were

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[1]In citing these regulations hereinafter, the reference to the Code of Federal Regulations volume ("40 C.F.R.") will be omitted for brevity.

introduced into evidence. The transcript of the hearing is contained in four volumes totaling 833 pages. The parties submitted their initial post-hearing briefs in December 1993 and reply briefs were due on January 5, 1994[2] (Tr. 832). Complainant filed its reply brief on January 5, 1994, and on January 10, 1994, Complainant submitted a motion to strike Respondent's reply brief, arguing that the Carney reply brief (which had not yet been filed) was five days overdue and that it was inequitable for Carney to have time to review EPA's timely-filed brief prior to submitting its reply brief. Respondent on January 18, 1994, filed both an opposition to the motion to strike and its reply brief. Respondent asserts in opposing the motion to strike that Complainant has been responsible for other delays in this cause and avers that Respondent's arguments should be considered on the merits, since any blame for the delay should be directed at Respondent's counsel. While the Respondent did fail to file its reply brief in a timely fashion, the delay herein was brief and, in the absence of demonstrable prejudice to Complainant, the Carney reply brief will be considered a part of the record of this proceeding. Therefore, the Complainant's motion to strike the Respondent's reply brief is denied.

This initial decision will separately consider the issues presented in this proceeding, including a review as necessary of the parties' positions on each issue, and an analysis and resolution of each issue. The decision will conclude with 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

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[2]The exhibits will be cited as "Ex.", with "C" and the appropriate number for Complainant's exhibits (e.g., Ex. C-1) 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 by party with appropriate abbreviations and page numbers, such as Comp. Init. Br., p. 10.

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. PROCESS WASTE WATER

The threshold issue in this case is whether the waste water released by Respondent to the Sandpoint POTW constituted process waste water as defined in Section 401.11(q) of the EPA Regulations governing effluent guidelines and standards from new and existing sources (Effluent Standards), 40 C.F.R. § 401.11(q), which sets out:

> The term *process waste water* means any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, by-product, or waste product.

If the Carney discharges are process waste water, then Section 429.75 of the Timber Products Regulations is applicable. Section 429.75 provides that: "There shall be no introduction of process wastewater pollutants[3] into publicly owned treatment works." The parties do not dispute that Respondent introduced water contaminated with PCP into the Sandpoint POTW (Ex. C-25, pp. 3-14; Tr. 415-426). The heart of their dispute is whether Respondent's discharges were process waste water under the definition in Section 401.11(q) set out above. If the PCP was discharged in process waste water, the discharges were prohibited by Section 429.75 of the Timber Products Regulations and Respondent has violated Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). If the water containing PCP was not process waste water, the discharges were not prohibited by Section 429.75, and no violation of the Act occurred.

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[3]Under Section 401.11(r), the term "process waste water pollutants" means pollutants present in process waste water. Under Section 401.11(f), pollutant means, among other things, chemical and industrial wastes discharged into water. Respondent has not disputed that PCP discharged from its wood preserving operation was a pollutant under these definitions.

From 1982 to 1990, Respondent conducted a nonpressure wood preserving treatment operation at its facility located in Sandpoint, Idaho (Tr. 699). This operation involved the treatment of logs in two tanks, one in which the logs were placed horizontally and one in which the tanks were partially dipped in a vertical manner (Tr. 643, 647). PCP arrived on site in blocks that were dissolved in hot carrier oil to form a solution containing 5% PCP (Ex. C-20, p. 1). Respondent pumped this oil/PCP solution through the treatment tanks, heating the solution with steam by means of a heat exchanger to maximize the solution's penetration of the logs (Tr. 627, 643-44). Other equipment at the facility included nine tanks used for mixing and storage of the solution and carrier oil storage (Ex. C-20, composite photo #1), a boiler room (Tr. 647), an oil/water separator (Tr. 647), a sump pump, a heat exchanger, and circulation pumps (Tr. 647-8).

The sump pump was an essential part of Respondent's wood treatment operation. To paraphrase a description offered by James Comerford, President of B.J. Carney Industries, Inc., in a letter of September 6, 1985 to EPA Region X: rain and possibly upland runoff entered a cement cavity that surrounded the horizontal treatment tank; that water had to be pumped off to avoid what otherwise would have been a "disastrous" floating of the treatment tank and the breakage of its solution feed lines; and the water was pumped to a four stage oil water separator and then discharged to the sewer line (Ex. C-1). Respondent's consultant, CH2M Hill, described the situation in its report of June 20, 1986 (Ex. C-25, p. 1):

> The present treating tanks were installed in the early 1950s. They were installed partially in the ground to provide structural support and insulation. Because the groundwater is at times higher than the bottom of the tanks, the water must be continuously removed to prevent the floating of the treatment tanks.
>
> The groundwater flows into an equipment vault at the end of the treating tank. The wastewater is pumped from a small sump in the vault to a four-compartment

> oil/water separator. The effluent from the separator flows into the site sewerline and then into the City of Sandpoint sewer system.

In that same report (id., p. 3-13), this route of contamination was described by CH2M Hill as a possible source of PCP in the waste water:

> One source of PCP and O&G [oil and grease] in the sump is believed to come from contamination in the soil surrounding the treatment tanks that is carried in by the groundwater and precipitation. Definite oil contamination can be seen in the water flowing into the vault from under the treating tank.

Further, a narrative on an inspection conducted on April 25, 1985 by the Idaho Department of Health and Welfare, Division of Environmental Quality (Ex. 20, p. 2), noted:

> Precipitation which falls near the treatment tanks is collected in a sump room. It is then pumped to an oil/water separator where it passes through a column of absorbent material and then is further absorbed by additional material placed on top of the liquid. The water phase is then supposed to drain off the bottom into the sewer line. However, a sample taken of the water discharge was yellow in color and had the odor of PCP. Apparently the absorbent material when saturated falls to the tank bottom where it continues to release oil/PCP into the discharge outlet.

Therefore, Respondent, Respondent's consultant, and the State of Idaho had all identified the water pumped from around the treatment tanks by the sump pump as a source of PCP in the water released by Respondent.

Given the above factual circumstances, the issue presented is whether the PCP-contaminated water passing through the sump and wastewater separator and into the city sewer line constituted process waste water subject to the "no introduction" requirement of Section 429.75 of the Timber Products Regulations. Complainant and Respondent reach different conclusions regarding this issue.

A. Complainant's Position

Complainant argues that the water Carney discharged into the POTW was contaminated by PCP that had escaped from the treating process, either through leaks in the dip tank or from the PCP/oil mixture that had dripped on the ground around the tank (Comp. Init. Br., p. 6). Complainant contends that the soil around the tank was contaminated with PCP and avers that the ground around the facility was contaminated by activities inherent to the wood treating process employed by Carney. In this regard, Complainant asserts that there were spills and boil-overs of PCP mixture, drips from the removal of treated logs, leaks onto the ground and into the equipment vault from faulty equipment, all of which were part and parcel of the Carney wood treating operation. Complainant argues that these activities all occurred during Carney's tenure at the facility and were characteristic of its treatment process. According to Complainant, the discharges of PCP to the POTW were an integral part of Carney's operation. (Id., p. 7).

In addition, Complainant relies on the following passage in a comment and response in the Federal Register notice proposing the revisions to Part 429 of the Timber Products Regulations, that included the "no introduction" requirement of Section 429.75 (Comp. Init. Br., pp. 9, 10):

> EPA purposely expanded the definition of "process wastewater" from the definition in the existing regulation...The new regulations will not apply to boiler blowdown, noncontact cooling water and run-off from raw material or finished product storage areas; precipitation in the immediate area of the retort[4] is included in the definition of process wastewater. Runoff from raw material and finished product storage areas might be addressed later in a review of Best Management Practices (BMP) of the industry. 44 Fed. Reg. 62,810, 62,830-31 (Oct. 31, 1979)[5]

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[4]A "retort" is a steel vessel in which wood products are pressure impregnated with chemicals that protect the wood from biological deterioration or enhance fire resistance. It is also called a treating cylinder. (Ex. R-34, p. 320.)

[5]The selective presentation of this passage in Complainant's Initial Brief suggests that the definition of "process wastewater" is being expanded somewhere in the regulations, a claim

Complainant further argues that the rationale in the above set out comment is applicable, even though Carney's operation did not involve a retort, since the rainfall around the machinery mixes with raw material or waste product. The key here is that the effect of precipitation on and near the treating equipment was considered in formulating the definition of process wastewater. (Comp. Init. Br., p. 10, n. 5.) Complainant acknowledges that this passage refers to operations involving a retort, not operations with open treatment tanks, but argues that the same logic should apply in the open tank (Carney) situation.

Complainant also parses the language of the definition of process waste water to argue for its applicability to Respondent's operations. According to Complainant:

> The PCP pumped from Carney's equipment vault constituted either "raw material" or "waste product." PCP was a primary ingredient in Carney's wood-treating solution. That PCP which reached the ground or leaked from pipes prior to treatment of the logs was unused "raw material." Alternatively, it could be considered "waste product" in that once out of the treatment tank, PCP that did not make contact with logs could no longer be utilized. Likewise, that PCP which reached the equipment vault after treatment of the logs constituted "waste product." (Id., p. 7.)

To summarize, Complainant argues that Respondent released either raw material or waste product PCP during its manufacturing or processing and therefore violated the "no introduction" requirement of Section 429.75 of the Timber Products Regulations..

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repeated in Complainant's Reply Brief, p. 3. Instead, a review of the entire comment and response demonstrates that the definition was expanded only in the "Data Collection Portfolio" as part of an effort to gather data on a larger universe of waste water from wood preserving plants than was regulated under the applicable definition of process waste water. The response to comment then confirms that the regulatory definition of "process waste water", set forth then, as now, at Section 401.11(q), is unchanged, 44 Fed. Reg. at 62,831.

B. Respondent's Position

With reference to the process waste water issue, Respondent contends that no water was used in the treatment process at the site and that water was inimical to the process (Resp. Init. Br., p. 4). Respondent argues that EPA's regulations only ban the introduction of process wastewater pollutants, not all wastewater pollutants, and that Respondent's discharges were not process wastewater (id., pp. 17-22)..

Respondent also relies on an earlier version of the regulations at issue and concludes that EPA's 1974 process wastewater discharge rules and definition were, insofar as they applied to the Carney facility, identical to the 1981 version of the rule EPA now claims Carney violated (id., p. 18). Respondent then argues that a Development Document[6] prepared in connection with this earlier version of the regulation draws a distinction between wastewater pollutants, for which several control technologies were offered, and nonprocess waste, which was left for discussion in future studies (id., pp. 19-20; Exs. R-1, R-2). Respondent also cites a portion of this document that states that there is no process wastewater generated in nonpressure processes (Resp. Init. Br., p. 21; Ex. R-1).

C. Analysis and Resolution

The general definition of process waste water appearing in Section 401.11(q) of the Effluent Standards is broadly drafted to include a variety of sources from a variety of operations. The exemptions set forth in Section 429.11(c) of the Timber Products Regulations--noncontact

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[6]The EPA document is entitled "Development Document for Effluent Limitations Guidelines and New Source Performance Standards for the Plywood, Hardboard and Wood Preserving Segment of the Timber Products Processing Point Source Category", April 1974. The full text of this document is contained in Ex. R-34 and excerpts appear as Exs. R-1 and R-2.

cooling water, material storage yard runoff, and boiler blowdown--are narrowly drafted and do not include the water collecting under the treatment tank at issue here.[7] Read together, the two regulations suggest a wide scope for the coverage of the term "process waste water" at timber products processing plants with only three specific exceptions--exceptions that do not include sources of contamination originating in water pumped from the treatment area. Therefore, the applicable regulations suggest that Respondent's waste water releases were within the scope of the definition of "process waste water".

Additionally, a principle announced in the Federal Register notice issuing Part 429 of the Timber Products Regulations suggests that the PCP-contaminated water pumped from the treatment tank area is "process waste water" under Section 401.11(q) of the Effluent Standards. The notice states that precipitation in the immediate area of the retort is included in the definition of process waste water, 44 Fed. Reg. at 62,831. As noted above, a retort is a vessel used in pressure treatment processes, and Respondent's operation involved the nonpressure treatment of poles. Nevertheless, the statement that precipitation is included in the definition of waste water must be a statement explaining the fact that precipitation is not covered by the exclusions of Section 429.11(c), which Section is applicable to pressure and nonpressure treatment plants alike and limits the scope of the broad definition of "process waste water" in Section 401.11(q) of the Effluent Standards. Since precipitation is not excluded by Section 429.11(c) from the broad

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[7]The Federal Register notice proposing the regulations at issue distinguishes between precipitation in the area of the retort, such as the water in question here, and runoff from raw material and finished product storage areas, which is excluded from the scope of Section 429.11(c) of the Timber Products Regulations. See 44 Fed. Reg. at 62,831. As noted by Complainant, Respondent's releases do not originate in a storage area but in the area where logs are treated with the PCP/oil solution (Comp. Init. Br., p. 4), and therefore are outside of the scope of the material storage area exemption.

coverage of Section 401.11(q) and since at least some of the PCP-contaminated water at issue here originated as precipitation, the statement on precipitation in the Federal Register notice further supports an interpretation that the water passing through Respondent's sump pump should be included as regulated "process waste water" under Section 401.11(q).

Regarding Respondent's principal argument on this issue, the Development Document prepared in connection with the 1974 rulemaking and discussed in Respondent's post-hearing briefs does not offer much guidance in interpreting Section 429.75 of the Timber Products Regulation. First, the references to "nonprocess waste which shall be discussed in future studies" and to "waste water pollutants" (Ex. R-2) simply show that these are two categories of waste streams. There is no discussion to indicate the relationship between these two categories and no information that resolves the question of regulatory interpretation at issue here. Second, the statement that "there is no process waste water generated in nonpressure processes" (Ex. R-1), is inconsistent with (1) the applicability to pressure and nonpressure processes alike of the specific exclusion in Section 429.11(c) of certain categories of waste water from the definition of "process waste water" and (2) the apparent need to prohibit such discharges reflected in the "no introduction" requirement of Section 429.75. Therefore, on analysis, the Development Document relied on by Carney is not determinative of the "process waste water" issue.

Overall, it must be concluded that the PCP-contaminated water released by Respondent is within the scope of the term "process waste water" as defined in Section 401.11(q) of the Effluent Standards. Moreover, the facts developed at hearing support this conclusion.

At the evidentiary hearing, it was established that PCP in the waste water released by Respondent to the Sandpoint POTW came, at least in part, from the use of PCP in the PCP/oil

mixture at the site and that PCP was carried by precipitation and groundwater into the area under the treatment tanks (see pp. 5-6, *supra)*. To prevent the tanks from floating on this contaminated water, Respondent pumped the water to its oil/water separator (Ex. C-1); from there, the water, still contaminated with PCP, was released into the sewer (Comp. Init. Br., Appendix A; Tr. 416-419).

Whether this water was "process waste water" under Section 401.11(q) of the Effluent Standards depends on whether the contaminated water, during manufacturing or processing, resulted from the production or use of a raw material or waste product. Respondent's own president wrote that without removal of groundwater buildup by the sump pump, the tank would have floated disastrously (Ex. C-1). Therefore, the waste water at issue was created by an essential part of Respondent's manufacturing or processing operation. Without the sump pump, Respondent could not have conducted its operation in the manner that it did.[8]

Additionally, the PCP/oil mixture is either "raw material" or "waste product" within the meaning of Section 401.11(q). When the PCP and oil have been mixed but not yet used in the treating process, the mixture is a "raw material" to be used in the log treatment process. Once the PCP/oil mixture escapes from the treatment process into the waste water stream and can no longer be recovered and put to use as a raw material, it is then a "waste product" of the process. As a result, it is reasonable to determine that Respondent's releases of PCP into the Sandpoint POTW are within the definition of process waste water in Section 401.11(q) of the Effluent Standards and, therefore, are subject to the "no introduction" requirement of Section 429.75 of

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[8]While Respondent needed to use the sump pump to remove groundwater buildup, Respondent had several options to minimize or eliminate the wastewater discharge (Ex. C-25, p. 2-1). However, these discharge control options were rejected as too expensive (Tr. 655-657).

the Timber Products Regulations.

In conclusion, a review of the applicable law and the facts of this case reveals that Respondent's releases of PCP-contaminated waste water to the Sandpoint POTW constituted the introduction of process waste water into that facility. As a result, Respondent has violated the "no introduction" requirement of Section 429.75 of the Timber Products Regulations and Section 301(a) of the Act.

III. EQUITABLE ESTOPPEL[9]

A. Respondent's Position[10]

Respondent claims that Complainant should be equitably estopped from bringing this enforcement action because of Complainant's conduct with respect to Carney and the City of Sandpoint in the years preceding this enforcement action. According to Respondent, the proper remedy for this alleged misconduct is the dismissal of the case. Carney argues that the facts presented here satisfy all of the traditional elements of estoppel as to private parties and also meet the additional requirement that, as is required when estoppel is sought against the government, Complainant's actions amount to affirmative misconduct.

Specifically, Respondent contends that, with regard to its release of PCP to the Sandpoint POTW: (1) that Complainant knew the relevant facts; (2) that Complainant knew that Carney

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[9]Respondent had previously argued that Complainant was collaterally estopped from bringing this action. As Complainant points out, collateral estoppel requires a previous judgment regarding issues actually litigated and determined and no such previous judgment exists in this matter (Comp. Init. Br., pp. 11-12, citing Lawlor v. Nat'l Screen Service Corp., 349 U.S. 322, 326 (1955)). Respondent has not offered any evidence of a prior judgment nor any response to Complainant's argument and does not mention collateral estoppel in either of its post-hearing briefs. Therefore, the defense of collateral estoppel is considered withdrawn.

[10]Respondent's position is being considered first in this section of the decision since equitable estoppel is an affirmative defense and Respondent has the burden of proof thereon.

would rely on the City's acts as approved by EPA; (3) that Respondent was unaware that Complainant did not agree with the City's actions; and (4) that Respondent relied to its detriment on Complainant's actions (Resp. Init. Br., pp. 26-29). Carney claims that these four elements satisfy the four traditional requirements of estoppel, citing Watkins v. United States Army, 875 F.2d 699, 709 (9th Cir. 1989); and also alleges that Complainant's actions constitute affirmative misconduct (Resp. Init. Br., pp. 26-32).

With reference to the first element, Carney argues that Complainant knew that the City would be the lead agency in dealing with Respondent and directed the City to issue an "Industrial Waste Acceptance" (IWA or permit) to Respondent. Issued in January 1987, the IWA permitted Carney to discharge up to 50 ppm PCP to the Sandpoint POTW up to a maximum of 3 pounds PCP per day (id., pp. 27-28; Ex. R-11).

Secondly, Carney avers that it rightfully believed that Complainant intended Respondent to rely on Complainant's acts. Respondent claims that Complainant indicated that it would coordinate with the City and that Complainant acquiesced in the City's policy of gradualism with respect to Carney's releases to the POTW (Resp. Init. Br., pp. 28-29).

Next, Respondent claims that it was unaware that Complainant did not approve of or intend to be bound by the City's issuance of the IWA (id., p. 28).

Finally, Carney asserts that it relied to its detriment by implementing the "gradualism" approach to reducing PCP discharges in accordance with the IWA since, ultimately, it still faced a penalty action from Complainant, despite efforts to reduce releases of PCPs (id., p. 29).

In addition, Respondent alleges that Complainant's actions constitute "affirmative misconduct". Respondent acknowledges that this is a necessary condition of its claim of estoppel

against the government, describes the applicable standard for estoppel as one based on the facts and circumstances of each case, and claims that certain court precedent supports a liberal interpretation of what constitutes affirmative misconduct (id., p. 30.) Turning to the situation presented here, Respondent claims that the delay and inaction by Complainant rise to the level of affirmative misconduct. Specifically, Respondent claims that Complainant allowed the City of Sandpoint to issue an IWA permit to Carney for 50 ppm and allowed Carney to rely on its policy of acquiescence for approximately five years. Respondent concludes that Complainant's repeated waiver of enforcement of the regulation at issue herein makes its present complaint inequitable under the circumstances. (Id., p. 32.)

B. Complainant's Position

Complainant argues that equitable estoppel is not available in this case, because: (1) equitable estoppel is disfavored when the government acts in its sovereign capacity; (2) there was no affirmative misconduct here; (3) Respondent did not reasonably rely on Complainant's actions; (4) the City of Sandpoint is not Complainant's agent; and (5) Carney suffered no detriment from its claimed reliance.

First, Complainant contends that the U.S. Supreme Court has consistently refused to apply the equitable estoppel doctrine against the government, no matter how compelling the circumstances. Complainant argues that federal courts have not permitted equitable defenses to prevent the United States from exercising its sovereign powers for the benefit of the public, and that this case involves the sovereign exercise of the powers of the United States. (Comp. Init. Br., pp. 13, 14).

Next, Complainant asserts that the facts of this case do not support Respondent's claim of

estoppel. Complainant emphasizes its repeated communications on the issue of Respondent's discharges: between 1985 and 1990, Complainant had notified Sandpoint at least 12 times that the Respondent was out of compliance and that, as a result, the City was not properly implementing its pretreatment program. Complainant also refers to two letters sent directly to Carney on the issue of the applicability of the pretreatment regulations to Respondent's discharges. (Id., pp. 16, 17.)

On the issue of affirmative misconduct, Complainant argues that such a finding requires an active or intentional concealment of a material fact and cites a series of cases demonstrating the courts' reluctance to estop the government. Complainant argues that its conduct here does not meet this standard as Complainant consistently told Respondent that its discharges were regulated, and that Complainant's actions were reasonable and justified under the circumstances. (Id., pp. 19, 20.)

Next, Complainant avers that, as a precondition for estoppel, that Respondent must show that its alleged reliance on Complainant's actions was reasonable. Complainant contends that here, in light of Complainant's letters to Respondent stating that Respondent could not discharge PCP to the POTW, Respondent's reliance on Complainant's failure to enforce was not reasonable. (Id., pp. 20-21.)

Complainant also argues that, since the City of Sandpoint is not the agent of Complainant, actions by the City cannot have the effect of estopping Complainant from enforcing the law. Here, Complainant claims that it retains concurrent authority to enforce pretreatment standards and that the City acts on its own behalf when taking an enforcement action against an industrial user such as Respondent. (Id., pp. 22-24.)

Finally, Complainant asserts that Respondent suffered no detriment from its claimed reliance but, in fact, benefited from Complainant's delay in bringing this enforcement action. Complainant argues that, ultimately, shutting down the facility was the only economically viable manner to comply with the process waste water regulation and that Respondent's operation during Complainant's delay in enforcement actually resulted in additional profits to Respondent. (Id., pp. 24-25.)

C. Analysis and Resolution

Equitable estoppel is rarely available against the federal government acting in its sovereign capacity. A review of federal case law reveals that the criteria for such an estoppel are strictly construed by the courts.

The United States Supreme Court has repeatedly refused to apply estoppel against the federal government in a variety of situations, some involving considerable detriment to private parties. For example, in a leading case, Utah Power & Light Co. v. United States, 243 U.S. 389 (1917), the Supreme Court refused to find the United States estopped where the claimant had built a power plant on federal land based on alleged assurances from federal officers and agents.

More recently, the Supreme Court reviewed a claim against the Department of Health and Human Services (HHS) in Heckler v. Community Health Services, 467 U.S. 51 (1984), a case cited by both Respondent and Complainant in their briefs on the estoppel issue. In that case, a provider of home health care services, relying on the advice of an agent of the Federal government, had provided services for which it was reimbursed. Upon later review, the payments to the provider were determined to be duplicative and the agent demanded repayment. The provider claimed that HHS and its agent should be estopped from obtaining repayment because

the provider had relied on the agent's advice. The Supreme Court held that the provider could not succeed in its estoppel claim against the government for several reasons. The Court found that the provider's only detriment was the inability to retain money that it should never have received in the first place, id. at 61. Additionally, the Court wrote of estoppel against the government:

> When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant. Id. at 60 (citations omitted).

Ultimately, the Supreme Court noted that it was unpersuaded that even the traditional elements of estoppel had been demonstrated by the provider and therefore refused to find any estoppel against the government or its agent, id. at 61-66.

The principles announced in Utah Power & Light and Community Health Services have been followed in a series of federal cases. For example, in Simon v. Califano, 593 F.2d 121, 123 (9th Cir. 1979)(per curiam), the court held that the Social Security Administration was not estopped from denying benefits to a claimant whose only error on an application for benefits resulted from the failure of a trainee claims representative of the SSA to ask her how many children the claimant had, and noted that negligence does not amount to affirmative misconduct. In Morgan v. Heckler, 779 F.2d 544, 545 (9th Cir. 1985), the court similarly held that a claimant for retirement benefits could not sustain an estoppel argument against the government despite erroneous advice from a claims representative. The court pointed out that estoppel against the government requires the four traditional elements of estoppel and affirmative misconduct beyond mere negligence, and stated that estoppel will apply only where the government's wrongful act

will cause a serious injustice, and the public's interest will not suffer undue damage by the imposition of liability, id. And, in United States v. Chevron U.S.A., 757 F.Supp. 512, 516 (E.D.Pa. 1990), the court refused to find an estoppel against the government in a case brought by EPA for violations of the Clean Air Act. The court held that, as a threshold matter, Chevron could not satisfy the elements for equitable estoppel, and further concluded that:

> Even if Chevron had been entitled to rely on the alleged misrepresentation by the inspector and the EPA's delay in prosecution, the health of the public and its interest in a pollution-free environment should not be sacrificed because these actions work a potential hardship on Chevron. Therefore, following well-established law, we decline to estop the EPA from filing suit against Chevron. Id.

In Chevron, EPA's delay in enforcement was inadequate to constitute equitable estoppel against the government in light of the public's interest in preventing pollution.

The analysis of Respondent's estoppel claim in the present case, then, must be considered in light of the strong aversion of Federal courts to estoppel against the federal government. A close examination of Respondent's estoppel claim reveals that it fails to satisfy several necessary conditions for estoppel.

First, Respondent must show that it reasonably relied on Complainant's actions, or failure to act. As noted above, Respondent's theory is that Complainant had acquiesced in the City's policy of gradualism with respect to eliminating the PCP releases. However, this claim is belied by correspondence in the record to the contrary. In addition to the communication between Complainant and the City of Sandpoint, Complainant twice wrote directly to Respondent about this issue. In the letter of November 6, 1985, Complainant wrote that Respondent's facility was subject to the regulation at issue and was in violation of the pretreatment standards (Ex. C-3, p. 2). That letter also indicated that EPA would be initially coordinating with the City to ensure that

it has taken appropriate enforcement action (id.). On September 4, 1987, Complainant wrote that the facility was covered by the regulation, confirmed Complainant's previous position, and stated that the regulations cover discharges emanating from the Carney facility (Ex. C-5, p. 2). Both letters should have made it clear to Carney that it was subject to the "no introduction" regulation and to enforcement action for violating the regulation. Moreover, it is not reasonable for Respondent to consider that Complainant's coordination with Sandpoint on enforcement a waiver of the "no introduction" regulation or a decision by the Complainant not to enforce that regulation.

Next, Respondent has failed to show that it has suffered a detriment adequate to sustain a claim of estoppel against the government. Faced with Respondent's violations of the regulation at issue, Complainant had several options. One option would have been an immediate Federal enforcement action against the Respondent as soon as the violations were discovered. Since Respondent's eventual method of compliance was to discontinue operations, an earlier enforcement action might have forced an earlier shutdown of operations. Respondent acknowledges that it operated profitably during the years 1987 to 1990 (Tr. 771) and, as Complainant points out, an earlier shutdown would have prevented Respondent from earning profits during those years (Comp. Init. Br., p. 25). Respondent claims that its detriment resulted from the expenses involved with the closure of the plant (Resp. Init. Br., p. 29). However, these expenses would have also been involved with an earlier closure. Therefore, Respondent has failed to satisfy the detriment element required to support a finding of estoppel.

Finally, Respondent has failed to prove that Complainant's actions in this matter rise to the level of affirmative misconduct. As the case law cited above demonstrates, Federal courts have

refused to find affirmative misconduct even where Federal employees have provided erroneous information. Here, the most that Respondent can allege is that Complainant stood by while the City of Sandpoint issued the IWA and then did not bring this action until 1990. Under the standards established by Utah Power and Light and Community Health Services, such inaction simply does not rise to the level of affirmative misconduct.

In conclusion, Respondent's claim that Complainant should be estopped from bringing this action cannot be sustained. Applicable Federal law does not favor estoppel against the government and requires that Respondent show, among other things, reasonable reliance, detriment, and affirmative misconduct to support a finding of estoppel. As Respondent has failed to satisfy these necessary elements, Complainant is not estopped from bringing this action.

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 matters 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 (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 (EAB, 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.[11] In In re: Puerto Rico Urban Renewal & Housing Corp., Docket No. CWA-II-89-249 (Initial Decision, 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 specific 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

With regard to this factor, it is reasonable to begin by considering the number of violations involved. The Complaint alleges that Respondent discharged process wastewater containing PCP to the Sandpoint POTW from February 1986 to July 1990 (Amended Complaint, Paragraph 4).

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

However, Complainant has not presented on the record a more specific description of how many violations took place and on what dates the violations occurred. Complainant's position is that Carney discharged PCP contaminated waste water on an almost daily basis from February 1984 until July 1990 because PCP was allegedly found on 23 of the 25 occasions that monitoring was conducted at the manhole on the Carney facility (Comp. Init. Br. p. 32). However, this general conclusion is not supported by the record. First, the figures are not accurate. Appendix A to the Complainant's Initial Brief, which was compiled from the testimony at Tr. 415-26, reflects only 22 sporadic monitoring samples at the Carney manhole from March 1985 through January 1990, with 2 samples where no PCP was detected. Further, the frequency of the monitoring at the Carney manhole was not established (Tr. 419) and the two samples where PCP was not detected vitiates against inferring, as Complainant suggests, that the PCP discharge occurred on an almost daily basis. Moreover, during the relevant time frame, October 1985 to July 1990, a period of almost five years, the record only shows 20 monitoring samples at the Carney manhole and, on 2 of those, PCP was not detected (Tr. 415-26; Comp. Init. Br. Appendix A). Such evidence cannot sustain a conclusion that the PCP discharge occurred on an almost daily basis.

Rather, the record herein supports a conclusion that Respondent violated the "no introduction" requirement of Section 429.75 of the Timber Products Regulations on eighteen days during the period[12] of alleged violations in the Amended Complaint. Specifically, the monitoring results at the Carney manhole alluded to above show violations on only eighteen separate days during this almost five year period (Tr. 416-419; Comp. Init. Br., Appendix A). Therefore,

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[12]As discussed *infra*, the relevant time frame for penalty calculation is at most October 12, 1985 to July 1990.

Respondent is found to have violated the "no introduction requirement" and the Clean Water Act on the eighteen days on which monitoring results demonstrated the introduction of PCP into the Sandpoint sewer system.[13]

With the number of violations established, attention can be turned to the nature, circumstances, extent and gravity of the violations (hereafter for brevity, "gravity"). Since the Clean Water Act does not have a penalty policy setting guidelines for determining the gravity of violations, one method of valuing CWA cases examines the harm or potential for harm to human health or the environment presented by the violations. Federal courts have sometimes based penalties imposed, in part, on this "harm" factor.[14] For example, the court cited EPA and state documents detailing the environmental harm caused by each pollutant Defendant discharged in upholding an unadjusted gravity penalty of $4,205,000 (the statutory maximum) against a tank farm operator in Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 79 (3rd Cir. 1990). On the other end of the spectrum, the lack of measurable material harm was considered to be a significant mitigating factor in assessing penalties in Hawaii's Thousand Friends v. Honolulu, 821 F.Supp. 1368, 1396 (D.Hawaii 1993).

Here, Complainant has not made a strong case on harm to the environment, arguing

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[13]The dates and sample results (in parts per million of PCP) are as follows: 4/16/86, 7.05; 12/15/86, 4.12; 2/2/87, 1.977; 6/17/87, 1.12; 9/22/87, 3.78; 11/4/87, 4.46; 3/3/88, 1.05; 8/18/88, .288; 10/4/88, 14.5; 11/28/88, 29.6; 1/3/89, 1.56; 3/7/89, 3.616; 4/5/89, 15.9; 6/6/89, 7.3; 8/8/89, 20.2; 10/3/89, 19.8; 11/28/89, .880; 1/31/90, 11.4. (Comp. Br., Appendix A; Tr. 416-19.)

[14]But see cases where courts have held that such a showing is not a necessary element of Complainant's case and imposed gravity penalties without reference to harm: e.g., Student Public Interest Research Group of New Jersey v. Monsanto, 29 E.R.C. 1079, 1090-91 (D.N.J. 1988); PIRG v. Powell Duffryn Terminals, 720 F.Supp. 1158, 1167 (D.N.J. 1989), rev'd on other grounds, 913 F.2d 64 (3rd Cir. 1990); Natural Resources Defense Council v. Texaco, 800 F.Supp. 1, 24 (D.Del. 1992), rev'd on other grounds, 2 F.3d 493 (3rd Cir. 1993).

merely that Complainant is entitled to the presumption that the violation of EPA regulations results in environmental harm, even if no harm can be demonstrated (Comp. Init. Br., p. 32).

In fact, the evidence suggests that the PCP introduced by Respondent into the Sandpoint POTW had a minimal effect on the environment. First, PCP levels at the POTW influent were very low, ranging at twelve out of fifteen sampling events from .00015 to .129 parts per million.[15] Since some PCP would have been captured during wastewater treatment in sludge (Tr. 798-800), only a fraction of the PCP entering the POTW was actually discharged into the Pend Oreille River. On this issue, the Public Works Director of the City of Sandpoint wrote (Ex. C-17, p. 3):

> According to the best information available to the City, the POTW has had a removal rate so that the amount of P.C.P. in the POTW effluent is between 2 and 10 parts per billion, and, when those concentrations are considered in light of the one million to one dilution factor as the effluent enters the Pend Oreille River, the concentration of P.C.P. would be far below any level of toxicity...[According to the State of Idaho,] the acute and chronic toxicity to freshwater life occurs at concentrations of 55 parts per billion and 3.2 parts per billion, respectively.

Even including waste water from three or four other major industrial users of the Sandpoint POTW (Tr. 421), discharges to the Pend Oreille River were only at chronic toxicity levels and were immediately diluted to about one-one millionth of these levels.

As a result, when the gravity of the violations is evaluated in terms of their harm, it must be concluded that the eighteen violations at issue are minor in nature. While the maximum statutory penalty for each violation is $10,000, the minimal gravity of the violations makes it reasonable to assess an unadjusted penalty of $1,000 for each violation.

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[15]Tr. 423-24; Comp. Init. Br., Appendix A. Three other sample results may be anomalous: two show nondetectable levels of PCP and one shows 9.919 parts per million (id.).

B. Ability to Pay

Ability to pay is one of the penalty adjustment factors that must be taken into account under Section 309(g)(3) of the Act. However, at no time during this proceeding has the Respondent raised the issue of its ability to pay. Since this factor only relates to a downward adjustment of the penalty, and since the Respondent does not rely on this factor, no adjustment to the penalty being assessed herein is warranted based on ability to pay considerations.

C. Prior History of Violations

The prior history of violations is another penalty adjustment factor under Section 309(g)(3) of the CWA, and consideration of it only relates to an upward adjustment of the penalty. Complainant correctly argues that a penalty should not be reduced because the Respondent does not have a history of prior violations (Comp. Init. Br., pp. 34, 35). The record does not reflect any prior history of violations on Carney's part and consequently, no penalty adjustment should be made based on this factor.

D. Degree of Culpability

The third penalty adjustment factor in Section 309(g)(3) of the Act is the Respondent's degree of culpability. Regarding culpability, Complainant argues that Respondent was aware that its discharges of PCP violated the "no introduction" requirement and delayed compliance expenditures to maximize profits until the facility's ultimate shutdown (Comp. Init. Br., pp. 33, 34). According to Complainant, Carney's "take-the-money-and-run" approach to compliance demonstrates actual culpability, and no reduction in the penalty should be granted on this basis (id., p. 34). Respondent makes no argument regarding the degree of culpability factor.

Overall, it appears that the Respondent's actions with regard to the PCP discharge were

taken in good faith, particularly in light of the differing regulatory approaches taken by Sandpoint and EPA, and there is nothing in the record to establish that Carney was intentionally dilatory in addressing the problem. Neither an increase or a decrease in the penalty based on culpability is appropriate.

E. Economic Benefit

The next adjustment element under Section 309(g)(3) of the CWA reflects whether the Respondent received any economic benefit or savings from the violations. Respondent may have enjoyed some economic benefit from delayed capital costs and avoided operation and maintenance (O and M) costs associated with Respondent's failure to install and operate pollution control equipment to eliminate the violations. Complainant calculated this benefit using a figure of $62,550 for capital costs and $1550 for O and M costs. These costs were allegedly avoided by Carney for a period from January 26, 1984 until October 19, 1993, the date of the start of the evidentiary hearing herein. (Tr. 443.) In the calculation, the Complainant used a discount rate of 16.01%, Federal tax rates of 0 to 46%, and state tax rates of 0 to 8% (Tr. 444). Using this methodology, Complainant estimated an economic benefit to Carney of approximately $167,000 for non-compliance (Tr. 447). However, for several reasons, the record in this case does not support Complainant's calculation of this benefit.

Complainant started its economic benefit calculation on January 26, 1984 (Tr. 443) and postulated that the avoided costs benefit ran until the date of the hearing, October 19, 1993. However, the Amended Complaint in this matter was filed on October 12, 1990, and paragraphs numbered 2 and 4 of the Amended Complaint describe the time frame for the violations from at least February 21, 1986 until July 1990. Furthermore, the statute of limitations for violations of

the CWA is five years. While the Act contains no statute of limitations itself, the statute of limitations set generally for claims by the United States, 28 U.S.C. § 2462, requires that a proceeding for enforcement of a CWA penalty be commenced within five years from the date when the claim first accrued. See, e.g., Sierra Club v. Chevron U.S.A., 834 F.2d 1517, 1521 (9th Cir. 1987); Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, 913 F.2d 64, 74 (3rd Cir. 1990). Therefore, Complainant is barred by the statute of limitations from seeking penalties prior to October 12, 1985, and this is the earliest date that should have been used to calculate economic benefit.

Similarly, Carney came into compliance in July 1990 and this should have been the ending date for the benefit.[16] Complainant's calculation assumes that Respondent continued to earn income on its avoided costs until October 19, 1993, the date of trial. Complainant's theory on this issue is that Respondents earn a benefit from delaying penalty payment while contesting a Complaint, a benefit that should be recaptured by this component of the benefit calculation (Tr. 476). However, Carney came into compliance by July 1, 1990 (Tr. 443) and had a colorable legal theory on the "process waste water" issue that would have completely vitiated liability, so it would not be equitable to increase the economic benefit to the Respondent by having the calculation run during the period of litigation. A different result might have been warranted had Carney remained in violation until the date of hearing.

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[16]Complainant's economic witness did, on cross-examination, indicate that Carney would have achieved a $117,000 benefit by year end 1990 (Tr. 468-69). However, this calculation again was based on the inappropriate beginning date of January 26, 1984 and used over the six year period the unrealistic steady 16.01% discount rate discussed below. Moreover, this alleged benefit would have been offset by the costs of about $240,000 expended by the Respondent in attempting to come into compliance (Tr. 673). See the discussion on offset, *infra.*

Further, it is very questionable whether the Complainant's witness on the economic benefit issue applied the appropriate discount rate when calculating Respondent's economic benefit. The witness used a rate of 16.01 percent (Tr. 444), a rate that she derived herself (Tr. 438, 482, 490) by combining the applicable cost of debt and cost of equity to determine the return that a company would expect to earn on its investments (Tr. 438-39). However, this rate did not vary over the entire nine year, nine month period (1/26/84-10/19/93) used in the Complainant's calculation (Tr. 444, 482-4), a period during which economic conditions, including the cost of debt and cost of equity, certainly did vary.[17] The witness attempted to justify the fixed discount rate on the basis that, after realizing the cost savings in 1984, the company would not then renegotiate their capital to where the discount rate would change (Tr. 491). However, this explanation is unrealistic since it assumes Carney could have secured an investiment that would yield a 16.01% return over close to a ten year period. This is an unreasonable assumption, in light of the varying economic conditions during the relevant period. Moreover, as noted above, starting in 1984 is not appropriate because the statute of limitations bars any penalty for violations prior to October 12, 1985, and the witness should have at least calculated a discount rate applicable at that date. The failure of Complainant to adjust the discount rate to market conditions or to present a viable explanation of why the rate was not adjusted, represents a major shortcoming in Complainant's economic benefit analysis.

Complainant argues that the approach taken in Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc. (PDT), 913 F.2d 64 (3rd Cir. 1990), should be followed

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[17]By comparison, the calculation is sensitive enough to take into account changes in tax law (Tr. 440-41) which have an indirect effect (Tr. 445-6) on the economic benefit derived by the violator.

here. In PDT, 913 F.2d at 80, the appellate court held that precise economic benefit might be difficult to prove, so that reasonable approximations will suffice. However, in PDT, id., the appellate court also found that the economic benefit penalty component "reasonably approximated" by the trial court far exceeded the statutory maximum penalty. Therefore, any slight error in the calculation of economic benefit would not have had an impact on a penalty that was already limited by statute to an amount well below the approximated economic benefit.

Moreover, another federal case, Student Public Interest Research Group of New Jersey v. Monsanto Co. (Monsanto), 29 E.R.C. 1078 (D.N.J. 1988), aff'd 870 F.2d 652 (3rd Cir. 1989), presented economic benefit issues similar to those presented in the case at bar and is more useful in determining the approach to be taken here. In Monsanto, the trial court was unable, despite detailed testimony and evidence, to determine the economic benefit of noncompliance. Just as in the instant case, the trial court identified several serious problems with the benefit calculation, two of which are also presented here: the doubtful assumptions on which the calculations were based and the failure of the witnesses to utilize a computer program (the BEN program) to calculate economic benefit, id. at 1089. While the trial court was prepared to assess a penalty calculated to recover the defendant's economic benefit, it ultimately did not assign a penalty related to economic benefit but based its penalty assessment on gravity factors alone. The trial court concluded that, if there was any such economic benefit, the evidence failed to provide any satisfactory method of quantifying such benefit, despite the witness' complex calculations. Id. at 1090-91.

In the present case, as in Monsanto, Complainant's presentation does not provide a satisfactory method of quantifying economic benefit because of the flaws in the calculation

discussed above. Therefore, a reasonable approximation of economic benefit cannot be made in this cause.

Further, it was uncontroverted that the Respondent expended about $240,000 to reduce the discharges during the period of operations at issue (Tr. 673). These were good faith efforts by Carney to come into compliance.[18] However, Complainant's benefit witness did not take these costs into account in the benefit calculation and explained that it was not appropriate to consider these costs since the calculation was only evaluating the benefit of non-compliance, not analyzing the costs of other compliance efforts (Tr. 469-71). This represents another serious flaw in the benefit calculation, since it is equitable to offset any costs for attempting to eliminate the discharge against the costs saved by non-compliance. It is clear that, had this offset been made, the economic benefit cost saving from non-compliance would have been entirely eliminated, in light of the substantial sums expended in compliance efforts.

Moreover, the Respondent did expend $450,000 to $500,000 to shut the plant down in July 1990 (Tr. 671) and an argument can be advanced that Carney received an economic benefit from delaying these costs from the relevant date of October 12, 1985 until the closure date of July 1990. However, no evidence was presented to quantify this benefit and it cannot be calculated on the record. The costs would have to be discounted to their net worth in 1985, appropriate tax and discount rates for the period would have to be established, and the offset for the compliance costs of $240,000 would have to be considered. On the evidence presented, any attempt to

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[18]These compliance costs expended by Carney are, from an equity standpoint, being considered as an offset in this economic benefit area. They could also as logically be treated as a substantial mitigating factor in the evaluation of the "such other matters as justice may require" element set out in Section 309(g)(3) of the Act.

quantify the alleged benefit from delayed shut down costs would be mere speculation.

Similarly, another consideration worth comment is that Carney apparently profited from facility operation during certain years in the period of non-compliance. However, no quantification of the profits Carney received from its operations during the period of the violations was presented on the record. This failure of proof makes it impossible to determine what economic benefit, if any, was involved in this regard. Since it is conceivable that losses at other times during the relevant period could have offset this profit benefit, it would be speculative to find an economic benefit on this basis.

Given the above described defects in Complainant's economic benefit calculation and the Complainant's failure to offset the compliance expense, the Complainant's calculation is rejected and no upward penalty adjustment will be made because of the economic benefit factor.

F. Such Other Matters as Justice May Require

Additionally, Section 309(g)(3) of the Act requires that adjustment of the proposed penalty to take into account such other matters as justice may require. The testimony (see, e.g., Tr. 633-36) and documentary evidence presented indicate that it is appropriate in evaluating this penalty factor to take into account the circumstances Carney was faced with because of the different regulatory approaches of Sandpoint and the Complainant.

Sandpoint took an incremental approach towards compliance with the "no introduction" requirement (see, e.g., Ex. R-12), while Complainant insisted on full compliance with the "no discharge" requirement (see, e.g., Exs. C-3 and C-5). However, Complainant supported and deferred to Sandpoint's compliance efforts, and delayed initiating this action for over 5 years from when it was aware of the alleged violations by Carney. It is warranted to conclude that

Respondent considered itself to be proceeding reasonably with its compliance efforts, or at least that Respondent was confused by the two different regulatory approaches. Moreover, Respondent made its inquiries about the applicability of the regulation in good faith and attempted to meet the City's extended compliance schedule. While the facts herein are not sufficient to sustain Carney's equitable estoppel claim, the two conflicting regulatory approaches, the extended delay in bringing this Federal enforcement proceeding, and Carney's good faith efforts at compliance constitute other matters that justice requires be considered. As a result, equity requires that the gravity component of the penalty be adjusted significantly downwards to reflect these other matters as justice may require.

In recognition of this other matters as justice may require factor, the unadjusted gravity component of $1,000 per violation is reduced by 50% to $500 for each violation, which makes the total penalty assessed herein $9,000.

IV. 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, a civil penalty of $9,000 be assessed against Respondent for its eighteen discharges of process waste water containing PCP into the Sandpoint POTW, in violation of Section 301(a) of the Act and Section 429.75 of the Timber Products Regulations.

2. That payment by Respondent of the full amount of the $9,000 civil penalty assessed shall be made within sixty (60) days of service of the final order of the Environmental Appeals

Board[19] 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 36074M
Pittsburgh, PA 15251

Daniel M. Head
Administrative Law Judge

Dated: March 13, 1996
Washington, DC

[19]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.