

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

<b>In the matter of</b>	)	
	)	
<b>Allen Family Foods, Inc.,</b>	)	<b>Docket No. CWA-3-2001-0002</b>
	)	
<b>Respondent</b>	)	

**INITIAL DECISION**

By: Carl C. Charneski  
Administrative Law Judge

Issued: February 17, 2004  
Washington, D.C.

**Appearances**

For Complainant:

Kerry Nelson, Esq.  
U.S. Environmental Protection Agency  
Region III  
Philadelphia, PA

For Respondent:

Anthony G. Gorski, Esq.  
Charles R. Schaller, Esq.  
Schaller & Gorski, L.L.P.  
Annapolis, MD

**I. Background**

The United States Environmental Protection Agency (“EPA”) brings this civil penalty enforcement action against Allen Family Foods Inc. (“Allen”), pursuant to Section 309(g)(1)(A) of the Federal Water Pollution Control Act, commonly referred to as the “Clean Water Act.” 33 U.S.C. §1319(g)(1)(A). In its Amended Complaint, EPA charges that Allen committed 304 violations of the Clean Water Act by failing to comply with the effluent discharge, effluent

monitoring, and violation reporting provisions of its Industrial User (“IU”) permit.<sup>1</sup> This permit was issued to respondent by the Town of Hurlock’s Publicly Owned Treatment Works (“POTW”). Noncompliance by an Industrial User with its POTW-issued discharge permit constitutes a violation of Section 307 of the Clean Water Act. 33 U.S.C. § 1317.

Specifically, EPA charges that Allen exceeded the effluent parameters of its IU permit on 232 occasions, that respondent failed to monitor its discharge to the POTW, as required by the permit, on 48 occasions, and that on 24 occasions Allen failed to timely notify the POTW as to its noncompliance with the IU permit, another permit requirement. These violations allegedly occurred from April, 1996, through September, 2000.

EPA seeks the statutory maximum penalty of \$137,500 for the alleged violations, pursuant to Section 309(g)(2)(B) of the Clean Water Act. 33 U.S.C. § 1319(g)(2)(B).<sup>2</sup> Allen denies all 304 charges of violation and alternatively asserts that the penalty sought by EPA is excessive.<sup>3</sup>

A hearing was held in this matter on March 25-28, 2002, and continued on April 2, 2002, in Annapolis, Maryland. As set forth below, it is held that Allen committed the 303 of the 304 violations as alleged by EPA. For these violations, a penalty of \$90,000 is assessed against respondent.

## **II. Findings of Fact**

### **A. An Overview of Allen’s Poultry Processing Facility**

1. Allen owns and operates a poultry processing facility located in Hurlock, Maryland (the “Hurlock facility”). Stip. 2 (March 25, 2002). It purchased this facility from Con-Agra in October, 1993. Tr. 218, 672.

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<sup>1</sup> In its Amended Complaint, EPA charged Allen with 295 violations. At the hearing, 305 violations were actually alleged and tried. *See* CXs 2, 39, & 55. Following the hearing, EPA withdrew one of the monitoring violations charges. Compl. R.Br. at 1 n.1. Accordingly, the final count stands at 304 alleged violations.

<sup>2</sup> Section 309(g)(2)(B) provides that the Administrator may assess a Class II civil penalty not to exceed \$125,000 for a violation of Section 307 of the Act. Pursuant to the Debt Collection Improvement Act, 28 U.S.C. § 2461, this penalty maximum has been increased to \$137,500. *See* 40 C.F.R. Part 19 (“Adjustment of Civil Monetary Penalty for Inflation.”)

<sup>3</sup> In answering the Amended Complaint, respondent raises a number of affirmative defenses which it did not subsequently develop at hearing or pursue in its post-hearing argument. To the extent that these defense may have some bearing on the understanding of this case, they are discussed, *infra*.

2. At its Hurlock facility, Allen processes two types of birds, large broilers and roasters. It processes the birds to produce whole chickens and cut-up pieces for sale. Because of the difference in size between a broiler and a roaster, different equipment is used to process each type of bird. Also, because different equipment is used, broilers are processed on one shift and roasters are processed on another shift. Tr. 172-176.

3. To provide some idea as to the scope of the Hurlock facility, in 1996, Allen processed approximately 93,600 birds per day. Tr. 226.

4. In general, preparing the bird for market is a two-step process. The “first processing” takes place in the receiving, picking, and eviscerating areas of the facility. The “second processing” consists of the cut-up phase, including the “mechanical separated chicken,” or “deboning.” Tr. 682.

5. Birds arrive at the Hurlock facility live. They are then weighed, after which they are placed in a holding shed. From the holding shed, the birds are taken to the line receiving area where they are off-loaded onto a conveyor and transferred to a hanger room. There, the birds are hung on the line. This “first process” stage essentially involves an exchange of the birds from the “kill line” to the “eviscerating line.” There is a minimal amount of water used by respondent in the kill area. Tr. 173, 675-676. *See* RX 2 (photographs of plant operation).

6. In the next stage, the “second processing,” the birds proceed to the “scalding area” and then to the “picking room” where they are defeathered. After the birds are defeathered, they enter into the eviscerating process where the entrails are extracted. Tr. 677-678.

7. After evisceration, the birds are “final inspected” by the United States Department of Agriculture (“USDA”). Every bird is inspected by a USDA inspector. After final inspection, the birds enter the “chill process.” Tr. 174, 680.

8. The “chill process” consists of a “chiller” tank which contains approximately 50,000 gallons of water. The tank is operated in a continuous overflow manner. The purpose of the chiller is to bring the temperature of the bird down to 40 degrees or lower, a USDA requirement. Birds cannot be packed and shipped for sale without this requirement having been met. Tr. 221, 680, 705.

9. After the birds exit the chiller tank, they go into “second processing.” The birds either go to what is called the “whole bird farm,” or they are cut up. In either case, they are packaged, stored, and eventually shipped to customers. Tr. 174-175, 711.

## **B. Allen’s General Water Usage**

10. Respondent’s poultry processing operation utilizes significant amounts of water at the scalding, picking/defeathering, evisceration, chilling, and cutting stages. Tr. 674-717. For example, Allen uses 10,000 to 15,000 gallons of water just to start up the production line for its

day shift and it uses an equal amount of water to start up its night shift line. An additional 30,000 gallons are used per shift during startup for the “scalders.” Tr. 716-717.

11. A significant amount of water also is used to clean up the plant. In that regard, the United States Department of Agriculture provides for “a total shutdown of that facility and a total scrub down from top to bottom.” Allen uses approximately 180,000 gallons per day to clean its plant. Tr. 225, 717.

12. For all of the time periods involved in this case, Allen discharged its wastewater from its Hurlock facility to the Town of Hurlock’s Publicly Owned Treatment Works. Stip. 5 (March 25, 2002). The operation of this POTW system is discussed, *infra*.

13. Allen’s wastewater discharge from its Hurlock facility consists only of conventional pollutants. Tr. 1305; CXs 68-70.

14. Allen pretreats its wastewater before it is discharged to the Hurlock POTW. First, there is a large manual screening pretreatment component through which the wastewater passes. Tr. 848-858, 1307.

15. Specifically, there are two flows that exit the processing plant. One flow is called the “meat side” and one flow is called the “feather side.” Each of these flows enters into the offall building where they separately go through a primary screening system in order to take out the heavy solids. Tr. 844-845.

16. The offall building contains a pit where these flows mix. The wastewater is then pumped to a secondary screen. The “finer larger particles” are screened out and sent to trailers for transport to rendering. Tr. 846.

17. After this secondary screening, the wastewater goes into an equalization tank or basin. The equalization chamber contains approximately 35,000 to 40,000 gallons of water. This begins the “acidulation process,” the purpose of which is to control the pH level. Tr. 846-847, 849. Here, the lowering of the pH level essentially “changes the charges and breaks up the bonds” between the solids and particulates in the water. Tr. 195. “[I]t begins to align the positive and negative ions so that you can coagulate them more effectively later on in the system.” Tr. 847. The acidulation process has the added benefit of lowering, but not eliminating Biochemical Oxygen Demand. Tr. 195-196.

18. The wastewater next proceeds from the equalization chamber to the dissolved air flotation pretreatment system, otherwise known as a “DAF.”<sup>4</sup> The DAF system pretreats

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<sup>4</sup> “The purpose of the DAF tank is to provide a zoned area where the water comes in and the coagulants have an opportunity to work and attach all the particles together and float them to the top of the tank.” Tr. 851.

pollutants in the solid form by removing grease and solids. A coagulant is added to the DAF tank causing the organic particles to clump together. The grease and solids then float to the top where they are skimmed off the water for disposal. Tr. 848-854, 1306-1307.

19. Once the water passes through the DAF, it exits at the processing plant's flow meter and is discharged to the Town's POTW system. Tr. 853, 1307. Flow is continuously monitored by the plant's discharge meter. Tr. 183, 186.

### **C. The USDA Requirements**<sup>5</sup>

20. Poultry processing is regulated by the United States Department of Agriculture. *See* 21 U.S.C. § 451 *et seq.*; 9 C.F.R. 304, 327 & 417. In order to ensure food safety, the USDA requires that processors use specific amounts of water for specific processing activities, such as scalding and chilling. Tr. 679-680, 694-705, 713-722.

21. From 1995 through 1999, the USDA implemented regulatory changes which tightened food safety tolerances. Tr. 721-742. These changes are referred to as the "Hazard Analysis and Critical Control Point System," also known as the "HACCP." Tr. 721-722; *see* 9 C.F.R. 417.

22. The HACCP is a "zero tolerance" program. It allows for zero fecal contamination in the bird at the final USDA inspection point. The HACCP is a stricter USDA program than previously was in place. Under the HACCP program, if the processing plant is found to be in noncompliance, all the production lines are now stopped. Tr. 725-727.

23. Allen implemented a number of measures at its Hurlock facility in order to satisfy the requirements of the HACCP. These added measures, however, increased the amount of water that Allen used to run its poultry processing operation. Tr. 758-774.

24. Allen's efforts to comply with the HACCP requirements also resulted in fewer birds being processed at its Facility. Tr. 217-218, 222, 226.

25. In order to comply with the HACCP, in 1997, Allen added the following features to

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<sup>5</sup> One of the affirmative defenses mentioned by Allen in its Amended Answer involves what it believes is conflicting regulatory enforcement efforts between the USDA and EPA. It states, "EPA's action in this matter is preempted by the United States Department of Agriculture pursuant to the comprehensive poultry processing requirements under federal law and regulations." Amend. Ans. ¶ 39. While Allen makes a considerable effort to show these "comprehensive poultry processing requirements," it has not done so, however, in the context of advancing its preemption argument. Instead, as discussed, *infra*, respondent seems to have shifted the focus of this alleged regulatory conflict from a preemption argument to a penalty reduction one.

its processing operation: high pressure washers to the paw wash area (increasing water usage by 100 gallons per minute (“gpm”)); chlorinated misters to rinse birds after scalding and picking (increasing water usage by 10 gpm); washers at the hock cutter where the foot is removed to cleanse the birds prior to USDA inspection (increasing water usage by 8 gpm); more nozzles on the rehang belt wash cabinets (increasing water usage by 8 gpm); two rinse cabinets installed on line prior to evisceration (increasing water usage by 32 gpm); two “rotary cabinets” (increasing water usage by 140 gpm); high pressure hoses to the “inside/outside bird washers” (increasing water usage by 200 gpm); shower heads to the inside/outside bird washers for additional cleaning (increasing water usage by 72 gpm); and wash cabinets to the reprocessing area (increasing water usage by 75 gpm). Tr. 756-757, 764-769; *see* RX 2 (photographs).

26. Besides these equipment changes, in June of 1998, Allen added an antibacterial system just recently approved by the USDA for use in poultry processing plants. This antibacterial system is known as “Alcide.” The Alcide is applied to the bird before the bird goes into the chiller. Tr. 213, 215-216, 789-790. Allen’s use of this Alcide system caused a significant increase in their soluable BOD level. Tr. 214.

**D. Allen’s Efforts To Reduce Water Usage Upon Achieving Compliance With the HACCP**

27. Testing for HACCP compliance began in 1997. Once Allen configured its processing lines to satisfy these regulations, it set about reducing water usage not necessary for USDA compliance. Tr. 772-773. Anthony Macer, the plant manager, established a team of employees to address the issue of wastewater reduction for purposes of compliance with its IU discharge permit. This is the discharge permit issued by the Town of Hurlock POTW. Tr. 754, 772-774.

28. In that regard, Allen took steps to eliminate ineffective or water intensive equipment, even though the equipment had been installed for purposes of HACCP compliance. For example, in 1998, Allen removed the paw washers that had been installed in 1997 (reducing water usage by 100 gpm). It similarly eliminated spray nozzles, wash cabinets, the rotary cabinets, replaced its old “bird washers” with new ones, and installed new brushes (reducing water usage by 368 gpm). Tr. 783-795.

29. Also, one of the things that Allen did to reduce its wastewater was to cease processing by-products, such as necks, giblets and paws. Tr. 774-779.

30. In 1977, Allen began a daily review of its water usage and decreased its plant operation hours in an attempt to reduce water usage. Because the basic operation of the facility required a certain amount of water no matter how many birds were processed, decreasing the hours of the plant’s operation did not bring about the level of water reduction that respondent thought would be the case. Tr. 780-782. For example, each day the plant requires 80,000 gallons to fill the scalders and chiller and 180,000 gallons for cleanup, regardless of the number of hours the plant processes birds. Tr. 707, 716-717.

31. While the use of the Alcide system allowed respondent to reduce its water usage by 75 gpm, the Alcide system had an undesirable side effect. As noted, it adversely impacted the BOD levels in respondent's wastewater. In response to these increased BOD levels, in the Fall of 1998, Allen began diverting the wastewater rinsing from the Alcide system at its Hurlock facility to its processing facility in Cordova, Maryland.<sup>6</sup> Respondent's Cordova facility has a biological wastewater treatment system capable of handling this Alcide rinse. Tr. 215-216. Allen used tanker trucks to haul the Alcide from its Hurlock to its Cordova plant. Tr. 791-792, 942-945.

32. Finally, in 1999, Allen upgraded its Dissolved Air Flotation pretreatment unit in order to increase its wastewater treatment capacity. The cost of this upgrade was \$150,000. Tr. 1079-1081.

33. Allen's efforts at water usage reduction, and hence the reduction of its wastewater, included actions taken outside the plant building. In that regard, as part of its operation, Allen collects and treats storm water from several outside areas contaminated by the deposit of chicken manure, feathers, blood, and oil and grease. Tr. 856-866.

34. Between April, 1997, and October, 1997, Allen installed a drainage system at the Hurlock facility to divert storm water away from its wastewater collection system. Tr. 206, 867-869; RX 16.

#### **E. The Town of Hurlock POTW**

35. The Town of Hurlock, Maryland (the "Town," or "Hurlock"), has a population of approximately 1,700 people. It operates a Publicly Owned Treatment Works for the treatment of wastewater. Two Industrial Users discharge approximately 75% of the flow to this sewage treatment plant. Tr. 58, 120. Allen is one of the Industrial Users, contributing about 62% to 64% of the POTW's effluent. Tr. 159-160.<sup>7</sup>

36. The term "Industrial User" means a "source of indirect discharge." 40 C.F.R. 403.3(h). The term "indirect discharge" is defined as "the introduction of pollutants into a POTW from any non-domestic source regulated under section 307(b), (c), or (d) of the Act." 40 C.F.R. 403.3(g).

37. The Hurlock POTW is operated pursuant to a National Pollutant Discharge

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<sup>6</sup> After being applied to the bird, the Alcide eventually rinses to the bottom of the cabinet in which this process takes place. Allen captures the Alcide rinse before it reaches the cabinet drain. Tr. 215.

<sup>7</sup> The POTW's average weekday flow rate is between 1.3 and 1.5 million gallons. On weekends, when the Industrial Users are not operating, the flow rate drops to approximately .4 million gallons per day. Tr. 139-140, 186.

Elimination System (“NPDES”) permit and a State of Maryland groundwater discharge permit. Stip. 4 (March 25, 2002). RXs 51 & 52.<sup>8</sup>

38. On, or before, January 11, 1993, the POTW incorporated local limits for Biochemical Oxygen Demand (“BOD”),<sup>9</sup> Total Suspended Solids (“TSS”), and Oil and Grease (“O&G”). Stip. 3 (March 25, 2002).

39. In 1983, the Maryland Department of Environment (“MDE”) required that all POTWs have an industrial pretreatment ordinance. Accordingly, the Town of Hurlock proposed a pretreatment ordinance, which was subsequently approved by the MDE. Tr. 59.

40. Since March of 1985, the Town of Hurlock has had a pretreatment program approved by United States Environmental Protection Agency. Stip. 3 (March 25, 2002).

41. In the late 1980's, the MDE audited the Town of Hurlock and discovered that the Town was not fulfilling the requirements of its pretreatment ordinance. As a result, the Town sought the services of Davis, Bowen & Friedel (“DB&F”), an engineering firm. For purposes of this case, the role of DB&F in the Town of Hurlock’s enforcement of its pretreatment ordinance was an administrative one. In that regard, when an Industrial User violated its IU permit, DB&F submitted “the figures” to the Town in the form of a Notice of Violation. The Town then issued the Notice of Violation, sending a copy both to the cited Industrial User and to the Maryland Department of the Environment. Tr. 59-60. When there is such an IU permit violation, the POTW cannot fine the offending Industrial User; it can only assess a surcharge. Tr. 85-86.

42. In Ordinance No. 1992-4, the Town of Hurlock set forth uniform requirements for direct and indirect dischargers to the Town’s POTW. The ordinance provided pollutant limitations of 350 milligrams per liter (“mg/l”) for BOD, 450 mg/l for TSS, and 150 mg/l for O&G. CX 66 at § 2.3. The ordinance also prohibited the discharge of any wastewater having a pH of less than 5.0, or greater than 8.5. *Id.*, at § 2.1(e). These are the pollutant limitations which are applicable to this case.

43. Self-monitoring also is built into the IU permits. The permits require the Industrial User to monitor its effluent and to submit its laboratory test results to DB&F. Tr. 63-64, 68.

44. The Hurlock POTW operates a four-cell facultative lagoon, normally five to six feet in depth, with a total water storage capacity of approximately 150 million gallons. “Facultative” means that it is a biological treatment process, operating by means of a combination of aerobic

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<sup>8</sup> During the time periods involved in this case, the Town of Hurlock was out of compliance with its NPDES permit. Tr. 124, 661-662.

<sup>9</sup> Biochemical Oxygen Demand was described by the Town’s Director of Public Works as “an ancient test that measures the pollutant of the wastewater itself.” Tr. 76. Thus, the higher the BOD level, the more treatment that is required by the POTW. Tr. 79.



and anaerobic organisms. Tr. 1311-1313. Basically, flow comes into the system and goes to one of two primary cells, then to a secondary cell before it is discharged. Tr. 62, 123. The Hurlock POTW is a detention-type treatment system. Tr. 138.

45. Essentially, the facultative lagoon system treats the incoming wastewater by diluting it with a large volume of water. The solids settle to the bottom, with the pollutants acting as food for the aerobic and anaerobic processes. Tr. 1312-1315. Frank Wright, the Town's Director of Public Works, explained that the POTW lagoon system "is a process of nature ... set up on the design of what comes in, detention time, primary treatment, secondary treatment and chlorinating, dechlorinating and discharge." Tr. 128.

46. The POTW can accept 12,000,000 gallons per week. The Town's total flow is approximately 40,000,000 gallons per month. The Town's POTW system requires approximately a 90-day retention time to treat conventional pollutants. It is set up to run on a 90- to 120-day basis. Tr. 140, 1314, 1316-1317.

47. The POTW has two discharge locations. One location is Wright's Branch, a perennial stream which flows into Marshyhope Creek.<sup>10</sup> The other location involves a ground discharge, available only from approximately April 1 through October 30. The POTW has a State permit for this ground application. Tr. 62, 125-126; RXs 41, 45, 51, & 52.

48. Allen discharges approximately 20,000,000 gallons per month to the Town of Hurlock POTW. Tr. 1309. As noted, this constitutes approximately 62% to 64 % of the total inflow to the POTW. Tr. 120. As also noted, Allen pretreats this wastewater before its discharge. Tr. 843-854.

49. Allen and the Town agreed that when respondent's flow meter was not operating, Allen could report its discharge by estimating its flow. In such a case, they agreed that Allen would report 80% of the amount of the water that it pumps from its groundwater wells, *i.e.*, the influent water). Stip. 1 (March 28, 2002). Approximately 20% of the water produced from the wells does not become wastewater. It is utilized for ice production, potable water usage by employees, or it is absorbed by the processed birds. Tr. 855.

50. In addition, Allen and the Town of Hurlock agreed not to revise or modify the daily maximum flow limit in Allen's IU permit because the Town considered that exceeding that limit by less than 1.2 times to be of "low magnitude," and it was not concerned by such an excursion

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<sup>10</sup> Another affirmative defense recited by Allen in its Answer to the Amended Complaint is as follows: "EPA's alleged violations did not result in release of pollutants into waters of the United States." Amend. Ans. ¶ 44. This is yet another defense raised by respondent and apparently waived. In any event, given the fact that the Town of Hurlock POTW operates pursuant to an NPDES permit issued by EPA, it would appear that the effluent discharged by Allen to the POTW eventually does flow into the "Waters of the United States." Respondent has offered no evidence to the contrary. Thus, any such jurisdictional challenge was doomed to fail.

from an operational standpoint. This agreement did not change the terms of Allen’s IU permit. Stip. 2 (March 28, 2002).

**F. Allen’s Industrial User Discharge Permits**

51. As noted, Allen discharges effluent from its Hurlock facility to the Town of Hurlock POTW. Stip. 5 (March 25, 2002).

52. Over the years, Allen has been issued a number of pretreatment discharge permits by the Hurlock POTW.<sup>11</sup> The permits that are relevant to this case are as follows:

- Permit No. 008-94, effective February 1, 1994, to December 1, 1996 (the “1994 Permit”);
- Permit No. 008-96, effective December 1, 1996, to March 5, 1997 (the “1996 Permit”);
- The modified version of the 1996 Permit, effective March 5, 1997, to March 1, 1998 (the “1996 R-2 Permit”);
- A second modified version of the 1996 Permit, effective March 1, 1998, to November 30, 1999 (the “1996 R-3 Permit”);<sup>12</sup> and
- Permit No. 008-99, effective December 1, 1999 (the “1999 Permit”), and covering the latest time period relevant to this case.

Stip. 6 (March 25, 2002).

53. Respondent’s discharge permits contained effluent limits for Biochemical Oxygen Demand (*i.e.*, BOD), Total Suspended Solids (*i.e.*, TSS), Oil and Grease (*i.e.*, O&G), pH, and flow. The effluent limits relevant to this case are as follows:

<u>Permit</u>	<u>Effective</u>	<u>Parameter</u>	<u>Limit</u>
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<sup>11</sup> A pretreatment program implements requirements imposed on an Industrial User of a POTW. The requirements are designed to reduce, eliminate, or change the properties of pollutants in the user’s wastewater before the wastewater is introduced into the POTW. 40 C.F.R. 403.3(q)-(r); *see Advanced Electronics, Inc.*, CWA Appeal No. 00-05 (EAB) (March 11, 2002), at 4 n.3.

<sup>12</sup> The charts on the following pages show the effective end date of the 1996 R-3 permit as December 1, 1999, and not November 30, 1999. The parties have nonetheless stipulated to these inconsistent dates.

1994 Permit	2/1/94 - 12/1/96	BOD	350 milligrams per liter (“mg/l”)
		TSS	450 mg/l
		Flow	800,000 gallons per day (“gpd”)
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1996 Permit	12/1/96 - 3/5/97	BOD	350 mg/l
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1996 R-2 Permit	3/5/97 - 3/1/98	BOD	350 mg/l
		Flow	900,000 gpd/650,000 gpd mo. avg.
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1996 R-3 Permit	3/1/98 - 12/1/99	BOD	350 mg/l
		Flow	900,000 gpd/650,000 gpd mo. avg.
		O&G	150 mg/l
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1999 Permit	12-1-99 - end of case	BOD	350 mg/l
		Flow	900,000 gpd/650,000 gpd mo. avg.
		pH	in range 5.0 - 8.5 standard units

Stip. 7 (March 25, 2002).

54. Allen’s permits required that it test its effluent for the BOD, TSS, O&G, pH and flow parameters during the time period of September, 1996, through September, 2000. Stip. 8 (March 25, 2002). On some occasions, when sampling for BOD or TSS, Allen would take a spilt sample with the Town of Hurlock to ensure the accuracy of the laboratory results. Tr. 182-183; Stip. 10 (March 25, 2002).

55. Flow is a continuous daily recording. Tr. 68, 186. In addition, pH is likewise monitored continuously. Tr. 183. The BOD parameter is monitored with a “composite sampler.” A composite sampler has a sampling tube that is inserted into the discharge flow and it collects a sample over a 24-hour period. Tr. 183-184.

56. The BOD, TSS, O&G, pH, and flow readings are maintained by Allen on monthly reports. Tr. 68-69. Once Allen collects its samples for BOD, TSS, O&G, and pH, it sends them for an independent laboratory analysis. Tr. 184. After Allen receives the laboratory analysis, it forwards the results on data sheets to DB&F, the Town of Hurlock’s consulting engineering

firm. These monthly reports are required by the IU permit. Tr. 184-185; CX 13. *See* Stip. 11 (March 25, 2002).

57. Allen’s discharge permits also required it to conduct monitoring of its effluent for BOD, TSS, O&G, pH and flow at specific intervals and to report the monitoring data to the Town of Hurlock POTW within specified time periods. These sampling and reporting periods were as follows:

<u>Permit</u>	<u>Effective</u>	<u>Parameter</u>	<u>Sampling Frequency</u>	<u>Reporting Date</u>	
1994 Permit	2/1/94 - 12/1/96	BOD	1x/week	postmarked 15 <sup>th</sup> day of month after	
		TSS	1x/week	”	”
		O&G	2x/month	”	”
1996 Permit (Incl. R-2 & R-3)	12/1/96 - 12/1/99	BOD	3x/week	”	”
		TSS	3x/week	”	”
		O&G	2x/month	”	”
		pH	1x/day	”	”
		Flow	continuously	”	”
1999 Permit	12/1/99 - end of case	BOD	3x/week	”	”
		TSS	3x/week	”	”
		O&G	2x/month	”	”
		pH	1x/day	”	”

Stip. 13 (March 25, 2002); *see* CXs 67-71.

58. In addition to the effluent limitations and the monitoring requirements, respondent’s IU discharge permits required it to report to the POTW violations within 24 hours of becoming aware of such noncompliance. If the initial notification was verbal, the permits further required Allen to provide a written follow-up notice within five days. Stips. 14 & 15 (March 25, 2002).

59. The Town of Hurlock amended Allen’s IU permit in 2001. Daily maximum flow limits were changed to daily averages. The Town of Hurlock’s Director of Public Works explained, “we did away with daily maxes and went to monthly averages or weekly averages.” Tr. 122, 128-129.

**G. The Alleged Violations of Allen’s IU Permit**

60. In EPA's complaint, Allen is charged with 232 effluent violations of its various Industrial User permits. The effluent violations allegedly occurred between September, 1996, and July, 2000. EPA maintains that each of these effluent excursions above the listed IU parameters constitutes a violation of Sections 301, 307 and 308 of the Clean Water Act. 33 U.S.C. §§ 1311, 1317 & 1318. The alleged violations are as follows:

<u>Effluent Characteristic</u>	<u>Number of Alleged Violations</u>
Biochemical Oxygen Demand (BOD)	82 <sup>13</sup>
Total Flow	147
Total Suspended Solids (TSS)	1
Oil and Grease (O&G)	1
pH	1

CX 2; *see n.1, supra.*

61. Allen also is charged with 48 monitoring violations. EPA charges that respondent failed to comply with the monitoring requirements of its IU permit by not sampling and timely submitting the sampling data to the Town of Hurlock POTW. EPA submits that in each instance respondent violated Sections 301, 307, and 308 of the Clean Water Act, *id.*, as well as 40 C.F.R. 403.12. *See* CX 39.<sup>14</sup> The monitoring violations allegedly occurred between April, 1996, and June, 2000. Specifically, EPA alleges 19 BOD, 24 TSS, and 5 flow monitoring violations.

62. EPA further alleges that Allen failed to comply with the notification provisions of its IU permit. The permit requires respondent to verbally notify the Town of Hurlock within 24 hours of noncompliance and, thereafter, in writing within 5 days of the noncompliance. Stips. 14 & 15 (March 25, 2002). Complainant charges that between February, 1997, and January, 2000, respondent failed to provide the required noncompliance notification 24 times, each in violation of Sections 301, 307, and 308 of the Clean Water Act, *id.*, as well as 40 C.F.R. 403.12. *See* CX 55.<sup>15</sup> The alleged violations are broken down as failing to provide verbal notification within 24 hours of noncompliance with the IU Permit on 16 occasions, and failure to provide written follow-up notification within 5 days on 8 occasions.

### **III. Discussion**

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<sup>13</sup> Complainant erroneously listed 2 BOD violations as occurring on October 9, 1996, instead of only 1 violation. Compl. Findings at 5 n.26.

<sup>14</sup> Complainant erroneously listed 2 failures to report for both BOD and TSS, instead of only 1 failure for each. Compl. Findings at 7 n.39.

<sup>15</sup> EPA seeks to correct two errors in Complainant's Exhibit 55. It states that the violation which respondent failed to report on April 6, 1998, was for flow, and not BOD, and that on April 17, 1998, the respondent failed to provide 24-hour notification to the Hurlock POTW, and not the 5-day notification. Compl. Findings at 8 n.43.

Section 301 of the Clean Water Act prohibits the discharge of any pollutant to a water of the United States, except in compliance with, among others, Sections 307 and 402 of the Act. 33 U.S.C. §§ 1317 & 1342. Section 307(b) of the Clean Water Act directs the Administrator of EPA to publish regulations “establishing pretreatment standards for introduction of pollutants into treatment works ... which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works.” 33 U.S.C. § 1317(b).

Pursuant to Section 307(b), EPA promulgated POTW treatment standards at 40 C.F.R. Part 403. Section 403.8 provides for the development and implementation of pretreatment programs by POTWs. 40 C.F.R. 403.8. “Each POTW developing a POTW Pretreatment Program pursuant to § 403.8 shall develop and enforce specific limits to implement the prohibitions listed in paragraphs (a)(1) and (b) of [Section 403.5].” 40 C.F.R. 403.5. Moreover, “[w]here specific prohibitions or limits on pollutants or pollutant parameters are developed by a POTW ..., such limits shall be deemed Pretreatment Standards for the purposes of section 307(d) of the Act.” 40 C.F.R. 403.6(d). In sum, “local limits,” or those developed by the POTW, as well as other requirements implemented by the POTW as part of its Pretreatment Program, are enforced as Pretreatment Standards under Section 307(d) of the Clean Water Act. *U.S. v. Iverson*, 162 F.3d 1015, 1019 (9th Cir. 1998).

## **A. Liability**

### **1. The Effluent Violations**

Allen is charged with 232 effluent violations of its Industrial User discharge permit. The violations are broken down as follows: 147 violations involve the flow parameter, 82 violations involve the Biochemical Oxygen Demand parameter, and 1 violation each of the Total Suspended Solids, Oil and Grease, and pH parameters.

Insofar as the effluent violations are concerned, there is no dispute regarding the underlying facts. EPA determined that for the time period in question Allen violated its Industrial User permit based upon the data provided by Allen to the Town of Hurlock POTW. This data is set forth in Complainant’s Exhibits 3 through 38. Allen does not dispute the accuracy and reliability of the effluent data which it submitted to the POTW. Instead, respondent submits that a substantial number of the effluent violations (as well as some of the monitoring violations) can be excused because they “were exceptional incidents resulting in unintentional and temporary noncompliance with its Permits and were beyond its reasonable control.” This is Allen’s “Upset” defense.

Allen submits that a substantial number of the 232 alleged effluent violations were the result of Upsets and, therefore, are excusable. *See* Resp. Findings, ¶¶ 83-84, & 90; *see also*, Resp. Br. at 4-5. Allen attributes the Upsets to rainfall and the resulting storm water impact, as

well as to equipment malfunctions.<sup>16</sup> EPA counters, arguing that Allen may not raise such an Upset defense in this case. Thus, this threshold issue must first be addressed.

**a. May Allen Assert an “Upset” Defense in This Case?**

This question is answered in the affirmative. Allen may raise such a defense. We begin with 40 C.F.R. 403.16(a), which defines the term “Upset” as follows:

For purposes of this section, *Upset* means an exceptional incident in which there is unintentional and temporary noncompliance with categorical Pretreatment Standards because of factors beyond the reasonable control of the Industrial User. An Upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or careless or improper operation.

*Id.* (Emphasis in Original).

Section 403.16(b) goes on to state that “[a]n Upset shall constitute an affirmative defense to an action brought for noncompliance with categorical Pretreatment Standards,” so long as certain requirements are met. These requirements include documentation as to the cause of the upset, that at the time of the Upset the facility was being operated in a “prudent and workman-like manner,” and that the Industrial User provided prompt notification to the POTW along with a description of the cause and time of the Upset and the remedial steps taken by the IU. 40 C.F.R. 403(c). The burden of proving such an Upset in an enforcement proceeding lies with the Industrial User. 40 C.F.R. 403.16(d).

While an Upset defense is specifically available to an Industrial User who violates categorical Pretreatment Standards, EPA maintains that such a defense cannot be raised in an enforcement proceeding where, such as in this case, the violations involve “local Pretreatment Standards.” Remember, the effluent parameters appearing in Allen’s various IU permits regarding flow, BOD, TSS, O&G, and pH are all based upon a Town of Hurlock ordinance. These effluent parameters, therefore, are local Pretreatment Standards and not categorical Pretreatment Standards. Thus, EPA argues that the Upset defense provisions of Section 403.16 have no applicability here. This argument is rejected for the reasons that follow.

The regulatory history of the Section 403.16 Upset provisions shows that it is up to the POTW to decide whether it will extend the Upset defense, applicable to categorical Pretreatment Standards, to its local Pretreatment Standards. In that regard, during Part 403 rule making, in response to a comment by a POTW that the Upset defense should likewise apply to local

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<sup>16</sup> The numbers of violations cited by respondent in its proposed Findings as being the result of an Upset cannot be reconciled with the numbers reported in its Brief.

Pretreatment Standards, EPA responded, “it remains the option of the Control Authority to adopt parallel provisions to govern violation of local Standards.” 46 Fed. Reg. 9437.<sup>17</sup>

In this case, there is a dispute between the parties as to whether the Town of Hurlock made a determination that the Upset defense could be raised in circumstances involving the Town’s local Pretreatment Standards. On the one hand, in each of the four Allen IU permits involved here the POTW defined “Upset” to mean, “an exceptional incident in which there is unintentional and temporary noncompliance with Categorical *or Local* Pretreatment Standards ....” CXs 67, 68, 69, & 70, at § I.E.6 (emphasis appearing in CXs 67 & 68). Thus, it would appear that the Town of Hurlock intended to extend the applicability of the Upset defense to include local Standards, as Allen asserts in this case.

On the other hand, however, each of these IU permits issued to Allen, in discussing the term “Upset provision,” subsequently speak only in the context of categorical Pretreatment Standards. *Id.*, § II.B.5. These provisions suggest that the Town might not have intended to extend the Upset defense to its local Standards.<sup>18</sup>

On balance, the most reasonable reading of Allen’s Industrial User permits is one that recognizes the applicability of the Upset defense to circumstances involving the Town of Hurlock’s local Pretreatment Standards. The fact that in all four of the permits the Town used the word “Local” in conjunction with the word “Categorical” in explaining the scope of the term “Upset,” and emphasized the word “Local” in two of the permits, supports such a finding. To read these IU permits differently would suggest that while the Town used the term “local Pretreatment Standards,” it did not intend for it to have any meaning or effect.

#### **b. Has Allen Established an Upset Defense?**

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<sup>17</sup> Citing 40 C.F.R. Part 403, EPA argues that allowing an Industrial User to raise the Upset defense where local Pretreatment Standards are involved “would conflict with the federal scheme under which municipalities may administer an approved pretreatment program.” Compl. R.Br. at 3. Given the Agency’s own view of this Federal scheme, as set forth at 46 Fed. Reg. 9437, no such conflict exists.

<sup>18</sup> Interestingly, despite the fact that Frank Wright testified, neither EPA nor Allen asked him whether the Town permitted Industrial Users to raise an Upset defense for violations of local Pretreatment Standards. Wright is the Director of Public Works for the Town of Hurlock.



The answer to this question is that it has not.<sup>19</sup> In order to establish an Upset of the involved local Pretreatment Standards, respondent must satisfy the prerequisites that are set forth in its IU permit at § II.B.5.<sup>20</sup> These prerequisites are (a) that an upset occurred and the permittee can identify its cause; (b) that at the time of the upset the facility was being operated in a prudent and workmanlike manner and that it was in compliance with applicable operational and maintenance procedures; and (c) that the permittee submitted notification of this Upset within 24 hours of its occurrence (if notification was verbal, a written follow-up was due within 5 days), including a description of the discharge and the cause of noncompliance, the period of noncompliance, including exact dates and times or the anticipated time that the noncompliance is expected to continue, and the steps being taken (or planned) to reduce, eliminate, and prevent recurrence of the noncompliance.

Allen argues, however, for a more restrictive reading of the requirements of its IU permits as it pertains to an Upset. It submits that in order to establish an Upset it need only show that the noncompliance with the local Pretreatment Standards was the result of an “exceptional incident” causing an “unintentional and temporary noncompliance” and that such was due to “factors beyond the reasonable control of the Permittee.” Resp. Br. at 3. This is the definition of “Upset” as it appears in § I.E.6 of its various IU permits.

Allen submits that if the Town of Hurlock wanted it to satisfy the categorical Pretreatment Standards’ prerequisites in establishing an Upset defense where local Standards are exceeded, then the Town would have said so. Because the Town made no such demand in § I.E.6, respondent argues that it was not the Town’s intention that such prerequisites apply to local Standards. Respondent further argues that cases involving the National Pollution Discharge Elimination System offer guidance in this area and, in its view, support its proposed narrow reading of the IU permits. Resp. Br. at 2-3. Thus, Allen asserts that the Town of Hurlock provided for a substantially more relaxed burden for an Industrial User to establish an Upset to violations of the POTW’s local Pretreatment Standards.

Allen’s arguments are unpersuasive. Just as it was proper to consider the provisions of § II.B.5 together with § I.E.6 in resolving whether respondent could properly raise the Upset defense to violations of local Pretreatment Standards in the first place, so too is it appropriate to consider both these provisions in determining what an Industrial User needs to show in order to establish this defense. Therefore, it is the finding of this Tribunal that the definitional provisions of § I.B.5 must be read in conjunction with § II.E.6, the provisions which set forth the mechanics for establishing an Upset. By reading these provisions of Allen’s IU permits together, this Tribunal finds that it was the Town of Hurlock’s intention to require the prerequisites of § II.E.6 to apply where a Upset is being cited for noncompliance with local Pretreatment Standards.

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<sup>19</sup> “In any enforcement proceeding the Industrial User seeking to establish the occurrence of an Upset shall have the burden of proof.” 40 C.F.R. 403.16(d).

<sup>20</sup> The provisions of § II.B.5 mirror the provisions of 40 C.F.R. 403.16(c) (“Conditions necessary for a demonstration of upset.”)

Finally, given the express language of the various IU permits at issue in this case, there is no need to reach to cases arising under the NPDES for possible guidance, as Allen suggests.

Despite arguing that the prerequisites of § II.E.6 are not applicable to situations involving local Pretreatment Standards, Allen submits that on the basis of “credible evidence” it has nonetheless satisfied “the Permits’ prerequisite requirements by providing the necessary notice to the POTW.” Resp. Br. at 3. Allen, however, fails to discuss this credible evidence in any detail. While the record in this case is considerable, respondent provides no record citation to support its legal arguments.

Aside from Allen’s lack of proof, EPA put on a strong case that respondent did not establish an Upset defense to any of the violations at issue here. First, EPA argues that respondent has failed to show that “the permitted facility was at the time being operated in a prudent and workmanlike manner and in compliance with applicable operation and maintenance procedures.” Compl. R.Br. at 3. This argument is directed to the 64 violations which Allen attributes to equipment failure. *See* Resp. Br. at 4. In that regard, EPA notes that the only evidence that respondent offered on the § II.E.6 prerequisites was the rather general testimony of Larry Enders, its Corporate Director for Technical Services. Tr. 170. EPA is correct in its argument that the non-specific testimony of Enders is not sufficient to satisfy the “prudent and workmanlike” prerequisite of § II.E.6. As EPA notes, Enders had no specific knowledge as to operation and maintenance of the equipment that failed. Tr. 1102.

Second, complainant argues that Allen failed to show that it provided the required notification of the Upset to the POTW. Compl. R.Br. at 4; *see* § II.E.6. This argument takes aim at all the violations to which the respondent claims an Upset. EPA’s argument is well made. It is respondent’s burden to establish that it has complied with the notice prerequisite and respondent has not done so.

Finally, EPA contends that the effluent violations which respondent claims were caused by rainfall and mechanical failure cannot be considered Upsets. EPA reasons that Upsets are the result of exceptional circumstances and not common place occurrences such as rainfall and the breakdown of equipment. Moreover, EPA further contends that the number of mechanical failures relied upon by Allen to show an Upset are more illustrative of sloppy maintenance than they are of an exceptional incident beyond the control of the Industrial User. Compl. R.Br. at 5-6.

Even though it already has been held that Allen has not satisfied all the prerequisites of § II.E.6 in order to establish an Upset defense in this case, had respondent done so, it is the view of this Tribunal that the rainfall events and mechanical breakdowns cited by the company would not be sufficient to sustain its affirmative defense. There is nothing “exceptional” about the rainfall events referenced in this case. *See* 40 C.F.R. 403.16(a). The fact of the matter is that normal rainfall occurred in the Hurlock, Maryland, area and not unexpectedly, it increased the effluent discharge of respondent’s Hurlock facility to the POTW. There also has been no showing by Allen that the mechanical problems experienced on the processing line were beyond its reasonable control and were not the result of “lack of preventative maintenance, or careless or

improper operation.” *Id.* Accordingly, Allen’s Upset defense likewise must fail insofar as it blames rainfall and mechanical breakdowns for noncompliance with its Industrial User permit.

### **c. EPA has Established the 232 Effluent Violations**

Respondent does not dispute that its IU permits contained effluent limits for Biochemical Oxygen Demand, Total Suspended Solids, Oil and Grease, pH, and flow. It also does not dispute that the IU permits required that it test the Hurlock processing facility’s effluent for these parameters. Stips. 7 & 8 (March 25, 2002). Furthermore, Allen stipulates that “[f]or parameters such as BOD, Respondent’s tests on its effluent were recorded on laboratory data sheets and that “[t]he results of Respondent’s tests on its effluent were also recorded ... in the monthly reports it was required to submit to the Town of Hurlock.” Stips. 9 & 11 (March 25, 2002).

Complainant’s Exhibits 3 through 38 contain the monthly reports that Allen submitted to the Town of Hurlock regarding its effluent parameters. As EPA asserts is the case, comparison of the data contained in these monthly reports against the provisions of respondent’s IU permits (CXs 67-71) shows that Allen exceeded the IU in the 232 instances alleged by complainant.<sup>21</sup>

Aside from its Upset defense, Allen offers no explanation for these parameter excursions. In its proposed findings of fact, however, respondent does state that “124 alleged violations are less than 1.2 times the flow limit contained in Allen’s permit and within the tolerance limit established by the Town.” Resp. Findings, ¶ 88. Here, Allen is referring to its understanding with the Town of Hurlock that such an excursion would be of “low magnitude.” *See* Stip. 2 (March 28, 2002). While it not entirely clear whether Allen is arguing that these 124 flow excursions are not violations of its IU permit, given its “understanding” with the Town, to the extent that it may be raising such an argument, it is rejected. In that regard, “[m]ere verbal representations by officials that certain portions of a permit will not be enforced, without formal modifications in the permit, will not excuse the holder from the terms of that permit.” *U.S. v. Gulf States Steel, Inc.*, 54 F. Supp. 2d 1233, 1245 (N.D. Ala. 1999), quoting *PIRG v. Yates Industries*, 757 F. Supp. 438, 445 (D. N.J. 1991).

Accordingly, it is held that Allen committed the 232 effluent violations as charged. These violations are set forth in Appendix A to this decision.

## **2. The Monitoring Violations**

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<sup>21</sup> In Complainant’s Exhibit 2, EPA alleged 2 effluent violations for TSS excursions occurring on October 9, 1996. In its brief, EPA stated that it was alleging only 1 TSS violation for that date, and not 2 violations. Compl. Br. at 5 n.27. A review of EPA’s supporting documentation (CX 4) shows that while the monthly report submitted by Allen for the TSS parameter indicates compliance with its IU permit, the laboratory analysis by Envirocorp, Inc., shows noncompliance, *i.e.*, a reading of 510 mg/l. This Envirocorp, Inc., analysis is sufficient to establish noncompliance by Allen with its Industrial User permit for the TSS parameter on October 9, 1996.

EPA also charges Allen with 48 violations of the monitoring provisions of its Industrial User permits. These alleged violations are listed in Complainant's Exhibit 39. In response, Allen states that six of the alleged monitoring violations "were due to unexpected occurrences beyond [its] reasonable control and were repaired immediately upon discovery." Resp. Findings, ¶ 95. To the extent that respondent seeks to raise its Upset defense to these monitoring violations, that argument is rejected for the reasons mentioned above.

In addition, with respect to the COD ("Chemical Oxygen Demand") monitoring violation of December 1, 1999, respondent submits that "it appealed the daily COD sampling requirement and that it was removed from its permit as a result of that appeal." Resp. Findings, ¶ 95.<sup>22</sup> In its post hearing argument, EPA does not address the COD violation, other than providing two general references. The first reference is in Complainant's Exhibit 39. That exhibit bears the notation that the COD violation is based upon the "12/99 Allen monthly report" and the "1/31/00 Hurlock NOV." In its proposed Finding of Fact No. 22, EPA also states that the parties stipulated that Allen's 1999 IU permit contained a monitoring requirement for COD.

With respect to the COD monitoring requirement stipulation, however, EPA is incorrect. A review of Stipulation 13 (March 25, 2002) does not contain a monitoring requirement for COD. Moreover, a review of Complainant's Exhibit 71, Allen's Industrial User permit with an effective date of December 1, 1999, supports Allen's argument that respondent had no monitoring obligation for COD on the date of the alleged violation. Accordingly, EPA has not established a violation with respect to COD monitoring.

Finally, Allen asserts that the unmetered flow on March 10, 1998, occurred for only two hours, that the unmetered flow on March 2, 1999, occurred for only three hours, and that the unmetered flow of June 7, 2000, occurred for only two hours. Resp. Findings, ¶ 97. Assuming respondent's representations to be true, to the extent it is arguing that the limited time of the unmetered flow does not constitute a monitoring violation, its argument is rejected.

In sum, EPA has established, on the basis of the information compiled in Complainant's Exhibit 39, that Allen committed 47 of the 48 monitoring violations charged.<sup>23</sup> These violations are set forth in Appendix B to this decision.

### **3. Failure to Report the IU Permit Violations**

EPA alleges that Allen violated the Clean Water Act in the 24 instances in which it failed to timely notify the POTW of noncompliance with its Industrial User permit. The evidence

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<sup>22</sup> "COD" is a comparable measurement to "BOD." Tr. 76.

<sup>23</sup> Further support for the 47 failure to monitor violations is found in Complainant's Exhibits 41-43, 51, 56, and 58-63.

supporting EPA's charges in this regard is summarized in Complainant's Exhibit 55. This exhibit contains four pieces of information upon which EPA relied to determine the reporting violations. Tr. 380-393. This information included the date of the permit violation, the parameter violated, whether the violation was for the 24-hour notification or the 5-day notification requirement, and the specific evidence that EPA relied upon to reach its conclusion that a notification violation did in fact occur.

It is noteworthy that Allen does not dispute complainant's assertion that there are 24 instances of alleged failure to notify of permit noncompliance. Rather, Allen's challenge to the 24 alleged reporting violations is a limited one. In that regard, it specifically takes issue only with the alleged reporting violation dated September 27, 1999. Resp. Findings, ¶ 100. EPA agrees with Allen as to the reporting events of September 27, 1999, and it has withdrawn this alleged violation. Compl. R.Br. at 1, n.1.

In addition, Allen moves to strike Complainant's Exhibits 29 and 61 on the ground that these exhibits lack sufficient authentication. Resp. Br. at 26. Respondent objects to these exhibits to the extent that they reference Notices of Violation ("NOVs") issued to Allen. See Tr. 103-104. These exhibits in part reference the alleged reporting violations of November 1, 1999, December 20, 1999, and December 22, 1999. EPA opposes Allen's motion to strike. Complainant argues that even though these two exhibits do not bear the Town of Hurlock letter head, and even though they are not signed by Frank Wright, the Town's Director of Public Works, Wright's testimony establishes that these NOVs are reliable and are what EPA purports them to be. See Tr. 115-116.

Exhibits 29 and 61 were admitted into evidence at hearing over the objection of respondent's counsel, but also with some reservation by this Tribunal. Tr. 117-119. Nonetheless, upon reviewing the transcript as it relates to these exhibits, respondent's post hearing motion to strike is *denied*. In that regard, Frank Wright explained how the information was collected by Davis, Bowen & Friedel on behalf of the Town. Wright also explained how DB& F would check the information provided by the Industrial User against the requirements of its permit and, if necessary, prepare a Notice Of Violation for the Town. At all times, however, the decisions as to whether to issue the NOV lay solely within the discretion of the Town of Hurlock. Finally, Wright testified that Exhibits 29 and 61 were provided to EPA by the Town and that those exhibits are "true and correct copies" of the NOVs that the Town issued to Allen. Tr. 84-90. Indeed, Allen does not even argue that these Notices of Violation were never received by respondent. Tr. 116.

Accordingly it is held that EPA has established the remaining 24 violations for failure to report IU permit noncompliance.<sup>24</sup> These violations are set forth in Appendix C to this decision.

## **B. Civil Penalty**

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<sup>24</sup> Further support for the 24 failure to report noncompliance violations is provided in Complainant's Exhibits 56-63.

Having found that Allen committed 304 violations of the Clean Water Act due to noncompliance with its Industrial User permits, a civil penalty must now be assessed.<sup>25</sup> Section 309(g)(3) of the Act sets forth the penalty factors that are to be taken into account in determining this penalty. Section 309(g)(3) states:

In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the 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.

33 U.S.C. § 1319(g)(3).

### **1. Seriousness of the Violations**<sup>26</sup>

Because of the different nature of the violations at issue here, the seriousness of the effluent violations will be addressed separately from the monitoring and noncompliance reporting violations.

Insofar as the effluent violations are concerned, the most damaging evidence to respondent is their sheer number. One cannot play down the significance that Allen exceeded its flow, BOD, TSS, O&G, and pH parameters on 232 occasions. Nonetheless, as damaging as that may be, EPA concedes that “the magnitude of the exceedences was generally small, that the Respondent discharged to a POTW rather than directly to a stream and that the exceedences were not of toxic pollutants so that the risk of environmental harm was reduced.” Compl. Br. at 5 (fn. omitted). Also, it must be kept in mind that the 232 violations took place over a four and one-half year period, and for several months out of each year the POTW discharged its effluent upon land and not to Wright’s Branch.

In addition, Allen points out that 124 of the flow violations were within 1.2 times the flow limit parameter set forth in its Industrial User permit. Resp. Findings, ¶ 88. This limited excursion is significant given that EPA and Allen stipulated as follows:

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<sup>25</sup> EPA seeks the statutory maximum civil penalty of \$137,500. It reasons that this request is “extremely conservative,” because had complainant brought this action in Federal District Court it could have sought a penalty of \$7,425,000. Compl. R.Br. at 7. This Tribunal finds such an assertion to be of no persuasive value.

<sup>26</sup> The “seriousness” of the violations includes consideration of the “nature,” “circumstances,” “extent,” and “gravity” criteria.

Allen and the Town agreed not to revise or modify the daily maximum flow limit in Allen's IU permit because the Town considered exceedences of less than 1.2 times that limit to be "low magnitude" and was not concerned about such exceedences from an operational standpoint. This agreement did not affect a change in the permit.

Stip. 2 (March 28, 2002).

While this "understanding" between Allen and the Town of Hurlock previously has been rejected as a defense to the effluent violations in the liability section, *supra*, it is properly considered at the penalty stage. On that note, the stipulation provides clear evidence that the operator of the Publicly Owned Treatment Works did not find such marginal excursions to be a serious threat to the integrity of the POTW system.

Finally, the evidence in this case is that the effluent violations did not have an immediate and direct adverse impact upon the Town of Hurlock POTW. The testimony of Frank Wright, the Director of Public Works for the Town, suggests that there was no risk to the POTW as a result of Allen's effluent violations because of the "massive" size and the capacity of the POTW. Tr. 123, 160-161.

John Reid, respondent's POTW expert, similarly concluded, "I don't believe their excursions had any negative impact [on] the town system and [its] performance." Tr. 1321. Reid reached this conclusion based upon his evaluation of the size of the Town of Hurlock POTW and the nature of the pollutants being discharged by Allen. Tr. 1313-1322. He likened Allen's discharge to "a bucket of water going into a swimming pool." Tr. 1322.<sup>27</sup>

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<sup>27</sup> Reid testified:

In this particular case here, you got -- it's run as a lagoon system where the lagoons are run, the flows split and you go through two lagoons that are running series. Well, the first lagoon -- the detention time on the first lagoon is over two months. So anything coming in in one month is going to be blended with something that went in before it the month before. And then in the lagoon after that, that's going to be blended with two more months.

So a slug like that, a spike, a blip in the data is still going to be blended out. The average of those excursions with the other data that is before and after it, the average of that still comes out within the average in the permit in terms of pounds of pollutants per month they were allowed to discharge....

Tr. 1322-1323.

Reid also testified that Allen's BOD excursions had little impact upon the Town of Hurlock POTW system. He stated that Allen only discharged about 57,000 lbs. of BOD monthly, even though under the terms of its Industrial User permits it was allowed to discharge 70,000 lbs. each month. This expert witness added that it would take approximately 120,000 lbs. of BOD to cause a problem for the POTW. Tr. 1339.

In sum, the effluent violations are not as serious as EPA asserts. Certainly, their number is significant, but these violations must be viewed in the context of a four and one-half year time frame and particularly in the context that they did not cause, or even threaten, serious harm to the POTW. Moreover, in 2001, Allen's Industrial User permit was modified to allow for "monthly averaging." RX 56; *see* Resp. Br. at 12-13. Allen witness Larry Enders testified that this monthly averaging would have eliminated the violations had it been in place earlier. Tr. 904-907. Whatever the actual effect of the terms of the 2001 IU permit on the violations at issue in this case, EPA does not contest respondent's assertion that there would have been fewer.

It is a different story, however, with respect to the reporting violations, *i.e.*, the 48 instances where Allen failed to monitor its effluent and the 24 instances where respondent failed to timely notify the Town of Hurlock POTW of noncompliance with its IU permit. There is no doubt these violations are serious. On that score, the Environmental Appeals Board has provided the rationale for such a designation. In *Advanced Electronics, Inc.*, CWA Appeal No. 00-5 (March 11, 2002), it stated:

As the Board has consistently held, the failure to monitor as required deprives the Agency and other regulators of information that is necessary to ensure the safety of the public and the environment. *In re Safe & Sure Prods., Inc.*, 8 E.A.D. 517, 530 (EAB 1999); *In re Woodcrest Mfg., Inc.*, 7 E.A.D. 757, 781 (EAB 1998)("[w]e have consistently held that failure to comply with the reporting or registration requirements of environmental statutes can cause significant harm to the applicable regulatory scheme and may be grounds for imposition of a substantial penalty."); *see also In re Sav-Mart, Inc.*, 5 E.A.D. 732, 732, 738 n.13 (EAB 1995).

*Id.* at 22. *See Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1491 (9th Cir. 1987) ("The NPDES program fundamentally relies on self-monitoring."), *vacated and remanded on other grounds*, 485 U.S. 931 (1988).

## **2. Ability to Pay**

Respondent does not argue that it is unable to pay the proposed penalty. Tr. 413 Citing a Dun & Bradstreet report, EPA contends that respondent's sales volume for the year 2000 was 265 million dollars and projected to be higher for the following year. Tr. 415. Accordingly, it is held that respondent has the ability to pay the penalty assessed in this case.



### **3. History of Violations**

The violations at issue in this case stretched from April, 1996, through September, 2000. There has been no showing by EPA that Allen previously had been in noncompliance with its IU permit.

### **4. Degree of Culpability**

With respect to the effluent violations, the evidence in this case supports a finding that respondent was moderately negligent. On the one hand, because Allen compiled monthly reports on flow, BOD, TSS, O&G, and pH for submission to the Town of Hurlock POTW, it was the first to know that it was not in compliance with its IU permits. Indeed, it struggled unsuccessfully with compliance issues from at least April of 1996, through September of 2000. Also, the fact that respondent exceeded its IU permit parameters 232 times during this period is no small matter.

While these considerations suggest a greater finding of negligence, they are balanced by Allen's efforts to reduce its water usage and comply with its IU permit. In that regard, the fact that Allen had no choice but to achieve compliance with the United States Department of Agriculture's HACCP regulations cannot be ignored. As the record shows, this compliance resulted in a considerable increase in water usage. Allen also had no choice but to comply with the discharge provisions of its Industrial User permit. It tried to do both, but failed. While Allen's noncompliance with its IU permit warrants a monetary sanction, the overall severity of that sanction must be reduced considering the substantial water conservation efforts, previously chronicled, implemented by respondent at its Hurlock facility. On balance, therefore, a finding of moderate negligence is appropriate for the effluent violations.

Allen, however, is highly negligent in its commission of the monitoring violations and in its failure to report to the Town of Hurlock POTW noncompliance with its Industrial User permits. These monitoring and reporting violations occurred because respondent failed to act. There is no dispute in this case that Allen was under an obligation to monitor its effluent and to report its noncompliance. Allen has offered no plausible argument that may excuse a finding of a high degree of negligence for these violations.

In assigning the above negligence values to the three categories of violations in this case, this Tribunal disagrees with EPA's assertion that "[r]espondent purposely violated its permit because it simply didn't like the permit's terms." Compl. R.Br. at 7 (emphasis in original). Viewing the violations committed by Allen in the context of the entire record, particularly the efforts made by Allen to comply with both the applicable USDA regulations and the terms of its Industrial User permits, the record simply does not support a finding that respondent purposefully and deliberately violated the Clean Water Act.

### **5. Economic Benefit**

EPA submits that as a result of the respondent's noncompliance with its Industrial User

permits, Allen sustained an economic benefit in the amount of \$36,350. The government bears the burden of proof on this issue. In order to meet this burden, it “need not show with precision the exact amount of the economic benefit enjoyed by the respondent.” *B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 217 (EAB 1997). Rather, “[i]t is sufficient that the complainant establish a ‘reasonable approximation’ of the benefit.” *Id.*; see *Sierra Club v. Cedar point Oil Co., Inc.*, 73 F.3d 546, 576 (5th Cir. 1996) (“we note that a court need only make a ‘reasonable approximation’ of economic benefit when calculating a penalty under the [Clean Water Act].”); citing *Public Interest Research Group of New Jersey, Inc., v. Powell Duffryn*, 913 F.2d 64, 80 (3rd Cir. 1990).

Seeking to clear this “reasonable approximation” bar, the government asserts that “[r]espondent could have addressed the chronic BOD and flow violations by installing some basic facilities, such as an aeration basin.” Compl. Findings, ¶ 31 (footnote omitted). EPA further asserts that it would have cost Allen approximately \$36,350 to construct an “aeration basin.”<sup>28</sup> It is EPA’s view that an aeration basin would have addressed the “chronic BOD” violations, as well as provide a buffer for the flow violations. Tr. 404.

As support for its economic benefit theory, complainant relies exclusively upon the testimony of Ashley Toy, an EPA environmental engineer.<sup>29</sup> Toy testified that in order to calculate Allen’s economic benefit, “we had to assume some design criteria” and “we used very conservative estimates.” Tr. 404. As explained below, however, on cross-examination of EPA’s key economic benefit witness respondent exposed several critical shortcomings in complainant’s economic benefit argument.

First, Toy testified that she computed the proposed penalty (including consideration of the economic benefit penalty factor) *before* she received any Agency training on how to determine penalty *proposals*. Tr. 434. Second, Toy never inspected, or even visited, either Allen’s Hurlock facility or the Town of Hurlock POTW. Tr. 434, 438. Indeed, this witness had no experience in either designing or improving pretreatment systems. Tr. 437. Third, the economic benefit determination was not even made by Toy. It was made by her predecessor, who did not testify. Tr. 533.<sup>30</sup>

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<sup>28</sup> An aeration basin was described as a basin where air would be pumped into the wastewater stream. Tr. 601.

<sup>29</sup> EPA also presented testimony through Toy that respondent may have enjoyed an economic benefit as large as \$185,000 by not hauling some of the Hurlock facility wastewater to its Cordova, Maryland, facility for treatment. Toy did not know, however, whether the Cordova facility had sufficient capacity to accept this additional wastewater. She stated, “it was just a reasonable assumption based on my part.” Tr. 409. In any event, complainant rests its economic benefit argument solely on the lower of the two amounts -- *i.e.*, upon the \$36,350 figure. Tr. 407- 410.

<sup>30</sup> Apparently, at an earlier point in time, EPA inspected Allen’s Hurlock facility and the Agency determined that respondent could build an aeration basin. Tr. 664.

Accordingly, Toy was unable to testify as to how large the aeration basin should be, its capacity, the length of time that the wastewater would have to remain in the basin, and whether its construction was even feasible. Tr. 601-602, 604, 607. What Toy did offer falls far short of establishing an economic benefit in this case. She stated that the economic benefit dollar figure was “based on the energy that would be needed and there was a diagram to determine ... the cost associated with it, and it’s in EPA’s 1983 treatability manual.” Tr. 603. All that Toy did was to review the aeration basin information that already was in the case file. Tr. 667.

In sum, EPA failed to provide a “reasonable approximation” of any economic benefit gained by Allen as a result of its noncompliance with the Clean Water Act.

#### **6. Other Factors as Justice May Require**

There are no “other factors as justice may require” which would result in a reduction to the penalty assessed. In that regard, Allen’s efforts to achieve compliance with the United States Department of Agriculture’s HACCP regulations, and its subsequent efforts to reduce unnecessary water usage, already have been taken into account.

#### **IV. ORDER**

It is held that Allen Family Foods committed 304 violations of the Clean Water Act. For these violations, respondent is assessed a civil penalty of \$90,000. Allen Family Foods, Inc., is directed to pay this penalty within 60 days of the date of this order.<sup>31</sup>

Unless an appeal is taken to the Environmental Appeals Board pursuant to 40 C.F.R. 22.30, or unless a party acts pursuant to 40 C.F.R. 22.27(c), this decision shall become a Final Order as provided in 40 C.F.R. 22.27(c).

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Carl C. Charneski  
Administrative Law Judge

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<sup>31</sup> Payment of the civil penalty may be in the form of either a cashier's check or a certified check, made payable to the Treasurer of the United States, and addressed to Mellon Bank, EPA Region 3 (Regional Hearing Clerk), P.O. Box 360515, Pittsburgh, Pennsylvania, 15251.

**APPENDIX A**

**(The Effluent Limit Violations)**

<b>Date</b>	<b>Parameter</b>	<b>Reported Value</b>	<b>Limit Value</b>	<b>Units</b>
09/10/96	Flow	857,970	800,000	gpd
09/11/96	Flow	898,250	800,000	gpd
09/12/96	Flow	865,780	800,000	gpd
09/17/96	Flow	819,820	800,000	gpd
10/08/96	Flow	901,990	800,000	gpd
10/09/96	BOD	720	350	mg/l
10/09/96	TSS	510	450	mg/l
10/28/96	Flow	828,307	800,000	gpd
10/29/96	Flow	812,871	800,000	gpd
11/26/96	Flow	862,080	800,000	gpd
02/06/97	BOD	355	350	mg/l
02/25/97	BOD	440	350	mg/l
04/28/97	BOD	530	350	mg/l
07/08/97	BOD	460	350	mg/l
08/20/97	Flow	967,657	900,000	gpd
09/02/97	BOD	440	350	mg/l
10/22/97	BOD	510	350	mg/l
03/04/98	BOD	370	350	mg/l
03/09/98	BOD	370	350	mg/l
04/01/98	BOD	420	350	mg/l
04/02/98	BOD	410	350	mg/l
04/06/98	Flow	918,846	900,000	gpd
04/16/98	O&G	200	150	mg/l

04/17/98	Flow	914,287	900,000	gpd
04/30/98	Flow	917,440	900,000	gpd
05/01/98	Flow	901,208	900,000	gpd
05/04/98	Flow	917,395	900,000	gpd
05/06/98	Flow	935,098	900,000	gpd
05/06/98	BOD	360	350	mg/l
05/08/98	Flow	902,282	900,000	gpd
05/13/98	Flow	934,991	900,000	gpd
05/19/98	Flow	913,993	900,000	gpd
05/20/98	Flow	974,537	900,000	gpd
05/22/98	BOD	500	350	mg/l
05/28/98	Flow	908,772	900,000	gpd
06/02/98	Flow	903,852	900,000	gpd
06/03/98	Flow	952,855	900,000	gpd
06/11/98	Flow	910,486	900,000	gpd
06/22/98	Flow	901,808	900,000	gpd
06/23/98	Flow	916,200	900,000	gpd
06/25/98	BOD	560	350	mg/l
07/01/98	Flow	911,609	900,000	gpd
07/09/98	Flow	904,685	900,000	gpd
07/15/98	Flow	925,643	900,000	gpd
07/17/98	Flow	920,190	900,000	gpd
07/22/98	Flow	903,300	900,000	gpd
08/06/98	Flow	914,597	900,000	gpd
08/25/98	Flow	911,891	900,000	gpd
08/26/98	Flow	958,145	900,000	gpd
10/28/98	BOD	410	350	mg/l

11/30/98	BOD	370	350	mg/l
01/07/99	Flow	935,600	900,000	gpd
01/13/99	Flow	902,600	900,000	gpd
01/19/99	Flow	942,600	900,000	gpd
03/01/99	Flow	984,700	900,000	gpd
03/04/99	Flow	966,000	900,000	gpd
03/22/99	BOD	490	350	mg/l
05/05/99	Flow	1,016,900	900,000	gpd
05/06/99	Flow	970,100	900,000	gpd
05/06/99	BOD	400	350	mg/l
05/07/99	Flow	909,200	900,000	gpd
05/07/99	BOD	450	350	mg/l
05/08/99	BOD	360	350	mg/l
05/10/99	Flow	922,900	900,000	gpd
05/12/99	Flow	906,000	900,000	gpd
05/14/99	Flow	1,068,700	900,000	gpd
05/14/99	BOD	370	350	mg/l
05/17/99	Flow	1,136,000	900,000	gpd
05/18/99	Flow	999,400	900,000	gpd
05/19/99	Flow	920,100	900,000	gpd
05/20/99	Flow	1,003,800	900,000	gpd
05/24/99	Flow	1,006,300	900,000	gpd
05/25/99	Flow	963,200	900,000	gpd
05/25/99	BOD	360	350	mg/l
05/26/99	Flow	919,800	900,000	gpd
05/26/99	BOD	380	350	mg/l
05/27/99	Flow	920,700	900,000	gpd

05/28/99	Flow	909,300	900,000	gpd
06/01/99	Flow	971,800	900,000	gpd
06/02/99	Flow	1,025,600	900,000	gpd
06/03/99	Flow	1,100,700	900,000	gpd
06/04/99	Flow	981,300	900,000	gpd
06/07/99	Flow	913,400	900,000	gpd
06/08/99	Flow	980,200	900,000	gpd
06/09/99	Flow	995,600	900,000	gpd
06/10/99	Flow	952,400	900,000	gpd
06/11/99	Flow	934,300	900,000	gpd
06/14/99	Flow	916,600	900,000	gpd
06/15/99	Flow	932,300	900,000	gpd
06/15/99	BOD	580	350	mg/l
06/16/99	Flow	985,200	900,000	gpd
06/16/99	BOD	440	350	mg/l
06/17/99	Flow	959,800	900,000	gpd
06/22/99	Flow	908,400	900,000	gpd
06/23/99	Flow	915,000	900,000	gpd
06/23/99	BOD	380	350	mg/l
06/24/99	Flow	913,400	900,000	gpd
06/24/99	BOD	370	350	mg/l
06/25/99	BOD	400	350	mg/l
06/30/99	BOD	370	350	mg/l
07/01/99	Flow	919,000	900,000	gpd
07/01/99	BOD	470	350	mg/l
07/02/99	BOD	490	350	mg/l
07/06/99	BOD	390	350	mg/l



07/07/99	BOD	430	350	mg/l
07/12/99	BOD	400	350	mg/l
07/13/99	Flow	910,500	900,000	gpd
07/13/99	BOD	380	350	mg/l
07/14/99	Flow	920,300	900,000	gpd
07/14/99	BOD	560	350	mg/l
07/15/99	BOD	400	350	mg/l
07/16/99	Flow	938,500	900,000	gpd
07/19/99	BOD	400	350	mg/l
07/20/99	BOD	400	350	mg/l
07/22/99	Flow	980,500	900,000	gpd
07/22/99	BOD	440	350	mg/l
07/23/99	BOD	540	350	mg/l
07/26/99	BOD	570	350	mg/l
07/27/99	Flow	912,700	900,000	gpd
07/27/99	BOD	570	350	mg/l
07/28/99	BOD	380	350	mg/l
07/29/99	BOD	440	350	mg/l
08/02/99	BOD	400	350	mg/l
08/04/99	Flow	933,600	900,000	gpd
08/04/99	BOD	470	350	mg/l
08/05/99	BOD	450	350	mg/l
08/06/99	BOD	400	350	mg/l
08/09/99	BOD	470	350	mg/l
08/10/99	Flow	915,700	900,000	gpd
08/10/99	BOD	360	350	mg/l
08/11/99	Flow	918,600	900,000	gpd

08/12/99	Flow	952,600	900,000	gpd
08/13/99	BOD	390	350	mg/l
08/19/99	BOD	370	350	mg/l
08/23/99	Flow	1,012,400	900,000	gpd
08/24/99	Flow	901,600	900,000	gpd
08/25/99	Flow	929,100	900,000	gpd
08/26/99	BOD	380	350	mg/l
08/31/99	Flow	971,300	900,000	gpd
09/01/99	Flow	985,500	900,000	gpd
09/02/99	BOD	430	350	mg/l
09/07/99	Flow	909,400	900,000	gpd
09/08/99	Flow	994,400	900,000	gpd
09/09/99	Flow	1,023,200	900,000	gpd
09/10/99	Flow	948,600	900,000	gpd
09/10/99	BOD	400	350	mg/l
09/13/99	Flow	1,056,300	900,000	gpd
09/14/99	Flow	1,007,500	900,000	gpd
09/15/99	Flow	1,700,600	900,000	gpd
09/16/99	Flow	1,154,300	900,000	gpd
09/20/99	Flow	1,021,700	900,000	gpd
09/21/99	Flow	1,011,200	900,000	gpd
09/22/99	Flow	947,100	900,000	gpd
09/23/99	Flow	1,024,400	900,000	gpd
09/24/99	Flow	970,000	900,000	gpd
09/24/99	BOD	460	350	mg/l
09/27/99	Flow	1,078,400	900,000	gpd
09/28/99	Flow	1,016,100	900,000	gpd

09/28/99	BOD	400	350	mg/l
09/29/99	Flow	981,500	900,000	gpd
09/29/99	BOD	390	350	mg/l
09/30/99	Flow	971,700	900,000	gpd
10/01/99	BOD	480	350	mg/l
10/04/99	Flow	992,400	900,000	gpd
10/04/99	BOD	470	350	mg/l
10/05/99	Flow	986,500	900,000	gpd
10/06/99	Flow	971,300	900,000	gpd
10/07/99	Flow	1,071,500	900,000	gpd
10/11/99	Flow	959,000	900,000	gpd
10/12/99	Flow	1,138,200	900,000	gpd
10/12/99	BOD	380	350	mg/l
10/13/99	Flow	1,005,100	900,000	gpd
10/14/99	BOD	410	350	mg/l
10/15/99	BOD	440	350	mg/l
10/18/99	Flow	1,116,700	900,000	gpd
10/19/99	Flow	1,119,400	900,000	gpd
10/20/99	Flow	1,113,700	900,000	gpd
10/21/99	Flow	1,015,500	900,000	gpd
10/25/99	Flow	930,300	900,000	gpd
10/26/99	Flow	950,900	900,000	gpd
10/27/99	Flow	931,900	900,000	gpd
10/28/99	Flow	989,300	900,000	gpd
11/01/99	Flow	952,600	900,000	gpd
11/03/99	Flow	932,800	900,000	gpd
11/09/99	Flow	950,600	900,000	gpd

11/09/99	BOD	360	350	mg/l
11/10/99	BOD	390	350	mg/l
11/12/99	BOD	360	350	mg/l
11/23/99	Flow	920,600	900,000	gpd
11/30/99	Flow	1,077,200	900,000	gpd
12/02/99	BOD	360	350	mg/l
12/08/99	BOD	400	350	mg/l
12/10/99	BOD	410	350	mg/l
12/20/99	Flow	907,300	900,000	gpd
12/21/99	Flow	926,200	900,000	gpd
12/22/99	Flow	936,700	900,000	gpd
12/29/99	BOD	360	350	mg/l
01/19/00	BOD	390	350	mg/l
01/27/00	Flow	923,900	900,000	gpd
01/27/99	BOD	370	350	mg/l
01/28/00	Flow	907,800	900,000	gpd
01/31/00	BOD	400	350	mg/l
02/01/00	BOD	400	350	mg/l
02/02/00	BOD	360	350	mg/l
02/07/00	BOD	390	350	mg/l
03/15/00	Flow	933,200	900,000	gpd
03/20/00	BOD	390	350	mg/l
03/21/00	Flow	938,100	900,000	gpd
03/22/00	BOD	370	350	mg/l
03/29/00	BOD	360	350	mg/l
04/03/00	BOD	360	350	mg/l
04/27/00	Flow	925,400	900,000	gpd

05/08/00	Flow	943,300	900,000	gpd
05/15/00	Flow	904,700	900,000	gpd
05/18/00	Flow	930,600	900,000	gpd
06/12/00	Flow	917,100	900,000	gpd
07/13/00	Flow	923,100	900,000	gpd
07/17/00	Flow	939,800	900,000	gpd
07/18/00	Flow	908,700	900,000	gpd
07/19/00	Flow	941,500	900,000	gpd
08/02/00	Flow	915,500	900,000	gpd
08/16/00	Flow	933,600	900,000	gpd
08/21/00	Flow	912,800	900,000	gpd
08/22/00	pH	4.4	5.0 min.	su
08/29/00	Flow	904,800	900,000	gpd
09/12/00	BOD	490	350	mg/l
09/14/00	Flow	942,900	900,000	gpd
09/20/00	Flow	964,800	900,000	gpd
09/21/00	Flow	988,700	900,000	gpd
09/25/00	Flow	1,136,600	900,000	gpd
09/26/00	Flow	935,700	900,000	gpd
09/27/99	Flow	938,400	900,000	gpd

**APPENDIX B**

**(Failure to Report Monitoring Violations)**

<b>Date</b>	<b>Parameter</b>	<b>Frequency of Sampling</b>	<b>Required Sampling</b>	<b>No. of Violations</b>
04/17/96	BOD	0/week	1/week	1
04/17/96	TSS	0/week	1/week	1
05/08/96	BOD	0/week	1/week	1
05/08/96	TSS	0/week	1/week	1
Week of 01/01/97	BOD	1/week	3/week	2
Week of 01/01/97	TSS	1/week	3/week	2
Week of 01/06/97	BOD	1/week	3/week	2
Week of 01/06/97	TSS	1/week	3/week	2
Week of 01/13/97	BOD	1/week	3/week	2
Week of 01/13/97	TSS	1/week	3/week	2
Week of 01/20/97	BOD	1/week	3/week	2
Week of 01/20/97	TSS	1/week	3/week	2
Week of 01/27/97	BOD	1/week	3/week	2
Week of 01/27/97	TSS	1/week	3/week	2
Week of 02/03/97	BOD	1/week	3/week	2
Week of 02/03/97	TSS	1/week	3/week	2

Week of 02/10/97	BOD	1/week	3/week	2
Week of 02/10/97	TSS	1/week	3/week	2
03/10/98	Flow	Unmetered	Continuous	1
Week of 03/15/98	TSS	2/week	3/week	1
Week of 07/01/98	BOD	2/week	3/week	1
Week of 07/01/98	TSS	2/week	3/week	1
08/03/98	Flow	Unmetered	Continuous	1
Week of 09/07/98	BOD	Unknown	3/week	1
Week of 09/07/98	TSS	Unknown	3/week	1
Week of 11/23/98	BOD	2/week	3/week	1
Week of 11/23/98	TSS	2/week	3/week	1
03/02/99	Flow	Unmetered	Continuous	1
01/31/00	Flow	Unmetered	Continuous	1
Week of 02/21/00	TSS	0/week	3/week	3
06/07/00	Flow	Unmetered	Continuous	1

**APPENDIX C**

**(Failure to Report Violations)**

<b>Date</b>	<b>Violation</b>	<b>Failure to Report</b>
02/25/97	BOD	24-hour Notification
04/01/98	BOD	5-day ”
04/02/98	BOD	5-day ”
04/06/98	Flow	5-day ”
04/17/98	Flow	24-hour ”
06/22/99	Flow	24-hour ”
06/23/99	Flow	24-hour ”
06/24/99	Flow	24-hour ”
07/19/99	BOD	24-hour ”
07/19/99	BOD	5-day ”
07/26/99	BOD	24-hour ”
07/26/99	BOD	5-day ”
07/27/99	BOD	24-hour ”
07/27/99	BOD	5-day ”
07/28/99	BOD	24-hour ”
07/28/99	BOD	5-day ”
07/29/99	BOD	24-hour ”
07/29/99	BOD	5-day ”
09/24/99	Flow, BOD	24-hour ”
09/30/99	Flow	24-hour ”
11/01/99	Flow	24-hour ”
12/20/99	Flow	24-hour ”
12/22/99	Flow	24-hour ”
01/31/00	BOD	24-hour ”