UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	**)**	
	)	
CITY OF MARSHALL,	**)**	**Docket No. CWA-5 98-013**
	)	
Respondent	**)**	

Decision Upon Remand

Introduction

In this administrative proceeding under Section 309(g) of the Clean Water Act ("CWA"), the Environmental Appeals Board ("EAB" or Board) has remanded the case to the Court, requiring that it "examine and explain whether the penalty calculation should be reassessed in light of [this Court's] upward adjustment in the number of identified violations." Board Decision and Remand Order at 25 -26. Slip Opinion, December 31, 2001, CWA Appeal No. 00-9.[1]

Following the issuance of this Court's Initial Decision on October 3, 2000, it issued an "Errata"on November 15, 2000. Upon reading EPA's Appeal to the Board, the Court realized that a clerical error had been made. As the "Errata" noted, at page fifteen of the Initial Decision the Court stated "... the instances of recognizable violations within Count I are reduced to include only those loads of land-applied sewage occurring from **September 28, 1995 through November 7, 1995**, while the violations alleged for Count III, occurring during February and March 1994, are dismissed." (emphasis in original). The Court then informed that the "... sentence should have read: "... the instances of recognizable violations within Count I are reduced to include only those loads of land-applied sewage occurring from ***February 20, 1995 through December 1996***, while the violations alleged for Count III, occurring during February and March 1994 are dismissed." (emphasis in original). This Court went on to note that "[c]onsistent with this clerical error, the Initial Decision inadvertently referred to a subtotal, instead of the total, when discussing the recognizable violations remaining after application of the Section 503.2(a) defense. Thus, "fifty-six" instances (instead of the "one hundred and

[1]Hereinafter the Board's Decision and Remand Order will be referred to as "Board's Remand." The Board emphasized that the reassessment of the penalty is the *only* aspect of the Court's decision on remand that may be appealed. Board's Remand at 26.

seventeen" instances charged) should have appeared where "twelve"[2] instances appears."

The "Errata" emphasized that the errors were clerical and took some pains to show that "*all charged instances were considered"* by pointing out that on the very first page of the Initial Decision it was noted that Count I, which involved the land application violations, applied to alleged violations from August 1994 through **December 1996**. The Court then added in its Errata, that at page three of the Initial Decision, it was noted that "exhibits JX1 through JX3 as well as exhibits JX6 through JX8 pertained to 1994 through **1996**." Furthermore, the Errata also pointed out that the Initial Decision, at page three, explicitly referred to "excess molybdenum values [that] were recorded on October 14th, November 6th, and December 5th, **1996**." Although that should have been sufficient for EPA to realize that the reference to September 28, 1995 through November 7, 1995 was a simple clerical error, and not reflective of the Court's oversight of the scope of violations under consideration, the Errata also took note that the Initial Decision expressly stated: "EPA does not dispute that **of the 117 days of violation alleged for Count I**, there is direct evidence of violations for only six of those days and that it relies upon "circumstantial evidence" for the days." Initial Decision at 8. (emphasis added). At footnote 19, this Court accepted that, "[e]xcept for those issues specifically addressed in the body of this decision, **all other determinations necessary for liability to attach are found to be present**." (emphasis added).

Thus, the Errata was issued to correct a *clerical* mistake, not an oversight as to the number of violations the Court was cognizant of when it issued the decision. A review of the evidence confirms that, while the Court's clerical error was regrettable, it does not reflect its misapprehension of the number of violations involved, nor the number of violations that were in fact considered in arriving at the penalty. By its Remand Decision, the EAB has affirmed that, by virtue of 40 C.F.R. § 503.2(a), the Respondent's date for compliance started February 19, 1995. However, while the period under consideration should have listed (as reflected in the Errata) February 20, 1995 as the start date, as a practical matter the Initial Decision was correct in listing September 28, 1995 as the beginning point because the first exceedance after February 19th occurred on September 28th. However, the Initial Decision did, inaccurately, reflect November 7, 1995 as the end of the period under consideration, when it should have listed December 25, 1996.

The applicable monitoring reports, JX-2 and JX-3, together with the samples, as reflected in JX-25, show that the City first had an applicable exceedance on September 28, 1995 and that it resumed a state of compliance on November 8, 1995. These records also show that the City

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[2]The Court was also perplexed as to where the erroneous number arose. In reviewing the handwritten notes it composed in reviewing the evidence, it discovered that the number 12 listed under the number of instances occurring from August 1994 through September 1994 (along with a notation that 91 loads occurred during that time). It seems that at some point in the drafting the wrong page notations were inadvertently inserted from that page. However, a review of the Court's notes, confirms that it was at all times considering the complete period of violations.

fell back into non-compliance on November 16, 1995 and did not come back into compliance until February 7, 1996. It continued to remain in compliance until October 14, 1996. From that date, it remained out of compliance until December 26, 1996, when the lab testing reflected a molybdenum value of 67.33 mg/kg. In short, for 1995 the City was out of compliance from September 28, 1995 through November 8, 1995 and then out of compliance again from November 16, 1995 until December 31, 1995. For 1996, the City was out of compliance from January 1, 1996 through February 6, 1996. It then resumed compliance until October 14, 1996 when it again fell into noncompliance until December 25, 1996.

However, having this information, which was found by the Initial Decision to be fact, is not enough because the Complaint charges land application of the sludge when the molybdenum values exceeded the concentration limit of 75 mg/kg. Therefore one must examine the records of the dates when the sludge, with its excessive molybdenum levels, was actually land applied. This information is reflected in Exhibits JX -7 (for 1995) and JX-8 (for 1996). In total, these documents reflect land applications on 55 days. By virtue of the Court's ruling, as upheld by the Board, that the onset of the City's compliance obligations was February 19, 1995, EPA lost 63 of the dates it claimed the City was in violation, because those dates all preceded February 19th.

The Initial Decision fully recognized 61 of the land applications were covered by the Section 503.2(a) defense and that 56 land applications remained cognizable. Footnote 27 of that decision makes it clear that the Court was well aware of the number of violations it had to consider for penalty purposes. It stated: "It is noted that during the period covered by the Section 503.2 defense, there were 61 land applications involving 565 truckloads and that in the period after that time there were 56 land applications involving 574 truckloads. During the time covered by the defense, molybdenum concentrations ranged from 94.85 mg/kg to 143.6 mg./kg, while in the post-defense period, the concentrations ranged from 108.3 mg/kg to 176.1 mg/kg." *See* Initial Decision at p. 15[2].

It is hoped that the foregoing clears up the regrettable clerical errors that were in the Initial Decision and that it demonstrates that all the days of violation were, in fact, considered in arriving at the penalty imposed. The balance of the Court's penalty discussion in the Initial Decision, with the corrections discussed above superimposed, is incorporated by reference in this Decision Upon Remand. *See* Initial Decision at 15-17. In doing so, the Court points out that EPA offered no evidence of the "allocation of penalty amounts ascribed for each statutory criterion for each Count, nor [did it provide] any overall breakdown ... for any of the Counts, as originally pled, nor subsequently, for the two Counts remaining in the Amended Complaint." Initial Decision at 15.

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[2]The small difference between the number of violations remaining within Count I, referred to as 56 in the Initial Decision and 55 here is likely attributable to whether one counts or excludes a particular day as the onset of the violation. However, the difference is so small that, under either total, the penalty would be virtually identical.

Thus, "the upward adjustment in the number of identified violations" was a clerical adjustment only. In fact, as a reading of the entire decision reveals, all the violations were considered, and the Court continues to conclude that $6,000 is the appropriate penalty to be imposed.

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William B. Moran
United States Administrative Law Judge

Dated: December 7, 2001

Docket No. 5-CWA-98-013

CERTIFICATE OF SERVICE

I certify that the foregoing **Initial Decision**, dated December 7, 2001, was sent this day in the following manner to the addressees listed below:

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Dated: December 7, 2001