

6/29/93

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

U.S. ENVIRON. PROTECTION  
AGENCY, REGION II

JUN 30 PM 12:18  
REGIONAL HEARING  
CLERK

In the Matter of )  
 )  
Puerto Rico Urban Renewal ) Docket No. CWA-II-89-249  
& Housing Corporation, )  
 )  
Respondent )

Clean Water Act - Owners and Operators - Strict Liability - Acts of Third Persons

Because Section 301(a) of the Act makes any discharge of any pollutant from a point source without a permit illegal, owner of sanitary collection system and pump station was strictly liable for unpermitted discharges of untreated wastewater to the river, notwithstanding that the discharges resulted from the actions of residents of a housing project in connecting to the non-operating system without being authorized to do so and the actions of persons unknown in digging a trench which conveyed the wastewater to the river.

Clean Water Act - Administrative Penalties - Culpability - Other Matters As Justice May Require

Although owner of non-operating sanitary collection system and pump station was strictly liable for unpermitted discharges of wastewater, maximum Class II administrative penalty sought by Complainant under Section 309(g) of Act would not be assessed where the facts did not support Complainant's contention Respondent was highly culpable in the discharges and "other matters as justice may require" warranted a reduction in the penalty.

Appearance for Complainant:

Michael S. Siegel, Esq.  
Assistant Regional Counsel  
U.S. EPA, Region II  
New York, NY

Appearance for Respondent:

Marta Quinones Zambrana, Esq.  
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San Juan, Puerto Rico

Norma Cotti Cruz, Esq.  
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Hato Rey, Puerto Rico

INITIAL DECISION

This is a proceeding for the assessment of a civil penalty under Section 309(g)(2) of the Clean Water Act (33 U.S.C. § 1319(g)(2)). The proceeding was commenced on October 3, 1989, by the filing of a complaint charging Respondent, Puerto Rico Urban Renewal and Housing Corporation (PRURHC) with violating Section 301 of the Act by continuously discharging, during the period February 1, 1989, to July 20, 1989, pollutants (untreated sewage) to the Culebrinas River, San Sebastian, Puerto Rico, without a National Pollution Discharge Elimination System (NPDES) permit. For this alleged violation, Complainant proposed to assess PRURHC the maximum Class II administrative penalty authorized by the statute of \$125,000.

PRURHC answered denying the factual allegations of the complaint, denying responsibility for the violation alleged and averring that the violation resulted from actions of the residents of the Villa Sophia housing project in connecting to the sewer system constructed by PRURHC without being authorized to do so. PRURHC requested a hearing.

By an order, dated March 4, 1991, PRURHC's Motion to Dismiss and/or for Summary Judgment was denied and Complainant's Motion for an Accelerated Decision was granted as to liability. A hearing on

the issue of the amount of an appropriate penalty was held in Hato Rey, Puerto Rico on October 8, 1991.

Based on the entire record including the proposed findings and briefs of the parties, I make the following:

#### Findings of Fact

1. The Puerto Rico Urban Renewal and Housing Corporation (PRURHC) was created by Act No. 88, June 22, 1957, of the legislature of Puerto Rico. Among the purposes of the PRURHC, a public corporation, was to promote public housing and urban renewal programs. See Law No. 55, August 9, 1991 (R's Exh 15).
2. On December 22, 1972, PRURHC purchased 76.0476 "cuerdas" of land adjacent to the Culebrinas River in San Sebastian, Puerto Rico.<sup>1/</sup> The purpose of the purchase was to assist low income residents in obtaining housing.
3. The parcel of land mentioned in the preceding finding, referred to as "Residencial El Pepino" or the "Villa Sophia Project," was divided into 544 lots which were conveyed to qualified families for a nominal consideration of one dollar.<sup>2/</sup> PRURHC laid out the lots, constructed streets and

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<sup>1/</sup> A cuerda is a measure of land equal to 3,930.4 square meters. Facts concerning acquisition of the parcel are taken from PRURHC's Motion to Dismiss and/or for Summary Judgment, dated April 3, 1990, hereinafter "PRURHC's motion."

<sup>2/</sup> Testimony of Joaquin Figueroa Ferrer (Figueroa), an engineer employed by the Puerto Rican Department of Housing (Tr. 98-102). Mr. Figueroa's testimony is substantially confirmed by facts alleged in "PRURHC's motion" (note 1 supra).

installed electrical lines and water systems. Each family was, however, responsible for the construction of a residential unit on the lot so acquired, which included construction of a septic tank. Although the record is not clear, presumably soil percolation tests were performed before septic tanks were constructed. When the septic tanks became full, it was the responsibility of the residents or owners to call for a truck to pump out the tanks [and properly dispose of the wastewater] (Figueroa, Tr. 117-18). As of January 23, 1990, PRURHC had conveyed all but 43 of the lots.

4. In 1983, residents of Villa Sophia petitioned to have a sanitary system installed at the project.<sup>3/</sup> Funds for this purpose were appropriated by the legislature and the plans were approved by the Puerto Rican Aqueduct and Sewer Authority (PRASA). Contracts for the construction of a collection system and pump station were awarded by PRURHC in 1983 and the system and pump station were completed in 1985. EPA had instituted a suit against PRASA under the Clean Water Act in federal court, however, and because the San Sebastian WWTP was "overloaded," and currently operating in excess of its design capacity, PRASA was under a court order not to permit further connections to its San Sebastian system without EPA approval. By letter, dated October 18, 1985, PRASA informed the

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<sup>3/</sup> Figueroa (Tr. 101). Although there is some indication this was because septic tanks overflowed, Mr. Figueroa testified that the residents were concerned that the septic tanks would become full (Tr. 117).

inspection of the Villa Sophia pumping station (Tr. 11, 12; logbook, C's Exh 14). He found that the pump station had been vandalized, that electrical lines to the emergency generating unit had been disconnected, that the control panel to unit had been disconnected and that parts were missing (Tr. 14; logbook). He concluded that the pump station had never been in service. Additionally, he observed a man-made trench approximately seven feet deep which ran from a manhole behind the pumping station to the Culebrinas River. He testified that there was sewage (raw, untreated wastewater) in the trench which was eventually conveyed to the Culebrinas River. From his observations of the river at the point of discharge, he concluded that the discharge had been occurring for some time (Tr. 15).

7. Mr. Modesto took pictures showing a general view of the Villa Sophia dwellings, of the pump station, of a manhole located behind the pump station which is lacking a cover, but which is apparently not the one which overflowed and discharged to the trench, of the trench which he described as having been dug by manual or mechanical means and which shows water at the bottom and of the point where wastewaters were discharged to the Culebrinas River (C's Exh 2, Photos 1-16). Mr. Modesto opined that the discharges affected the color of the river as the color of the wastewater and the water in the river appeared to be the same (Tr. 21, 22). He did not take any samples from the river (Tr. 93).

8. Upon returning to his office, Mr. Modesto wrote a memorandum summarizing his findings (memorandum, dated March 28, 1989, to the Chief Water Permits & Compliance Branch, C's Exh 3). Thereafter, the Director of the Water Management Division, EPA, Region II, issued an order finding that PRURHC was in violation of the Clean Water Act as it did not have a permit for the discharge described in finding 7 and directed PRURHC to take all measures necessary to "cease and desist" the discharge of pollutants to the surface waters of the United States from the Villa Sophia pump station (Order, dated March 29, 1989, C's Exh 4). PRURHC was directed to submit within 30 days a complete and definitive report of short- and long-term measures taken to permanently cease and desist the discharge of pollutants from the pump station.
9. PRURHC received the "cease and desist" order on April 4, 1989, and under date of April 27, 1989, submitted a schedule of proposed actions to remedy the violations at Villa Sophia (C's Exh 5). This schedule contemplated, among other things, that proposals for necessary improvements at the Villa Sophia pump station would be solicited on April 18, 1989, that a contract would be awarded by June 30, 1989, and that construction of the improvements would start on July 10, 1989. Additionally, the schedule contemplated that the improvements would be completed by December 11, 1989, that the pump station [and presumably the collection system] at Villa Sophia would be transferred to PRASA by December 18, 1989, and that PRASA

would apply to EPA for approval to connect the pump station to the existing system by December 29, 1989. Short-term measures included requesting the Puerto Rico Environmental Quality Board to issue an order directing each resident to immediately cease the discharge of pollutants to the Culebrinas River.

10. On May 9, 1989, the Secretary of the Housing Department issued an administrative order authorizing the executive director of PRURHC to use emergency procedures to contract for required improvements at the Villa Sophia pumping station (C's Exh 6). Mr. Modesto inspected the Villa Sophia pumping station again on May 12, 1989 (Tr. 23). Because he found conditions basically the same as in the prior inspection, he did not make any written findings or report.
11. By letter, dated June 9, 1989, EPA informed PRURHC that its response, dated April 27, 1989, to the order of March 29, 1989, was inadequate in that PRURHC did not take direct and effective short-term measures to immediately cease the discharge of pollutants from the Villa Sophia pump station to the Culebrinas River and the types of improvements required were not well defined, necessary corrective actions were not well defined and estimated costs for each task were not included (C's Exh 7). PRURHC was directed to submit within 14 days a well developed plan of remedial measures taken or to be taken to cease the discharge. PRURHC replied to this letter on June 28, 1989. Referring to the denial of its application to connect the Villa Sophia sanitary system and pump station

to PRASA's system, the letter stated that PRURHC had contributed \$250,000 to PRASA for the construction of a "package plant" with a capacity of 400,000 gallons, which was in excess of the needs of the project (Joint Exh 4). PRURHC stated that construction of the package plant had recently been completed and that there should be no difficulty in obtaining PRASA's acceptance of the discharge. It pointed out, however, that the pump station had been vandalized and needed to be repaired. PRURHC stated that its long-term plan of action addressed the need to repair the pump station. The short-term action plan consisted of the installation of a temporary pump which would discharge through the already constructed main force line into an existing PRASA manhole.

12. Although a formal contract for repair of the Villa Sophia pump station was not executed until July 31, 1989 (R's Exh 5), the contractor, Engineering Enterprises, was given notice to proceed with the work on June 19, 1989 (R's Exh 8). This contract apparently included installation of a temporary pump so as to convey the sewage from a manhole near the pump station to an existing PRASA manhole. The amount of the contract was \$55,673. A change order was issued, however, which increased the amount of the contract by \$11,616.30.<sup>4/</sup> Work specified by the contract was sufficiently completed so

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<sup>4/</sup> R's Exh 6. An unsworn statement by Mr. Figueroa (Exh 11 of "PRURHC's motion") states that the total cost of the contract, including administrative costs was \$85,489.



that discharges to the Culebrinas River from the pumping station stopped on July 20 (Figueroa, Tr. 111).

13. Mr. Modesto, identified finding 6, visited the Villa Sophia site again on August 1, 1989. He verified that flows to the Culebrinas River from the pump station had ceased as of July 20, 1989 (Tr. 25, 29; memorandum, dated August 15, 1989, C's Exh 8). He reported that a submersible pump had been installed in a manhole behind the pump station and that wastewater was being conveyed to a PRASA manhole. His memorandum pointed out that this temporary discharge to PRASA's system was illegal, because the San Sebastian plant was under a sewer connection ban.
14. Mr. John Kushwara, Chief of the Compliance Section, Water Management Division, EPA, Region II, testified as to the calculation of the proposed penalty of \$125,000 against PRURHC. Although he denied that EPA had a penalty policy or guideline for assessing penalties under the Clean Water Act, he acknowledged that the Agency had a policy for determining an acceptable figure for settlement purposes (Tr. 36, C's Exh 16). Mr. Kushwara testified that in determining the proposed penalty of \$125,000, he considered the statutory factors in

Section 309(g) of the Act.<sup>5/</sup> His analysis is set forth in a written memorandum (C's Exh 13).

15. Regarding the "nature, circumstances, extent and gravity of the violation," Mr. Kushwara pointed out that in this instance there was a continuous discharge of raw wastewater which was conveyed to a water body in the absence of the controls of an NPDES permit. This violation occurred from at least February 1, 1989, to July 20, 1989. He testified that the actual and potential impact of the discharge on human health and the environment was significant, because untreated wastewater will have a deleterious impact on the receiving water (Tr. 50, 51). This was of particular concern because of the uses to which the receiving body of water may be put such as for drinking water and use by wildlife. He explained that typical pollutants in raw sewage include biochemical oxygen demand (BOD<sub>5</sub>), dissolved oxygen (DO), phosphorous, coliforms

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<sup>5/</sup> Tr. 49, 50. Section 309(g)(3) of the Act provides:

(3) Determining amount

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. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

PRURHC took no action to remedy the situation.<sup>6/</sup> He stated that PRURHC knew that the septic tanks were failing and should have known that the residents were going to connect to the collection system which at some point would result in the discharge of pollutants [to the river].<sup>7/</sup>

17. Mr. Kushwara testified that EPA used a computer model called "BEN" to calculate the economic benefit to PRURHC of noncompliance (Tr. 67, 68). He explained that the model utilizes current economic and inflation values to calculate savings from noncompliance based on inputs such as the cost of pollution control equipment, the date the respondent should have been in compliance and the date of actual compliance. In this instance, the BEN calculation was made on September 26, 1989, the required capital investment or expenditure was considered to be \$65,673, annual operating and maintenance costs were considered to be \$30,000, useful life of the

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<sup>6/</sup> Tr. 61, 62. Mr. Modesto also testified that the reason PRASA denied permission to connect the pump station to the existing system was that the pump station did not meet design standards (Tr. 30).

<sup>7/</sup> Although Mr. Kushwara's penalty memorandum (C's Exh 13) concludes that PRURHC was highly culpable, it does so for different reasons, stating only that PRURHC knew that PRASA had not authorized a connection to the San Sebastian WWTP, but proceeded to place persons in possession of various premises, knowing that wastewater would not be disposed of properly. There is no evidence that PRURHC placed persons in various residences knowing that the wastewater would be disposed of improperly. The memo also points out that PRURHC was directed to cease the discharge by the order, dated March 29, 1989, but continued to discharge until July 20, 1989.

equipment was estimated to be 15 years, delay in compliance was considered to be five months and it was anticipated that payment of the penalty would be made in December 1989 (Tr. 71-83; C's Exh 11). The economic benefit from the five-month delay in compliance and a ten-month delay in payment of the penalty was determined to be \$11,696. Mr. Kushwara pointed out that the statutory maximum penalty of \$10,000 per day times 170 days of violation would equal \$1.7 million dollars (Tr. 86).

18. Regarding ability to pay, Mr. Kushwara testified that PRURHC had not seriously raised this issue, and the issue had not been pursued by the Agency, because PRURHC had denied all liability (Tr. 65-67). He acknowledged that PRURHC had submitted a balance sheet and a combined income and expense statement (both unaudited) as of June 30, 1989 (R's Exhs 13 and 14). He considered these to be inadequate, however, asserting that "we" would need a lot more information such as audited statements for the past three years (Tr. 67). His basic position, however, was that because PRURHC was subsidized by the Commonwealth, ability to pay was not a real issue (Tr. 66). Although the financial statements are difficult to interpret, the balance sheet appears to show a deficiency or deficit in cash on hand of \$20,692,351; total current assets of \$350,681,908 as compared to current liabilities totaling \$209,330,497 and total liabilities of \$1,644,760,354 as compared to assets and capital totaling

\$2,196,756,844. The income and expense statement shows income of \$35,590,734, operating expenses totaling \$128,643,168 for a net operating loss of \$93,052,434. This statement also reflects total other income of \$94,123,192, and other expenses of \$30,712,338 for a net loss of \$29,641,580.

19. Mr. Figueroa testified that PRURHC had spent over \$900,000 in constructing the sanitary system and resolving the problems with the sanitary system at Villa Sophia (Tr. 114). He stated that the initial collection system and pump station had cost \$575,000, that PRURHC had contributed \$250,000 to PRASA for the construction of improvements to the WWTP and that approximately \$85,000 had been spent in correcting the problem of wastewaters reaching the river and in repair of the pump station.
20. By Act No. 55, approved August 9, 1991, the PRURHC was dissolved and the Puerto Rico Urban Renewal and Housing Corporation Accounts Liquidation Office established to be in charge of the liquidation of the assets and liabilities of PRURHC (R's Exh 15). Section 1(a) of the Act provided that the Accounts Liquidation Office would be directed by a Special Trustee, appointed by the Governor with the advice and consent of the Senate of Puerto Rico. The Special Trustee was responsible for all activities necessary and desirable for maximizing the value of the Corporation's assets so as to meet the greatest number of its financial responsibilities with its own resources. A Ratifying Board was created by Section 1(b)

to approve transactions addressed to the liquidation of PRURHC's assets and to attend to its financial obligations. Transactions involving the payment of financial obligations imposed by judgments or by orders or resolutions of administrative bodies which were final and binding were excepted from the requirement of Board ratification. Section 9 of the Act provided that the [Liquidation] Office would have the power to sue and be sued and to, among other things, file all kinds of judicial and administrative actions. Section 18 of the Act required the Special Trustee to report to the Governor and each House of the Legislature if it is not possible to satisfy the debts and obligations of the corporation with its own resources. Section 19 specified that the Special Trustee would use his best efforts and diligence to conclude the liquidation process in a reasonable period of time. There is no evidence in the record as to the status of the liquidation.

#### C O N C L U S I O N S

1. PRURHC as owner of the sanitary collection system and pump station at the Villa Sophia project is strictly liable for the unpermitted discharges of wastewater to the Culebrinas River, notwithstanding that the system was not operating and notwithstanding that the discharges resulted from actions of the residents of Villa Sophia in connecting to the collection system without being authorized to do so and the actions of

persons unknown in digging a trench which conveyed the wastewater to the river.

2. The facts do not support Complainant's contention that PRURHC was "highly culpable" in the unpermitted discharges. Moreover, Complainant's demand for the maximum Class II administrative penalty allowed by Section 309(g) of the Act fails to consider "other matters as justice may require," which warrant a reduction in the penalty.
3. An appropriate penalty is the sum of \$50,000.

#### D I S C U S S I O N

##### A. Liability

PRURHC's liability, as the owner of the Villa Sophia sanitary collection system and pump station, for the discharges at issue was determined in the Order Denying Respondent's Motion to Dismiss and/or For Accelerated Decision, dated March 4, 1991, which is incorporated by reference. Suffice it to say here that the order was based on decisions applying Section 301(a) of the Act, which provides essentially that except in accordance with a permit, the discharge of any pollutant [from a point source] by any person is unlawful. Although in its motion PRURHC argued that the non-operational pump station was not a point source as defined in the Act, there can be little doubt that the pump station, manhole and trench by which the sewage was conveyed to the Culebrinas River are "discrete conveyances" and thus point sources as defined by Section

502 of the Act. There is no dispute that the discharges were not authorized by a permit.

B. Amount of Penalty

As we have seen (supra note 5), Section 309(g)(3) of the Act requires the Administrator, in determining the amount of any penalty, to consider, inter alia, the "nature, circumstances, extent and gravity of the violation or violations." Mr. Kushwara testified that the continuous discharge of untreated sewage had a significant potential to [adversely] impact human health and the environment, because of the deleterious impacts of raw wastewater on the receiving water body, the Culebrinas River in this instance (finding 15). He explained these concerns and impacts in some detail and there can be no serious argument, but that these discharges, which continued for a period of at least 170 days (finding 16), would standing alone warrant a substantial penalty.<sup>8/</sup> PRURHC's argument (Post-hearing Brief at 5) that samples should have been taken to determine the extent, gravity and significance of the violation is rejected and Mr. Kushwara's testimony that samples were unnecessary in this instance (finding 15) is accepted.

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<sup>8/</sup> Although Mr. Kushwara did not so testify and the memorandum he wrote justifying the penalty (C's Exh 13) does not so state, Complainant's pre-hearing exchange, dated April 12, 1990, indicates that the base penalty was calculated at \$1,000 per day to which was added \$11,696 for economic benefit. The resulting figure was then reduced to the statutory maximum for Class II administrative penalties of \$125,000.



the Matter of New Waterbury, Ltd., A California Limited Partnership, Docket No. TSCA-I-88-1069 (Decision After Reopened Hearing, May 7, 1993), presently on appeal.

In this instance, however, it is concluded that evidence in the record is sufficient to sustain Complainant's burden. Once Respondent has put on its evidence, it is no longer relevant whether Complainant has made a prima facie case (Kay Dee, supra). Although the income and expense statement for the period ending June 20, 1989, shows a net loss exceeding \$29 million dollars, the balance sheet for the same period appears to show that assets and capital exceed liabilities by over \$550 million dollars (finding 18). PRURHC questions the accuracy of these statements, asserting that at the time (September 28, 1991) the Special Trustee specified by Act No. 55 (finding 20) was appointed, "no clear financial statements were available" and alleges in effect that prior financial statements of PRURHC were not reliable (Post-hearing Brief at 14). PRURHC introduced the statements and has not substantiated the contention that the statements are unreliable. Although findings in the "Statement of Motives" to Act No. 55 providing for the dissolution of PRURHC refer to the critical financial condition of the corporation and state that "it is unpostponable" to authorize dissolution of PRURHC, from which it could be inferred that the financial condition of the corporation had substantially deteriorated since the date of the financial statements in the record, there is no evidence as to the extent or

particulars of the deterioration.<sup>12/</sup> Under all the circumstances, a preponderance of the evidence supports the conclusion that PRURHC has the ability to pay a penalty of the magnitude proposed in the complaint and no adjustment is warranted for that reason.

The next adjustment factor is "prior history of such violations." It is undisputed that PRURHC has no record of prior violations of the Act and although it argues to the contrary, Complainant's position that this factor serves only to increase a proposed penalty is considered to be reasonable.

The third adjustment factor in Section 309 is "degree of culpability." Although Mr. Kushwara considered that PRURHC was highly culpable in the unpermitted discharge, the facts do not warrant such a conclusion. Firstly, however reasonable it may have been to expect low income residents to pay to have their septic tanks pumped out, the fact is that the Villa Sophia housing project was established on that expectation (finding 3). Secondly, when the residents petitioned for the installation of a sanitary system and to connect to the PRASA system, funds for this purpose were appropriated by the legislature and the plans were approved by PRASA (finding 4). Accordingly, for all that appears, when construction of the sanitary system and pump station was completed in 1985, PRURHC had every reason to expect its application to

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<sup>12/</sup> The Act contemplates that PRURHC's assets may not be sufficient to discharge its liabilities and, in such an event, provides for the Special Trustee to report to the Governor and the legislature. While this implies that the Commonwealth may make up any deficiency, the conclusion that PRURHC has the ability to pay the penalty proposed is not based on that expectation.

station. This was clearly a beneficial undertaking both from the standpoint of the residents of Villa Sophia and the environment as a whole. Moreover, the violations here resulted from the illegal acts of the residents in connecting to the non-operational system and the possibly criminal acts of persons unknown in constructing a trench which conveyed the untreated wastewater to the river. Such activities by third persons are considered to be within the scope of "other matters as justice may require" in Section 309(g)(3), justifying a reduction in the proposed penalty.

A penalty of \$50,000 will be assessed against PRURHC.

O R D E R

Puerto Rico Urban Renewal and Housing Corporation having violated the Clean Water Act as alleged in the complaint, a penalty of \$50,000 is assessed against it in accordance with Section 309(g) of the Act (33 U.S.C. § 1319).<sup>13/</sup> Payment of the penalty shall be made by mailing a certified or cashier's check in the amount of

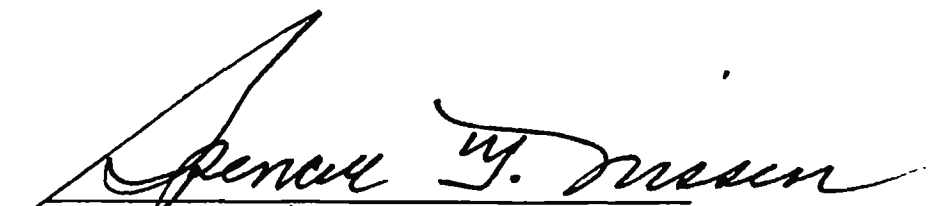
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<sup>13/</sup> Unless appealed in accordance with Rule 22.30 of the Rules of Practice (40 CFR Part 22) or unless the Environmental Appeals Board (EAB) elects sua sponte to review the same as therein provided, this decision will become the final order of the EAB in accordance with Rule 22.27(c).

\$50,000 payable to the Treasurer of the United States to the following address within 60 days after receipt of this order:

Regional Hearing Clerk  
U.S. EPA, Region II  
P.O. Box 360188M  
Pittsburgh, PA 15251

Dated this 29<sup>th</sup> day of June 1993.

  
Spencer T. Nissen  
Administrative Law Judge