UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
Jehovah-Jireh Corporation, d/b/a Ogle's Laundry Columbus, Indiana	)	Docket No. CWA 5-99-016
Respondent	)	

INITIAL DECISION

I. Introduction

In this administrative complaint brought under Section 309(g) of the Clean Water Act ("CWA" or "Act"), the Environmental Protection Agency ("EPA" or "Agency") has alleged that Jehovah-Jireh Corporation, d/b/a Ogle's Laundry ("Ogle's") discharged effluent into the Columbus, Indiana, Publicly Owned Treatment Works, ("POTW") in excess of the daily limits imposed by the Sewers and Sewage Disposal Ordinance and enforceable as "pretreatment standards" under Section 307(d) of the CWA, 33 U.S.C. § 1317(d). According to EPA, Ogle's violated the City Ordinance's limits for pH and for oil and grease on numerous occasions since 1995. The Complaint charged Ogle's with 37 violations of the CWA. During the hearing EPA presented evidence of ten additional discharge violations since the filing of the complaint and a failure to comply with an order to monitor. The parties agreed to conform the Complaint to the evidence presented so that all alleged violations could be resolved. Tr. 200-203. The ten new discharge violations also involved pH and oil and grease exceedances, while the order to monitor violation alleges that Ogle's failed to comply with the December 9, 1998 order requiring it to monitor its wastewater discharges, on a weekly basis, until notified to stop.

At issue is the Columbus POTW's pretreatment program and the local limits for pH and for oil & grease. In 1984, the Columbus POTW received approval to operate its pretreatment program and discharge wastewater into the East Fork of the White River. CX-1[1]. This program

[1]Complainant's exhibits will be referred to with the prefix "CX-"and Respondent's with the prefix "RX-." Similarly the shorthand expression for the parties briefs will "C's Brief," and "C's Reply" and "R's Brief" and "R's Reply."

was incorporated into Indiana's NPDES permit and contains limitations on what can be discharged into the River. Tr. 90-92; CX-2. As originally promulgated, the program contained an ordinance which prohibited the discharge of grease or oils in excess of 100 mg/l and waters or wastes having a pH of less than 6 or greater than 9 standard units ("s.u."). CX- 3. In 1999, the Columbus City Council acted to amend the ordinance by expanding the pH range to allow discharges between 6 and 11 s.u. and to only limit non-polar oil and grease.[2] Tr. 142.

The Columbus Ordinance

Under Section 307(d) of the CWA, it is unlawful for an "owner or operator of any source[3] to operate any source in violation of any such effluent standard or prohibition or pretreatment standard." Ogle's Laundry is a corporation organized in the State of Indiana and has operated an industrial laundry and uniform supply company in Columbus, Indiana since 1994. Complaint at ¶¶ 12, 13; Answer at ¶¶12, 13. The Respondent concedes that it is an owner-operator, and a source which discharged pollutants into the City's POTW. Tr. 24.

Pursuant to a permit issued by the Indiana Department of Environmental Management ("IDEM") under the National Pollutant Discharge Elimination System ("NPDES,") the Columbus, Indiana City Utilities discharges effluent to the East Fork of the White River. Complaint at ¶ 8, Tr. 80. On August 28, 1985, IDEM approved the incorporation of the Columbus POTW's pretreatment program into its permit. *Id*. This program was approved by the EPA in September 1984. Complaint at ¶ 9; Tr. 97.

As part of the pretreatment program, the City of Columbus adopted an ordinance which regulates the level of pollutants that enter the POTW. In pertinent part, this ordinance states:

> No person shall discharge or cause to be discharged the following described substances, materials, waters or wastes except if it appears likely in the opinion of the Superintendent that such wastes will not harm either the sewers, sewers, sewage treatment process or equipment, not have an adverse effect on the receiving stream, nor can otherwise endanger life, limb, public property nor constitute a nuisance.. . . Included but not limited to, the substances not acceptable are the following: . . .
> 2) any water or waste containing fats, wax, grease or oils, whether emulsified or not, in excess of one hundred (100) mg/l...;

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[2]"Non-polar"oil and grease refers to petroleum or mineral sources of oil, whereas "polar" refers to primarily animal or vegetable sources. Tr. 137.

[3]"Source" means "any building, structure, facility, or installation from which there is or may be the discharge of pollutants." 33 U.S.C. § 1316(a)(3).

8) any waters or wastes having a pH of less than 6 or greater than 9. (CX- 3, Sec. 26-48)

According to the Federal Regulations, this ordinance, as established by the POTW, is deemed a pretreatment standard under the CWA. 40 CFR § 403.5(c). Violation of these standards would constitute a violation of the CWA. As alluded to, in 1999 the City passed a new ordinance with the intent of changing the acceptable levels of pH and oil & grease. Tr. 142. There was testimony that the ordinance now allows pH levels between 6 and 11 and only the non-polar component is measured for the 100 mg/l limit.[4] Tr. 107.

The City monitors industrial users to see that they are in compliance with the pretreatment limits. Tr. 110. Some industrial users do their own testing, which is then submitted for review. The City also randomly take samples and performs the analyses in their labs and sends a copy of the report to the industrial user. Tr. 110. These monitoring reports are sent periodically to the users and lists the date the sample was taken, how it was collected, and the results of the sample. Tr. 111. If a facility exceeds the allowable levels for a regulated substances they are notified through the Enforcement Response Procedures.[5]

Ogle's received a number of reports from the City reflecting results of sampling conducted at Ogle's laundry between 1995 and 1998. These reports show that Ogle's discharged oil and grease above 100 mg/l and had pH values above 9. CX - 4. Similarly, the City issued Ogle's Notices of Violation between October 1996 and February 1998 for exceeding the acceptable oil and grease limits. RX -1. The City also conducted sampling during July and August 2000. Tr. 112. The parties stipulated that this sampling showed that Ogle's exceeded the revised pH limit on three occasions and the oil and grease limit on seven occasions. These constitute the "subsequent exceedances" which the parties agreed to have adjudicated in this proceeding. Tr. 200.

The 1998 Order

On December 9, 1998, EPA issued a Compliance Order which included a requirement that Ogle's submit a written certification of their intent to comply with the Order within five days, achieve compliance with the CWA within 30 days, and immediately begin monitoring its wastewater discharges on a weekly basis. CX- 6. The Order states that the monitoring was to be within the parameters outlined in the temporary permit issued September 18, 1998 and continue "until such time as directed otherwise by written notification." *Id*. This information was to be

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[4]The EPA entered the 1984 ordinance into the record. However, the recent ordinance, which outlines these changes has not been submitted.

[5]According to the testimony, a facility is usually first notified by telephone that they are not in compliance. That is followed by a Letter of Violation and other steps if appropriate. Tr. 112.

summarized and submitted to the EPA on a quarterly basis. Ogle's monitored its wastewater until April 15, 1999 when they discontinued the activity without authorization from the EPA or the City. Tr 201. Ogle's also failed to notify the EPA of its intent to comply within five days.

II. Discussion

EPA has alleged that, on thirty-one occasions, Ogle's discharged wastewaters into the POTW with a pH level that exceeded the daily allowances under the NPDES permit. Complaint at ¶ 16; CX-7; Tr. 200. EPA also alleged that on sixteen occasions, Ogle's laundry discharged waste waters in excess of the oil and grease allowances. Complaint at ¶ 16; Tr. 200-203, CX-7. In support of these allegations, EPA submitted monitoring reports conducted by Columbus POTW. These reports[6] show the pH and the oil and grease levels of the wastes discharged into the system. CX- 4. On each of the dates, Ogle's discharged waste with a pH above 9. Additionally, their oil and grease discharges exceeded the listed 100 mg/l limit. These monitoring reports and the tables that summarized them, show that on the dates in question, Ogle's discharged wastes at the levels reflected. The Respondent does not dispute the results of the monitoring reports. Discharging wastes in excess of the limits set forth in the ordinance is a violation of the Clean Water Act.

1. Did the City have the discretion to deviate from the limits in the 1984 Ordinance?

Ogle's asserts that, for most of the alleged violations, in fact no violation occurred. This contention stems from Ogle's assertion that the ordinance allows the City to depart from the default limits and, as the City did so depart, there can be no violation as long as Ogle's was within the amended limits. Reviewing the provision at issue, Ogle's notes that while the ordinance prohibits a discharge above certain levels there is an exception to those listed levels where the superintendent determines that the wastes will not cause certain harms. CX-3, Sec. 26-48. Ogle's calls attention to the fact that some of the monitoring reports reflect that the POTW viewed Ogle's as "in" compliance despite having results outside of the pH range. CX- 4. Tr. 132. Thus, as far as the City was concerned, the pH values were in a range that did not harm the sewer system. Tr. 134. Confirming this view, Gary Pugh, the manager of treatment operations at the POTW, testified that during the time the quarterly reports were created, the pH from Ogle's laundry did not pose any harm. Tr. 136. Finally, Ogle points out that under the recently approved City Ordinance, formally amending certain discharge limits, most of the pH discharge levels in issue in this litigation would now be deemed acceptable. Respondent argues

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[6]EPA also intended to prepare and attach to the Complaint a "Table A" which summarized the violations by listing the dates of the exceedances, the pollutant involved, the measured s.u. for pH and the mg/l or oil & grease, and the percentage of exceedance for oil & grease. Table A was referenced in paragraph 17 of the Complaint but, at hearing, Counsel for EPA informed that, due to an oversight, the table was not attached to it. For this reason the table was included as Complainant's Exhibit 7.

that since those levels would now be acceptable, there should be no liability. Similarly, for the oil and grease violations, Respondent points to the testimony of Pugh that, at that time in question, the POTW only cited violators for non-polar oil and grease. Tr. 137. Pugh viewed the non-polar sources as more of a threat than the polar components and therefore, in practice, enforced the ordinance only in instances where the nonpolar component was in excess of 100 mg/l.[7] Tr. 137. In support of this contention, it points out that Ogle's was issued six notices of violation from the City even though the Complaint identifies nine violations of the oil and grease limit. RX- 1. Since the City used its discretion in enforcing the statute, Ogle's argues that this should be taken into account.

EPA takes issue with the contention that the City has discretion to allow deviations from the ordinance. It argues that the ordinance does not provide for informal changes nor has the Superintendent made a formal determination allowing Ogle's to deviate from the limits. Further, the Agency observes that Ogle's did not submit evidence that it sought a variance from the limits. EPA also notes that Pugh testified that the POTW had experienced recent cutbacks and that these fiscal reductions had compromised the operation of the pretreatment program, particularly in the monitoring area. Tr. 170. It notes that Pugh admitted that, given the City's limited budget, choices had to be made regarding how to effectively use their enforcement resources. Tr. 168. It was based on the City's economic constraints and his view that monitoring values involved here did not detrimentally affect the sewer system, that Pugh decided not to pursue enforcement actions. Tr. 133.

In the Court's view, the Section of the City Sewer Use Ordinance relied upon by the Respondent, Section 26-28, entitled "Specific Discharges Prohibited," is not a model of clarity. This section is vague because it appears to describe certain enumerated wastes as "not acceptable" while simultaneously excepting those wastes from being classified as prohibited discharges if, in the Superintendent's opinion, it appears that they will not cause harm or have an adverse effect. Although this would appear to afford the Superintendent latitude, despite the apparent absolute restrictions,[8] another interpretation is also possible because the substances deemed "not acceptable" are not restricted to those that are listed. The subject provision notes that the prohibition is "not limited" to the enumerated substances. Thus, one could construe the provision to read that the enumerated restrictions are not modifiable, being beyond the Superintendent's discretion, while the non-enumerated substances, which have no stated limits attached to them, would be within the discretion to modify. For the non-enumerated substances,

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[7] The Respondent argues that the City only viewed the non-polar fraction of oil and grease in the 100 mg/l limit. They also admit that while the violations alleged in the original complaint would still violate this limit, the percentage is much less than if the limit were not treated as separate. R's Brief at 5.

[8]For example, Section 26-48 provides, without any reference to discretion by the Superintendent, that "*...the substances not acceptable* are the following: ... (8) *Any* waters or wastes having a pH of less than 6 or in excess of 9." (emphasis added).

the Superintendent's discretion would be guided by a determination as to whether the substances, materials, waters or wastes would be likely to cause harm.

While the Court would be inclined to adopt the latter construction, it is unnecessary to resolve the ambiguity in this instance because the evidence is uncontroverted that the Superintendent never expressed an opinion, during the dates of the alleged violations, that the wastes in issue, (i.e. the described pH and oil and grease limits), would "not harm either the sewers, sewage treatment process or equipment, nor have an adverse effect on the receiving stream, nor [would] otherwise endanger life, limb, public property nor constitute a nuisance." Consistent with the conclusion that no such opinion[9] was expressed, it is noted that no document or testimony exists in the record reflecting that the Superintendent gave consideration to the "quantities of subject wastes in relations to flows and velocities" or to any of the other factors listed in Section 26-48 of the Ordinance.

The Court does not accept the Respondent's characterization of the pH and oil and grease limits as "merely default limits," nor the notion that the views of Mr. Pugh, as the pre-treatment coordinator, can be accepted as authority for deviation for those limits.[10] R's Brief at 4. While Pugh was of the opinion that the pH values here never presented any harm or threat to the POTW or the receiving stream, he also admitted that the 1984 Ordinance remained in effect from January 1995 through December 1998, that no changes were made to it from 1984 through the end of 1998,[11] and that under the City Sewer Code, the lawful pH limit was between 6 and 9. Tr. 105, 108.

Thus the Respondent has not shown that the POTW legally altered the allowable limits for wastes discharged into the POTW. There is no evidence that the POTW took any action to grant a variance under the statute. Rather, there is only evidence that the POTW did not deem Ogle's violations as a serious threat to the pretreatment system. EPA correctly observes that if "an opinion elicited at an administrative hearing in 2000 can retroactively apply to a standard in 1995," the discharge limits would be unascertainable. While Ogle's showed that the POTW opted not to enforce the limits, that showing does not refute the fact of violations. Therefore,

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[9]During the hearing Respondent's Counsel incorrectly characterized the Superintendent's duty under the section by asserting that the inquiry was whether the "Superintendent accepted" a pH of 9 to 11. Tr. 12. Even accepting that the listed limits could be changed by the Superintendent, that individual's duty under the section, as set forth above, involves much more than mere acquiescence to a change.

[10]Similarly, Pugh's views that the pH values reflected by the monitoring never presented any harm or threat to the POTW or the receiving stream, while relevant to penalty issues, are not material to the liability determination.

[11]Pugh stated that a "draft" ordinance was sent to EPA in either 1993 or 1994. EPA responded to the draft by requesting modifications to it. Tr. 143. The City's action and EPA's reply is a far cry from the notion that the ordinance had been amended.

Respondent's argument fails. EPA has retained the right to enforce the CWA[12] when the City is unable or chooses not to do so.

2. Is EPA estopped from enforcing the 1984 Ordinance against Ogle's?

The Respondent concedes that it faces a formidable burden to establish the appropriateness of applying estoppel against the government. Specifically, Respondent acknowledges that it must show a misrepresentation by the government which it reasonably relied upon, to its detriment, together with a showing of affirmative misconduct. The Respondent argues that, in approving the 1984 Ordinance, EPA allowed for a deviation from the approved limits.[13] The acceptance of the right to deviate from the limits, coupled with EPA's knowledge that the City was in fact permitting higher limits, estops EPA from enforcing the default values.

To support its position, the Respondent looks to two cases in which estoppel *was not* applied against the government, U.S. v. City of Toledo, 867 F. Supp. 603 (N.D. Ohio, March 31, 1994)("Toledo") and B.J. Carney Industries, Inc. 7 EAD 171, 1997 WL 323716 (EPA) (June 9, 1997)("Carney").

Toledo involved an action by EPA directly against a City's water treatment plant, as opposed to an action against a discharger to the plant. The City, like Ogle's in the present case, claimed that compliance with the effluent limits was excused by the State EPA. In rejecting the City's claim, the district court observed that to prevent the CWA's goals from being defeated, "EPA must have the authority and the ability to respond to violations of the Act ... even though such violations have been sanctioned by a state agency." 867 F.Supp. at 606. Pointedly, the district court held that "[m]ere inaction by USEPA in face of known NPDES permit violations is not affirmative misconduct upon which equitable estoppel will lie." *Id.* at ** 9.

In Carney, as in this case, a POTW was obligated to enforce pretreatment requirements for its users. Carney Industries was found to have discharged wastewater pollutants into the POTW. In its defense, Carney claimed that EPA was estopped from enforcement on the theory that it had acquiesced in the POTW's nonenforcement. In addressing that claim, the Board

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[12]EPA notes that it retains the right to launch its own enforcement action if it believes that the POTW has not acted appropriately and this right extends to instances where it views the monetary penalty to be insufficient. 40 C.F.R. § 403.8(f)(1)(vi)(B).

[13]Respondent's estoppel argument is built upon two premises: that the ordinance allowed for deviations from the listed limits and that a deviation was lawfully enacted. As discussed earlier, while the first premise is debatable, the second premise, as discussed earlier, was not satisfied, the Court having determined that the City never lawfully brought about changes to the ordinance during the time in issue.

observed that the POTW had the initial responsibility to enforce the pretreatment standards. The Board rejected Carney's assertion that a showing that the Region was aware of, and lodged no objection to, the POTW's issuance of an industrial waste acceptance, coupled with waiting five years after learning of the violations to bring an enforcement action, amounted to acquiescence and delay, constituting affirmative misconduct. Citing a long list of federal court decisions, the Board pointed out that mere negligence, delay, inaction, indifference, passivity, silence or failure to follow agency guidelines does not constitute affirmative misconduct.[14] The Board also noted that to establish detriment a party must have relied on the government's conduct "in such a manner as to change [its] position for the worse." Carney at 26, quoting from Heckler v. Community Health Services, 467 U. S. 51, 59 (1984). Accordingly, it held that EPA's three year delay in objecting to the violative discharges did not constitute affirmative misconduct.

Ogle's distinguishes Toledo and Carney on the ground that, in this case, affirmative misconduct by the government is present. By Respondent's accounting, EPA's first act was its "approval" of the 1984 Ordinance. This approval made it permissible for the City to deviate from the ordinance's listed pH and oil and grease limits. With EPA's knowledge, the City then began using its authority to deviate from the limits, implementing the ordinance so that only the expanded 6-11 pH range and the non-polar oil & grease measure were applied. Respondent maintains that it relied upon those actions to its detriment because it was adhering to the revised values.

Restated, Ogle's argues that estoppel against the government is supported because EPA, knowing that the ordinance would allow such deviations from the pH and oil and grease values, went ahead and approved the ordinance with these provisions. This was followed by EPA's awareness, through receipt of monitoring reports in 1997 or 1998 and through other communications, of the City's subsequent implementation of the ordinance, permitting the subject deviations. Despite this awareness EPA never told the City to revert to the listed pH and oil & grease values. The Respondent acknowledges that to that point, even if its recounting were accepted, its estoppel argument would be insufficient under Toledo and Carney. In Respondent's view, the critical distinction which warrants estoppel is EPA's subsequent formal approval of the revised values which had been long applied by the City. Thus, it is Respondent's argument that it was EPA's ratification of the City's implementation of the revised values that constitutes the affirmative misconduct that was missing in Toledo and Carney.

EPA takes issue with the predicates of Respondent's arguments as well as the assertion that affirmative misconduct occurred. To begin with, it does not accept the assertion that the ordinance was lawfully amended during the time covered by the violations set forth in the original complaint. Accordingly, it argues that whatever the City, or even EPA, may have told

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[14]The Board observed that "[a]ny harshness perceived to result from this analysis is tempered by the principle that the facts upon which ... [one relies] ... to show estoppel may nevertheless be considered in connection with assessing a penalty." Carney at 27.

Ogle about the limits, it could not change the ordinance's provisions.[15] Beyond this, EPA maintains that no affirmative misconduct has been demonstrated. Pointing to Toledo, it argues that "merely indifferent, passive or negligent behavior does not constitute affirmative misconduct." C's Reply at 12. EPA contends that, as in Toledo, regardless of the reason for the City's decision not to enforce the ordinance, Ogle's acted at its peril by violating its listed limits. In addition, Complainant takes issue with Respondent's claim that the actions of the POTW can be imputed to EPA. It maintains that the actions of EPA's Ms. Staniec and Mr. McDonough, being no more than lapses in communication, do not constitute affirmative misconduct. Finally, in challenging the assertion that EPA's approval of the relaxed limits amounts to affirmative misconduct, Complainant points out that an amendment to an existing standard is a common occurrence when new information suggests a change is warranted. However, it observes that an amendment can not eviscerate the authority to enforce an existing standard while it is still in effect.

The Court notes that there is no disagreement as to the legal standard applied when equitable estoppel is asserted against the government. As noted in United States v. Smithfield Foods, Inc. 965 F. Supp. 769 (E.D. Va 1997)("Smithfield") estoppel against the United States obtains in "only the most extraordinary circumstances." *Id*. at 790. In a situation analogous to this case, the defendants in Smithfield urged estoppel against the United States because EPA had been long aware of the water control board's special orders revising the permit obligations. Rejecting the argument for estoppel, the Court noted that there was no evidence that EPA "ever affirmatively stated to defendants that they were not obliged to comply with the Permit requirements ... [nor] that the Special Orders changed or were incorporated into, the Permits" nor that they agreed to be bound by the Board's actions or otherwise approved of noncompliance. *Id*. The Court pointed out that inaction or passivity does not equate with affirmative misconduct. *Id*. at 791.

The facts do not support Ogle's estoppel claim. Although EPA requested copies of Ogle's monitoring reports and became aware of the City's interpretation of the ordinance in the spring of 1997 or 1998,[16] Pugh agreed that there were no changes to the ordinance between January 1, 1995 and December 31, 1998 and that the lawful limits for total oil & grease was 100 milligrams per liter and that the pH could not be less than 6 nor in excess of 9 s u. Tr. 106-108, 136. Pugh

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[15]EPA also looks to Toledo and Carney to support its position, as well as to Heckler v. Community Health Services, 467 U.S. 51 (1984) and United States v. CPS Chemical Company, Inc., 779 F. Supp. 437 (E.D. Ark. 1991)

[16]Pugh sent the monitoring reports that were associated with the notices of violation. Tr. 160. Pugh testified that Staniac from the EPA raised the issue of the lack of notices of violation for pH greater than 9 but less than 11. *Id*. He also stated that he was not told to change his practice. *Id*.

sent the monitoring reports and the notices of violation to IDEM, as well as to EPA.[17] Tr. 139, 145, 160. He acknowledged that at a later time EPA questioned why violations had not been issued for the exceedances and that his response was that he did not view the exceedances as posing a threat to the treatment works. Tr. 159 - 160. In 1993 or 1994, the City presented EPA with a "draft" of the ordinance the City wanted to enact, requesting EPA's approval. Tr. 141. This draft ordinance ultimately was enacted by the City Council in 1999. Tr. 142. Although EPA reacted to the proposed ordinance with several requested modifications, none involved the proposed changes for pH or oil & grease. Tr. 143.

The case of United States v. City of Menominee, Michigan, 727 F. Supp. 1110 (W.D. Mich. 1989) presents a strikingly similar situation to Ogle's. There a paper company was discharging into a POTW under the assumption that a more recent proposed permit was operative when in fact the earlier permit remained in effect. The company asserted that estoppel applied, as EPA knew the company believed the more recent permit applied and did nothing to dispel that belief, but the court rejected the claim, holding that there was no waiver of its ability to enforce the Clean Water Act. This conclusion was reached even though EPA knew the company assumed the more recent permit applied and despite EPA's nine year delay before initiating enforcement. "The burden," the Federal District Court observed, "is on the polluter to comply with the CWA, not on USEPA to ensure compliance." *Id.* at 1122.

It is noteworthy that the September 24, 1997 letter from the City to Ogle's refers to "the recent *violations* for Oil and Grease from your facility." CX- 5 (emphasis added). Although Pugh believed that the City had the authority to enter into a compliance schedule with Ogle's and to forego fines, EPA's December 8, 1998 Order makes no such concession. Paragraph 8 of the Order provides explicitly that "[n]either the issuance of [the] Order by U.S. EPA nor compliance with [the] Order by Ogle, shall be deemed to relieve Ogle of liability for any penalty, fine, remedy, or sanction authorized to be imposed pursuant to ... the CWA." CX- 6 at p. 6.

There has been no showing of affirmative misconduct. The Respondent can not show that it was unaware of the true facts or that the EPA made a representation of material fact. The fact that the City chose not to enforce those limits is not affirmative conduct by the EPA. The Respondent has not shown how the actions of the POTW workers can be considered action by the EPA. While the EPA received monitoring reports on Ogle's, there is no indication that Ogle's was aware of, let alone relied upon, such communications. Importantly, even if they had so relied, such communications do not rise to the level of "affirmative misconduct." EPA's decision to take action years after receiving the monitoring reports is similar to Carney in which the EPA waited five years to file a complaint. Carney, 7 E.A.D. 171. In this case, EPA became aware of the violations two years ago. Tr. 158.

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[17]Pugh contradicted himself, originally stating that EPA did not get the City's monitoriing reports but he subsequently corrected his accounting, agreeing that EPA was sent the reports and the notices of violation. Tr. 145- 146, 160. The Court accepts his amended recounting of the events.

Regardless of what Ogle's understood or relied upon, based on actions by the City, Ogle's was expected to know the law and "may not rely on the conduct of government agents to the contrary." Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 63 (1984). This concept was applied in CPS Chemical where the federal district court determined that regardless of any statements made by EPA agents or employees to the contrary, noncompliance with the effluent limitations is a violation of the law. U.S. v. CPS Chemical, 779 F. Supp. 453 (E.D. Ark. 1991)(citing US v. City of Hoboken, 675 F. Supp 189, 199 (D.N.J. 1987). In that case the company relied upon the representations of the EPA and made a number of modifications rather than challenge the NPDES permit. The court found that CPS was presumed to know the law, failed to do so at its own peril and was liable for the violations. CPS, 779 F. Supp. at 453. Based on the provisions of the ordinance, Ogle's was on notice of the ordinance's limits and, by exceeding them, did so at its peril.

The Court also finds there is no evidence regarding forbearance by EPA; the Agency never indicated they would not enforce the standards. It was, after all, initially the City's responsibility to enforce the ordinance. EPA stepped in only later when they made the judgment that the City's actions were inadequate. The potential penalty resulting from the violation is the only detriment that Ogle's would suffer. Since Ogle's did not rely on EPA nor suffer a detriment based on this reliance, this element of estoppel is not met. Respondent has not proven the elements of estoppel. Therefore the EPA is not estopped from enforcing the pH limit of 6-9 and a total oil and grease limit of 100mg/l under the 1984 Ordinance. However, the actions by the City may be considered in regards to the penalty.

3. Can EPA enforce the recent exceedances of the discharge limits?

Third, the Respondent argues that EPA can not enforce the recent exceedances because EPA had not integrated the 1999 Ordinance into the City's NPDES permit. Respondent contends that under such circumstances only the City can enforce the pH and oil and grease limits. At the trial Ogle stipulated to the pH and oil and grease readings taken in July and August 200, however in their brief the Respondent argues that the EPA has not proved their authority to enforce these violations. In regards to the original violations, the EPA submitted into evidence the pre-treatment program approval, the modification of the NPDES permit and the 1984 Ordinance. See CX 1 - 3. However, no such documents were submitted in support of the recent violations. Thus the Respondent asserts that since the EPA did not show that it has the authority to enforce the new limits, only the City can hold Ogle's liable.

As the issue was not adequately briefed, the Court directed the parties to file supplemental responses "addressing the integration of the 1999 Ordinance."[18] April 18, 2001

[18]Respondent's supplemental response misapprehends the effect of the Order by suggesting that the "[o]rder gave the EPA the opportunity to inform [the court] if the ordinance had been approved and was federally enforceable at the time of the recent exceedances, so the

Order. EPA notes that the Columbus City Council amended the sewer ordinance in 1999, modifying the pH limits to permit a range between 6 to 11 standard units and considering only non-polar oil and grease. The modification for pH is not deemed substantial and under 40 C.F.R. § 403.18(d), unless objections are lodged, becomes effective 45 days after submission to the approval authority. No objections were made to the pH modification. In contrast, the amendment to the oil and grease limit is considered "substantial" under 40 C.F.R. § 403.18(b)(2). Such a proposed change becomes effective only after public notice of the amendment. EPA reports that it approved the oil and grease modification on September 25, 2000. Once approved, under 40 C.F.R. § 403.18(e), amendments to pretreatment programs are to incorporated into the POTW's NPDES permit.

In responding to Ogle's assertion that EPA may not enforce the July and August 2000 modifications to the pretreatment program because the IDEM has not yet incorporated those changes into the NPDES permit for the City's POTW, EPA now asserts that the original limits remained applicable to the most recent exceedances.[19] This is because, as EPA did not issue its approval for the new oil and gas limits until September 25, 2000, the original limits remained in effect until that approval date. To conclude otherwise would be inconsistent with the fact that EPA is the approval authority in Indiana. In that role EPA has the authority to review amendments sought by local authorities to ensure consistency with the objectives of the CWA.

For its part, Respondent, noting that the Court observed a lack of evidence that the City's amended limits had by approved by EPA or made part of the NPDES permit, asserts that because the City's 1999 amendment to the ordinance had not been so approved or integrated into the

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issue would not be resolved base on EPA's inadvertent failure to prove up federal enforceability of the 1999 Ordinance, if, in fact, it was federally enforceable at that time." R's Supplemental Brief at 2. In fact, the Order only noted that the Respondent questioned EPA's authority to enforce the recent exceedances and ordered that the supplemental response address "the integration of the 1999 Ordinance."

[19]EPA's claim that it "has *never sought* to enforce the amended limits for oil and grease and pH," maintaining it has always been enforcing the original limits, is completely disingenuous. C's Supplemental Brief at 3 (emphasis added). Recognizing this artful assertion, it acknowledges a host of instances in its earlier briefs where it maintained it was applying the revised limits, but then compounds its lack of candor by characterizing those instances as "misstatements." Respondent, understandably, was irked by this tactic and points out that even in its reply brief EPA was contending that the revised ordinance was applicable to the most recent violations. Despite EPA's lack of forthrightness, the Court does not agree with Respondent's contention that EPA is barred from asserting that the original ordinance applies when it consistently had contended that the revised ordinance applied. The Court must still resolve which ordinance applies, if any, to Ogle's subsequent exceedances during the summer of 2000.

permit, there is no federal enforceability for the most recent exceedances.[20] This, Respondent contends, is because with the 1984 Ordinance becoming "defunct" and with no federal approval of the amended ordinance during the time applicable to the most recent exceedances, a gap in enforcement resulted. Respondent also challenges EPA's assertion that the original ordinance remains federally enforceable until EPA approves an amendment to it. Respondent notes that EPA has not cited any regulation, statute or court case as authority for this contention. To the contrary, Respondent believes that because, under 40 C.F.R. § 403.8(f)(1)(vi)(B), EPA can only seek enforcement after it has first determined that the local enforcement has been inadequate and because the City had amended the ordinance, EPA's attempt to enforce a defunct ordinance must fail. Similarly, having amended the ordinance, the Respondent contends that the City could only bring an enforcement action where the amended limits had been violated. Nor could EPA enforce the amended ordinance because it had not yet approved the revision. Thus, by Respondent's assessment, there was a gap created in EPA's ability to enforce the limits. Respondent maintains that it would be "incongruous and contrary to law" to hold an industrial user of a POTW subject to two sets of requirements. R's Supplemental Brief at 4.

The Court finds that the 1984 Ordinance remained in effect for the most recent exceedances. EPA, as the approval authority, is the deciding force as to the ordinance, both as it was originally proposed and as later amended. Under Respondent's rationale whenever a local authority voted to amend an ordinance there would *always* be a gap in federal enforcement pending its approval. Similarly, this construction does not take account of the possibility that EPA could decide to reject the amended ordinance. The suggestion, by that reasoning, is that the City could then enforce its own standard while the approval authority could proceed with a different standard or that the City would have no ordinance to enforce pending readoption of the earlier provision. Such a construction would be at odds with common sense. Thus, for EPA, as well as for the POTW, the 1984 Ordinance was applicable until such time as EPA approved the changes.

4. Was the 1998 Order to Monitor unreasonable?

In its Post-hearing Brief Ogle's presents two arguments[21] in support of its contention that

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[20]The Respondent also objects to EPA's remarks in its Supplemental Brief that were irrelevant to the issue the Court asked the parties to address. The Court agrees with the Respondent that EPA went beyond the scope of the supplemental brief, and used the occasion to reargue points raised in its initial and reply briefs and, accordingly, those remarks by EPA are disregarded.

[21]In its Reply Brief, Ogle asserted for the first time that the Order was not enforceable. This argument is rejected on two grounds. First, Ogle did not raise the contention until it submitted its Reply Brief. The concept of the reply brief is to afford the opposing sides an opportunity to respond to contentions raised in their respective post-hearing briefs. In this instance, with the matter being raised only with the reply brief, EPA had no opportunity to

the Order to monitor was unreasonable. First, it asserts that the monitoring requirement ceased when the temporary permit issued by the City terminated. Alternatively, it contends that an open-ended requirement to monitor is beyond the scope of the Order.

In support of its argument that the Order could not last longer than the temporary permit, it asserts that the monitoring requirement could not last beyond the effective date of the 1984 Ordinance. The findings in the 1998 Order refer to the 1984 "Columbus Sewer Ordinance" which was the one approved and incorporated into the NPDES permit. Ogle's argues that since the new ordinance was not incorporated into the NPDES permit, the Order's effect terminated. The Order required sampling within the parameters of the temporary permit but when the temporary permit expired no permanent permit was issued. Therefore, Ogle's argues that with the expiration of the temporary permit, the parameters within it were also extinguished, thereby ending their duty to monitor. R's Brief at 33. Respondent also argues that the purpose of the temporary permit was to determine if a permanent permit was required. Thus, it maintains that it was reasonable to conclude that since a permanent permit was not deemed necessary, there was no need to continue monitoring.

Respondent points to the terms of Section 308(a) of the Clean Water Act and its requirement that an order must be reasonable. Ogle submits that the measure of reasonableness must be made in light of the order's objective. R's Brief at 31. That objective, Respondent acknowledges, was to determine whether Ogle's was still exceeding the pre-treatment limits, with the measure of such monitoring results to be compared with the limits set forth in the 1984 Ordinance. The Respondent also relies upon Finding 11 of the Order which relates that Ogle's was issued a temporary permit that would expire on April 15, 1999.

Under its construction of the terms of the Order, Ogle's maintains that as long as it came into compliance within 30 days, as the Order directs it to so do, its duty to monitor would end. R's Brief at 32. As an alternative stance, Respondent suggests that because the Order included a finding referencing the temporary permit, it is also arguable that monitoring was to continue until the permit's expiration. Respondent contends that since the purpose of the temporary permit was to determine if a five-year permit would be needed, allowing open-ended monitoring would effectively create a five-year permit without the need for a supporting determination.

Respondent's alternative argument[22] asserts that the open-ended monitoring requirement

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respond. Second, although the first reason is sufficient, the Court rejects the substance of Respondent's argument in any event.

[22]Ogle's also contends that the Order was not validly issued and in any event could not be effective beyond the life of the 1984 Ordinance. Neither of these contentions deserve much comment. Ogle's claims that as the Order was not signed by the Region's water director, the duly delegated authority to issue the Order, but rather by another individual, and that EPA had to show that individual had authority to issue the Order. The Order was signed by another

was unreasonable, given the scope of the order, the termination of the temporary permit by the City and the amount of time that passed since it last violated the permit. R's Brief at 2. Since the Order was open-ended, there existed the possibility that Ogle's would have to monitor indefinitely, thus raising the question whether this was a reasonable means of achieving its objectives. Ogle's argues that as the purpose of the monitoring was to determine whether they had come into compliance and since it was determined that they had come into compliance within the dates set forth in the Order, there was no need for continued monitoring. It contends that the Order's findings must offer support to justify the direction for open-ended monitoring. It asserts that the Order does not plainly require such open-ended monitoring and that no such support can otherwise be found in the Order. Linking this contention with its argument that the monitoring must end when the temporary permit ceased, it asserts that the Order is ambiguous because the requirement to sample was tied to the parameters in the temporary permit and once that permit expired the parameters ended as well.

Respondent deals with the Order's language directing that monitoring continue "until otherwise directed" by contending that this provision was intended to allow EPA to order the monitoring to end after the initial 30 days had elapsed. It also dismisses Ogle's subsequent exceedances as "irrelevant to the scope of the Order" because the Order is limited by its findings. As the subsequent exceedances occurred a year and a half later, they were beyond the Order's scope. In addition, Respondent asserts that because the later exceedances were not due to a chronic condition but rather were caused by the settling pit becoming full, they were brought about by new problems, not those addressed by the Order. R's Brief at 34.

Additionally, Respondent contends that EPA's treatment has not been evenhanded, asserting that larger companies have only been required to monitor for three months.[23] In contrast, Ogle's monitored for six months before unilaterally deciding to stop.

In support of the contention that the open-ended monitoring requirement was unreasonable, Respondent points to the testimony of EPA witness McDonough that Ogle's had been in compliance from 1998 until he prepared the penalty justification memorandum. Tr. 210. Respondent also notes that Steve Ogle testified that the monitoring cost $75 per week and was a financial hardship on the business. Tr. 280; CX- 11. Ogle even discussed the cost issue with the

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individual on behalf of the Acting Director. Given the absence of an earlier challenge to this individual's authority to sign the Order, this contention is rejected. Ogle's other claim that, as the Findings relate only to that 1984 Ordinance, the Order necessarily terminated when the revised ordinance came into effect in 1999 is also rejected for the reasons already discussed regarding the enforceability of that ordinance.

[23]Ogle's cites In the Matter of Universal Circuits, Inc., 1990 WL 324102 (EPA April 11, 1990), as an example of uneven treatment. Respondent relates that while the pretreatment standards had been violated from August 1985 through December 1987 the violator was required to monitor for only three months.

City's Bob Lindemann and the fact that they had been in compliance. While Mr. Ogle admits that he was not officially given approval, he stated that, in working with Lindemann, he decided not to continue the monitoring since Lindemann said it "looked clean." Tr. 280. Given the financial burden the monitoring placed upon them, Ogle's only other option was to initiate an action for review, which it declares is itself an expensive procedure. R's Brief at 35.

EPA agrees that an order issued under Section 308 of the Clean Water Act must be reasonable in comparison to its objective. C's Reply at 14. The objective in this instance was to determine whether Ogle's was in compliance and to ensure that its compliance continued. EPA notes that the Order specifically provided that monitoring was to continue until Respondent was notified, in writing, that it could stop. It also points to Ogle's own understanding of the terms of the Order, observing that Mr. Ogle's January 28, 1999 letter to EPA informed that the laundry "will continue to test *until notified otherwise*. We will comply " CX - 12 (emphasis added). Thus, given the unambiguous terms of the Order, EPA rejects Respondent's claim that the Order terminated upon the expiration of the temporary permit. As the purpose of continued monitoring was to detect continuing problems, such as those arising from the subsequent alleged exceedances, (which later formed the basis for the additional violations) which were included in this proceeding, Ogle's unilateral decision to stop monitoring had the effect of blocking such detection. C's Reply at 15.

While the Court has considered the Respondent's reasons for discontinuing the monitoring, the Respondent was not relieved from its obligation to comply with the Order. On its face the Order is reasonable and within the EPA's authority. Paragraph 2 of the Order, which directs Ogle's to commence monitoring, is a stand-alone provision with no tie or reference to a temporary permit. The Respondent had the option to either challenge or comply with the Order to monitor. The Complainant has established that Ogle's discontinued monitoring without written approval from the EPA. This constituted a violation of the Order, and therefore a violation of the CWA. The Order required Ogle's to continue monitoring until they were notified in writing that they may stop. Even though Ogle's stated they "will continue to test until notified otherwise," they conducted no monitoring after April 15, 1999. Tr. 201; CX- 12.

Balanced against this finding, the Court notes that Ogle's contacted EPA after receiving the Order and requested a delay in compliance and a conference at the end of the temporary permit to discuss means of achieving compliance. CX- 11. However, EPA never responded nor asked Ogle's to continue monitoring. Tr. 231, 272. Although EPA's lack of a response contributed to the problem, a reasonable person would have pursued the inquiry until it was resolved. Therefore, while the Order was violated, it is reasonable to consider this surrounding circumstance in assessing the penalty.

III. Determination of an Appropriate Penalty

In its Complaint EPA proposed that a $60,000 penalty be imposed against Ogle's for the exceedances identified in Table A. Complaint at ¶¶ 17 and 22. EPA concedes that there is no penalty policy for the Court to consider where Section 309 violations of the Clean Water Act are

involved. Tr. 29. Upon determining that a violation has occurred, the Clean Water Act sets forth criteria which must be considered in determining the penalty. The criteria are the nature, circumstances, extent and gravity of the violation and the violator's ability to pay, degree of culpability, the economic benefit or savings resulting from the violations and such other matters as justice may require. 33 U.S.C. § 1319(g)(3).

Given the various contentions regarding the original ordinance, the appropriate parameters to be applied to that original version and the enforceability of the ordinance, as amended, and the Court's resolution of those issues, it would be understandable for one to have lost site of the monitoring results which prompted the filing of the Complaint. Therefore, it is worthwhile, in the context of assessing an appropriate penalty, to revisit this by setting forth the monitoring values, as there is no dispute at least as to the results themselves, and to make some observations about the nature of the violations.

The initial pH exceedances cited were:

	pH values		*pH values*
July 17, 1995	9.9	May 21, '97	10.6
Aug. 8, '95	9.8	June 4, '97	10.6
Sept. 26, '95	9.1	June 25, '97	10.3
Oct. 6, '95	10.0	July 1, '97	9.9
Nov. 8, '95	9.7	July 14, '97	9.2
Feb. 13, 1996	9.8	Aug. 11, '97	10.2
March 29, '96	9.8	Feb. 3, 1998	10.4
April 16, '96	9.5	Feb. 18, '98	9.7
May 13, '96	10.5	March 5, '98	9.7
Jan. 8, 1997	9.3	March 20, '98	9.3
Feb. 10, '97	9.4	Oct. 13, '97	9.9
Feb. 27, '97	9.5	Oct. 28, '97	10.0
April 7, '97	9.1	Dec. 1, '97	9.8
May 5, '97	10.2	Dec. 8, '97	10.2

The subsequent pH exceedances were:

	pH values
Aug. 2, 2000	11.4
Aug. 3, 2000	11.2
Aug. 10, 2000	11.1

As reflected in Complainant's Exhibit 4, for reasons unexplained, EPA did not cite Ogle's apparent pH exceedances on the following dates:

June 26, 1996	9.7	Sept. 24, '96	9.9
July 16, '96	9.8	Oct. 29, '96	10.9
Sept. 5, '96	10.5	Nov. 8, '96	9.7
		Dec. 30, '96	9.9

Some of these omissions are particularly difficult to understand. The June 26, 1996 result, for example, stems from the same August 1, 1996 pretreatment results letter to Ogle's in which EPA cited exceedances of 9.8 on Feb. 13th, 9.8 on March 29th and 9.5 on April 16th of 1996. The June 26th 9.7 value exceeded the cited April 16th result and was just below the 9.8 results recorded for February 13th and March 29th. Although most of these uncited pH exceedances stem from the October 30, 1996 and January 27, 1997 letters of pretreatment results, EPA was clearly aware of the results, as they referred to those same letters for the oil & grease exceedances which were measured on August 5th and October 18,1996, and are reflected in those reports.

As previously determined, the Court has found that the applicable parameters for all the pH values involved in this litigation requires that they not be less than 6 nor more than 9 s.u. Therefore, as set forth in the Complaint, and as reflected by the figures above, Ogle's exceeded the upper pH limit of 9 on 28 occasions from July 17, 1995 through December 8, 1997 and again on three occasions in August 2000, when each of those three times the pH exceeded 11 su. However, in terms of assessing the penalty, it can not be ignored that the City was applying a more lenient, albeit improper, pH range which allowed values between 6 and 11 s.u.. Under that standard, none of the 28 original values reached 11 s.u.. In correspondence from the City to Ogle's, on several occasions it effectively lulled the Respondent by stating in its reports of the pretreatment results that the laundry was "in" compliance.[24] In contrast, the three subsequent exceedances are more serious because, under either pH range, the allowable limits were exceeded and these occurred in the context of Ogle's unilateral cessation of its duty to conduct

[24]Letters from the City dated October 25, 1995, January 25, 1996, August 1, 1996, April 29, 1997, August 1, 1997 each informed Ogle's that it was "In Compliance" CX- 4. On those five dates the average pH values reflected in each report ranged from 9.3 to 9.7 su and no oil and grease violations were recorded at those times. In five subsequent reports, starting with October 30, 1996 and ending with May 6, 1998, Ogle's was listed as "out of Compliance." However, for two of those, reflecting pH averages of 9.7 for the October 30, 1996 report and 9.5 for the January 27, 1997 report and reporting Oil & Grease exceedances with *nonpolar* values in excess of 100, the City deemed the Ogle's noncompliant status as "nonsignificant." Only three of the reports, dated October 31, 1997, January 27, 1998 and May 6, 1998, listed Ogle's Non-Compliant status as "Significant." For these, Ogle's pH averages ranged from 9.2 to 10.0 su. Therefore, if the City was applying a consistent standard for determining whether the non-compliant status was significant or not, one would have to conclude that it was the non-polar oil and grease values that brought about the "Significant - Out of compliance" designation and not the pH values because, in large measure, earlier pH values at or very near that level did not prompt the "Significant" designation.

weekly monitoring.

The initial oil and grease exceedances cited were:

	Total Oil & Grease	*Non-polar value*
August 5, 1996	769	130
October 18, 1996	259	144
July 28, 1997	549	135
August 7, 1997	748	542
August 12, 1997	1370	726
September 22, 1997	1076	746
October 29, 1997	341	232
November 3, 1997	1535	594
February 3, 1998	763	440

As with the pH exceedances, EPA, without explanation, ignored several instances where the oil & grease measurements exceeded the proscribed 100 mg/l and did so despite the fact the exceedances were listed from information in the same reports as those relied upon in the Complaint. For example, the October 30, 1996 pretreatment results letter to Ogle's contains the August 5, 1996 exceedance listed above *and* the September 5, 1996 oil & grease exceedance, but only the August exceedance is cited. Similarly while the Complaint lists the October 18, 1996 oil & grease exceedance, it ignores the October 10th and October 29th values, both of which significantly exceeded the *total* oil & grease limit of 100 mg/l with readings of 500 mg/l on each occasion, but which produced *non-polar values* of only 20 and 5 mg/l, respectively. The same approach was applied with the City's October 31, 1997 pretreatment results letter to Ogle's in which EPA asserted three exceedances of oil & grease, as derived from July and August monitoring, but ignored the putative violation of July 31, 1997, in which the total oil & grease was measured at 502 mg/l but where the *non-polar value* was only 61.

From the listing which follows, one can observe that EPA ignored total oil & grease violations, even when the values for total oil & grease were significantly above the limit it insists should be applied to Ogle's of 100 mg/l.

	Total Oil & Grease	*Non-polar value*
May 13, 1996	149	12
September 5, 1996	235	5
October 10, 1996	511	20
October 29, 1996	511	5
July 31, 1997	502	61
January 12, 1998	1494	(no value listed)
March 5, 1998	605	92
October 13, 1997	101	51

November 18, 1997 114 34

The subsequent Oil & Grease exceedances were:

	Non-polar value[25]
July 21, 2000	241 mg/l
July 25, 2000	194 mg/l
July 31, 2000	137 mg/l
August 1, 2000	173 mg/l
August 2, 2000[26]	254mg/l
August 7, 2000	160 mg/l
August 8, 2000	128 mg/l

Tr. 200.

As with the pH exceedances, the oil & grease violations have a duality to them in that the City was enforcing the limitation under a different standard than EPA claims applies. The City considered only the *non-polar* fraction for oil & grease, although the ordinance did not make such a distinction. The Court has already determined that the measure for determining an oil & grease exceedance under the ordinance did not distinguish between polar and non-polar components. Therefore, violations have been established for each of the original nine exceedances because each had a total oil & grease value above 100 mg/l. In addition, given the rationale for distinguishing between polar and non-polar values, the Court can not ignore that in those nine instances the non-polar values also reflected values exceeding 100 mg/l. Thus, even applying the measure which considered only non-polar values, Ogle's did violate the oil & grease standard on those occasions. However, as demonstrated above, while EPA claimed that it looked to *total* oil & grease, in fact it cited only the *non-polar* exceedances above 100 mg/l. For that reason the Court rejects EPA's claimed percentage exceedance, as set forth in Complainant's Exhibit 7, because that measured the exceedances by looking to a *total* oil & grease level of 100 mg/l, even though EPA never included such *total* exceedances as violations in the Complaint. As with the pH exceedances, the Court views the subsequent oil & grease exceedances as more serious because all reflected only non-polar values and because the subsequent exceedances of Ogle's occurred in the context of its unilateral cessation of its duty to conduct weekly monitoring.

1. Penalty for Violation of the pH and Oil and Grease Limits.

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[25]Only the non-polar value was provided for the subsequent oil & grease exceedances.

[26]Counsel for EPA did not explicitly state that the August 2, 2000 oil & grease value was *non-polar*, however this is construed as an oversight as all the other subsequent oil and grease exceedances, both preceding and following that date, were expressed as non-polar values.

Nature, Circumstances & Extent of the Violation

EPA charged and proved that Ogle's owned and operated an industrial laundry which discharged wastewater into the Columbus POTW in excess of the pH and oil & grease limits set forth in the City Ordinance. The Respondent draws attention to the wastewater exceedances which occurred in Pleasant Hills Authority, CWA-III-210, 1999 EPA ALJ LEXIS 87 (Nov. 19, 1999)("Pleasant Hills"), and characterizes Ogle's violations, by comparison, as less serious. Respondent notes that, unlike Pleasant Hills, the pollutants from Ogle's Laundry were not toxic and they were discharged to the POTW, which is prepared for such wastewater, and not to a receiving stream. R's Brief at 13

EPA reiterates that the action involves violations of Section 307(d) and 308(a) of the CWA. 33 U.S.C. §§ 1317(d), 1318(a). Specifically, Ogle's discharged wastewater in excess of the City Ordinance limits for pH and oil & grease and failed to sample its wastewater as required by the Order of Compliance issued by EPA on December 9, 1998.

Gravity of the Violation

The gravity of the violation takes into account the seriousness of the violation as well as the harm to the environment. See U.S. v. The Municipal Auth. of Union Township; and Dean Dairy Products, 929 F. Supp 800, 807 (M.D. Pa 1996). According to EPA, the discharge exceedances from Ogle's laundry can have a serious effect on the operation of the POTW. Pugh described the operation of the POTW and how it treats discharges. He testified that detergents emulsify the oil and grease such that they are not separated. Tr. 86. While the POTW skims the water to collect as much oil as they can, some emulsified oil still goes through the system unchecked. *Id*. This oil tends to coat the microorganisms on the rotating biological contractors (RBC's) which serve to treat the wastewater.[27] *Id*. This causes their pollution removing functions to be diminished by minimizing the oxygen they need to survive and by preventing contact with the waste. Tr. 87. Similarly, Pugh testified that pH levels beyond a certain range can affect the integrity of the system. Tr. 109. The entire system must operate at a pH level of 8.5 s.u. to prevent diminished microbiological activity. Tr. 254. Without these microorganisms, the POTW cannot operate efficiently and consequently discharges into East Fork of the White River which are not in compliance with their NPDES permit may result.[28] Discharges of pollutants could lead to fish and plant kills and have an aesthetic impact. Tr. 92. This is serious

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[27]Although EPA testimony established that excess oil & grease can diminish the ability of nitrifying bacteria to remove organic matter, (referred to as Biochemical Oxygen Demand or "BOD") and that potentially this could inhibit the bacteria's ability to remove enough ammonia-nitrogen, a toxic pollutant, there is no evidence that such a problem occurred here. Tr. 79.

[28]In 1993, the Columbus POTW paid a $25,000 fine for violations of the ammonia-nitrogen limit discharges into the East Fork of the White River. Tr. 94-95.

because the river is designated as "full body contact," which means that it is used for recreational purposes such as swimming, fishing and boating. Such activities would be prohibited if the river became septic from the wastewater. Tr. 91, 93.

The Respondent argues that the gravity is low because their discharges have never affected the functioning of the POTW and have never caused a potential violation of the POTW'S NPDES permit. R's Brief at 19. Pugh testified that he had no direct knowledge of a problem with the RBC's from Ogle's discharges. Tr. 121. He also testified that considering Ogle's discharge of volume of water into the POTW, its contribution was insignificant. Tr. 255.[29] Respondent denies that there was potential harm as well. Ogle's argues that the City's act of only enforcing the less stringent standards shows that the it was not concerned about discharges at those levels. Pugh testified that when he sent EPA copies of the correspondence regarding Ogle's laundry in 1997 or 1998, they discussed the issue. Pugh stated that he did not think that the discharge levels were a threat to the POTW. Tr. 160; RX- 4. He further testified that EPA never told him to cite instances where the pH level was between 9 and 11. Tr. 160. Since the City was not enforcing the standards and the EPA was aware of how those standards were being enforced and did nothing, then the gravity of the violation must not be serious. Additionally, EPA has subsequently agreed to allow the City to change the ordinance. Tr. 224. If EPA felt that the amended levels would pose a problem, they would not have allowed the change.

The Respondent also compares the seriousness of the violation to that in Pleasant Hills, arguing that the percentage of the exceedances for Ogle's was much lower than in that case. The Respondent argues that exceedence was on average 211 percent above the limit in comparison to over 400 percent in Pleasant Hills. Pleasant Hills, at *46; R's Brief at 16. In fact, Pugh testified that the City only looks at the percent for non-polar oil and grease exceedances in determining the significance of the non-compliance. Tr. 260. In his view, anything over 66 percent is considered significant. Tr. 261. Since the City only looked at the non-polar fraction, the percentage of exceedence is much lower than the Complaint charges. R's Brief at 17.

The Court notes that actual damage is not a prerequisite to finding the gravity of violation serious. See Municipal Auth. of Union Township, 929 F. Supp. at 807 (finding that it is not necessary to prove actual harm for a penalty to be appropriate). While actual damage as a result of the discharges was not shown, there is evidence that discharges in excess of the pH and oil & grease limits could have upset the efficient operation of the POTW. Regarding the oil & grease exceedances, the ordinance, at the times in issue in this litigation, did not make a distinction between the polar and non-polar fractions. Even under the new ordinance's recognition of the distinction, all nine of the original & grease exceedances had non-polar values over 100 mg/l, as did each of the subsequent seven oil & grease violations that were added to the Complaint. Thus, the oil & grease exceedances must be viewed, under either standard, as serious.

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[29]Ogle's discharged 10,750 gallons per day, of which 9840 gallons was from the laundry operations. See RX- 3. The POTW discharged 9 million gallons per day. Tr. 90

Examining the pH exceedances, while all 31 instances exceeded a pH value of 9 s.u., only three of those were in excess of 11 s.u. . Given that EPA itself ignored seven other instances where the pH exceeded 9 s.u. , that the City only viewed exceedances above 11 s.u. as harmful, and that currently EPA accepts the City's higher upper pH limit of 11 s.u. , the gravity, except for the most recent three exceedances, must be viewed as low.

Culpability

EPA argues that the penalty be increased upon consideration of the culpability factor. They argue that Ogle's failed to install an oil and water separator per an agreement with the POTW. According to Pugh, Ogle's agreed to install the separator to rectify its oil & grease violations in exchange for a six month grace period. Tr. 122. Pugh drafted a letter from Keith Reeves, the acting director of the POTW, memorializing the meeting. CX- 5, Tr. 123. This letter discusses Ogle's commitment to installing the separator within six months, and its agreement to work with the customer who appeared to be the source of the oil. CX- 5.[30] The POTW also agreed to investigate initiating surcharging for high strength oil and grease. CX- 5.

Ogle's disagrees with the assertion that they committed to installing the separator. Mr. Ogle testified that at the meeting they agreed to install the separator "if that's what it takes to get this thing resolved." Tr. 271. It was Ogle's belief that if he couldn't solve the oil and grease problem, he would need to install the separator. Tr. 273. He believed that he had six months to solve the problem but wanted to do so immediately. Tr. 270; 273. Ogle's dropped the NTN account in December 1997, even though the grace period for solving the problem did not expire until April 1998. Tr. 274. However, Pugh testified that there was a commitment to install the separator regardless of the NTN situation. Tr. 150. Since each side walked away from the meeting with a different belief, the letter from Keith Reeves serves as evidence for what occurred, especially since Ogle did not communicate disagreement with the letter. Tr. 122.

If Ogle's had made a commitment to install the separator, there would have been no need for the City to investigate a surcharge. This is consistent with Mr. Ogle's belief that he was working with the City to arrive at a solution for the problem by looking at all the options. The Respondent also argues that if the separator was required, it would have been referenced in the temporary permit issued on September 18, 1998.[31] R's Brief at 27. The separator was not

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[30]Ogle's believed the source of the oil was the NTN contract for the cleaning of work gloves. Tr. 269. The violations began when Ogle's undertook the contract and the violations were minimized after Ogle's terminated the contract. Tr. 230; 273

[31]Initially Pugh asserted that the temporary permit was issued before the letter referencing a commitment to install the separator. When presented with evidence that this was not the case, he offered the explanation that the absence of reference to the separator in the temporary permit was attributable to fact that the time for the installation of the separator had not yet expired at the

required after the permit expired, nor was it included in the EPA's 1998 order. Tr. 154; CX- 6. Pugh was unable to testify as to why the requirement was not included in the permit. Given this evidence, the Court finds that Ogle did not intentionally disregard the POTW's request for a separator. While the City may have used their enforcement discretion not to issue notices of violation to Ogle during the six month compliance period, the evidence is not conclusive that Ogle's was required to install the separator. Rather, it appears that the separator was one of the options discussed for bringing Ogle's into compliance. Thus the Court concludes that Ogle's actions were not a disregard for the system but rather the product of a miscommunication between the two sides on how to deal with the oil and grease problem.

EPA also asserts that Ogle's displayed a general disregard for the CWA, as evidenced by its unilateral decision to stop sampling, its continuing violations of the pH and oil & grease limits and the indifference reflected by Ogle's failure to maintain a copy of the sewer ordinance at its office. In addition, since Ogle's received their water monitoring reports, EPA argues they should have known that there was a problem and that a prudent person would have sought to rectify the discrepancy between the ordinance and the POTW's practice. C's Brief at 27. Ogle's responds that there was no need to seek a variance because the ordinance allows the utility to deviate from the limits when it sees fit. Since the City was enforcing the same limits against all industrial users, there would be no need for Ogle's to spend time or money seeking a variance from the City when the City was using its discretion.

While Ogle's has a duty to comply with the law, the City's actions in leading Ogle's to believe they were in compliance is relevant to their culpability. Ogle's did not set out to violate the law but rather was led to believe that the pH limits were acceptable and that the City was investigating options for dealing with the oil and grease in Ogle's wastewater. The EPA argues that the relationship with the City should not be considered in the penalty. In Advanced Electronics, CWA-5-98-021 (Aug. 15, 2000), the judge rejected the argument that reliance upon the relationship with the POTW serves as a defense from an enforcement action by the EPA. While reliance is not a defense, it does serve to mitigate the penalty.

However, as mentioned, the recent exceedances must also be considered. As discussed earlier, under either version of the ordinance, there were nine oil & grease violations originally and seven new such violations in July and August 2000. In addition, even under the broader pH parameters, there were three such exceedances in August 2000. Therefore Ogle's clearly discharged wastewater which exceeded the discharge limits, even if measured under the terms of the revised ordinance. The subsequent violations occurred after Ogle's received an administrative complaint with the possibility of a large penalty for their violations. While these violations apparently were caused by Ogle's failure to pump the settling pit as often as needed, Ogle's behavior is inexcusable. Respondent was aware from the letters it received from the City

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time the permit letter was issued. Tr. 156. The Court does not adopt the witness' explanation. Rather the evidence shows that both sides walked away from their meeting with different understandings of their agreement.

that it had a problem with these pollutants, yet it allowed the subsequent exceedances to occur. Under these circumstances Ogle's should have had a heightened sense of awareness of its responsibilities as a discharger into the POTW.

History of Prior Violations

The history of prior violations is also considered in the penalty calculation. In calculating the proposed penalty, as Ogle's had no prior violations, EPA's McDonough did not enhance the penalty for this factor. CX- 9. However, given the recent exceedances for both these pollutants, arguably a Court could find that there was a prior history for the pH exceedances, given the original 28 exceedances under the 6 - 9 pH valuation, and the three exceedances, even under the expanded 6 - 11 pH scale, during August 2000. In addition, under either version of the ordinance, the oil & grease limit was exceeded, originally on nine occasions, and later on seven occasions during July and August 2000. While the subsequent exceedances could be viewed as reflecting a history of violations, the Court, in its discretion, elects to treat all the violations as a group with the consequence that the penalty is not enhanced for these later violations upon consideration of the history of prior violations factor.

Violator's Ability to Pay

The Court must also consider the violator's ability to pay the penalty. This does not account for the violator's desire to pay the penalty but rather the effect that the penalty will have on the violators's ability to stay in business. In the Matter of Chempace Corp., Doc. No. 5-FIFRA-96-107 (Feb. 25, 1999.) EPA's burden under this factor is minimal; it must show that the penalty is appropriate and that a respondent generally has the ability to pay. The burden then shifts to the respondent to show "with specific information that the proposed penalty assessment is excessive or incorrect." Chempace Corporation, FIFRA Appeal Nos. 99-2 & 99-3, 2000 EPA App. LEXIS 15 (EAB, May 18, 2000). EPA offered three matters for analyzing this factor.[32] First, it points to McDonough's testimony that the Dunn & Bradstreet report shows that Ogle's is in no financial difficulty. CX- 10. McDonough testified that the report shows that Ogle's paid their bills on time, borrowed money, and had some UCC filings for accounts receivable. On this basis it was his opinion they could pay the fine. CX- 10; Tr 212. However, as Ogle's argues, this document only shows bills of $550 and under, an amount which gives little indication to

[32]At trial, the parties discussed the admissibility of the Ogle's tax returns. These documents were labeled as Confidential Business Information (CBI) and were used in calculating the penalty. Tr. 243. Because of the CBI issue, the EPA decided not to enter the documents into the record. Tr. 246. Since the Respondent did not offer the documents, there is no evidence on the record to support the EPA's discussion of the equipment depreciation in the post hearing brief. Therefore, the only document for consideration under the ability to pay is the Dunn & Bradstreet report. Tr. 250.

their ability to pay a $60,000 penalty. In support of their inability to pay argument, Respondent submitted a "Statements of Operation" for December 1997 & 1998, prepared by Ogle's accountant. RX- 5. It argues that this document shows the financial condition of the company at the time of the violations. Tr. 286. The Respondent did not submit evidence of its most recent financial condition. Importantly, Mr. Ogle even agreed with EPA's assessment of this factor by stating that he didn't think the penalty would bankrupt him or put him out of business.[33] Tr. 310. Despite this concession, Ogle's argues that the penalty, in addition to spending approximately one hundred thousand dollars on treatment equipment would put them out of business.[34] The Court concludes that EPA satisfied its initial burden on this issue and, on this record, the Respondent mustered insufficient evidence to support a claim of an inability to pay.

Economic Benefit or Savings Resulting from the Violations

The economic benefit is the savings the company accrued from non-compliance with the CWA. Ogle's argues that there was no economic benefit from the alleged violations. They contend that there was minuscule financial benefit from the NTN account, as it was labor intensive, earning very little profit. Tr. 276. Any profit from keeping the account after the first exceedance was negated by the cost of sampling required by the City. R's Reply at 23. Based on the testimony, there does not appear to be a significant economic benefit from the NTN account.

The Respondent also argues that there was never an agreement to install an oil and water separator. As discussed under the culpability factor, there is conflicting testimony as to Ogle's commitment to install a separator and the possibility of the City investigating other options. Since EPA did not establish by a preponderance of the evidence that Ogle's agreed to install the separator, there was no avoided cost of compliance in this regard.

However, Ogle's subsequent exceedance, attributable by its accounting to a need to pump out the settlement pit, represents an avoided cost. EPA argues that the Respondent gained a significant benefit from failing to pump the settling pit as often as needed. In their estimation, Ogle's saved $4,200 per year.[35] To arrive at that estimate, EPA assumes that Ogle's should have

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[33]Ogle also asked that the contributions given to his church not be considered in the ability to pay. Tr. 292. This court agrees that these contributions are not a factor in determining the penalty.

[34]Ogle argues that the business is his only source of income and he intends to retire in six years. Tr. 292. In his opinion, he would not be able to generate enough income to pay the debt he would incur from such a high penalty. This would prevent him from retiring when he plans. This argument is not considered in the penalty calculation. *Id*.

[35]The cost of cleaning the pit is $2,100 for each cleaning. Tr. 241. At the time of the violations, Ogle's pumped the pit twice a year however McDonough testified he did not know how often the pit would need to be pumped to avoid violations. Tr. 242.

been pumping the pit four times per year, instead of two, since August 1996. Tr. 219. They also assume that this savings would have been invested, resulting in a savings of over $18,000 at the time of the hearing. C's Brief at 30-32. At best, this argument is speculative. McDouough testified that he was unsure how often the pit needed pumping, while Ogle testified that he checked the pit weekly. Tr. 242; 299. In Pleasant Hills, the court did not find a economic benefit in delaying the development of a pretreatment program. Pleasant Hills, at *63. EPA's has not established that Ogle's derived a significant economic benefit from not pumping the pits.

Other Factors as Justice May Require

The parties had little to say regarding this penalty element. Respondent only touched upon the "other factors as justice may require" element. At the conclusion of its post-hearing brief, Ogle's refers to City of Salisbury, 2000 WL 190658 (EPA, Feb. 8, 2000), noting that in that case the ALJ upheld a penalty reduction under that element where a municipality, though not unable to pay the proposed penalty, nevertheless had limited financial resources. R's Brief at 40.

For its part, EPA did not address this penalty element in its initial brief but did respond to Respondent's assertion in its reply brief. It noted that in Salisbury it was the *complainant* who proposed a reduction under that element. EPA also argues that different aspects are involved where a municipality, as opposed to a private corporation, seeks relief under this element, by associating the element with the financial strain which would result if the full penalty were imposed.

The Board has noted that "the application of this factor to reduce penalties should be 'far from routine' and should be used to 'reduce [a] penalty when the other adjustment factors prove insufficient or inappropriate to achieve justice." Pepperell Associates, 2000 WL 576426 (EPA EAB May 10, 2000) quoting from Spang & Co., 6 E.A.D. 226, 249-50 (EAB 1995). Upon consideration, the Court finds that its evaluation of the other penalty factors has already adequately accounted for factors which could be entertained under this element and that justice has been achieved upon their weighing.

Penalty for Violation of the pH and Oil & Grease Limits

Although the Court has the duty to analyze each of the statutory penalty factors, there is no duty to assign specific dollar reductions to each penalty factor. *See* Britton Construction, 1999 WL 198919 (EPA March 30, 1999) in which the Board approved of the judge's choosing a figure for the overall penalty, after "dutifully analyzing" each of the statutory factors. EPA proposed a penalty of $60,000 for the violations alleged in the Complaint. Its proposed penalty did not factor in the subsequent pH or oil & grease violations which were established during the hearing. While the earlier (i.e. initial) pH violations are, given the previously discussed attending circumstances, nominal in nature, the subsequent pH exceedances are more serious, particularly given the fact that they represent a recurrence of the problem and occurred in the context of Respondent's unilateral cessation of its obligation to perform weekly monitoring. As

noted, with regard to the oil & grease violations, each of the nine original violations as well as the seven subsequent exceedances, had non-polar values in excess of the more lenient measure, which examined only non-polar values in excess of 100 mg/l. As with the pH violations, because they were recurring and occurred in the context of a prior history of such violations, the Court views the subsequent oil & grease violations as more serious.

Taking into account all of the foregoing discussion regarding the penalty factors, the Court finds that a penalty of $25,000 is appropriate for all of the pH and oil & grease violations.

2. Penalty for Violation of the Order to Monitor
Nature, Circumstances & Extent of the Violation

The same statutory factors must be analyzed in determining the penalty amount for the violation of the Order to monitor. In addressing the nature and circumstances of the violation, EPA discusses the potential harm caused by the violation while the Respondent argues that there was no actual harm. Ogle's argues that at most the absence of monitoring may have missed occasional exceedances and since there was no threat to the POTW, the circumstances should not warrant a high penalty. While this violation may not have resulted in environmental harm, there was disregard for the EPA's regulatory authority. This action hindered EPA and the POTW from knowing what was in the wastewater. While it is known that Ogle's violated the CWA after they stopped monitoring, there is no way to know how many other violations they may have committed. It is for this reason that a penalty is needed.

The violation existed for fifteen months and would constitute 69 violations, one for each week that they failed to report. R's Brief at 36. The Respondent compares the extent of this violation to that in Pleasant Hills. The fact that in Pleasant Hills there were 17 months and 407 violations does not diminish the seriousness of this violation. Pleasant Hills, at *18.

Gravity

Ogle's tries to minimize the gravity of the violation by arguing that unlike Pleasant Hills, the monitoring was for conventional, not toxic, pollutants. There were no violations during the time in which they were monitoring the wastewater and they continued operating in the same manner once they stopped monitoring. Tr. 281. They argue that a failure to pump the settling pit caused the violation, not systemic treatment failure. Tr. 281. They also point to the testimony from Gary Pugh who stated that Ogle's contribution to the POTW did not pose a significant threat. Tr. 255. However, these factors do not mitigate the gravity of the violation. Ogle's failed to comply with an Order from the EPA after he stated that he would do so until told otherwise. CX- 12. Tr. 231. Further, violations of this nature are serious because they fail to detect the non-compliance and future problems which are critical to understanding an industrial user's performance. In finding that violations of this nature are serious, the Court in Advanced Electronics stated, "knowledge as to what is 'up the pipe' is critical." See In the Matter of Advanced Electronics, Docket No. CWA-5-98-012 slip op. at 22 (Aug. 15, 2000). As the EPA points out, had Ogle's continued monitoring, they may have discovered the problem with the

settling pit sooner and would not be facing the violation for recent exceedances.

Violator's Ability to Pay

The same analysis of violator's ability to pay applies to this violation as that for the violation of the pH and oil and grease limits. Since it has been established that Ogle's has the ability to pay a penalty, this factor will not be revisited.

Culpability

Ogle's degree of culpability is deserving of some mitigation. Although Ogle's unilateral decision to stop monitoring was a serious transgression, given the Order's direction to continue testing until advised otherwise, there is evidence that Ogle's stopped monitoring not because of a disregard for the CWA but because it (and arguably the City) believed that weekly monitoring was not needed. RX- 4. Since the City would continue monitoring, there was no need for Ogle's to do the same. Despite the belief that the monitoring was not needed, Ogle's tried to work with the EPA to solve their exceedence problems. Ogle's wrote to the EPA asking them for a delay in complying with the order. CX- 11. They explained that as a small company, compliance with the order was a hardship. CX- 11. However, the EPA never responded nor asked Ogle's to continue monitoring. Tr. 231, 272. While Ogle's was wrong to cease monitoring their wastewater, there does not appear to be negligence nor reckless disregard to the CWA. In addition, Ogle's dropped the NTN account and was working with the City. This shows that they were trying to correct their problems, not avoid them.

Economic Benefit or Savings Resulting from the Violations

As discussed earlier, the economic benefit includes both the actual and avoided costs of compliance. The Respondent argues that the money they saved by not conducting the monitoring was not an avoided cost that gave them an advantage nor a normal compliance cost. Rather they argue that the cost was an extra cost, imposed upon them by the order.[36] In its post

[36]Although the Respondent cites U.S. v. Tivian Laboratories, Inc., 589 F.2d 49 (1st Cir. 1979), in which the court remanded the case for a determination whether the cost of compliance with an EPA is so burdensome that the Responded is entitled to reimbursement for the costs, the case has no significance in this proceeding. Tivian involved Constitutional challenges to the very distinct "information request" proceedings under the Clean Air and Clean Water Acts. Each of those challenges was rejected. The sole concession to the Respondent was its acknowledgment that a district court may impose reasonable restrictions on subpoenas and may determine whether compliance with the request would be so burdensome that reimbursement would be appropriate. Obviously Ogle's situation, arising in the context of ordered monitoring for exceedances, has no bearing to the dicta in Tivian.

hearing briefs EPA did not discuss the economic benefit issues for the failure to monitor violation. Upon consideration, the Court finds that Ogle's gained no economic benefit from its premature cessation of monitoring.

Other Factors as Justice May Require

The Court's earlier analysis of this factor is unchanged in the context of the violation for failure to comply with the order to monitor.

History of Prior Violations

For the reasons articulated in the discussion of the exceedances violations, Ogle's has no history of prior violations under the CWA. In addition there is no history of failure to comply with other orders under that Act.

Penalty for Failure to Comply with the Order to Monitor

Upon consideration of all the penalty factors, the Court finds that a $15,000 penalty is appropriate for the Respondent's failure to conduct monitoring, as required by the Order.

ORDER

A civil penalty in the amount of $ 40,000 is assessed against the Respondent, Jehovah-Jireh Corporation, d/b/a Ogle's Laundry. Payment of the full amount of the civil penalty assessed shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c). Payment shall be submitted by a certified check or cashier's check payable to the Treasurer, United States of America and mailed to:

US Environmental Protection Agency
EPA Region 5
Regional Hearing Clerk
P.O. Box 70753
Chicago, IL 60673

A transmittal letter identifying the subject case and the EPA docket number, plus the Respondent's name and address must accompany the check. Failure of the Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalties. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within twenty (20)

days after service of the Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the EAB is taken from it by a party to this proceeding, pursuant to 40 C.F.R. § 22.30(a), within thirty (30) days after the Initial Decision is served upon the parties; or (3) the EAB elects, upon its own initiative, under 40 C.F.R. § 22.30(b), to review the Initial Decision.

So Ordered.

Dated: July 25, 2001

William B. Moran
United States Administrative Law Judge

In the Matter of Jehovah-Jireh Corporation d/b/a Ogle's Laundry
Respondent
Docket No. CWA-5-99-016

CERTIFICATE OF SERVICE

I certify that the foregoing **Initial Decision,** dated July 26, 2001 was sent this day in the following manner to the addressees listed below:

Original + 1 copy by Pouch Mail to:

Sonja R. Brooks-Woodard
Legal Technician/Regional Hearing Clerk
U.S. EPA - Region 5
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Rachele D. Jackson
Legal Staff Assistant

Dated: July 25, 2001