7/25/95

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
OUTBOARD MARINE CORPORATION	)	Docket No. V-W-91-C-123B
	)	
Respondent	)	

INITIAL DECISION

Regarding Count One of the complaint, it is concluded that respondent violated the consent decree and is liable for a civil penalty in accordance with section 109(b) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9609(b), and penalty assessed. Concerning Count Two, it is concluded that respondent did not violate sections 301(a), 402 of the Clean Water Act, 33 U.S.C. §§ 1311(a), 1342. Count Two dismissed.

By: Frank W. Vanderheyden
Administrative Law Judge

Dated: July 25, 1995

Appearances:

For Complainant:

Sean Mulroney, Esquire
Cathleen R. Martwick, Esquire
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

For Respondent, Outboard Marine Corporation:

Kirk M. Minckler, Esquire
SONNENSCHEIN NATH & ROSENTHAL
8000 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606

For Intervenor, Canonie Environmental Services Corp.

Mary Rose Hughes, Esquire
John M. Devaney, Esquire
PERKINS COIE
607 Fourteenth Street, N.W.
Suite 800
Washington, D.C. 20005

INTRODUCTION

Initially, the representation by counsel during the hearing must be addressed in the interest of clarity. The sole respondent in this matter, as reflected in the administrative complaint, issued October 1, 1991,[1] is Outboard Marine Corporation (sometimes respondent or OMC). In its prehearing motion of November 19, Canonie Environmental Services Corporation (Canonie) sought to intervene in the subject proceeding. The stated reasons for the motion were that Canonie acknowledged, pursuant to a contract with OMC, it faced potential liability in the event OMC was found to have committed the violations as charged in the complaint, and that "Canonie wishes to align itself with [OMC] and intends to argue in these proceedings that the complaint lacks both a factual basis and a legal foundation." (Mot. at 2.) In its response, served December 4, the U.S. Environmental Protection Agency (sometimes complainant or EPA) stated that it neither objected to nor concurred in Canonie's motion; that the alleged violations related in the complaint were committed by OMC resulting from violations of a consent decree and order entered April 27, 1989, in United States of America v. Outboard Marine Corporation, No. 78-C-1004, (N.D. Ill.); and that OMC, not Canonie, is the party responsible for any violations. (Resp. at 1.) By order issued February 6, 1992, Canonie's motion to intervene was granted. Pursuant to a separate settlement agreement entered into between respondent and Canonie,

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[1] Unless otherwise indicated, all dates are for the year 1991.

the latter agreed to "assume the defense" of the former, and that it would be representing the defense "for both the Respondent OMC and the Intervenor Canonie." (Tr. 37-38.) The consent agreement established the Waukegan Harbor Trust Site funded by respondent. This Trust gave authority to the Trustee to perform the work under the consent agreement. The Trustee then entered into an agreement with Canonie, dated October 25, 1989, whereby the latter would provide all work required under a Remedial Action Plan (RAP) which included the design and construction of the New Slip, more of which will be said below. (JX 21 at ¶ 5.)

All proposed findings of fact and conclusions of law inconsistent with this decision are rejected by the undersigned Administrative Law Judge (ALJ), or not considered of sufficient import for the resolution of the questions presented. The scope of this canvas is not sufficiently broad to address every single issue raised in the proceedings. Further, it is not required that the ALJ engage in the unnecessary titanic task of resolving all questions regardless of their significance. It is sufficient that there be a resolution of only those major questions necessary for a decision.

To be determined here is whether or not the allegations raised in the complaint are supported by a preponderance of the evidence.[2]

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[2] In pertinent part, the Consolidated Rules of Practice provide that: "Each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence." This standard is not limited to the liability issue. Complainant also has the burden of establishing that the penalty is "appropriate." 40 C.F.R. § 22.24.

"Preponderance of the evidence" is the degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

This matter has its provenance in the aforementioned consent agreement and order. With appendices, it is a corpulent document, indeed. (JX 1.) From this, EPA crafted its two-count complaint. The first count alleges that OMC violated the pertinent section of the consent decree; that it is responsible for civil penalties under section 122(l) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9622(l); and that respondent engaged Canonie to perform the work required under the consent agreement for remediation of Waukegan Harbor. More specifically, paragraph 10 of the complaint charges that the respondent allowed leachate to accumulate in the waste pile above 36 inches[3] as measured in the leachate manhole. When such a limit was exceeded, respondent was required to dispose of the accumulated leachate at either the North Shore Sanitary District (NSSD) wastewater treatment plant or at another facility approved by EPA. Paragraph 11 of the complaint alleges that

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[3] The record shows that the parties variously stated either 36 inches in the manhole, or one foot above the bottom of the liner which was situated immediately underneath the collection pipe that entered the manhole. There is no difference in numbers. The diagram of the manhole shows that the bottom of the manhole is 2 1/2 feet below the center of the 4-inch diameter collection pipe. Therefore, the distance from the bottom of the manhole to the bottom of the liner would be 2 feet 2 inches, or 26 inches. Adding one foot or 12 inches to that results in 36 inches. (RX 51; Tr. 120.)

respondent allowed leachate "to accumulate over 61 inches at which point it was in danger of overflowing the bermed pile onto surrounding property." The pertinent section of CERCLA provides for a civil penalty of not more than $25,000 per day during which the violation continues, and in the case of a second or subsequent violation, such penalty may not be more than $75,000 for each day during which the violation continues. Section 109(b), 42 U.S.C. § 9609(b).[4] The penalty proposed in the complaint to be assessed for Count One is $158,468. This figure was subsequently reduced at the hearing.

It is charged in Count Two of the complaint that respondent has failed to comply with IV(E)(1) of the consent agreement. It is alleged that in the construction of a new recreational boating slip Canonie purposely "dewatered the construction area by pumping the contaminated water from that area to the Upper Harbor . . . ; [that Canonie] discharged water from New Slip construction area beginning on or about March 2, 1991, through March 25, 1991, at an approximate frequency of every other day for two (2) hours for an estimated total volume of 2 million gallons; [and that] Section 301(a) of the Clean Water Act (the Act), 33 U.S.C. §1311(a), prohibits the discharge of any pollutant except in accordance with the Act, and as authorized by, and in compliance with, a permit issued under Section 402 of the Act, 33 U.S.C. § 1342 . . . . [Respondent] is liable for civil penalties in accordance with

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[4] The consent decree placed a limit of $25,000 per day notwithstanding the number of violations. (JX 1 at 51; Tr. 194.)

Section 109(b) of CERCLA, 42 U.S.C. § 9609(b)."[5] (Compl. ¶¶ 17-19, 21.) The proposed penalty sought in the complaint for Count Two is $325,000.

FINDINGS OF FACT

Count One

On the day that the hearing commenced, complainant, OMC and Canonie entered into an agreement entitled, "Statement of Material Facts Not in Dispute With Respect to Count 1 of the Complaint." (JX 21.) An observation is made here concerning paragraph 11 of JX 21. It refers to two diagrams attached to the exhibit which "accurately depict the leachate system." The ALJ did not find such diagrams attached. However, it is his view that RX 46, which is the contaminant cell (hereinafter CC) diagram, and RX 51, a drawing of the manhole, reflect sufficiently the leachate system.

The consent decree demanded that remediation activities conform to the requirements of the RAP. On October 12, 1990, Canonie submitted a plan to complainant for design of the designated soil CC. The plan was Appendix N of the Design and Analysis Report and was approved by complainant in a letter of October 16, 1990. At that time, it became part of the RAP. The latter required the closure of Slip No. 3 and its conversion to the CC for receipt of contaminated sediments and dredged soils. This would require the construction of a New Slip, which under the

[5] Subsection 9609(b)(5) provides for penalties for violations, among others, of consent decrees.

consent agreement must be completed prior to the initiation of remediation activities on the site. (JX 21 at ¶¶ 3, 4, 9.)

In January 1989, Canonie took soil borings from the area of the proposed New Slip. One of the borings disclosed unexpectedly that the soil was contaminated by polynuclear aromatic compounds (PNAs). Additional borings and examination of samples all showed contamination. Monitoring wells were installed in the area of the proposed New Slip in late summer of 1989. This monitoring showed the presence of PNAs at depths of 5 to 15 feet. Phenols were also detected in the area. It was agreed to relocate the New Slip about 60 feet north of the original site in order to avoid an area known as Area B where there was PNA contamination. When the New Slip was excavated, PNA contaminated soils would be placed in the CC for temporary storage. (The parties sometimes refer to the CC as the "designated soil stockpile" or "designated soil contaminant cell.") (JX 21 at ¶¶ 7-8.)

The overall dimensions of the CC were about 120 feet by 120 feet. At its bottom was a liner of 40 mil thick high density polyethylene (HDPE) and it had a perimeter sand berm which, as actually constructed, was about 5 feet above the original ground surface. (JX 21 at ¶ 10; RX 46.) The CC had a leachate system for collecting and disposing of water that seeped through from the soil. Described broadly, the CC had a perforated pipe that rested just above the top of the HDPE liner which was sloped slightly downward along the entire length of the CC to the manhole where the water was deposited. Soil was placed into the CC from the area

excavated around the sheet pile wall between the harbor and the starting point of the New Slip. Of the 200 or 300 yards of soil put in the CC, it was not at that time contaminated by PNAs. During the winter the system remained open, without a cover on it, for the reason that in the area, while there may be snow, not much water developed. (RX 46; Tr. 733-38.)

Crucial to resolving liability in Count One is a document, Appendix N, drafted by Timothy J. Harrington (Harrington) who, from 1981 to 1993, was vice-president of the midwest operation for Canonie. (Tr. 730-33.) The document specified the removal of water from the manhole after it accumulated to a particular level. In pertinent part, it reads:

> The water level inside the collection manhole shall be monitored during each weekly inspection. A water level more than one foot above the bottom liner at the manhole shall be set as the point for removal of water. . . .
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> During construction, rainwater is likely to accumulate in the designated soil stockpile. The stockpile is also likely to contain some free pore water from the soils excavated from below the ground water table. If the water generated during filling of the designated soil stockpile accumulates to a depth one foot above the bottom of the liner at the collection manhole, removal actions will be taken . . . .
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> Removal of accumulated liquids during construction of the designated soil pile shall be by disposal to the North Shore Sanitary District (NSSD), or if the NSSD refuses to accept the leachate, to another facility and by such means as are approved by the on-scene coordinator. . . .
>
> After closure of the designated soil stockpile, the water level in the manhole shall be checked weekly. If additional water

> accumulates to a depth of one foot above the bottom liner, the liquid level shall be reduced by pumping to the NSSD.

(JX 6 at N7, N8; RX 48.) (Emphasis added.)

Appendix N also provided that designated soils excavated from below the water table would be placed alongside the excavation basin before such soils were placed into the CC. The purpose of this was to attempt to reduce the volume of water draining through the CC from the "wet" soils. It was anticipated the excavation of designated soils would take about four weeks to complete. Appendix N also required that following the excavation of designated soils, the CC would be covered with a liner similar to that at its bottom to prevent further entrance of water by precipitation. (JX 21 at ¶ 13.) The aforementioned Appendix estimated that designated soils removed would be about 2,000 cubic yards. Should this volume be exceeded, then the CC would be expanded by increasing the height of the pile. Based upon certain assumptions concerning the porosity for sands in the area and leachate depths, it was thought that the accumulated leachate in the CC would be between 37,000 to 102,000 gallons. (JX 6 at N2, N8; JX 21 at ¶ 13.)

The bottom liner for the CC was begun on December 7, 1990, and completed on December 11, 1990. Also, on the latter date, the manhole for leachate collection was completed, and the first designated soils were placed into the CC. Further, Canonie was taking additional samples from the borings within the area of the New Slip in order to evaluate the degree of soil contamination. Excavation of the New Slip continued through much of February.

However, progress in excavating the New Slip was delayed due to a disagreement between EPA, Canonie, and the Trust. This concerned the extent to which EPA would require excavation of an area along the south wall of the New Slip. This area of designated soils is being referred to as "Area A." (JX 21 at ¶¶ 15-16.) During much of February and a portion of March, EPA, Canonie, and the Trust tried to ascertain the degree of contamination in Area A, and reach an agreement concerning the amount of excavation required for the soil there. On March 18, EPA rejected the suggestion for less extensive excavation. Following this, EPA, the Illinois Environmental Protection Agency (IEPA), and the United States Army Corps of Engineers (Corps) arrived at a plan for excavating Area A, under which a large portion of the Area would have to be excavated down to the clay till, which was a depth of about 25 feet. The digging commenced on March 19 and was completed on April 2. (JX 21 at ¶ 17.)

On or about March 19, at a weekly meeting, the Corps raised a question concerning the level of leachate in the manhole. Canonie took a measurement on March 20. This showed the leachate to be about 31 inches above the bottom liner of the manhole. On the same date, Canonie sent a sample of the leachate to Kemron Environmental Services for analysis concerning volatile and semivolatile organic compounds. On March 28, Canonie placed three 5,000 gallon storage tanks, that it had on the site, next to the CC. On this date, Canonie received the results from Kemron concerning the samples of leachate. The analysis revealed the following: only six analytes

were present in the leachate concentrations above their detection limits; that those compounds were present in very low concentrations; that the six substances detected in the CC leachate were methylene chloride, 22 parts per million (ppm); toluene, 180 ppm; acenaphthene, 57 ppm; dibenzofuran, 22 ppm; fluorine, 29 ppm; and bis(2-Ethylhexyl) phthalate, 14 ppm; and that Canonie, upon receipt of these test results, submitted them immediately to NSSD. (JX 21 at ¶¶ 17-21.)

On March 29, Canonie leased a 5,500 gallon tanker truck in order to provide additional storage capacity for the leachate in the CC. It began to pump the leachate from the CC into the storage tanks that day. (The pumping was done by Canonie's subcontractor, HiTech Remediation.) On the aforementioned date, approximately 12,000 gallons of leachate were pumped into the storage tanks. An unspecified amount of leachate was pumped the following day. On Monday, April 1, Canonie readied a 7,000 gallon "clarifier" tank to provide additional storage capacity for leachate and pumped leachate from the CC into the storage tank. The next day, OMC and Canonie met with representatives from NSSD to seek permission to discharge leachate into the latter's treatment facility. On April 2, Canonie readied a 3,000 gallon storage tank to receive leachate and pumped same from the CC into the temporary storage tank. Canonie leased two additional 5,000 gallon tanker trucks on April 3, to increase the available storage capacity on-site, and pumped leachate from the CC into these tankers. On April 4, NSSD declined to accept the leachate from the designated soil CC. (JX 21

at ¶¶ 22-26.) The reason for NSSD's declination to receive the leachate was because it was concerned about possible CERCLA liability if it accepted same. (Tr. 126.)

On April 7, following all designated soil having been placed in the CC, Canonie covered it with a temporary plastic tarpaulin in order to prevent water from entering. The next day Canonie leased an additional 5,000 gallon tanker truck and pumped leachate from the CC into the storage tank. Canonie wrote to complainant on April 9, advising the latter of NSSD's decision to reject leachate from the CC. As an alternative, Canonie then sought permission of complainant to treat the leachate by employing carbon filtration, with periodic and appropriate sampling of the treatment effluent. It proposed that such effluent be discharged into the closed-off New Slip. Then, on April 11, OMC and Canonie sought emergency approval from EPA to permit Canonie to use Toxic Substances Control Act-designed tanks on the OMC site for the storage of leachate from the CC because heavy rain was forecast for later that weekend. Canonie hired a licensed waste hauler on April 12 to transport water to OMC's tank farm, and on the same day approximately 35,000 gallons of leachate were removed from the CC. On June 4, complainant approved the carbon filtration treatment of the stored leachate as proposed by Canonie in its April 9 letter, and supplemented by a communication of June 3. Canonie began treatment on June 5, using a licensed waste hauler to recapture the leachate from the OMC tank farm. Each tanker-load of leachate was manifested. (JX 21 at ¶¶ 27-31.)

Treatment of leachate from the CC and storage tanks continued until June 15. An approximate total of 98,000 gallons of leachate, of which 51,000 gallons having been stored in OMC's tank farm, were removed from the CC and from temporary storage and treated as described above. In a letter of June 21, Canonie sought complainant's approval to use the same carbon filtration treatment of leachate that continued to collect in the CC. A permanent HDPE liner was placed atop the CC on April 26, as distinguished from the temporary liner of April 7. Its purpose was to prevent any additional water from entering the cell. However, a goodly amount of water remained in the soil present in the CC, which continued to create leachate, even after the installation of the permanent liner. This required the leachate to be removed on a continuing basis. Complainant and IEPA accepted Canonie's proposal in a meeting of June 25. A letter of July 11 confirmed this approval. At no time did leachate from the designated soil CC overflow or otherwise escape, nor was leachate released from the temporary storage tanks used by Canonie. (JX 21 at ¶¶ 32-34.)

The Stipulation also provided that, with regard to both Counts, the parties accept the application of the BEN model for determining whether there was any economic benefit that accrued to respondent as a result of the alleged violations. (JX 21 at ¶ 35.)

In addition to the Stipulation, other findings concerning Count One are that Edgardo Abat (Abat) is a supervisory civil engineer for the Corps. He was responsible for construction oversight and made periodic visits to the site. On March 19, he

noticed that the water level in the sand berm was approximately "three feet from the bottom of the liner, from the bottom of the berm."[6] Abat brought this to the attention of Adelbert Knight (Knight) on the aforementioned date. (Knight was the construction engineer for Canonie.) (Tr. 588-90, 596-98, 920-21.) The reason for the increase in the water level being that it was anticipated the digging and placement of soil in the CC would take about four weeks, after which a liner would be placed over the top. During the winter of 1990-1991, this system remained open. There was no cover on it. There was little water in the flecks of snow, and there was no immediate problem due to the absence of a cover. Nevertheless, water began to rise in the manhole. This was the result of heavy rainfall about March 17, plus the placing of water-saturated soil into the CC resulting from deep excavation in Area A. Such deep digging resulted in about 40 percent of the soil volume being water. (Tr. 332-33, 735-41, 744, 750-51.) The water level inside the manhole was monitored on a "weekly basis" prior to March 19-20. This inspection was done visually, and if the collection pipe was out of sight a measurement was taken. (Tr. 924-25.) No evidence was offered concerning the specific height of the water. However, when the manhole was inspected on March 20, there was no danger that the water in the cell was going to "overflow the cell." (Tr. 926.) Considering the precipitation at the site area

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[6] Referring to this testimony, complainant states that Abat noticed the leachate level in the "manhole" was too high. (Compl. Op. Br. at 15.) Apparently Abat was using "berm" in lieu of "manhole" or employing the words interchangeably.

and the water content of the soil placed into the CC, the water level "likely exceeded" one foot above the bottom of the liner sometime between March 15 and March 19. (Tr. 753.)

Returning to the leachate disposal, Cindy Nolan (Nolan) is the Remedial Project Manager for EPA in Region V. She has played a major role concerning the OMC site since around October 1988. (Tr. 74-78.) Referring to the manhole leachate, she stated that "the water wasn't that bad," but Nolan did decline to inject herself into NSSD's decision or persuade the latter to accept the water from the CC. (Tr. 1085.) This was the case, even though Canonie requested her intervention with NSSD. (Tr. 773-74.) However, within six months after rejection of the leachate, NSSD accepted wastewater from a location described as the "Dallenger Road site" which had higher concentrations of contaminants than that from the manhole. Subsequently, NSSD acknowledged, at least by implication, that its rejection of the leachate may have been in error. (RX 31; Tr. 770-72.) NSSD conceded "the results of organics analysis of the discharge water in question did not demonstrate any high levels of contaminants and [NSSD] was prepared to require additional testing prior to accepting the water . . . ." It was also discouraged from accepting same by IEPA which considered the material to be a RCRA waste leachate which automatically classified it as a RCRA listed waste. (RX 31 at 1.) Notwithstanding respondent's pumping and storage efforts, it was not making a significant impact on the water level in the CC. (JX 20 at 37.) Until more storage capacity was located by Canonie, there were

occasions when it pumped water from the perimeter into the CC, thus gaining the advantage of time before the leachate would be reflected in the manhole level. (CX 6 for April 4, 6, 9 and 10.) At one time, the daily log of Canonie mentioned the threat of possible escape of leachate. (CX 6 for April 2, 1991.) However, there was never a danger that the water in the manhole or in the CC would overflow. (Tr. 565.) Canonie's actions prevented leachate from escaping from either the manhole or the CC. (Tr. 776-77.)

A review of the evidence leads one ineluctably to find that complainant's Count One arose from the following scenario: On April 11, the leachate in the manhole had been pumped down and the water level in the moat area was within 12 to 6 inches from the top of the berm. Canonie was unable to get additional tanks with wheels and the weather forecast for the upcoming weekend of April 13 and 14 predicted heavy rain. There was concern that potentially the water level might overflow the berm and reach the ground outside the CC. Roger Crawford (Crawford) of OMC is Director of Environmental Control for Harbor Marine. This company had a tank farm with a huge capacity, which at the time was empty. To remove the danger of overflowing, Harrington proposed to Crawford that water be removed and placed in the tank farm, which in the former's view would then permit Canonie to grade the dirt and get a liner, and if it did rain during the weekend, only clean rain water would flow to the area surrounding the CC. Crawford agreed with this approach as a practicable solution to the problem. Sometime between 5 and 6 p.m. on April 11, Crawford and Harrington

together telephoned Nolan. The latter was apparently unsettled greatly by the call, being of the view that Canonie had improperly pursued the removal of the water, and if it had acted correctly, the crisis would have been avoided. However, Nolan agreed reluctantly to permit the transfer of the leachate to the tank farm because she was of a mind that there was no other option if a release of the leachate was to be avoided. (Tr. 139, 764-66.)

Nolan was of the opinion that Canonie's predicament was a "contrived" emergency and so advised the latter in a communication of April 23. (CX 10.) The evidence suggests strongly that Canonie, with diligence, may have anticipated the problem and perhaps avoided same. For example, and among others, beginning about mid-March, Canonie began digging deeply and putting soil into the CC which was completed about April 2 or 3. Much of the soil contained water. It did not get in touch with NSSD prior to the leachate becoming an issue. (Tr. 739-41, 857.) Complainant's view is that Canonie should have determined the method of disposal of leachate prior to placing the soils from Area A into the CC. "It was this failure that gave rise to the violation." (Compl. Op. Br. at 19.) Canonie may not have acted in the manner complainant thought appropriate to avoid an emergency situation. However, weighing the entire evidence addressing the specific question, the ALJ declines to make a finding that respondent "contrived" the predicament.

After the leachate was stored in the tank farm, Nolan was advised by Crawford and Harrington that the water could be readily treated with carbon units on site and discharged, in compliance

with standards, into the Upper Harbor. On-site treatment was not contemplated in that Appendix N provided for the leachate to be treated in a facility approved by EPA. However, Nolan approved the carbon treatment procedure, and the leachate was disposed of safely and properly. (Tr. 151-52, 307-08.)

Jan Sorenson (Sorenson) has been employed by the Corps for 16 years. His title is that of a construction representative. At the site, his title was that of oversight representative. Beginning January 30, he was at the site every day unless he was ill or had other duties. (Tr. 454, 457.) He was of the opinion that once the water in the manhole reached the level of one foot over the liner it needed to be removed. However, he did not know of any step Canonie should have taken, but did not. (Tr. 548.)

Count Two

Some history of the site bears upon the alleged violation. In the area of the New Slip, sometime between 1907 and 1912, the property had been used for coking operations and coal classification. Therefore, there was a small wood treating plant on the property. Another location for the New Slip was in order, such as one with less contamination. The original concept was to dig a New Slip into property owned by OMC. It was chosen at the time because it was probably a safer area to use rather than an area where there had been coking operations. It was determined that contamination still existed in the latter area, mostly as coal tar derivatives. Certain indicator chemicals were selected. It

was the PNH group. These were as high as 446,000 ppm. It was for this reason, in part, that the CC was constructed to receive contaminated soils and capture leachate that found its way to the manhole. (JX 5 at 1-2; Tr. 108, 110.)

The New Slip was to be dug at a location slightly south of where it was built eventually. The original intention was to dig from the harbor wall back towards the land in order that the piece of equipment doing the digging could rest upon the land. This is designated as "digging in the wet." At the site, a sheet pile wall formed the Upper Harbor wall, which was built around 1919. To the naked eye it was not a very solid structure, being rather old and with little maintenance. For example, the tie rods in the wall had failed in places and the wall was leaning out into the harbor. Also, there were large holes through the wall and water could go back and forth between the harbor and the ground water behind. The sheet piling had long since been compromised and did not serve as any barrier. The plan was to excavate out the concrete footings, but the wall would be kept in place. The water on either side of the wall would be equal, with water from the Upper Harbor filling the excavation area. There was rotten wood or decayed organic material embedded in the sand. Canonie was aware that as it dug much of the debris would come to the surface, and the intention was to keep the sheet pile in place in order to prevent any of the rubble from floating into the harbor and to dig the wall back to the east and complete the Slip. (RX 53-54; Tr. 165, 368-69, 786-91.) The original plan of excavation encountered difficulties when

it came time to remove the footings and take out the piles, concern developed that the sheet pile wall may collapse. Canonie changed its plans and decided to dig from west to east - from the beach end toward the harbor. It dug down 15 feet leaving the sand berm in place. The Corps was aware of the change in construction for the reasons that the construction manager on site had a regular Tuesday morning meeting with the Corps during which the construction plans for the following week were discussed. (RX 55; Tr. 793-95.)

During the excavation activity, suspended contaminants in the soil were released into the Slip water. Even under natural ground water conditions, absent the New Slip, contaminated ground water moves toward the Upper Harbor. If soil particles are disturbed by excavation, it is logical, depending upon the nature of the sediment, that there would be more contamination. Canonie, at least, in part, does not challenge this. It concedes that when excavation occurs, it stirs up dirt and whatever is suspended in water, and that the pile sheeting was not a deterrent to preventing sediments from moving into the harbor. Water from the Slip would eventually go through the sand berm to the Upper Harbor, but it would act as a filter and contaminants would not be as concentrated. (Tr. 164, 184, 431-32, 806.)

Canonie's dewatering activities are the heart of Count Two. Further findings are required in order to get a more complete picture. First, what was the extent of the alleged contamination of the water that was pumped by Canonie over the sand berm and which found its way into the Upper Harbor. The Construction

Specification of February 1991, addressing "excavation," stated "Dewater excavation as required." The pumping[7] commenced about February 27, but not on a daily basis. It first came to the attention of Sorenson on March 11. He was informed by the contractor that the pumping was done every two days for about two hours and ceased completely about March 21 or 25.[8] The dewatering or pumping of the water was through a six-inch pipe. It was done overtly and Canonie made no attempt to conceal such activity. Sorenson took photographs of the dewatering on March 11 and 21, but the pumping never appeared to him to be a matter of dispute that should be reported. (JX 8 at 42; CX 6, 2/27/91; CX 8; CX 9; RX 23; Tr. 532-34.)

There is some question concerning what, if any, water quality standards were in effect at the time of pumping. Complainant urges that these were the Illinois Water Quality Standards (IWQS), which demanded that if contaminants were present at elevated levels, the water was to be treated before discharge into the Upper Harbor. The IWQS at the time of pumping for phenol, arsenic, and iron were: 0.10 ppm, 0.19 ppm (chronic level for arsenic) and 0.36 ppm (acute level for arsenic), and 1.0 ppm, respectively. (Compl. Op. Br. at 26-27.) To support its contention that the pumped water was untreated and contained contaminants above the allowable water quality standards, complainant relies on RX 49. To be observed

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[7] "Pumping" in Count Two refers to dewatering from the New Slip and is distinct from "pumping" from the manhole in Count One.

[8] The pumping ended on March 25. (Tr. 345-46.)

immediately, is that the pumping ceased about March 25. The date of the first EPA sample was April 8. Whether it be complainant's sample or that of Canonie, each sample exceeded the IWQS. Canonie stresses that the IWQS were never identified in the Record of Decision (ROD) or the ROD amendment, and that reliance upon them is without merit. Further, the allegations concerning the IWQS were not mentioned in the complaint, nor was Canonie challenged with them during the hearing, raising a due process question. (Resp't Reply Br. at 18, n.7.) However, in light of the findings mentioned below on the question of purported contamination, it is unnecessary to make a finding whether or not the IWQS were applicable. The significant consideration is that at no time during the pumping were samples taken to determine the extent of contamination of the water reaching the Upper Harbor. Aside from the split samples taken on April 8, complainant offers the additional rationale that respondent pumped contaminated water over the sand berm, which found its way through the sheeting and into the Upper Harbor. Referring to JX 20 at 71, complainant states that sediment sample results taken on March 25[9] in the Upper Harbor demonstrate that the total PNAs present immediately outside the New Slip sheeting walls were at levels of 19,641 particles per billion (ppb) (column 6), concerning "Sediment-1 Soil" and 29,407 ppb (column 8) for "Sediment-2 Soil." This should be contrasted with the sample taken down gradient from the New Slip sheeting wall (column 9) regarding

[9] JX 20 at 71 shows this date to be April 25, 1991 and not March 25, 1991.

"Sediment-3 Soil," which disclosed a lower PNA concentration of 1,969 ppb. Complainant urges that the sample results demonstrate that contamination was present in the New Slip and that it was released and settled outside the New Slip sheeting wall. (Compl. Op. Br. at 24, n.16.) Notwithstanding complainant's piling Pelion on Ossa, the petrified fact is that no representative samples of the pumped water were taken and tested. This was the case, even though Nolan was on the site March 25, when the pumping ceased. (Tr. 344-45.) Samples of the water that were pumped could have been taken by complainant that day but were not. Complainant admitted that it did not have specific data, such as samples, to support its claim that the pumped water was contaminated. Absent data, complainant stated that it had "to make a number of assumptions." (Tr. 186.)

What was the function of the Corps on the site? Nolan retained the Corps to review the design on her behalf from a structural engineering standpoint. The Corps was EPA's "eyes and ears" concerning what was going on at the site and to report any deviation from the approved design. The Corps was paid by EPA. Nolan was firm in her thinking that the Corps could not direct the contractor, nor could the former approve or disapprove anything the contractor could do. Its sole function was to report. The Corps was on the site every day. Nolan acknowledged that Sorenson was aware of the dewatering prior to March 25, but he did not report the same to her. Though it varied, Nolan visited the site about

once a month. She visited the site only once in March, on the 25th. (Tr. 96, 98-99, 102-04, 174-76, 259-60.)

Pursuant to the inter-agency agreement between EPA and the Corps, the latter had the responsibility for ensuring that the construction project complied with the Remedial Design and Remedial Action plans. With respect to some issues that arose at the site, the Corps had authority to resolve these without even notifying EPA. When the Corps first reported the pumping to Nolan, it was not suggested that it was a problem. (RX 3 at 6; Tr. 264, 269, 362.)

The Corps assigned three of its employees to the site. One of these was Sorenson. As a construction oversight representative for the months of February, March, and April, he dealt directly with the contractor, such as evaluating paperwork submitted and payment estimates. He also checked material coming into the site and verified same. He saw that the contractor observed the written plans and specifications and that the jobs were built correctly. In Sorenson's prehearing deposition, he stated that if he witnessed what he perceived as a violation he would immediately inform the complainant and then the contractor. At the hearing, Sorenson qualified this to the extent that if it were a major violation he would call the complainant immediately. If a construction-related problem arose, Sorenson would attempt to resolve it on the site with the contractor after notifying his supervisor, Abat. Sorenson's primary contact was with Knight. The former had authority to talk to the contractor about construction-related

activities. The contract complainant had with the Corps was to oversee all field activities related to the approved remedy. In this capacity, Sorenson was on-site to make immediate reports to EPA of any violation of the consent agreement. Sorenson considered it his duty to report anything which, according to EPA, may be wrong. (Tr. 455-56, 490-91, 495-96, 500-01.)

Joint Exhibit 10 is a weekly report made by Sorenson on March 7. He also designated it a "To-Do-List." This is a highly significant document about which swirls much controversy and interpretation. Notation number four of this exhibit reads: "No pumping into west end of new slip. (Ed is checking) - 7 Mar. '91 - OK to pump." On direct testimony, Sorenson was unsure what "OK to pump" meant. Joint Exhibit 9 is a composite of Sorenson's daily logs. For the log of March 7, there is no mention of pumping activity. The monthly progress report for March 1991 was signed by Abat. The sole reference to pumping on the document is that "Pumping water from the New Slip has been stopped." (CX 2.) Sorenson could not remember conversations with Knight concerning pumping in the New Slip. (Tr. 477-79, 481-82.)

On March 7, Sorenson knew with certainty that respondent intended to perform construction dewatering, but it is unclear that he knew about the pumping before the aforementioned date. Sorenson admitted that notation number four could mean that no pumping was going on into the west end of the New Slip but Canonie wanted to know if it would be OK to pump into the west end of the New Slip. The phrase in item notation number four that "(Ed is checking)"

meant that Abat was to determine if pumping could begin. Sorenson did not deny that it was a fair interpretation of "OK to pump" that Abat had checked on the dewatering situation and that on March 7 he agreed that pumping was permissible. In Sorenson's prehearing deposition, he believed that it was "OK to pump" and that Canonie was so advised. Sorenson modified this in his testimony to mean that Abat was just checking to see if pumping were permissible. He did not deny that he was present when Knight was told by Abat that it was permissible to pump. His best answer was that he could not remember. On Sorenson's Daily Logs of Construction, there was a specific provision for "Controversial Matters in Detail." Sorenson never reported pumping as a controversial matter or voiced objection to same. He also completed a Weekly Report. In such a report for the week of March 3 to March 9, 1991, it also had a specific provision for "Problems Outstanding." Sorenson wrote "None." In his deposition, Sorenson stated that the pumping never appeared to be a controversial matter. If he thought pumping was a problem he would have recorded it as such. On redirect examination, Sorenson denied that he or Abat gave Knight approval to pump in the New Slip. (JX 9 at 10; RX 19 at 7; Tr. 513-14, 518-19, 523-24, 527, 533-38, 558.)

Abat denied that he gave approval to Knight or anyone else to pump water from the New Slip. He construed his function as requiring the following: to detect any problem on the site related to noncompliance of construction-related matters; that he was supposed to notify the contractor; and in those situations where

specific actions were not being met, he would request the contractor to correct same. Abat drew a distinction between construction-related matters and environmental issues. In the latter situations, he was of the view that it still had to be reported to EPA. He acknowledged that Nolan authorized the Corps to resolve certain problems in the field. If construction-related problems could not be resolved in the field, Abat reported these to EPA. (Tr. 607, 609-13, 616.)

Abat stated he first "saw" the pumping on March 21, 1991. He acknowledged, however, in his prehearing deposition that he first became personally aware of the pumping probably "two weeks prior to March 21." This awareness was when Abat saw the pump in the northwest corner of the New Slip, but it was not in operation. In his testimony, Abat stated that Canonie never asked him about the pumping, and that he could not recall if Sorenson asked him about it. (Tr. 617-23.)

Abat acknowledged that the "Ed" in the phrase, "Ed is checking," in Joint Exhibit 10, referred to him. Upon cross-examination, Abat was asked was it not true that he checked into the pumping situation, "and that you reported back it's 'OK to pump' and that the contractor was in fact told it's 'OK to pump?'" Abat's response was "I never checked with anybody regarding pumping. And I am very positive about that." (Tr. 627.) However, in his deposition, Abat testified that if Sorenson in his similar document testified that Abat checked into the pumping matter and indicated it was permissible to pump he, Abat, would not suggest

that Sorenson was wrong. Abat also admitted that Canonie made no attempt to conceal the pumping, and even though Abat was aware of the pumping two weeks prior to March 21, 1991, he did not report it to EPA. The reason Abat offered for this was "[b]ecause there was no pumping going on, and I didn't have to report that." (Tr. 628, 630.) This statement was made notwithstanding that Abat testified he was aware that pumping was going on for two weeks prior to March 21. Finally, Abat affirmed that "the pumping operation itself I didn't regard as a problem." (Tr. 631.) Also, Abat did not have knowledge of any contaminants in the water that was pumped. Even if Canonie followed Abat's suggestion to use bales of hay in an attempt to make the sheeting waterproof, this would not have stopped water from flowing into the Upper Harbor. Abat did not inquire of Canonie or EPA whether pumping had been approved, even though he thought it was important to know this. Further, he did not, prior to March 25, report pumping as being in noncompliance with the plans and specifications for the site. (Tr. 627-36, 638-39.)

Shamel Abou-El-Seoud (El-Seoud) is the third member of the Corps trio associated with the site and this litigation. He has had 16 years experience with the Corps, and his position is that of Chief Engineer, Management Branch. The relationship between EPA and the Corps is set forth in Inter-Agency agreements. In 1991, El-Seoud was the main person responsible for the Corps' work under the Inter-Agency agreements. He was the person at the Corps responsible for dealing with Nolan. The Corps made recommendations

to EPA concerning designs. El-Seoud denied that the environmental aspects of the design documents were reviewed by Corps' personnel with environmental expertise. However, in his deposition, El-Seoud admitted that if the design documents had environmental aspects they were reviewed by environmental people. (Tr. 659-61, 678-81, 684-85.)

Page 02222, Letter F, of Joint Exhibit 8, mentioned earlier, states "Dewater Excavation as Required." El-Seoud was of the opinion that in order to dewater one would have to refer to the appropriate section of the specification and the type of water being dealt with. He was certain that he did not give authority to Sorenson, Abat, Canonie, or anyone to dewater the New Slip. (Tr. 674-76.) El-Seoud made the definite statement on cross-examination that he would never tell Abat that it was okay to pump into the west end of the New Slip. He also stated that he did not tell Sorenson that it was okay to pump. On cross-examination, El-Seoud also admitted that he did not know if "any of [his] people told the contractor that it was okay to pump." (Tr. 711-12, 725.)

Knight had the clear impression that if the Corps had a problem with what Canonie was doing on the site, Sorenson "would have come and told me immediately." (Tr. 934.) A telling piece of evidence was offered by Knight on the dewatering issue. Sometime before March 25, after one of the weekly meetings, and after the pumping had begun, Sorenson and Abat were talking of the dewatering. A question was raised whether there was anything wrong with it. Knight said no, and that dewatering was necessary. Abat

said that he was going to call and ask Shamel (El-Seoud). Knight assumed Abat made a telephone call to El-Seoud. When Abat came out of the trailer, he stated to Knight and Sorenson that "I've talked to Shamel and Shamel does not have any problem with the dewatering as it's going on." (Tr. 935.) This conversation took place before EPA ordered the pumping to cease. In Knight's view, the water that was pumped was a mixture of groundwater and rain water. If the Corps had requested Canonie to cease the pumping to determine if it was in compliance with the design and specifications for the site, the latter would have ceased the activity. There was no mention of the Abat/Sorenson/Knight discussion concerning the approval of dewatering, mentioned above, in the March or April meeting notes. (JX 11, 13; Tr. 936, 956, 958.)

About March 15, Harrington came to the site. He saw the pumping activity in progress and inquired of Knight if he discussed it with the Corps and were they satisfied with it. Knight replied, "yes." Harrington was definite in his view that the Corps did not tell Canonie to stop pumping. The only contaminants that were ever monitored by Canonie in the New Slip water was after the pumping stopped, and such contaminants were typical of those found in both groundwater and the soil at the site. Harrington provided a logical and persuasive argument concerning why the dewatering of the New Slip did not release phenols. This being that the phenols that were detected in April of 1991, and reflected in RX 49 were

the result of very deep excavation of Area A. This excavation was not taking place at the time of the pumping. (Tr. 802-03, 810-11, 813-22.)

Complainant has the burden of proof to establish by the preponderance of the evidence, among other allegations, that Canonie was prohibited from pumping water from the New Slip. The complainant did not sustain its burden. It is found from the concatenation of the evidence that the Corps authorized the pumping. First, in evaluating all the evidence surrounding the phrase, "OK to pump," Canonie's position not only rebuts complainant's contention but is more persuasive. The phrase, "OK to pump," is declarative and not in the form of a question or exclamation. This, by itself, brings into question complainant's prima facie case. Of significance is the testimony involving whether or not dewatering was permitted. Knight's testimony was more convincing than that of the Corps' witnesses, Sorenson, Abat or El-Seoud. First, there were inconsistencies between the depositions and testimony at trial. Further, the witnesses were observed closely by the ALJ during their examinations. The demeanor of all three Corps' witnesses, while testifying, brought their credibility into question on the dewatering issue. They were, at times, evasive or hesitant in their answers and displayed unusual uneasiness while testifying. It takes a healthy dose of naivete to believe these witnesses. The ALJ is persuaded to find that the testimony of the Corps' witnesses on the dewatering issue is simply not believable.

It is also found that the evidence fails to establish that the pumped water from the slip exceeds effluent limits. This will be discussed more fully under the liability aspects concerning Count Two.

DISCUSSION, CONCLUSIONS OF LAW AND PENALTY DELIBERATION

Count One: Liability

The liability aspects of Count One, as distinguished from those concerning penalty, are fairly straightforward. Respondent is alleged to have violated the consent decree regarding the level of leachate in the manhole and its removal. Section 122(a) of CERCLA, 42 U.S.C. § 9622(a), provides generally that EPA may enter into an agreement with any person for the latter to perform any response action. Subsection (l), 42 U.S.C. § 9622(l), provides in significant part, that: "[a] potentially responsible party which is a party to an administrative order or consent decree entered pursuant to an agreement . . . which fails or refuses to comply with any term or condition of the order, decree or agreement shall be subject to a civil penalty in accordance with section 9609 . . . . " Penalties set forth in section 109(b)(5), 42 U.S.C. § 9609(b)(5), provide for a civil penalty of not more than $25,000 per day regarding violations of consent decrees.

The ALJ concurs in complainant's position that the core of Count One is Appendix N. (Compl. Reply Br. at 2.) A draft of Appendix N was prepared by Harrington in the early part of 1990, and forwarded in final form to EPA on October 12 of that year.

This was approximately five months prior to the issue that arose concerning the level of leachate in the manhole. (JX 6; Tr. 733, 769.) The pertinent language of Appendix N has been set out in the Findings. The black and white of the document is clear. Count One, with particular reference to paragraphs 10 and 11, referring to the leachate in the manhole, states it was "not permitted" to accumulate above 36 inches, that where the levels became higher than that, removal was required, and that Canonie allowed the leachate to accumulate over 61 inches. Respondent argues that there is no violation of the consent agreement. The apparent rationale being that: "There is no prohibition in Appendix N against the water in the manhole rising above 36 inches. Instead of prohibiting that occurrence, Appendix N shows that the parties specifically anticipated that the water would exceed that level." (Resp't Op. Br. at 22-24.) Complainant does not appear to meet this argument directly in its reply brief. The ALJ shall address it. There seems to be some semantic struggle with the words "permitted" and "prohibited." Paragraphs 10 and 11 of the complaint must be interpreted in conjunction with Appendix N. Common garden intelligence leads to the conclusion that the water in the manhole may at times exceed 36 inches. However, one cannot infer from this that such accumulation is "permitted." Canonie acted at its own peril when it allowed the leachate level to exceed 36 inches. At the point it exceeded 36 inches, it was engaged in a "prohibited" activity, contrary to the explicit terms of Appendix N. It is also as clear as a day in June that the leachate was not

disposed of by transfer to the NSSD or another approved facility. With regard to the liability under Count One, it is concluded that complainant has established by the preponderance of the evidence that Canonie violated the consent agreement.

PENALTY DELIBERATIONS CONCERNING COUNT ONE

The complaint sought a proposed penalty for Count One of $158,468. During the hearing, and for reasons expressed below concerning economic benefit, this was reduced first to $110,969 and then to $109,594. (CX 15, CX 20; Tr. 205, 1082-83.)[10] "Each matter of controversy shall be determined by the [ALJ] upon a preponderance of the evidence." 40 C.F.R. § 22.24. This section of the Rules of Practice also enjoins that the complainant "has the burden of going forward with and proving . . . that the proposed civil penalty . . . is appropriate."

This proceeding represented the first time Nolan ever calculated a proposed penalty. To complainant's knowledge, it was also the maiden attempt of Region 5, or any other Region of EPA, to adopt or adapt the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992K, penalty policy to a CERCLA matter. (Tr. 315.) The following methodology was used in arriving at the penalty for Count One. Nolan considered the penalty amounts set out in CERCLA and the limit of $25,000 per day stated in the consent agreement. She also looked at the draft of penalty policy

[10] The penalty calculation figures by complainant are the same in CX 15 and CX 20, except that in the latter the economic benefit amount was reduced greatly.

guidance for CERCLA, but decided ultimately to use the penalty policy for RCRA. The Penalty Policy of the latter statute was also employed because Nolan was of the view that the CC was analogous to a RCRA waste pile. (JX 3; Tr. 193-95.)

Complainant proceeded on the premise that for 25 days[11] respondent did not dispose of the leachate in the manhole when it exceeded 36 inches, and the level reached 61 inches at the point it was sampled and 12,000 gallons removed. (JX 5 at 2.) In considering the RCRA statutory maximum, the penalty would be $625,000. (CX 20.) The RCRA Penalty Policy uses a matrix. The penalty amount equals the gravity-based component, plus the multi-day component, plus adjustments, plus economic benefit. The gravity component is set out on a matrix form. The horizontal plane represents the extent of deviation from the requirement, specifying three categories, major, moderate and minor, with a numerical penalty range in each category. The vertical range of the matrix depicts the potential for harm from the purported violation. It has the same three categories of major, moderate and minor, again with a numerical penalty range in each category. The two factors of potential for harm and the extent of deviation determine the gravity-based component of the penalty. (JX 3 at 35273.) In its penalty calculation worksheet, complainant viewed the potential for harm as major and the extent of deviation as moderate. The matrix shows the monetary penalty range in that

[11] Complainant estimated originally that there were 43 days of violations. As a result of prehearing discovery, complainant reduced the days to 25. (Tr. 209.)

category to be from $15,000 to $19,000. Complainant selected $15,000. (CX 15.)

Complainant's rationale for the penalty proposed was that the alleged violation was a "direct variation from the requirement of the design which was incorporated into the Consent Agreement in anticipation of this [the level of leachate] very problem." (JX 5 at 2.) The specific reason offered by Nolan for the major designation being that the leachate "was about to crest over and constitute a release, is a fairly significant potential for harm." The extent of deviation was deemed moderate by complainant "because ultimately [respondents] came up with an engineering solution that was acceptable." (Tr. 198, 200.) Canonie's action reduced any danger that the water would overflow the cell. (Tr. 926.)

Turning to the multi-day matrix, complainant looked at the classification for potential for harm - major and extent of deviation - moderate. The range there is $750 to $4,000. Nolan "chose the middle of the range." This is stated as $2,375. (JX 3 at 35279; Tr. 200-01.) Proceeding on the assumption that the leachate exceeded the limit for 25 days, from March 1 to March 25, $2,375 was multiplied by 25 for a total of $59,375. (CX 15 at line 3; Tr. 200-02.) To this latter figure, complainant then added the gravity-based violation figure of $15,000 for a total of $74,375. The number 25 was based not upon fact but upon assumptions by complainant. For example, Nolan assumed that as of March 29 there was still leachate above one foot in the manhole. (Tr. 325-26.)

Complainant made no percentage increase, upwards or downwards, based upon good faith or lack thereof. The stated reasons for this being that good faith was not a question, and in that Canonie came up with a solution to the excess leachate question, it was "already taken into consideration under extent of deviation. So I don't want to double the account here." (CX 15 at line 5; Tr. 204-05.) Complainant, however, made a 25 percent increase for willfulness and negligence on respondent's part. For reasons mentioned below, the rationale for the increase is like listening to an out-of-tune piano. Everything seems a bit off. The basis for the increase being Canonie's alleged "conscience [sic] choice to deviate from the appropriate design was very clear. I thought 25 percent was a reasonable number." (Tr. 205-06.) As reflected in CX 15, complainant multiplied $74,375 (line 4) by 25 percent (lines 6 and 8) for a total of $18,594. When Nolan assessed the 25 percent increase for willfulness, she did not consider whether the leachate build-up was sudden or gradual; she did not consider any rainfall records prior to March 20; she was not aware that on March 17 there were .6 inches of rainfall in Chicago; and she agreed that heavily saturated Area A soils went into the CC on March 19 and 20. Nolan acknowledged that Canonie did not have any control concerning whether or not to put Area A soils into the CC, that the aforementioned events affected the rise in the leachate level, and that there was nothing willful about such events. Nolan's conclusion of willfulness, in part, is based upon an assumption

that Canonie did not monitor the CC before March 20. (Tr. 332-34, 750-51.) She opined further that NSSD's rejection of the leachate was reasonably foreseeable. NSSD acknowledged in writing, subsequent to rejection of the leachate, that it made an error. Notwithstanding, in Nolan's view, Canonie had an obligation to foresee the mistake, that this is a reasonable burden to place upon Canonie, and that the latter's failure to foresee the mistake is willfulness on its part! (Tr. 340-41.)

The parties stipulated to use the BEN Model for determining economic benefit to Canonie by alleged non-compliance. Economic benefit was calculated by complainant to be $18,000. This was based upon what it would cost Canonie to store the water pumped from the manhole. It was assumed that five 20,000 gallon tankers would be required, for what is stated to be 98,000 [not 100,000 gallons] and the $18,000 would be the cost to store the water. Complainant is of the view that Canonie benefitted from not having to take the water to a more expensive treatment facility off site. Complainant argues that inquiry discloses the costs to be about $35,000, and if that figure were used in the BEN Model the economic benefit figure would have been higher. (CX 15, line 10; Tr. 206-08.)

Nolan's economic benefit calculation was based upon five tankers at $75 per day, times 25. This figure would be $9,375. Nolan conceded that there may have been a mistake in her calculations concerning economic benefit. The record shows that respondent spent $18,368.38 for tank rentals, that Nolan was

unaware of this, that economic benefit was based upon the cost of tankers, and Nolan agreed that if Canonie spent the aforementioned amount on tankers there would be no economic benefit. (RX 29, table 1; Tr. 327-31.)

Complainant added lines 4, 9 and 10 on the Penalty Worksheet, (CX 15), and came up with a total proposed penalty figure for Count One of $110,969. However, near the conclusion of the hearing, complainant substituted CX 20 for CX 15, where the economic benefit factor was reduced from $18,000 to $7,625. This reduced the total proposed penalty for Count One to $100,594. (Tr. 1082-83.)

Robert Fuhrman (Fuhrman) was a witness for Canonie. He was qualified as an expert in the application of EPA penalty policies. He concurred with Nolan that the extent of deviation from the requirement was moderate but disagreed on the potential for harm. It was not major as Nolan concluded but rather moderate. (Tr. 977, 992-96.) The range in this category of the matrix is $5,000 to $7,999. Fuhrman chose the midpoint range of $6,500. (RX 36.) It has been found that the water in the CC contained low levels of contaminants, consisting mainly of rainwater and groundwater; that when the water reached above 36 inches in the manhole, it was removed; that there was no spillage of the water during its removal; that there was no meaningful threat to the environment. In this regard, Sorenson, complainant's witness, stated that there was no danger of water in the manhole or of the CC overflowing. (Infra at 16.) Measuring respondent's conduct against the criteria and examples shown on the RCRA Penalty Policy, the potential for

harm, coupled with the extent of deviation from the requirement, more appropriately belongs in the moderate/moderate category of the matrix. (JX 3 at 35276-78.) The ALJ concurs in Fuhrman's reasoning and assessment.

In order to determine the amount of penalty for multi-day violations, a finding has to be made concerning the number of days the leachate exceeded the one-foot level in the manhole. Appendix N states that the water level inside the manhole shall be monitored during each weekly inspection. Complainant assumed that the leachate in the manhole was one foot above the liner for 25 days beginning March 17. Harrington disagreed. He estimated that the water level in the manhole exceeded the one-foot level for four days, sometime between March 15 and March 19. However, the first data shows March 25 to be when the leachate was above the one-foot level. Working upon the 25-days assumption, the end date would be April 12. Complainant did not have information to indicate whether or not monitoring took place prior to March 20, and did not inquire of Canonie or OMC whether monitoring occurred prior to that date. Complainant assumed that when respondent pumped 12,000 gallons of water from the manhole on March 29, that the level in the manhole did not fall below the one-foot level, nor did complainant inquire from Canonie whether or not the manhole was dry after pumping the 12,000 gallons, assuming that on March 29 the level was above one foot. (JX 6 at N7; Tr. 283-89, 753.) Complainant's assumption that the leachate in the manhole was one foot above the liner for 25 days is just not supported by the evidence.

Sorenson, though not credible on the question of whether the Corps authorized pumping of water from the New Slip, is believable on the issue of the water level in the manhole. Though a witness's testimony may be false in part, it is improper to discredit other testimony where his testimony is corroborated by other credible evidence. See generally 81 Am. Jur. 2d Witnesses § 1045 (1992).

Sorenson had no personal knowledge of the level in the manhole prior to March 19. After the issue of the level of the water in the manhole was raised, he checked it every day. While Sorenson was uncertain about whether the manhole was pumped on both March 28 and March 29, he was aware that tank trucks were brought to the site and that "pumping events" took place. (Tr. 544-45.) Knight corroborated Sorenson on the manhole pumping, stating that the pumping on March 28 removed all the water from the manhole. (Tr. 929.) After the first pumping event took place on March 28, Sorenson agreed that Canonie kept the water pumped down to below the one-foot level. He also agreed that Appendix N contemplated that water would rise in the manhole, and when it exceeded one foot, the aforementioned document required its removal; that on March 20, when the level was in excess of one foot, it needed to be removed. That was the action Canonie was taking, and he did not know of any step Canonie should have taken, but did not, in dealing with the water level. (Tr. 546-48.)

Staying with the category of moderate/moderate, in his multi-day calculations Fuhrman took the midpoint range between $250 and $1,600, or $925. (JX 3 at 35279.) Adding the gravity-based penalty

amount of $6,500 to that for the multi-day figure of $8,325, Canonie arrives at a total of $14,825. (RX 36, line 4; Tr. 997-98.) Like complainant, it had no percent increase or decrease in the figures regarding good faith. However, Canonie parts company again with complainant on the question of a percent increase for willfulness or negligence. It found this figure to be zero. The invincible fact is that the increase of the water level in the manhole was the result of sudden .6 inches of rain within a short period of time resulting in the soil from Area A deposited in the CC being heavily ladened with water. Canonie did not have control over this situation.

The complainant was wrong in the number of days that the water level in the manhole exceeded the one-foot level, and it is in error on the issue of willfulness. In examining the criteria set forth in the Penalty Policy on the issue of willfulness/negligence, Canonie is not, as complainant at times implies, akin to Vlad the Impaler. Nature, not Canonie, had dominant control over the excessive water problem. Under the circumstances, Canonie did exercise reasonable foreseeability when it got in touch with NSSD concerning removal, and as subsequent events demonstrated, the latter wrongly rejected the water. It did take precautions to prevent the events constituting the violation. The manhole level was regularly inspected, and when the level of water exceeded the limit, steps in the form of pumping were instituted into tank trucks with no hazard to the environment ensuing. Canonie knew what hazards were associated with an overflowing manhole, but its

actions prevented this danger from occurring. (JX 3 at 35282; Tr. 999-1002.) Also, the hypothetical illustrations in the Penalty Policy buttress the position that a 25 percent increase in the penalty should not be assessed for willfulness. In Example 1, the gravity-based penalty is moderate for potential harm and moderate regarding extent of deviation. There is no percent increase for willfulness/negligence. (JX 3 at 35286-87.) In Example 2, the gravity-based penalty category is major potential for harm and moderate regarding extent of deviation. Again, there is no penalty increase for willfulness/negligence. (JX 3 at 35290-91.) In Example 3, both the potential for harm and the extent of deviation are major. Additionally, in this hypothetical case, "one of the company's other facilities recently had been found liable for similar violations." Notwithstanding, the penalty increase for willfulness/negligence is limited to 10 percent. (JX 3 at 35294-95.) It displays a startling suspension of common sense by complainant to seek a 25 percent increase on the facts of this case. The ALJ agrees with Canonie that there should be no percent increase in the penalty for alleged willfulness/negligence.

Addressing economic benefit in the penalty calculations, there were other missteps of EPA. Nolan acknowledged that there was no economic benefit to Canonie with respect to the tankers. Canonie, however, incurred costs of $18,368 for them. Its calculations for economic benefit are reflected in RX 35, and it did not base its economic benefit on an $18,000 delayed one time exception. It was premised upon a $44,661 one time expense being delayed. This delay

was for one month, a period which Canonie understood to be larger than the period of delay in the BEN model. It resulted in an economic benefit figure of $286. (Tr. 1018.) Canonie's calculation resulted in a total penalty figure of $15,111. (RX 36.) The ALJ concurs in the conclusion and methodology used by Canonie in its penalty calculations excepting the duration of the violation. The ALJ finds that March 17 was the point where the water exceeded the one-foot level, and ceased after the pumping began on March 28. This is a period of 12 days. The Penalty Policy provides that "the duration used on the multi-day calculations is the length of the violations minus one day . . . . " (JX 3 at 35279.) Excluding the first day of violation, the multi-day violation should be calculated on the basis of 11 days for the duration of the violation.[12] Using 11 days duration, and respondent's methodology, it is concluded that a total appropriate penalty for Count One is $16,961.

Count Two: Liability

Complainant bears the burden of proof to establish the allegations in the complaint that, among others, Canonie needed a permit issued under section 402 of the Clean Water Act, 33 U.S.C. § 1342, to pump the water from the New Slip and that such water was contaminated. The permit portion of this allegation may be disposed of summarily. At the hearing, EPA abandoned this portion

[12] Fuhrman calculated on the premise that the violation was from March 19 or March 20 to March 28 or March 29, using nine days for the multi-day penalty. (Tr. 999, 1020-21.)

of the allegation and conceded that a permit for the discharge of the water was not required. (Tr. 342-44.) The significant issue to be resolved is whether or not the water pumped exceeded effluent limits. No tests were conducted on the water pumped on March 25 and samples were not taken until April 8. Nolan acknowledged that these samples are not reliable concerning what contaminants may have been in the water pumped if the procedure were done on March 25. As found previously, the samples taken on April 8, as reflected in RX 49, showed phenol, arsenic, and iron content in the water to exceed the IWQS. Complainant urges that "[a]lthough these samples were taken two weeks after the pumping ceased they are indicative of the water make-up at the time of the pumping . . . ." (Compl. Op. Br. at 22, n.11.) Without more, "indicative" will not suffice. Complainant must demonstrate by the preponderance of the evidence that the water was contaminated. The Corps authorized the pumping. However, the legal significance of such authorization need not be pursued at this time. The brute fact is that no tests were conducted on the water during the period of pumping. Its effluent content remains unknown. Standing alone, this dooms Count Two. Further, Nolan admitted without reservation that the allegation that Canonie violated the effluent limits was based upon assumptions. Also, the Corps were the "eyes and ears" of EPA, but where was its tongue? Sorenson was aware of the pumping. This is eminently evident in light of the photographs he took of the pumping. Such knowledge is imputed to EPA, who had opportunities to take samples of pumped water for testing or, in

the alternative, directing Canonie to do so. It did neither. Without data to establish what degree, if any, the pumped water was contaminated, the ALJ declines to indulge in the presumption that it is more believable than not that the pumped water exceeded the effluent limits. EPA's difficulties are self-created. The ALJ does not perceive it to be his function to place suppositions atop EPA's assumptions to assist complainant in sustaining its burden of proof. Having determined that liability does not exist under Count Two of the complaint, it is not necessary to address the penalty question.

ULTIMATE CONCLUSIONS AND ORDERS

It is concluded concerning Count One that EPA has established by the preponderance of the evidence that respondent, Outboard Marine Corporation, has violated the consent decree and is liable for civil penalties in accordance with section 109(b) of CERCLA, 42 U.S.C. § 9609(b).

It is concluded further, with regard to Count Two, that respondent, Outboard Marine Corporation, did not fail to comply with section IV(E)(1) of the consent agreement; it did not violate sections 301(a), 402 of the Clean Water Act, 33 U.S.C. §§ 1311(a), 1342; and it is not subject to a penalty under 42 U.S.C. § 9609(b)(5).

IT IS ORDERED[13] that:

1. With regard to Count One, a civil penalty in the amount of $16,961 be assessed against respondent, Outboard Marine Corporation.

2. Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service date of the final order by submitting a certified or cashier's check payable to Treasurer, United States of America, and mailed to:

EPA Region V
Regional Hearing Clerk
P.O. Box 70753
Chicago, Illinois 60673

3. A transmittal letter identifying the subject case and the EPA docket number, plus respondent's name and address must accompany the check.

4. Failure upon the part of respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in assessment of interest on the civil penalty. 31 U.S.C. § 3717; 4 C.F.R. § 102.13.

IT IS ORDERED FURTHER that Count Two of the complaint be **DISMISSED**.

Frank W. Vanderheyden
Administrative Law Judge

Dated: July 25, 1995

[13] Unless appealed pursuant to 40 C.F.R. § 22.30, or the Environmental Appeals Board (EAB) elects to review same, sua sponte, as provided therein, this decision shall become the final order of the EAB in accordance with 40 C.F.R. § 22.27(c).