UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR
Decision Published At Website - http://www.epa.gov/aljhomep/orders.htm

IN THE MATTER OF	)	
	)	
INDUSTRIAL CHEMICALS CORP.,	)	**DOCKET NO. CWA-02-99-3402**
	)	
	)	
	)	
RESPONDENT	)	

Clean Water Act-General Storm Water Permits-Determination of Penalty-Burden of Proof

Where the record established that Respondent, a producer of inorganic chemicals, overlooked the effect of EPCRA § 313 on its monitoring and reporting obligations under a General Permit for Storm Water Discharges and failed to fully comply with other reporting and recordkeeping requirements, and, notwithstanding that the gravity and extent (potential for harm) of the violations and Respondent's culpability therefor differed substantially, the proposed penalty was determined on a lump-sum basis with no attempt made to allocate penalty amounts to specific violations, it was held that Complainant had failed to sustain its burden of showing that the proposed penalty was appropriate, because, inter alia, the record showed that the proposed penalty overstated the gravity and extent of the violations and the degree of Respondent's culpability. Respondent's contention that no penalty should be assessed was, however, rejected.

Appearances:

For Complainant: Lourdes Del Carmen Rodriguez, Esq.
Assistant Regional Counsel
U.S. EPA, Region II
San Juan, Puerto Rico

For Respondent: Dr. Bernard B. Baus, President
Industrial Chemicals Corporation
Peñuelas, Puerto Rico

INITIAL DECISION

This proceeding under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), was commenced on May 28, 1999, by the issuance of a complaint, findings of violation, notice of proposed assessment of an administrative penalty, and notice of opportunity to request a hearing charging Respondent, Industrial Chemicals Corporation ("ICC"), with violations of the Act and of a baseline general permit appearing at 57 Fed. Reg. 44412 (September 25, 1992), applicable to storm water discharges in connection with industrial activity.

Specifically, the complaint alleged that ICC did not conduct semiannual monitoring from January 1994 to September 1997 as required by Part VI of the baseline permit during which a total of eight semiannual monitoring activities should have taken place; ICC did not submit Discharge Monitoring Reports ("DMRs") for the period January 1995 until January 1998 as required by Part VI of the baseline permit during which a total of four DMRs should have been submitted; ICC did not submit 14 quarterly rain gauge reports for quarterly periods beginning on April 1, 1994 and ending on September 24, 1997 as required by Part VI of the baseline permit; the Pollution Prevention Plan ("PPP") developed by ICC did not include special requirements for facilities subject to Section 313 of the Emergency Planning and Community Right-To-Know Act ("EPCRA") as required by Part IV of the baseline permit; ICC did not conduct three annual comprehensive site evaluation inspections from

October 1, 1993 to September 24, 1997 as required by Part IV of the baseline permit; and ICC did not review its Pollution Prevention Plan ("PPP") in order to determine if the Plan needed updating by October 1, 1996 as required by Part IV of the baseline permit. For these alleged violations, it was proposed to assess ICC a penalty of $50,000.

ICC submitted a letter-answer under date of July 2, 1999. ICC acknowledged that it was not aware of the effect of being subject to EPCRA § 313 on its monitoring obligations until an EPA sponsored seminar in December 1998; alleged, among other things, that it did in fact conduct semiannual monitoring of its storm water runoff from 1992 through 1998 when it began quarterly sampling under the multi-sector permit; alleged that it did not submit DMRs and quarterly rain gauge reports because it was told by representatives of EPA and EQB that such reports were no longer required and that it would be informed if this situation changed; alleged that it was unaware of the quarterly sampling and annual reporting required by the multi-sector permit until December 1998 and asserted that had Mr. Rivera promptly filed his inspection report following his inspection in December 1997, this error would have been corrected 16 months earlier; repeated the assertion that it was unaware of the special requirements for facilities subject to EPCRA § 313 but alleged that the PPP was completely revised in March of 1998 once it became aware of the requirement; alleged that ICC did in fact

conduct several site evaluations and continues to do so and that corrective action, if necessary, is taken on the spot; and asserted that ICC did and does review its PPP annually and upgrades the Plan whenever changes are made in its storm water facilities.

In conclusion, ICC asserted that the only violations it acknowledged were the failure to recognize [the effect of] EPCRA § 313 monitoring requirements on the baseline permit and the failure to report monitoring results due to bad advice from EPA and EQB. ICC asserted that it was absolutely clear that its storm water handling system had acted to prevent potential harmful contaminants from being discharged to the Caribbean Sea and argued that it should be judged on its effective measures in protecting the environment. ICC requested a hearing.

A hearing on this matter was held in Hato Rey, Puerto Rico on February 23, 2000.

Based upon the entire record, including the briefs submitted by the parties, [1/] I make the following:

Findings of Fact

1. Industrial Chemicals Corporation ("ICC") is a corporation organized under the laws of Puerto Rico. ICC is a

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[1/] Although ICC indicated at the hearing that it would not be submitting a post-hearing brief, it has filed a letter, dated May 1, 2000, which is a revision of an earlier letter, dated April 28, 2000, and which states that it is intended to serve as " Respondent's Post-Hearing Brief for Proposed Findings of Fact and Conclusions of Law." This document will be considered.

manufacturer of basic inorganic chemicals which commenced operations in 1976 (Tr. 85, 86). It is in SIC Code 2816 and currently employs approximately 40 people.

2. EPA published Final NPDES Permits for Storm Water Discharges Associated with Industrial Activity on September 25, 1992 (57 Fed. Reg. 44436) (C's Exh 1). The permit applicable to Puerto Rico was designated PRR000000. Existing dischargers desiring to have their discharges authorized under the general permit were required to submit a notice of intent (NOI) to EPA at a designated Post Office box, Newington, Virginia, not later than October 1, 1992. Discharges in accordance with the terms and conditions of the permit were authorized two days after the postmark of the NOI. The permits were effective on September 25, 1992, and expired at midnight September 25, 1997.[2/]

[2/] Although the expiration date was revised to midnight September 24, 1997, by a NPDES General Permit Modification, 58 Fed Reg. 49996, 50004 at 50000 (September 24, 1993), the GP continued in effect until a new GP was issued provided the permittee filed a NOI not later than September 24, 1997. ICC filed a NOI under date of September 20, 1997 (R's Exh C-27), and was covered under the Multi-Sector General Permit, 60 Fed Reg. 51108 et seq. (September 29, 1995) as of October 16, 1997.

3. ICC submitted a NOI bearing a postmark of September 29, 1992.[3/] Part XI.B. of the General Permit (57 Fed. Reg. 44459) included special conditions for Puerto Rico imposed by the EQB as part of its CWA § 401 certification, referred to as the "General Water Quality Certificate" (GWQC) for storm water discharges associated with industrial activity. The EQB revised the GWQC on November 10, 1992, and requested that the General Permit (GP) be modified accordingly. EPA issued the modification on August 31, 1993, which was published in the Federal Register on September 24, 1993, effective on October 1, 1993 (58 Fed. Reg. 49996, September 24, 1993), and distributed to permittees by a letter, dated October 1, 1993, signed by the Director Water Permits and Compliance Branch, EPA Region II (R's Exh E). The letter states, inter alia, that only the conditions of Part XI.B.3 [Part IV, Storm Water Pollution Prevention Plans], 5. [Part VI., Monitoring and Reporting Requirements], and 6. [Part VII., Standard Permit Conditions] of the BGP were modified.

[3/] Complaint ¶ 9, which was admitted by ICC in its answer. In a letter forwarding its prehearing exchange, dated October 27, 1999, Complainant represented that the NOI copy in its files could not be located. A NPDES Storm Water General Permit Coverage Notice, dated December 31, 1992 (C's Exh 2; R's Exh C-12), however, lists Industrial Chemicals Corp., Peñuelas, P.R. as the facility and Bernard V. Baus, Santurce, P.R. as the operator (C's Pxh 5). Among other things, the Notice stated that you must prepare a pollution prevention plan (PPP) that is tailored to your industrial or constuction site.

4. Part XI.B. of the GP incorporates the GWQC issued by the EQB. Part XI.B.5. concerns changes to the monitoring and reporting requirements of Part VI of the BGP applicable in Puerto Rico. Part XI.B.5.B.1.a. required existing dischargers of storm water associated with industrial activity to install rain gauges not later than November 1, 1992, and ¶ B.1.c. requires the permittee to keep daily records of the rain, indicating the date and amount of rainfall (inches in 24 hours). A copy of these records was to be submitted to the EQB with a copy to the Regional Office, in accordance with Part VI.D. (reporting: where to submit) of the permit. Reports were to be post marked no later than the 28th day of the month following the end of the sampling period.

5. In addition to the foregoing, Part XI.B.5.B.2., "Monitoring Requirements", requires permittees with facilities identified in Parts VI.B.2.a through j. below to monitor storm water discharges at least quarterly (four times annually) with exceptions not here relevant. Facilities so identified were required to report in accordance with Part VI.D. (reporting: where to submit). Part VI. B.2.a. applies to " Section 313 of EPCRA Facilities" and provides that in addition to any monitoring required by Parts VI.B.2.b through j., facilities with storm water discharges associated with industrial activity that are subject to Section 313 of EPCRA for

chemicals which are classified as "Section 313 water priority chemicals" are required to monitor storm water for listed pollutant parameters that is discharged from the facility and that comes into contact with any equipment, tank, container or other vessel or area used for storage of a Section 313 water priority chemical, or [into contact] with a truck or rail car loading or unloading area where a Section 313 water priority chemical is handled.[4/] Among pollutants for which monitoring was required were any Section 313 water priority chemical for which the facility is subject to reporting requirements under EPCRA § 313.[5/] This list was expanded to include Nitrite plus Nitrite as Nitrogen (mg/L) and any pollutant limited in an

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[4/] Section 313 Water Priority Chemicals are listed in Addendum B to the GP, 57 Fed. Reg. 44465, and include ammonia and sulfuric acid both of which are handled or processed by ICC.

[5/] ICC was also subject to the monitoring and reporting requirements of Part VI by virtue of 5. Part VI B.2.j. "Additional Facilities" which at subparagraph (i) applies to storm water discharges associated with industrial activity which come in contact with storage piles for solid chemicals used as raw materials that are exposed to precipitation at facilities classified as SIC 30 (Rubber and Miscellaneous Plastic Products) or SIC 28 (Chemicals and Allied Products). As noted in finding 1, ICC is in SIC Code 2816. A Material Inventory worksheet, dated March 26, 1993 (R's Exh C-16) reflects that molten and solid sulfur, lime and bauxite were maintained in open storage areas and thus exposed to precipitation. The inventory also indicates that sulfuric acid, dry ammonia, ammonium sulfite, and alum would be exposed to precipitation only in the event of a tank rupture and that diesel fuel would be exposed to precipitation only in the event of a leak or [a spill] at material transfer. Some of this material may have been attributable to Puerto Rico Alum Corp., which apparently occupied the same site and was also owned and operated by Dr. Baus.

effluent limitation guideline to which the process wastewater stream at the facility is subject (Part VI B.3., Monitoring Requirements for All Other Industries).

6. The required frequency of monitoring was changed to semi-annually for facilities identified in Parts VI.B.2.a through f. by the amendments to the permit published on September 24, 1993 (58 Fed. Reg. 50002). Facilities identified in Parts VI. B.2.a through f. included Section 313 of EPCRA Facilities. This change to semiannual monitoring for the mentioned facilities applied as of October 1, 1992, and thus deleted the requirement for quarterly monitoring for these facilities as of the effective date of the permit. The required monitoring for Additional Facilities identified in Part XI.B.5.B.2.j., such as ICC (supra note 5), was changed to annually.

7. The initial GWQC issued by the EQB, which was incorporated into the GP as Part XI. B., contemplated, with exceptions not relevant here, that all monitoring would be performed on a quarterly basis. Thus, Part VI B. 3., “Annual Monitoring Requirements”, in the BGP (57 Fed. Reg. 44451) was changed to read “Monitoring Requirements for All Other Industries”, that is, other than those listed in Part XI.B.5.B.2. [Part VI.B.3.]. The amendment to the permit, however, specified that permittees with facilities identified in Parts VI.B. 3. a through d. were required, with specified exceptions not

relevant here, to monitor at least annually (58 Fed. Reg. 50002). Permittees having facilities so identified were not required to submit monitoring results unless required in writing by the Director. Facilities identified in Parts VI.B.3. were: a. Airports; b. Coal-fired Steam Electric Facilities; c. Animal Handling/Meat Packing; and d. Additional Facilities.

8. The language of Part XI.B.5.B.2, Monitoring Requirements, j. Additional Facilities, (i) including facilities having storage with storm water discharges associated with storage piles of solid chemicals used as raw materials that are exposed to precipitation at facilities classified as SIC 30 (Rubber and Miscellaneous Products) and SIC Code 28 (Chemicals and Allied Products) is identical to that in Part VI.B.3. specifying annual monitoring requirements. Facilities subject to annual monitoring requirements were no longer required to submit DMRs unless required by the Director.[6/] Such facilities were, however, required to retain such records in accordance with Part VI.E. (retention of records).

9. The BGP required that for existing facilities, such as ICC, which had storm water discharges in connection with industrial

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[6/] Because ICC was subject to Part XI.B.5.B.2.a. by virtue of being subject to EPCRA § 313, and thus required to monitor semi-annually after the amendments to the permit, ICC was required to submit monitoring reports even though its facility was within the "Additional Facilities" language of Part XI.B.5.B.2.j.

activity prior to October 1, 1992, pollution prevention plans (PPPs) were to be prepared on or before April 1, 1993, and updated as appropriate (Part XI.B.3.). ICC submitted its PPP under a cover letter, dated June 7, 1993, which states that the Plan, dated March 9, 1993, had been developed in March, and was being submitted at this time in response to an EPA inquiry, because the Plan mailed to EPA's office in New York in March without a cover letter apparently did not reach the addressee (C's Exh 5). Mr. Rivera, identified infra finding 16, testified that the PPP was the most important condition of the permit.[7/] He testified that, other than the additional requirements due to the fact that ICC was subject to EPCRA § 313, the PPP submitted by ICC met the minimum requirements of the permit (Tr. 48, 68). He described these additional requirements as [principally] employee training, security at the facility, and procedures to manage, control, minimize, prevent, and reduce [storm water] contact with Section 313 Water Priority Chemicals (Tr. 52).

10. For facilities other than those subject to EPCRA § 313, the permit, Part IV.D. "Contents of Plan", provided that the PPP shall include, inter alia, as a minimum, identification of

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[7/] Tr. 55, 56. This is supported by the Notice of proposed NPDES general permit modification, 58 Fed. Reg. 19427 (April 14, 1993), which states, among other things, that the focus of the general permit is the development and implementation of Pollution Prevention Plans to minimize the discharge of pollutants.

specific individual or individuals (and their responsibilities) as members of a Storm Water Pollution Prevention Team; a Description of Potential Pollutant Sources which may reasonably be expected to add significant amounts of pollutants to storm water discharges; a site map containing, inter alia, an outline of the portions of the drainage area of each storm water outfall within facility boundaries; a prediction of the direction of flow and an identification of the types of pollutants which are likely to be present in storm water discharges associated with industrial activity; an inventory of the types of materials at the site which may be potentially subject to precipitation and, inter alia, materials management practices designed to minimize contact of materials with storm water runoff.

11. Additionally, ¶ D.2.d., specified that the PPP include a summary of existing discharge sampling data and ¶ D.2.e., required a narrative description of the potential pollution sources from, inter alia, the following activities: loading and unloading operations, outdoor storage activities, outdoor manufacturing or processing activities. Requirements under ¶ D.3., "Measures and Controls", included, inter alia, Good Housekeeping, Preventive Maintenance, Spill Prevention and Response Procedures, Inspections[8/], Employee Training[9/],

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[8/] Part IV, ¶ D.3.d., "Inspections", provides: "In addition (continued...)

Recordkeeping and Internal Reporting Procedures, and Management of Runoff, i.e., the Plan shall contain a narrative consideration of the appropriateness of traditional storm water management practices used to divert, infiltrate, reuse, or otherwise manage storm water runoff in a manner that reduces pollutants in discharges from the site. Paragraphs

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[8/] (...continued)
to or as part of the comprehensive site evaluation required under Part IV.4 of this permit, qualified facility personnel shall be identified to inspect designated equipment and areas of the facility at appropriate intervals specified in the plan. A set of tracking or followup procedures shall be used to ensure that appropriate actions are taken in response to the inspections. Records of inspections shall be maintained.

[9/] Part IV, ¶ D.3.e., "Employee Training" provides: Employee training programs shall inform personnel responsible for implementing activities identified in the storm water pollution prevention plan or otherwise responsible for storm water management at all levels of responsibility of the components and goals of the storm water pollution prevention plan. Training should address topics such as spill response, good housekeeping and material management practices. A pollution prevention plan shall identify periodic dates for such training.

D.4. and D.6., are entitled Comprehensive Site Compliance Evaluation[10/] and Consistency with other plans, respectively.[11/]

12. Because ICC was subject to EPCRA § 313 reporting requirements for chemicals classified as "section 313 water priority chemicals," its PPP was subject to additional requirements specified in Part IV.D.7. of the BGP. The most important of these were, ¶ D.7.a., [installation of] drainage control and/or diversionary structures in areas where such chemicals were stored, processed or otherwise handled to include as a minimum (1) (c)urbing, culverting, gutters, sewers or other forms of drainage control to prevent or minimize the potential for storm water run-on to come into contact with significant sources of pollutants; or (2) (r)oofs, covers or other forms of appropriate protection to prevent storage piles from

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[10/] Part IV, ¶ D.4., "Comprehensive Site Compliance Evaluation", provides: Qualified personnel shall conduct site compliance evaluations at appropriate intervals specified in the plan, but, except as provided in paragraph IV.D.4.d. (below), in no case less than once a year. Such evaluations shall provide for, inter alia, inspections of areas contributing to storm water discharge, evaluation of measures to reduce pollutant loadings, revision of the PPP as appropriate as a result of the evaluation, and a report summarizing the scope of the inspection, date of the inspection and personnel making the same, observations made and actions taken as a result thereof.

[11/] Part IV, ¶ D.6., "Consistency with other plans",provides: Storm water pollution prevention plans may reflect requirements for Spill Prevention and Countermeasure [SPCC] plans developed for the facility under section 311 of the CWA or Best Management Practices (BMP) Programs otherwise required by an NPDES permit for the facility as long as such requirement is incorporated into the storm water pollution prevention plan.

exposure to storm water and wind. Operation of areas where liquid and (b), and non-liquid, section 313 water priority chemicals are stored, loaded and unloaded and where Section 313 chemicals are stored, processed, transferred, or otherwise handled, so as to minimize discharges of such chemicals; the inspection, at specified intervals identified in the plan of all areas of the facility for leaks or conditions that could lead to discharges of Section 313 water priority chemicals or [lead to] direct contact of storm water with raw materials, intermediate materials or products; facility security, and training, of personnel that work in areas where Section 313 water priority chemicals are used or stored.

13. The PPP submitted by ICC (finding 8) is in three parts: a site assessment inspection, a description of storm water management measures taken based on the site assessment, and identification of the members of the Storm Water Pollution Plan prevention team and their responsibilities. The site assessment of the PPP indicates that five areas were evaluated for pollutants. Referring to the “process area”, the assessment states that sulfuric acid and related inorganic chemical manufacture drain from this area and are collected in a process sump pond to be recycled back to the process. The second part of the PPP, measures taken based on the site assessment, addresses three areas: the liquid storage area,

the fuel station and the run-off area. With respect to the liquid storage area, the PPP states that ICC's facilities were designed to contain the volume of the largest tank in case a spill should occur, but that ICC was, nevertheless, implementing a personnel training and preventive maintenance program to minimize any risk. The PPP states that the fuel station will be inspected regularly and that plant personnel will be instructed to report any abnormal condition. As to the run-off area, the PPP states that the area is being cleaned and that trash and empty containers have been picked up and deposited in a designated area.

14. Referring to the "storage area", the assessment states that sulfuric acid, related inorganic chemicals, and other chemicals are stored in above ground tanks, and that leaks from these tanks are directed to the process sump pond or pumped to the water pond for reuse and/or evaporation. The assessment reports that all tanks were visually inspected and that a preventive maintenance program was being implemented to upgrade the condition of the tanks and minimize the risk of spills.

15. Concerning the truck loading area, the assessment states that sulfuric acid, ammonium sulfite/bisulfite solution and alum are loaded on site into tank trailers and that any small leaks from this activity are handled as indicated for the process

and storage areas. The assessment reports that the “fueling area”, which is limited to diesel oil, was inspected and cleaned and that there is a collector in the event any diesel spills during the fueling. The assessment states that the fifth and final area, the “run-off area,” was inspected. The summary of potential pollutant sources provides that in the event of a leak or spill, pollutants would be contained within “our” facilities. An attachment states that a site map was submitted with a previous report to both EPA and EQB.

16. On December 16, 1997, a compliance evaluation inspection (CEI) of the ICC facility was conducted by Mr. Jose A. Rivera, an EPA senior environmental engineer. For some unexplained reason, the findings of the CEI were not finalized until May 5, 1999, and a copy of the CEI was forwarded to ICC by a letter, dated May 7, 1999 (C’s Exh 3). Findings of the CEI included the fact that ICC had filed EPCRA § 313 Form Rs, reporting the handling or processing of ammonia and sulfuric acid in their liquid form for the years 1991 to 1993, and ammonia in its liquid form and sulfuric acid in its gas form for the years 1994 to 1997. As indicated (supra note 4), these chemicals are included in Section 313 Water Priority Chemicals listed in Addendum B to the BGP. This triggered a requirement that the permittee monitor storm water discharges that come into contact with any equipment, tank, container or

other vessel or area used for storage of a Section 313 water priority chemical, or located at a truck or rail car loading or unloading area where a Section 313 water priority chemical is handled for specified pollutants and for any Section 313 water priority chemical for which the facility is subject to reporting requirements under Section 313 of EPCRA.

17. The CEI recognized that ICC had conducted quarterly monitoring for storm water discharges for the periods October 1, 1992 to December 31, 1992, January 1, 1993 to March 31, 1993, April 1, 1993 to June 30, 1993, and from July 1, 1993 to September 30, 1993, and that ICC had submitted DMRs reflecting such monitoring.[12/] As indicated (finding 6), the requirement for quarterly monitoring was deleted retroactive to the effective date of the permit. The CEI states, however, that ICC did not conduct semi-annual monitoring beginning with January 1994 and ending in September 1997, as required by Part VI of the BGP, during which a total of eight semi-annual monitoring activities should have been conducted. The CEI also states that ICC did not submit four DMRs reflecting the mentioned

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[12/] The CEI states that two of the reports were submitted late-only one significantly so, the first DMR being dated February 19, 1993, when it should have been submitted by January 28, 1993. However, ICC explained this delay in a letter to Mr. Rivera, dated February 8, 1993 (R's Exh C-13), which stated that it expected to receive instructions for completing DMRs and official notification of the permit number "this week" and that the DMR for the fourth quarter of 1992 would be submitted about February 18, 1993.

semiannual monitoring and that ICC did not submit 16 [actually 14] quarterly rain gauge reports for the periods beginning on October 1, 1993 and ending on September 24, 1997, as required by Part VI.B.9. of the BGP.[13/] Additionally, the CEI concludes that ICC did not conduct three comprehensive site evaluation inspections from October 1, 1993 to September 24, 1997, as required by Part IV.D.4. of the GP and did not submit to EPA and the EQB the PPP recertification, i.e., that the Plan had been reviewed and that no modifications to the Plan were necessary (if that were the case), by October 1 1996, as required by Part IV.C. of the BGP. Plan reviews were to be conducted a minimum of once every three years. ICC submitted a certification under date of October 1, 1993, that the Plan had been developed and implemented and that ICC was in compliance therewith (R's Exh C-20).

18. ICC stipulated that it had not submitted data from 1993 through the first half of 1997, i.e., had not submitted semiannual DMRs and rain gauge reports [to the EQB and to the EPA Regional Office] as required (Tr. 14, 15). Dr. Baus testified that the reason ICC did not submit the mentioned data is that "..we did not believe....we had to." (Tr. 80).

[13/] As indicated infra finding 32, rain gauge data were submitted with DMRs for the second and third quarters of 1993. Additionally, an attachment to an ICC letter, dated March 3, 1993 (R's Exh B-7), is a tabulation of rainfall data for the calendar year 1992.

In this regard, it will be recalled that ICC alleged in its answer that it did not submit DMRs and rain gauge reports, because it was told by representatives of EPA and EQB that submission of such reports was no longer required. Although Dr. Baus alluded to this advice in his testimony and stated that ICC's policy was to follow advice from anyone in a control authority even if ICC did not think it was beneficial [or accurate] (Tr. 89), he made no attempt to identify individuals at EPA or EQB who assertedly informed ICC, after the permit modification, that submission of DMRs and rain gauge reports was no longer required.[14/]

19. Notwithstanding that the employees of EQB or EPA involved have not been identified, it is concluded that such [mistaken] advice concerning the effect of the permit modification on ICC's reporting obligations was provided ICC. Firstly, Dr. Baus is a forthright and completely credible witness; secondly, ICC submitted DMRs for the quarterly periods beginning with the effective date of the permit and ending with the effective date of the permit modification, thus lending support to the view that ICC considered that the permit modification had eliminated the necessity to submit

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[14/] Prior to taking the stand, Dr. Baus was informed that evidence he was told that ICC did not need to file DMRs would be relevant (Tr. 79).

DMRs;[15/] and thirdly, ICC's answer acknowledged, and Dr. Baus testified, that ICC had overlooked the effect of being subject to EPCRA § 313 on its monitoring obligations. This is relevant because, ICC's obligation to submit DMRs would have been eliminated by the permit modification except for the fact it was subject to EPCRA § 313 and handled § 313 water priority chemicals. A logical explanation for the erroneous advice received by ICC in this regard is that the person or persons rendering the advice were unaware that ICC handled EPCRA § 313 water priority chemicals. It was, of course, evident from the PPP submitted by ICC in June of 1993 (finding 9) that ICC produced or handled sulfuric acid and ammonia among other chemicals.

20. The CEI concludes that ICC did not conduct semi-annual monitoring from January 1994 to September 1997, during which a total of eight semi-annual monitoring activities should have been conducted. While ICC's stipulation appears to include only the failure to submit data, Dr. Baus acknowledged that "...we did not do all of the annual work required by the Baseline General Permit,...." (Tr. 80). This testimony is apparently based upon the mistaken belief that ICC, after the permit modification, was only required to perform annual

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[15/] An internal memorandum from Dr. Baus to A. B. Nazario, dated January 25, 1995 (R's Exh C-25), indicates that Dr. Baus considered that the permit modification of October 1, 1993, had reduced ICC's monitoring obligation to annually.

monitoring. It is also consistent with Dr. Baus' acknowledgment that ICC overlooked the effect of EPCRA § 313 on its monitoring and reporting obligations.

21. Dr. Baus referred to the PPP as requiring documentation of an [annual] semi-annual inspection (Tr. 80). It is probable that he was referring to Part IV, ¶ 4 of the GBP, which requires inspections by qualified individuals at appropriate intervals specified in the PPP, but in no case less than once a year (supra note 10). He testified that the ICC site occupied 15 acres--it drained approximately 19 acres--and that "we" do a complete inspection on almost a daily basis of the storm water handling facilities associated with the Best Management Practices to prevent spills and "other things" from reaching the Caribbean (Tr. 80, 81). Dr. Baus acknowledged that these inspections were not generally documented unless there was an exception to something going on, [i.e., a condition requiring remediation].[16/] He analogized this practice to permits under the Clean Air Act, where reporting was only required when an emission exceeded permit limits. He asserted that ICC had three or four other [spill prevention] plans [probably a tank

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[16/] Some support for this view is provided by Part IV.D.4. of the permit, which contains the requirement for a comprehensive site compliance evaluation and which provides at subparagraph c. that the report summarizing the scope of the inspection shall document any incidents of noncompliance.

vessel and facility response plan or SPCC plan under Section 311 of the CWA] and a Community Right-to-Know Plan.[17/]

22. Under cross-examination, Dr. Baus acknowledged that ICC had not revised its PPP in 1996 or certified to EPA that the PPP had been reviewed and that no changes were necessary (Tr. 97). This acknowledgment does not have the significance attributed to it by Complainant, because under Part IV, ¶ C.2 the PPP was to be reviewed at least once every three years and under Part IV, ¶ A.5, the EPCRA requirements, the most important portion of the PPP, were not required to be implemented until October 1, 1995.[18/] While it is true that ICC certified that

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[17/] Tr. 82. Part IV.D.6. of the BGP states that PPPs may reflect SPCC plans developed for the facility under CWA § 311 or BMPs otherwise required by an NPDES permit for the facility provided such requirements are incorporated into the PPP (supra note 11).

[18/] Part IV of the permit is entitled "Storm Water Pollution Prevention Plans" and Section A of that Part is entitled "Deadline for Plan Preparation and Compliance" (57 Fed. Reg. 4446). Section IV.A.5., which was not changed for Puerto Rico by the initial GWOC issued by the EQB or the amendment to the permit, provides"

> "5. Portions of the plan addressing additional requirements for storm water discharges subject to Parts IV.D.7. (EPCRA Section 313) and Part IV.D.8. (salt storage) shall provide for compliance with the terms of the requirements identified in Parts IV.D.7 and IV.D.8 as expeditiously as practicable, but except as provided below, not later than either (sic) October 1, 1995. Facilities which are not required to report under EPCRA Section 313 prior to July 1, 1992, shall provide for compliance with the terms of the requirements identified in Parts IV.D.7. and IV.D.8. as expeditiously as practicable, but not later than three years after the date on which the facility is first required to report under EPCRA Section 313. However, plans for facilities

(continued...)

it had implemented and was in compliance with its pollution prevention plan as of October 1, 1993, this certification was inoperative as to the additional EPCRA requirements which ICC had overlooked.

23. Mr. Jose Rivera has been employed by EPA since 1990 and in the Caribbean Environmental Protection Division in Puerto Rico since 1993 (Tr. 19, 20). He described his duties as including conducting inspections of industrial facilities, enforcing NPDES permits, and implementing the Storm Water Program for the region. In the latter capacity, he testified that he had discussions and had written letters to Respondent concerning the BGP. This is confirmed by the fact that DMRs submitted by ICC and accompanying correspondence were addressed to Mr. Rivera at EPA's Regional Office in New York (R's Exhs B-4, B-7, B-9, and B-15). Mr. Rivera conducted the compliance inspection on December 16, 1997, reaching the conclusions detailed above (findings 16 & 17). He also determined the proposed penalty (Tr. 25, 26; Administrative Class II Penalty Assessment, C's Exh 6). He concluded that the violations were serious and warranted a substantial penalty of $50,000.

[18/] (...continued)
subject to the additional requirements of Parts IV.D.7. and IV.D.8. shall provide for compliance with other terms and conditions of this permit in accordance with the appropriate dates provided in Part IV. 1, 2, 3, or 5 [this paragraph] of this permit."

24. Mr. Rivera testified that in determining the penalty, he considered all of the factors required by Section 309(g) of the Clean Water Act (Tr. 27, 28). With respect to the first such factors, i.e., “nature, circumstances, extent and gravity of the violation”, he pointed out that ICC had submitted an NOI, seeking coverage under the BGP and that the violations alleged in the complaint began in January 1994 and ended in September 1997 (Tr. 29). He opined that [ICC’s] failure to comply with the Storm Water Program and the BGP hindered the Agency in obtaining sufficient information and data to determine whether ICC’s discharges had an indirect impact on the receiving waters and on human health (Tr. 30). Additionally, he considered that ICC’s failure to comply with the permit was [unfair] to businesses similarly situated who did comply. This latter concern, of course, is addressed by recapturing in the penalty assessment any economic benefit or savings derived by the respondent’s noncompliance. Mr. Rivera acknowledged that he was unaware of any harmful discharges or runoff from ICC’s facility (Tr. 73.)

25. Regarding the penalty “as to the violator”, i.e., “ability to pay, any prior history of such violations, the degree of culpability, economic benefits or savings (if any) resulting from the violation, and such other matters as justice may require,” Mr. Rivera testified that ICC had no prior history

of violations (Tr. 31). He attributed this to the fact the instant permit was the first NPDES permit to which ICC was subject. Concerning ICC's ability to pay, Mr. Rivera relied on a Dun & Bradstreet Report, dated December 31, 1998 (C's Exh 7), which apparently reflects data for 1997, and indicates that ICC's gross sales were in excess of $2,660,000 and that its net income was over $450,000. He considered that the proposed penalty of just over 10% of profit was well within ICC's ability to pay (Tr. 42, 66).

26. Mr. Rivera considered that ICC was culpable in not complying with the BGP (Tr. 33). He pointed out that since 1990, when he was employed by the [EPA] Regional Office in New York, he had conversations with Dr. Baus, and corresponded with ICC. He testified that EPA had provided information to ICC about the BGP, that EPA had conducted numerous seminars and workshops [to explain permit requirements], that ICC had a copy of, and knew about the permit, and that Respondent [Dr. Baus] knew him (Rivera) personally and had his phone number, if he (Dr. Baus) had any questions.

27. The final factor considered by Mr. Rivera in determining the penalty was economic benefit. The economic benefit or savings enjoyed by ICC in failing to conduct semi-annual monitoring from 1994 to 1997 was determined to be $1,096 (Tr. 36, 37; Penalty Assessment, C's Exh 6). Although ICC should have

conducted a total of eight semi-annual monitoring activities, and Mr. Rivera estimated the cost of each sampling (set of analyses) at $177, total savings were computed as $1,096 (3 x $354) plus an additional unexplained $34, which may represent an overhead cost factored in by the BEN model. The $177 figure was computed based on Mr. Rivera's professional judgment as to the cost of the required analyses after contact with an unnamed commercial laboratory in Puerto Rico.

28. Although the Penalty Assessment refers to an attached calculation, no such calculation is attached to the Penalty Assessment (C's Exh 6) in the record. Moreover, no evidence was offered to support the assumptions upon which the BEN model is based so that it may confidently be concluded that the resulting figure bears a reasonable relationship to actual savings. These omissions, however, are not significant here, because Dr. Baus acknowledged that ICC had saved approximately $1,000 by not conducting analyses on four samples (Tr. 89, 90).

29. Asked whether his penalty computation included a breakdown of the amount attributable to each violation, Mr. Rivera replied in the negative, saying that the Clean Water Act did not include any policy as to the development of such figures (Tr. 71, 72). He acknowledged that the penalty was based upon his best judgment, explaining that he had been involved in the

preparation and review of more than 25 complaints in his career at EPA. (Id. 38). Dr. Baus stipulated that Mr. Rivera was a capable person experienced in the NPDES program (Tr. 20). This falls short of a stipulation that Mr. Rivera was an expert.

30. Describing ICC's operations, Dr. Baus testified that ICC was a manufacturer of basic inorganic chemicals and the only significant inorganic chemical producer left on the Island (Tr. 84). He explained that raw materials were purchased locally and that the principal raw material used by ICC is sulphur which is used to produce sulfuric acid. Sulfuric acid can be converted to alum (aluminum sulphate) and some of the sulfur dioxide, which forms sulfuric acid, is processed into ammonium-by-sulfide. Ammonium-by-sulfide is sold to a manufacturer of caramel coloring who in turn sells the coloring to Coke and Pepsi for use in their syrup plants [in Puerto Rico].

31. Dr. Baus described ICC's management staff as very small, consisting of only three technical people at the plant at most times: himself, Jimmy [his son] and, Lawrence Gomez, [general manager] director of operations.[19/] He pointed out that ICC currently employed about 40 people and that the three of them

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[19/] Tr. 81, 85. In addition, there was a maintenance superintendent, whom Dr. Baus stated functioned more as a mechanic, and a treasurer.

had to run the business, obtain raw materials, sell the product, do the technical work associated with running what he referred to as a "difficult process" and do all the engineering and construction work "ourselves" (Tr. 81, 82). He explained that "doing it yourself" was the only way a business could be maintained with the small market to which they had access in Puerto Rico. He testified that there were 15 different permits to which ICC was required to adhere and, while he acknowledged that ignorance of the law was no excuse, he maintained that the size of ICC's business [small staff] and the fact that they were fighting for survival were [or should be] mitigating factors (Tr. 85).

32. Rain gauge monitoring records maintained by ICC are in evidence (R's Exh A-1). These records cover the calendar years 1992 through 1998. Dr. Baus testified that the records were maintained by day-shift and evening-shift laboratory technicians employed by ICC and that the data were collected on a daily basis from a rain gauge outside the sulfuric acid plant (Tr. 75, 76). These records were to be submitted to the EQB with copies to the EPA Regional Office and to the Caribbean Field Office on a quarterly basis (Part VI, ¶¶ B.9.c and D.; 58 Fed. Reg. 50003). The requirement to report quarterly was not changed by the permit modification. Rain gauge records or reports for the period January through

October 1993 were enclosed with cover letters, dated July 28, 1993 and October 27, 1993, submitting DMRs for the second and third quarters of 1993 (R's Exhs B-9 and B-15). Although the rain gauge records are not signed as required by Part VII. G. of the permit, the accompanying DMRs were signed by an authorized official of ICC and the cover letters were signed by Dr. Baus.

33. Asked what use EPA makes of the rainwater data, Mr. Rivera replied that the permit required the data to be collected and that the protocol for the taking of samples requires a certain amount of precipitation [greater than 0.1 inch] in order that the samples be representative of the discharge (Tr. 39, 40). This indicates that the primary purpose of rain gauge data is to document that samples were properly collected, and inasmuch as there is no requirement that all discharges be sampled, the purpose of requiring that rain gauge reports or records be submitted more frequently than DMRs is difficult to fathom.

34. ICC's PPP indicates that any leaks or spills of chemicals in the process, storage or truck loading areas would be collected in the process sump pond and recycled to the process or pumped to the water pond for reuse and/or evaporation (findings 13 & 14). Dr. Baus confirmed that ICC had primary and secondary containment systems in place which would handle [any spills or leaks] (Tr. 87). He testified that these systems cost $20,000

to $30,000 and that the systems were beyond any Best Management Practice requirements of either the Baseline or Multi-Sector General Permits.[20/] As an example of actions initiated by ICC which were not required by the BGP, Dr. Baus indicated that the storm water pond would hold up to three-quarters of an inch of rainfall and that this was checked for various parameters, e.g., turbidity, pH, alkalinity, iron, before being discharged to the Caribbean (Tr. 61). He complained that ICC received no credit [for these expenditures and activities above and beyond permit requirements] (Tr. 87).

35. Attacking the proposed penalty of $50,000 for failure to submit paperwork, which he characterized as meaningless or nearly so,[21/] to EPA as unreasonable and inappropriate, Dr. Baus emphasized that ICC had not damaged or polluted the environment (Tr. 87, 88-90). He also pointed out that the special EPCRA requirements had been eliminated from the Multi-Sector General Permit and there were very few limitations,

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[20/] While this statement is literally accurate, it should be noted that Part IV.7. of the permit containing additional requirements for storm water discharges associated with industrial activity from facilities subject to EPCRA § 313 provides at ¶ b(1), concerning liquid storage areas for Section 313 water priority chemicals, that appropriate measures to minimize discharge of Section 313 chemicals may include “secondary containment....”

[21/] Dr. Baus’ statement in this regard apparently relates at least in part to the requirement to submit rain gauge data on a quarterly basis while monitoring was only required to be performed semiannually.

numerical or otherwise, on the content of storm water discharges.[22/]

Conclusions

1. ICC overlooked the effect of EPCRA § 313 on its monitoring and reporting obligations under the BGP and the additional requirements recognizing EPCRA § 313 which were to be included in its pollution prevention plan. Because of this mistake, ICC also interpreted the permit modification as eliminating the need to submit DMRs.

2. ICC's most serious violation is the failure, during the period January 1994 to September 1997, to monitor storm water discharges for pollutants including the presence of EPCRA Section 313 Water Priority Chemicals, sulfuric acid and ammonia in this instance.

3. The balance of the violations, i.e., failure to submit DMRs and rain gauge reports, ICC's failure to include special requirements for facilities subject to EPCRA § 313 in its pollution prevention plan, an alleged failure to conduct three

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[22/] Tr. 53-55. Part V of the BGP is entitled "Numeric Effluent Limitations", and limits discharges composed of coal pile runoff to not more than 50 mg/L total suspended solids. The pH of such discharges was to be within the range of 6.0-9.0. Failure to demonstrate compliance with these limitations as expeditiously as practicable, but in no case later than October 1, 1995, will constitute a violation of the permit. This limitation was expanded for Puerto Rico to include a prohibition on discharges causing an oil sheen on the receiving body of water and a prohibition on the discharge causing a violation of applicable water quality standards. Part V. B. and C.

annual comprehensive site evaluation inspections, and failure to review its pollution prevention plan and to certify that no changes were necessary, if that were the case, are on this record paperwork violations which do not warrant a substantial penalty. A penalty of $1,000 is assessed for these violations.

4. Complainant has failed to sustain its burden of proof that a $50,000 penalty is appropriate. An appropriate penalty, which is determined by considering the statutory factors of Section 309(g) in conjunction with EPA General Enforcement Policy, GM-21 (February 16, 1984), is the sum of $8,096, which includes $1,096 the economic benefit or savings which ICC obtained by its failure to perform semiannual monitoring and analyses of storm water discharges.

Discussion

At the outset, it is necessary to deal with Complainant's argument that, because the violations alleged in the complaint were stipulated with the exception of ICC's alleged failure to perform a yearly comprehensive site compliance evaluation, Respondent's exhibits, which include inter alia, rainfall data, analyses of samples from the storm water pond, DMRs and related correspondence, ICC's PPP and internal memoranda, were irrelevant and should not have been admitted into evidence (Post-Hearing Brief at 1, 2). This argument is patently erroneous. It was rejected at the

hearing and is rejected now. Section 309(g)(3) of the Act requires consideration of the following factors, among others, in determining the amount of a penalty "the extent and gravity of the violation, or violations,...and with respect to the violator, ...the degree of culpability,...[23/] Although only two quarters of rainfall data were submitted to EPA, the data were in fact collected and maintained by ICC.[24/] It is noted that the PPP supports Dr. Baus' testimony that any spills or leaks would be contained within the facility, thus tending to show that the potential for harm was very low and to mitigate the extent and gravity of the violations. Also, "culpability" means

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[23/] Section 309(g) of the CWA provides "(3) Determining amount. In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require...."

[24/] Among Complainant's objections to ICC's rain gauge data is the persons taking the readings were not identified and the time the readings were taken was not specified (Tr. 78). Although rainfall reports, notices of intent, pollution prevention plans and DMRs, and other reports submitted to EPA or EQB were required to be signed (Part VII G), identification of persons taking rain gauge readings and the time the readings were taken was not required (Part VI.B.1.). Additional data were required of storm events sampled, e.g., duration in hours, measurements or estimates of rainfall in inches, length of time between storm event sampled and the end of the previous measurable event (Part VI.B.2.), which supports the view that rainfall data apart from the events sampled were not a significant requirement of the permit.

"blameworthy"[25/] and evidence that ICC was complying or attempting in good faith to comply with the BGP certainly affects the extent to which it is "worthy of blame" for the violations. Moreover, Rule 22.22 of the Rules of Practice directs the ALJ to admit all evidence which is not irrelevant, immaterial, unduly repetitious or of little probative value. It follows that Respondent's exhibits were properly admitted and are properly for consideration herein.[26/]

ICC has acknowledged that it did not do all of the work [monitoring] required by the BGP and that it overlooked the effect of being subject to EPCRA § 313 on its monitoring obligations. (findings 19 & 20). These are more than mere "paperwork" violations. Section 309(g)(3) indicates that the first consideration in determining a penalty amount is the "nature, circumstances, extent and gravity" of the violations. This is

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[25/] Webster's Third New International Dictionary (1971).

[26/] It is of interest that, while Complainant insists that events prior or subsequent to the period of the GBP are irrelevant to any issues herein, it has cited a letter signed by Dr. Baus dated September 5, 1991 (R's Exh C-5), which states that he had been informed by EPA's Caribbean office that the conditions and regulations for the General Permit option for storm water runoff have not yet been published. The letter states that ICC intended to apply for coverage under the general permit for Puerto Rico and asks that ICC be supplied with the necessary information and forms when the regulations finally issue. Complainant uses the letter as evidence of ICC's culpability. While it is true that the letter shows that ICC was aware that a general permit governing storm water runoff was being developed, a more accurate characterization is that the letter demonstrates concern about coverage under the BGP and the conditions thereof. Moreover, the fact that the final BGP was not published until over a year later, lessens the significance of the letter as evidence that ICC was, or should have been, aware of final permit terms and conditions.

reinforced by the EPA General Enforcement Policy (GM-21) which reflects that the first step in determining a penalty is to calculate a preliminary deterrence amount which consists of an economic benefit and a gravity component (Id. Attachment A).

The nature, circumstances, and extent of the violations relate to monitoring and the failure to perform required monitoring might mean that substantial quantities of pollutants were being discharged in storm water without being detected. This is especially true for EPCRA § 313 Water Priority Chemicals (sulfuric acid and ammonia) for which ICC had failed to monitor. It is well settled, however, that reporting and monitoring violations are not as serious as violations resulting from discharges in excess of regulatory or permit requirements.[27/] Moreover, monitoring was only required to be performed every six months and, other than the requirements that storm water discharges, with limited exceptions, be comprised entirely of storm water, that storm water discharges not cause an oil sheen on the receiving body of water or a violation of water quality standards, there were no limitations, numeric or otherwise, on ICC's storm water discharges.

The primary criterion for the gravity of the violation is normally the harm or potential for harm resulting from the violation. Here the potential for harm is slight for the foregoing

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[27/] See, e.g., City of Salisbury, Docket No. CWA-III-219, 2000 WL 190658 (E.P.A.) (Initial Decision, February 8, 2000) and cases cited. It is understood that this decision is now on appeal to the EAB.

reasons and because the evidence establishes that any leaks or spills would be retained within the ICC facility. Under all of the circumstances, it is my conclusion that a penalty of $5,000 adequately reflects the nature, circumstances, extent and gravity, including an amount to deter future violations, of ICC's failure to conduct monitoring as required by the BGP. Conditions with respect to the violator or adjustment factors, including economic benefit or savings, are considered below.

Although ICC collected and maintained rain gauge data through out the term of the permit, it did not submit such data to EPA or EQB after the effective date of the permit modification, because it believed that it was no longer required to file DMRs. DMRs and rain gauge reports clearly contain differing sets of data and elimination of the requirement to file DMRs would not ipso facto eliminate the requirement to file rain gauge reports. Mr. Rivera, however, was unable to explain any purpose for rain gauge data apart from verifying for monitoring purposes that the samples were representative of discharges (finding 33). The point, of course, being that there is no basis for imposing a substantial penalty for ICC's failure to submit rain gauge data apart from DMRs. Mr. Rivera's assertion that ICC's failure to submit data, e.g., DMRs and rain gauge reports, and to comply with the permit in other respects hindered the Agency in determining whether ICC's discharges had an indirect impact on human health and the receiving

waters (finding 24), bears little relation to reality here, because there is no evidence of any leaks or spills and the evidence demonstrates that any leaks or spills would be contained within ICC's facility rather than being discharged to the Caribbean. Moreover, this concern is adequately addressed by considering the potential for harm resulting from ICC's violations.

The record reflects that the [provision for a] PPP was the most important condition of the BGP (finding 9). Because ICC had overlooked the effect of EPCRA on its monitoring and reporting obligations, its PPP makes no specific reference to EPCRA or the additional requirements permittees subject to EPCRA were to include in their pollution prevention plans. Apart from EPCRA requirements, ICC's PPP complied with the minimum requirements of the permit. Although he made no attempt to compare ICC's PPP with a plan complying with the additional EPCRA requirements, Mr. Rivera described the additional requirements permittees subject to reporting for EPCRA § 313 Water Priority Chemicals were to include in pollution prevention plans, as principally employee training, security at the facility and procedures to manage, control, minimize, prevent and reduce storm water contact with Section 313 Water Priority Chemicals (finding 9). ICC's PPP calls for employee training, however, and inasmuch as the principal chemicals produced or handled by ICC are sulfuric acid and ammonia, it is not clear

that employees training directed specifically to EPCRA § 313 would add anything of significance to the training.

While ICC's PPP is silent as to security at the facility, the most important features of a PPP written with EPCRA § 313 in mind are procedures to manage, control, minimize, prevent and reduce storm water contact with Section 313 Water Priority Chemicals (finding 9). Here again, however, the BGP, apart from EPCRA requirements, provided that PPPs, include among other things a description of potential pollution sources, an identification of the types of pollutants likely to be present in storm water discharges, materials at the site which may be potentially subject to precipitation, management practices designed to minimize contact of materials with storm water, a narrative description of potential pollution sources from, inter alia, loading an unloading operations, and outdoor storage, manufacturing or processing activities, and a narrative consideration of the appropriateness of traditional storm water management practices used to divert, infiltrate, reuse, or otherwise manage storm water runoff in a manner that reduces pollutants in discharges from the site (finding 12). ICC's PPP met the minimum requirements of the permit except for EPCRA requirements and this indicates that with the exception noted below the "additional EPCRA requirements for PPPs" did not vary significantly from the basic requirements for such plans insofar as ICC's facility is concerned. This is because the same

storage facilities, loading, unloading and processing areas were inspected for leaks, deteriorating conditions etc., irrespective of whether Section 313 Water Priority Chemicals were being handled.

The exception referred to above is the requirement of Part IV.D.7.a. of the GBP that permittees subject to EPCRA § 313 include containment, drainage control and/or diversionary structures in their PPPs to minimize or prevent storm water run-on to come into contact with significant sources of pollutants (finding 12). While this indicates that some construction and/or alteration of facilities were contemplated in order that PPPs comply with special EPCRA requirements, there was a suggestion, but no requirement, for the primary and secondary containment provided by ICC (note 20). This greatly reduces the harm or potential for harm resulting from the failure of ICC's PPP to incorporate additional EPCRA requirements. The necessity or potential necessity for construction and/or alterations was undoubtedly the reason permittees subject to the additional EPCRA requirements such as ICC were not required to implement their PPPs with respect to those requirements until October 1, 1995.

The record reflects that ICC conducted complete inspections of its facility on a weekly or almost weekly basis (finding 21). While Complainant complains of the lack of documentation of these inspections, Dr. Baus is a forthright and credible witness and I have no hesitancy in finding that these inspections were performed.

In addition, Dr. Baus testified that the only occasions when these inspections were documented were if remedial action were required. There is no evidence of remedial action being undertaken or required. The only violations here is are the failures to describe the inspections in writing and to attach a statement to its pollution prevention plan that the facility was in compliance with the plan and the permit. There was no requirement that these statements be submitted to EPA or to the EQB and these violations may not be described as serious on this record.

This brings us to the factors "with respect to the violator" portion of CWA § 309(g)(3), i.e., adjustment factors, including ability to pay, prior history of such violations, degree of culpability, economic benefit or savings resulting from the violations, and such other factors as justice may require. Complainant has demonstrated that ICC has the ability to pay a penalty of $50,000 (finding 25). A fortiori, ICC has the ability to pay a penalty of just under $8,100. ICC has no prior history of violations. On the theory, however, that compliance with the law is an obligation, not deserving of reward, prior violations are normally considered only as an enhancement factor in penalty computation.

It has been determined above that ICC's failure to perform semiannual monitoring from 1993 to 1997 warrants a gravity based penalty of $5,000. This failure on ICC's part came about because

it overlooked the effect of EPCRA § 313 on its monitoring and reporting obligations under the permit. ICC submitted DMRs and rain gauge data to EPA prior to the permit modification, which was effective October 1, 1993. This supports ICC's contention that it had a good faith belief that the modification eliminated the necessity to submit DMRs. As we have seen, this belief would have accurate, except for the fact ICC was subject to additional EPCRA requirements. While I find that ICC had a good faith, although mistaken belief, that the permit modification eliminated the requirement to submit DMRs, there is no basis for any contention that the modification eliminated the requirement to perform monitoring in toto. Indeed, there is evidence that Dr. Baus did not interpret the modification as removing the requirement for monitoring (note 15). I therefore find that ICC's failure to perform monitoring of its storm water discharges for the period January 1994 to September 1997 cannot be attributed to a good faith mistake and warrants a 20% enhancement for culpability in the $5,000 gravity-based penalty for this violation.

Inasmuch as the requirement to perform monitoring is inextricably linked to the requirement to submit DMRs, it is at least doubtful whether these are in fact separate violations warranting separate penalties.[28/] In any event, ICC will be

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[28/] See, e.g., Lazarus, Incorporated, Docket No. TSCA-V-32-93, 1995 ALJ LEXIS 11 (ALJ May 11, 1995) (failure to perform inspections and to keep records thereof held to warrant only one (continued...)

assessed a penalty of $5,000 for the failure to perform monitoring, enhanced by 20% for culpability, and there is simply no basis for an additional enhancement for failure to submit DMRs which Dr. Baus stated were not submitted simply because "we did not believe that had to" (finding 18). This, of course, stems from ICC having overlooked the additional EPCRA requirements and thus misinterpreting the effect of the permit modification. No sound reason for maintaining and submitting rain gauge data apart from DMRs has been demonstrated and ICC's failure to submit the data, which it did maintain, is not a serious violation warranting a substantial penalty, let alone a violation warranting penalty enhancement.

Dr. Baus acknowledged that ICC had not revised its pollution prevention plan in 1996 or certified to EPA that the plan had been reviewed and that no changes were necessary (finding 22). While this requirement was operative as to the pollution prevention plan apart from the additional EPCRA requirements, it was not applicable to the EPCRA requirements which were not required to be implemented until October 1, 1995. The plan review and certification were to be performed once every three years or not later than October 1, 1998. Therefore, this violation is not as serious as contended by Complainant and does not warrant a substantial penalty. Moreover,

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[28/] (...continued)
penalty), affirmed on other grounds, Lazarus, Incorporated, TSCA Appeal No. 95-2, 7 E.A.D. 318 (EAB, September 30, 1997).

although ICC's pollution prevention plan needed revision in the sense that it failed to recognize the additional EPCRA requirements, it has been concluded above that the additional EPCRA requirements for PPPs did not vary significantly from the basic requirements for such plans insofar as ICC's facility is concerned. In other respects, there is no evidence that any revisions to ICC's pollution prevention plan were necessary.

The only economic benefit or savings resulting from the violations claimed by Complainant is $1,096, representing the sum secured by ICC from the failure to conduct required monitoring. Dr. Baus acknowledged that ICC saved approximately $1,000 by not conducting annual monitoring. Inasmuch as monitoring was required to be conducted semiannually, and thus, the savings were certainly greater than $1000, ICC may not complain if the higher figure claimed by Complainant is accepted. Complainant's determination that ICC enjoyed savings of $1,096 from the failure to conduct monitoring is accepted and this amount will be included in the penalty assessed.

Dr. Baus complained that ICC did not receive "any credit" for its actions and expenditures [to prevent the discharge of pollutants], which were beyond the requirements of the permit and [for its good faith efforts to comply with the permit] (finding 34). At first blush, it is reasonable to conclude that actions and expenditures to protect the environment which are above and beyond

permit requirements may appropriately be considered in penalty computation and mitigation under the phraseology of Section 309(g) "other factors as justice may require." The Environmental Appeals Board has, however, limited the scope of the quoted phrase to circumstances where failure to allow some credit would be a "manifest injustice" under a similar penalty provision, EPCRA § 325(b)(2), 42 U.S.C. § 11045(b)(2), which incorporates the penalty provision of TSCA § 16, 15 U.S.C. § 2615.[29/]

In view thereof, and because ICC's provision for primary and secondary containment and other activities to protect the environment which were above and beyond permit requirements have been considered in determining the extent and gravity (potential for harm) of the violations, it is concluded that ICC is not entitled to any additional credit against the penalty for these expenditures and activities. The degree of ICC's culpability or otherwise stated, its good faith attempt to comply with permit requirements, has been recognized in that Complainant's culpability determination has been rejected and, with the exception of the failure to perform monitoring, the gravity-based penalty has not been enhanced for culpability. It is concluded that no further adjustments in the penalty so determined are warranted.

[29/] Catalina Yachts, Inc., EPCRA Appeal Nos. 98-2 & 98-5 (EAB, March 24, 1999), affirmed, Catalina Yachts, Inc. v. U.S. Environmental Protection Agency, CV 99-07357 GHK (VAPx), (U.S.D.C., Cent. Dist Calif, February 28, 2000).

ICC's contention that no penalty should be assessed will be briefly addressed. The purpose of penalties is, of course, to deter violations and to encourage compliance. The penalty is intended to deter not only the particular person or firm charged with an infraction, but also others similarly situated who may have a casual attitude toward compliance. Here, ICC's violations stem largely from it failure to recognize the effect of being subject to EPCRA § 313 on its monitoring and reporting obligations under the permit. That it faithfully followed the terms of the permit as it interpreted the same is demonstrated by the fact that it filed DMRs and rain gauge reports until the effective date of the permit modification.

Although ICC is culpable for overlooking the EPCRA requirements in the sense that a more careful reading of the permit would have revealed the EPCRA provisions, its interpretation of the permit was reinforced by mistaken advice received from EPA or EQB or both to the effect that after the permit modification, filing of DMRs was no longer required. This, of course, was not a basis for failing to perform any monitoring after January 1994, which was the most serious violation in that there was a potential that pollutants, including EPCRA § 313 water priority chemicals, might be in the discharges without being detected. While this potential was slight, because of the primary and secondary containment provided by ICC, it warrants some penalty. Moreover, by its own

acknowledgment, it saved approximately $1,000 by failing to perform the required analyses and this failure cannot be attributed to its good faith mistake in overlooking EPCRA requirements. ICC's contention that no penalty should be imposed is rejected and a penalty of $8,096 will be assessed.

Order

It having been determined that ICC violated the baseline general permit and Section 301 of the CWA as alleged in the complaint and as determined herein, a penalty of $8,096 is assessed against it in accordance with Section 309(g)(3) of the Act (33 U.S.C. § 1319(g)(3). Payment of the full amount of the penalty shall be made by mailing a certified or cashier's check payable to the Treasurer of the United States in the amount of $8,096 to the following address within 60 days of the date of this order:[30/]

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

Dated this 16TH day of June 2000.

[30/] Unless this decision is appealed to the Environmental Appeals Board in accordance with Rule 22.30 of the Rules of Practice (40 C.F.R. Part 22) or unless the EAB elects to review the same sua sponte as therein provided, this decision will become the final order of the EAB and of the Agency in accordance with Rule 22.27.

Original signed by undersigned

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Spencer T. Nissen
Administrative Law Judge