

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of)
)
Advanced Electronics, Inc.,) Docket No. CWA-5-98-021
)
Respondent)

INITIAL DECISION

By: Carl C. Charneski
Administrative Law Judge

Issued: August 15, 2000
Washington, D.C.

Appearances

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I. Statement of the Case

This is an enforcement proceeding arising under the Clean Water Act (the "Act"). 33 U.S.C. § 1251 *et seq.* The U.S. Environmental Protection Agency ("EPA") charges Advanced Electronics, Inc. ("Advanced"), with 107 violations of the Act for failing to comply with National Pretreatment Standards which regulate the discharge of pollutants into publicly owned treatment works ("POTW").

EPA alleges that on 74 occasions Advanced discharged to a POTW effluent containing prohibited levels of either copper, lead, or pH in violation of Section 307(d) of the Clean Water Act. 33 U.S.C. § 1317(d). EPA further alleges that on 33 occasions Advanced violated Section 307(d) of the Act by failing to monitor its effluent so as to demonstrate continued compliance with applicable pretreatment standards. For these violations, EPA

requests the assessment of a \$137,500 civil penalty. In response, Advanced denies that it violated the Clean Water Act. Advanced also argues that the penalty sought by EPA is excessive. An evidentiary hearing was held in this matter on August 18-20, 1999, in Chicago, Illinois.

For the reasons set forth below, Advanced is held to have violated the Clean Water Act in each of the 107 instances cited by EPA. A civil penalty of \$115,000 is assessed against Advanced for these violations.

II. Statutory and Regulatory Framework

Section 307(b) of the Clean Water Act states that the Administrator of EPA (“Administrator”) “shall ... publish proposed regulations establishing pretreatment standards for introduction of pollutants into treatment works ... which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works.” 33 U.S.C. § 1317(b).

Pursuant to Section 307(b), the Administrator published the “General Pretreatment Regulations for Existing and New Sources of Pollution.” These National Pretreatment Standards are codified at 40 C.F.R. Part 403. The objectives of the National Pretreatment Standards are threefold. First, they are intended “[t]o prevent the introduction of pollutants into POTWs which will interfere with the operation of a POTW, including interference with its use or disposal of municipal sludge.” Second, the pretreatment standards are intended “[t]o prevent the introduction of pollutants into POTWs which will pass through the treatment works or otherwise be incompatible with such works.” Third, these Part 403 standards are intended “[t]o improve opportunities to recycle and reclaim municipal and industrial wastewaters and sludges.” 40 C.F.R. 403.2.

In addition to the pretreatment standards of 40 C.F.R. Part 403, the Administrator has published pretreatment standards specifically for the “Metal Finishing Point Source Category.” These standards are codified at 40 C.F.R. Part 433 and apply to certain enumerated metal finishing operations. One of these metal finishing operations is “Printed Circuit Board Manufacture,” an activity engaged in by Advanced. See 40 C.F.R. 433.10(a).

Insofar as the present case is concerned, Parts 403 and 433 set daily maximum discharge levels for copper, lead, and pH. They also place monitoring and reporting requirements upon the party discharging these pollutants. Failure to comply with these pretreatment standards is a violation of Section 307(d) of the Act, and will result in the assessment of a civil penalty pursuant to Section 309(g). 33 U.S.C. §§ 1317(d) & 1319(g).

III. Findings of Fact

1. Advanced is an Illinois corporation engaged in the manufacturing of printed circuit boards. Its plant is located in the City of West Chicago, Illinois (“West Chicago”). Amended Ans. ¶¶ 13 & 14.

2. Advanced opened its West Chicago facility in 1995. Prior to that time, the company manufactured printed circuit boards in Elk Grove Village, Illinois. Tr. 335.

3. Respondent produces approximately 700 printed circuit boards per day. C.Ex. 6 at p.2; Tr. 156. In manufacturing the printed circuit boards, Advanced engages in metal finishing operations. Amended Ans. ¶ 14.

4. As a result of its metal finishing operations, Advanced discharges effluent containing the pollutants copper, lead, and pH. This effluent is discharged to the West Chicago publicly owned treatment works. The West Chicago POTW is a municipally owned facility which treats domestic sewage, and industrial and commercial wastewater. Advanced is an “Industrial User” of this POTW. Tr. 51, 54-55, 156.¹

5. The West Chicago POTW discharges effluent to the West Branch of the DuPage River. The POTW discharges this effluent pursuant to a permit issued by the Illinois Environmental Protection Agency (“IEPA”). The IEPA issued the permit to West Chicago under the authority of Section 402 of the Clean Water Act (“National pollutant discharge elimination system”). 33 U.S.C. § 1342. Amended Ans. ¶ 16.

6. The West Chicago POTW has adopted a pretreatment program which regulates discharges by industrial users to its sewage system. This pretreatment program, which includes specific “local” limits (discussed, *infra*), has been approved by EPA. C.Ex. 19. Accordingly, West Chicago is considered the “control authority” and EPA is considered the “approval authority.” Tr. 59.²

7. In order to receive EPA approval of such a pretreatment program, the POTW must meet the National Pretreatment Standards set forth in the Code of Federal Regulations. These

¹ The term “Industrial User” means “a source of Indirect Discharge.” The term “Indirect Discharge” is defined as “the introduction of pollutants into a POTW from any non-domestic source regulated under section 307(b), (c) or (d) of the Act.” See 40 C.F.R. 403.3(g) & (h).

² While the State of Illinois has been delegated the National Pollutant Discharge Elimination System program, it has not met all the requirements for the delegation of the pretreatment program. Tr. 54.

standards appear at 40 C.F.R. Part 403 and are titled, “General Pretreatment Regulations For Existing And New Sources Of Pollution.”

8. Part 403 limits the level of pH which may be discharged to a POTW. In that regard, Section 403.5(b)(2) prohibits the introduction into a POTW of “[p]ollutants which will cause corrosive structural damage to the POTW, but in no case Discharges with pH lower than 5.0, unless the works is specifically designed to accommodate such Discharges.” 40 C.F.R. 403.5(b)(2).

9. In addition to the Part 403 general pretreatment standards, Federal regulations appearing at 40 C.F.R. Part 433, titled, “Metal Finishing Point Source Category,” likewise contain pretreatment standards. These Part 433 standards are called “categorical standards.” They apply to plants, like Advanced, which engage in any one of six metal finishing operations. “Printed Circuit Board Manufacture” is one of the metal finishing operations listed. See 40 C.F.R. 433.10.

10. The Part 433 categorical standards set daily limits, as well as monthly average limits, for certain pollutants. These standards are technology based standards of performance intended to reflect the greatest pollutant reduction by the best available technology economically achievable. Tr. 57, 158; see C.Ex. 23 at p. 32465 (“Scope of this Rulemaking”).

11. 40 C.F.R. 433.17 (“Pretreatment standards for new sources (PSNS)”) provides that any “new source” which is subject to the metal finishing regulations, and which introduces pollutants into a publicly owned treatment works, must comply with the general pretreatment standards of 40 C.F.R. Part 403.³

12. Section 433.17(a) additionally provides that a “new source” must achieve specified pretreatment standards for certain listed pollutants. The metals copper and lead are among that list. In that regard, Section 433.17(a) sets the maximum daily limit for copper at 3.38 milligrams per liter (“mg/l”), with a monthly average not to exceed 2.07 mg/l. The daily maximum limit for lead is 0.69 mg/l, with a monthly average not to exceed 0.43 mg/l.

13. In addition to the pretreatment standards set forth in Parts 403 and 433, 40 C.F.R. 403.5(d) allows for the establishment of “local” discharge limits. Section 403.5(d) states: “Where specific prohibitions or limits on pollutants or pollutant parameters are developed by a POTW ..., such limits shall be deemed Pretreatment Standards for the purposes of section 307(d) of the [Clean Water] Act.”

³ Advanced is a “new source” within the meaning of Section 433.17 inasmuch as it began discharging copper and lead, two of the pollutants identified in these categorical standards, after the Part 433 regulations were proposed. Tr. 57, 157.

14. Pursuant to 40 C.F.R. 403.5(d), the West Chicago POTW established local limits for the discharge of pollutants to its sewage system. These discharge limits are set forth in the West Chicago Code. See C.Ex. 17; see also Tr. 62 (local limits evaluated yearly to determine their effectiveness).

15. Section 18-64.2 of the West Chicago Code prohibits “Interference,” “Pass through,” and “Any discharge that limits sludge disposal options.” C.Ex. 17.

16. “Interference” is a discharge that either alone, or in conjunction with another discharge, interferes with or inhibits the operation of the treatment works. Tr. 56. “Pass through” is the traveling of a pollutant into the POTW that goes untreated and is deposited into the sludge or the receiving stream.” *Id.* “Any discharge that limits sludge disposal options” refers to a discharge that inhibits the incineration or land-application methods of disposal.⁴

17. Table A of West Chicago Code Section 18-64.3 lists the “Maximum Allowable Objectionable Waste Which May Be Discharged into the Sanitary Sewer System.” It sets the limit for pH as “Not less than 6.0 nor greater than 9.0.” The 6.0 and 9.0 references are to “standard units,” otherwise referred to as “S.U.”. C.Ex. 17 at page 18-51.⁵

18. Table A of Section 18-64.3 also provides that the daily limit for copper is “2.0 mg/l” and that the daily limit for lead is “0.5 mg/l.” C.Ex. 17 at page 18-51.⁶

19. In 1994, the City of West Chicago issued Industrial Waste Discharge Permit #0218 (the “permit”) to Advanced. C.Ex. 1. This permit authorized Advanced to discharge industrial wastewater from its West Chicago circuit board manufacturing plant to the City’s POTW. The permit also required Advanced to monitor its effluent and to report the monitoring results to the POTW.

⁴ “Sludge” consists of dewatered solids from the treatment process. Tr. 59. Based upon a pretreatment audit of the West Chicago POTW, EPA has determined that this treatment works sends its sludge to a landfill for disposal. Tr. 60.

⁵ This pH limitation is also set forth in Section 18-64.2(b)(3) of the Code which prohibits the discharge into the City sewage system of “[a]ny wastewater which will cause corrosive structural damage to the POTW, but in no case wastewater having a pH less than 6.0 or greater than 9.0.” C.Ex. 17 at p. 18-48.

⁶ Section 18-64.4(b) states that “[d]ischarges ... shall not contain in excess of the permitted allocation of the pollutants based upon a *twenty-four-hour composite sample*.” C.Ex. 17 at 18-51 (*emphasis added*).

20. Permit #0218 was renewed by the City of West Chicago in 1997, without change to the effluent limitations and the monitoring and reporting requirements which are at the heart of the 107 violations involved in this case. C.Ex. 2.⁷

21. The permit provides that in discharging pollutants into the West Chicago wastewater collection system, Advanced must comply with Chapter 18 of the City of West Chicago Code. Under the heading, “Special Permit Conditions,” the permit states, “Section 18-64 of the City Code governs the maximum allowable discharge limits of pollutants to the City wastewater collection system.” C.Exs. 1 & 2.

22. Insofar as the present case is concerned, Permit #0218 limits the amount of copper, lead, and pH that Advanced may discharge to the West Chicago POTW. As can be expected by the permit’s reference to the City Code, these limits are identical to the discharge limits contained in that ordinance.

23. Table A of Permit #0218 lists the “Maximum Allowable Objectionable Waste Which May Be Discharged into the Sanitary Sewer System.” The permit sets the maximum daily limit for copper at 2.0 mg/l. The maximum daily limit for lead is 0.5 mg/l.⁸ As for pH, the permit allows for a discharge that is “Less than 6.0 not greater than 9.0.” C.Ex. 1 at p.2; C.Ex. 2 at p.2.

24. Consistent with the West Chicago Code, the permit’s reference to the pH limitation is read with the term “not” being inserted at the beginning of this standard. Accordingly, the permit is interpreted as setting the pH limitation as “*Not* less than 6.0 not greater than 9.0.” (*Emphasis added.*)⁹

25. Permit #0218 also contains monitoring and reporting requirements. The permit states, “Samples shall be representative of the plant[']s normal flow and shall be tested for all of the parameters listed on the Self-Monitoring report form.” C.Ex. 2 at p.3. In addition, the

⁷ The time frame of the 107 violations at issue here covers both discharge permits. As noted, however, in all key respects the two permits are identical.

⁸ Insofar as the copper and lead effluent violations are concerned, only the daily limits are involved here. EPA does not allege that respondent exceeded the prescribed monthly limits for these metals.

⁹ Compare with Finding No. 17 where the West Chicago Code sets the pH limit as “*Not* less than 6.0 nor greater than 9.0.” (*Emphasis added.*) EPA states that the pH limit in Permit #0218 reflects a typographical error. EPA submits that as in the case of the City Code, the pH limit in the permit should be read with the word “Not” preceding the word “less.” As discussed *infra*, EPA’s reading of the permit is accepted.

permit requires that pH is to be monitored twice a year, lead is to be monitored once per month, and copper is to be monitored five times per week. C.Ex. 1 at pp. 2-3; C.Ex. 2 at p.3.¹⁰

26. Pursuant to 40 C.F.R. 403.5(d), the pollutant discharge limits set forth in the West Chicago Code and contained in Permit #0218 constitute pretreatment standards for purposes of Section 307(d) of the Clean Water Act. 33 U.S.C. § 1317(d). Thus, any failure to comply with these provisions is a violation of the Act.

27. The daily copper and lead limits contained in the West Chicago Code and in Permit #0218 are more strict than the daily copper and lead limits contained in 40 C.F.R. 433.17(a), the categorical standards. Also, the pH limit contained in the permit is more strict than the pH limit contained in 40 C.F.R. 403.5(b)(2), the general pretreatment standard. See Findings 8 & 12.

28. Count I of EPA's amended complaint charges that on 74 occasions Advanced discharged to the West Chicago POTW effluent containing copper, lead, and pH in excess of the daily limits established by the POTW in Permit #0218. C.Ex. 51. Thus, EPA alleges 74 separate violations of Section 307(d) of the Clean Water Act. 33 U.S.C. § 1317(d).

29. Advanced admits discharging effluent to the West Chicago POTW "during the days listed and possessing the characteristics specified in Exhibits A and B" of the Amended Complaint. Amended Ans. ¶ 20.

30. Thirty-four of the 74 violations alleged in Count I involve Permit #0218's daily copper limitation of 2.0 mg/l. The charges of violation are based upon copper readings reported by Advanced to the West Chicago POTW. See C.Ex. 6-G. The dates and reported values relative to these readings are set forth in Exhibit A of the Amended Complaint. They are as follows:

<u>Date</u>	<u>Reported Value (mg/l)</u>
2/19/96	2.16
4/4/96	2.81
4/23/96	2.29
4/29/96	2.29
10/14/96	2.29

¹⁰ Pursuant to 40 C.F.R. 403.12(e)(1), POTWs can require industrial users to submit monitoring reports more frequently than Federal regulations require. Here, West Chicago required Advanced to submit copper and lead monitoring reports more frequently under the authority of Section 18-65.4(b) of the City Code. C.Ex. 17.

11/19/96	2.02
11/25/96	2.33
11/26/96	2.02
1/6/97	2.07
2/11/97	2.10
2/12/97	2.06
2/26/97	2.08
3/11/97	2.02
3/27/97	2.14
3/28/97	2.21
3/31/97	2.03
4/3/97	2.72
4/18/97	2.06
4/22/97	2.02
5/6/97	2.16
5/9/97	2.19
5/12/97	2.05
5/14/97	2.09
6/11/97	2.06
6/16/97	2.05
7/2/97	2.02
7/31/97	2.02
8/7/97	2.03
10/1/97	2.03
10/7/97	3.75
10/8/97	7.29
2/27/98	2.66
9/25/98	2.59
12/16/98	2.81

31. Accordingly, as established by the preceding copper readings, on 34 occasions Advanced exceeded the applicable daily copper limit of 2.0 mg/l in violation of Section 307(d) of the Clean Water Act. 33 U.S.C. § 1317(d).

32. Two of the 74 violations alleged in Count I involve excessive levels of lead. Permit #0218 set the maximum daily limit for lead at 0.5 mg/l. Advanced reported to the West Chicago POTW that on October 20, 1995, the level of lead was 0.62 mg/l. Advanced also reported that on October 23, 1995, the level of lead was 0.51 mg/l. See C.Ex. 6-G.

33. As established by Advanced's own reports, it exceeded Permit #0218's maximum daily limit for lead on two occasions in violation of Section 307(d) of the Clean Water Act. 33 U.S.C. § 1317(d).

34. Thirty-eight of the 74 violations alleged in Count I involve levels of pH which were either less than the 6.0 S.U., or greater than the 9.0 S.U., allowed by the permit.¹¹ These pH levels were reported by Advanced to the West Chicago POTW and appear in Exhibit B of the Amended Complaint. See C.Ex. 6-G. They are as follows:

<u>Date</u>	<u>Reported Value</u>
6/23/95	9.15
6/26/95	9.06
10/26/95	5.97
2/14/96	9.20
2/15/96	9.12
3/20/96	9.21
3/21/96	9.14
4/1/96	9.31
4/2/96	9.02
4/15/96	9.05
4/29/96	9.39
5/13/96	9.10
7/15/96	9.21
7/24/96	9.13
8/14/96	9.42
8/22/96	9.11
8/28/96	9.07
9/11/96	9.08
9/18/96	9.38
9/26/96	9.35
10/2/96	9.23
11/1/96	9.10
11/14/96	9.05
11/19/96	9.14
12/12/96	9.07
1/15/97	9.25
2/18/97	9.02
2/24/97	9.20
2/26/97	9.46
3/5/97	9.08
3/10/97	9.12
3/26/97	9.06

¹¹ Only one of the pH violations involved a pH level less than the 6.0 standard units; all other pH violations involved levels greater than 9.0 standard units.

4/11/97	9.56
4/17/97	9.10
4/21/97	9.73
4/23/97	9.20
2/20/98	9.04
2/27/98	10.64

35. Accordingly, as alleged by EPA, on 38 occasions Advanced violated Section 307(d) of the Clean Water Act by exceeding the pH limits contained in its discharge permit. 33 U.S.C. § 1317(d).

36. Count II of EPA’s amended complaint charges that on 33 occasions Advanced failed to demonstrate continued compliance with the applicable pretreatment standards in violation of the monitoring and reporting requirements of 40 C.F.R. 403.12(e) & (g).

37. 40 C.F.R. 403.12(e) is titled, “Periodic reports on continued compliance.” Section 403.12(e)(1) in part provides: “Any Industrial User subject to a categorical Pretreatment Standard ... shall submit to the Control Authority during the months of June and December, *unless required more frequently* in the Pretreatment Standard or by the Control Authority or the Approval Authority, a report indicating the nature and concentration of pollutants in the effluent which are limited by such categorical Pretreatment Standards....” (*Emphasis added.*)

38. 40 C.F.R. 403.12(g) is titled, “Monitoring and analysis to demonstrate continued compliance.” Section 403.12(g)(1) states, “The results required in ... (e) of this section shall contain the results of sampling and analysis of the Discharge, including the flow and the nature and concentration, or production and mass where requested by the Control Authority, of pollutants contained therein which are limited by the applicable Pretreatment Standards....”

39. Consistent with the provisions of 40 C.F.R. 403.12(e)(1), the West Chicago POTW included additional monitoring and reporting requirements in Permit #0218. In the “Special Permit Conditions” section, under the heading “Additional Monitoring [R]equirements,” the permit reads, “This industry is required to test each of the categorical parameters monthly and submit the results on the semi[-]annual report form. These monthly reports are due by the fifteenth of the following month. Copper shall be monitored five times per week and the results will be FAXed ... to the City weekly on a form to be devised by Advanced Electronics ... and approved by the City. The copper samples shall be composite samples representative of the normal discharge from the facility.” C.Ex. 1 at p.2; C.Ex. 2 at p.4.¹²

¹² These additional monitoring and reporting requirements are consistent with the requirements contained in Section 18-65.4(b) of the City Code. See C.Ex. 17.

40. Thus, as required by its permit, Advanced must monitor its effluent daily for copper and monthly for lead.¹³

41. In a letter dated December 16, 1998, EPA requested that Advanced provide monthly monitoring reports for categorical parameters for July, September, October, November, and December of 1995; February, March, April, May, June, August, September, October, and November of 1996; and February, March, April, and May of 1997. EPA also requested weekly monitoring data for copper from August 25 through September 17, 1995. R.Ex. I.

42. In response to EPA's December 16, 1998, information request, Advanced submitted a letter to EPA, dated December 28, 1998, which read in part:

(A) Monthly monitoring reports for categorical parameters for the requested months were not completed due to misunderstanding of reporting requirements. Monthly sampling and reporting of categorical parameters has been started since August of 1997.

(B) Weekly monitoring for copper from August 25, 1995 to September 17, 1995 were not submitted due to malfunction of an equipment (atomic absorption). Village of West Chicago notified about the problem.

R.Ex. I. See C.Ex. 49; *see also* Tr. 347 (plant official recalls a 2-3 week period in which sampling was not done due to equipment malfunction).

43. Accordingly, Advanced failed to submit its monthly reports for lead for July, August, September, October, November, and December of 1995; February, March, April, May, June, August, September, October, and November of 1996; and February, March, April, and May of 1997. Therefore, Advanced committed 18 violations of Section 307(d) of the Clean Water Act. 33 U.S.C. § 1317(d).¹⁴

44. Advanced also failed to monitor its effluent for copper for a 15-day period between August 25, 1995, and September 17, 1995. Accordingly, Advanced committed 15 violations of Section 307(d) of the Clean Water Act. 33 U.S.C. § 1317(d).

¹³ Because Advanced monitored its pH levels more often than required by its discharge permit, pH monitoring is not involved in Count II.

¹⁴ EPA has consistently alleged only 18 monitoring violations, despite the fact that it lists 19 months in which Advanced failed to submit the required monitoring reports. See Amended Complaint; *see also* EPA Br. at 39.

explained that he read the permit in this manner based upon his experience at other facilities where the monthly average was the lower figure appearing in the permit, and the daily average was the higher of the two figures. Tr. 351-352.

If Sheladia’s reading of the permit were correct, then Advanced would have exceeded the daily maximum limit for copper on only 2 occasions, rather than on the 34 occasions found, as the daily limit for copper would have been raised to 3.38 mg/l. Also, pursuant to this reading, the daily limit for lead would have been raised to 0.69 mg/l. In that case, Advanced would not have exceeded the permit’s maximum daily level for lead.

As support for the reading of the discharge permit offered by Sheladia, Advanced cites to the testimony of its expert witness, James Huff.¹⁷ Respondent argues that Huff found the copper, lead, and pH limits of the permit to be confusing, as well as the permit’s reporting requirements. Finally, Advanced asserts that clarifications made to the daily and monthly copper and lead limits in the most recently issued discharge permit, dated August of 1999, constitutes additional proof that the earlier issued permits were unclear. Adv. Br. at 19-20; see R.Supp.Ex. 2.

As discussed below, however, Sheladia’s reading of the permit is not correct. Further, the opinion offered by Huff that Advanced’s discharge permit’s effluent limitations and reporting requirements are unclear is rejected. Respondent’s argument that the subsequently issued August, 1999, discharge permit shows that the earlier issued permits involved in this case are unclear, likewise is rejected.

Copper	*2.0 (3.38)	mg/l
• •	• •	•
Lead, total	*0.5 (0.69)	mg/l
• •	• •	•

* These parameters are regulated under 40 CFR as Categorical concentrations for Metal Finishers. *The more stringent limit will apply in all cases.*

C.Exs. 1 & 2 (*emphasis added*).

¹⁷ Mr. Huff was accepted as an expert in the area of wastewater treatment, which includes wastewater design and sampling, chemical and environmental engineering, as well as laboratory analysis of samples and related accuracy considerations. Huff was not accepted as an expert in the areas of statutory penalty factors and the involved regulations. Tr. 401, 455.

Analysis of respondent's argument that the discharge permit is confusing begins with a consideration of the copper and lead limits. For both copper and lead, Table A of the permit contains one numerical figure outside parentheses, and one numerical figure inside. Also, Table A states that both metals are regulated under "40 CFR as Categorical concentrations for Metal Finishers" and that "[t]he more stringent limit will apply in all cases." See n.16, *supra*.

A review of the categorical standards contained in 40 C.F.R. 433.17(a) shows that the daily allowable discharges for copper and lead are the same as those appearing in parentheses in Table A of the permit. Absent more stringent limits these categorical standards would apply to Advanced's circuit board manufacturing operation. However, by the specific terms of the permit, more stringent limits did apply. A fair reading of the permit leads to the conclusion that the applicable limit for copper is 2.0 mg/l and that the applicable limit for lead is 0.5 mg/l. These figures are set forth in Table A of the permit. Simply then, the 2.0 mg/l and 0.5 mg/l limits apply to Advanced's West Chicago facility because these figures represent more stringent limitations on its metal finishing operations.

Not only does Table A of Permit #0218 identify 2.0 mg/l as the applicable limit for copper and 0.5 mg/l as the applicable limit for lead, a fair reading of this permit, along with the West Chicago Code and the Federal categorical standards, further identifies these parameters as being daily, and not monthly limits. For example, the discharge permit specifically states that its provisions are adopted from the West Chicago Code. See C.Exs. 1 & 2. Page one of the permit provides that Advanced is authorized to discharge industrial wastewater "in accordance with Chapter 18 of the City of West Chicago [Code]." In fact, immediately preceding the discharge limits of Table A, the permit reads: "Section 18-64 of the City Code governs the maximum allowable discharge limits of pollutants to the City wastewater collection system." These daily limits for copper and lead are clearly spelled out in Section 18-64.3, Table A, of the Code. This section lists the daily limit for copper at 2.0 mg/l and the daily limit for lead at 0.5 mg/l, the same limits appearing in Table A of Permit #0218. See C.Ex. 17 at p. 18-51.

As for the categorical standards of 40 C.F.R. Part 433, they are specifically referenced in the discharge permit. A reading of 40 C.F.R. 433.17(a) shows that the daily categorical standards for copper and lead are identical to the figures in parentheses for copper and lead appearing in Table A of the permit. It should have been apparent to Advanced, upon a reading of Section 433.17(a), that what it thought were applicable daily limits for copper and lead were actually categorical standards, standards not applicable by the terms of the permit because they were less stringent.¹⁸

¹⁸ Surprisingly, despite the fact that Sheladia held the title Vice-President of Operations and was responsible for wastewater treatment matters at the West Chicago plant, he was unsure as to the meaning of the term "C.F.R." as contained in the permit. Tr. 354. In

In addition, it is noteworthy that Sheladia reported to the City of West Chicago those instances when the daily copper readings at the West Chicago facility exceeded 2.0 mg/l. Tr. 353; see C.Ex. 6-E (Notices of Noncompliance sent by Advanced to the West Chicago POTW). It is difficult to reconcile Sheladia's action in this regard with his testimony that he believed that the figure in parentheses, which was greater than 2.0 mg/l, was actually the applicable daily limit.

Moreover, despite Advanced's assertion to the contrary, the testimony of its expert witness actually supports EPA's reading of the permit. In that regard, Huff stated, "[i]t's pretty common in permits to put the monthly average in parentheses next to the daily average." Tr. 487. According to Huff's testimony, one would expect the 2.0 mg/l and 0.5 mg/l figures appearing without parentheses to be the applicable daily limits. This is exactly what EPA maintains is the case. Huff's statement that it is common to place the monthly average in parentheses undercuts the contrary testimony of Sheladia.

Huff also provided further testimonial support for EPA's reading of Permit #0218. He stated:

Well, it took a while. It reads 2.0 and then, in parentheses, it says 3.38. My first reading was that the 3.38 is probably the daily maximum, and the 2.0 is the monthly number. However, upon close reading and reading the footnote, the footnote says: "These parameters are regulated under 40 C.F.R. as categorical concentrations for metal finishers. The more stringent limit will apply in all cases." So I believe the intent of this permit was that both would – they would be basically maximum limits. But it's confusing.

Tr. 434.

Thus, despite the fact that Huff opined that the permit was "confusing," the thrust of his testimony suggests that upon a closer reading, he understood that the lower, *i.e.*, the more stringent copper limit applied. Huff's testimony certainly doesn't support Advanced's position that the 2.0 mg/l figure was the monthly limit. This same reasoning holds true for the permit's lead provisions.

Accordingly, for the reasons mentioned above, respondent's challenge to the daily copper and lead discharge limits of 2.0 mg/l and 0.5 mg/l, respectively, is found to be without merit.

fact, Sheladia testified, "I read the permit, but not thoroughly." Tr. 356.

Respondent's challenge to the permit's pH provision likewise must fail. In that regard, Advanced argues that "[t]he permit is contradictory with respect to the City of West Chicago ordinance because the ordinance has a prohibition for pH discharges less than 6.0 or greater than 9.0, but the permit states that an industrial user must discharge less than 6.0 mg/l, not greater than 9.0 mg/l." Adv. Br. at 19, citing Tr. 486.¹⁹

Admittedly, upon a first reading, the language of Table A of the permit seems to be contradictory as it relates to the lower pH limit. Nonetheless, this permit provision cannot be read in a vacuum. As discussed with respect to the discharge permit's copper and lead provisions, the permit unambiguously states that the applicable provisions of the City of West Chicago Code govern. With respect to pH, Section 18.64-2(b)(3) of the Code prohibits discharges having a pH level of *less than 6.0 standard units*. See C.Ex. 17 at p. 18-48. Thus, given the permit's specific reference to the City Code, and given the City Code's unambiguous lower pH limit of 6.0 standard units, it is held that Permit #0218 required that pH discharges be either less than 6.0 S.U., or not more than 9.0 S.U.

Further support for this interpretation of the permit's lower pH limit comes from the general pretreatment standards of 40 C.F.R. Part 403. Section 403.5(b)(2) prohibits discharges with a pH level lower than 5.0 S.U. Thus, if Advanced were confused by the lower end of the permit's pH limits, it need only have looked to the general pretreatment standards for guidance. These standards inform the regulated community that there exists a lower pH limit below which pH levels may not drop.

Finally, if respondent had reviewed its permit more closely, it would have found clarifying language in the "Standard Permit Conditions" section. See n.18, *supra*. (Sheladia did not read the permit thoroughly.) There, under the heading "12. General Prohibitive Standards," the permit states:

The permittee shall comply with all the general prohibitive discharge standards in Chapter 18 of the City Code of Ordinances. Namely, the *industrial user shall not discharge wastewater to the sewer system ... f) having a pH lower than 6.0 or higher than 9.0...*

C.Exs. 1 & 2 (*emphasis added*).

¹⁹ It should be noted that only one of the pH violations involves the lower limit of the pH level that Advanced claims is confusing, *i.e.*, the limit of 6.0 standard units. All of the other pH violations involve discharge levels which exceeded the upper limit of 9.0 standard units.

In any event, the record does not show that respondent was confused as to the pH provisions in its discharge permit. Indeed, neither of respondent's two fact witnesses who were involved in the plant's day-to-day operation, the company's President and the former Vice-President for Operations, testified that they believed that the permit's pH provisions were confusing. In fact, given that Advanced's earlier Village of Bensenville discharge permit had allowed for pH levels between "5-9 units," respondent cannot show in this case that it didn't understand a similar pH standard subsequently imposed by the City of West Chicago. See C.Ex. 42 (Notice of Violation #2). Respondent's challenge in this case to the lower portion of the pH limit is based exclusively on the testimony of Huff, an expert retained by Advanced after EPA initiated the present enforcement action. This is simply not enough to establish that Advanced wasn't fairly apprised as to pH requirements of its discharge permit.

Finally, it must be remembered that it is the respondent who applied for the permit from the City of West Chicago. When the permit was issued, Advanced neither appealed its provisions, nor did it seek any kind of modification of the permit's terms. Tr. 342, 356-57. In fact, the permit which was initially issued on September 23, 1994 (C.Ex. 1), was renewed on February 1, 1997 (C.Ex. 2), without any changes to the copper, lead, and pH limits. It is somewhat late in the game for respondent to now argue that it didn't understand the terms of the copper, lead, and pH provisions of its own discharge permit.

2. Respondent's Challenge to the West Chicago Ordinance is Rejected

Advanced argues that the "City of West Chicago permit limits on copper, lead and pH have no scientifically sound basis." Adv. Br. at 18. Citing the testimony of its expert witness, James Huff, respondent recounts the wisdom of 40 C.F.R. 403.5(b)(2), which sets no upper limit on the pH level, and the categorical standards of 40 C.F.R. 433.17, with daily limits for copper and lead which are higher than those of Permit #0218. See Adv. Br. at 18-19. Advanced suggests that these Federal regulations have a sound scientific basis and that the pretreatment standards of the West Chicago Code, and thus Permit #0218, do not.

This challenge to the provisions of Permit #0218, and hence to the West Chicago Code, is rejected. First, Advanced was informed at the hearing that this court was not interested in how the City of West Chicago arrived at their numbers for copper, lead, and pH, and that Huff would not be allowed to collaterally attack the provisions of the West Chicago Code. Tr. 414-416, 419-421. Second, to the extent that it seeks to challenge the validity of the West Chicago ordinance, Advanced is simply proceeding in the wrong forum. Respondent has not cited to any authority that would allow this tribunal to hold that the West Chicago Code provisions at issue here are not valid. Indeed, it earlier has been held in this case that these West Chicago Code provisions constitute pretreatment standards pursuant to the Clean Water Act.

3. Respondent's Statistical Challenge is Rejected

Advanced raises a statistical challenge to some of the 74 violations listed in Count I. Those are the violations in which the company exceeded the daily maximum limits for copper, lead, and pH.²⁰ Based upon Huff's statistical analysis, respondent appears to suggest that it actually exceeded the daily maximum limit for these two metals only 18 times. Adv. Br. at 16.²¹

In response, EPA states that respondent's statistical analysis argument is "suspect," claiming that Huff relied upon the wrong sampling protocol to reach his conclusions. EPA R.Br. at 17. This is an interesting counter argument given the fact that EPA did not even cross-examine Huff on any aspect of his testimony, let alone upon his sampling protocol. Nor did EPA call its own witness in rebuttal to explain the alleged flaws in Huff's statistical methodology. Instead, complainant challenges Huff's testimony for the first time in its post-hearing brief.

Nonetheless, despite this shortcoming, any statistical challenge that respondent may be raising to the liability issue must fail. In that regard, the pretreatment standards applicable in this case to Advanced's operation are clear on their face. For example, the daily amount of copper contained in the effluent discharged to the West Chicago POTW cannot exceed 2.0 mg/l; the daily amount of lead cannot exceed 0.5 mg/l; and the pH level cannot be less than 6.0, nor more 9.0. standard units. These pretreatment standards set a specific target for each pollutant that must be met by Advanced. There is no indication in this record that the City of West Chicago, either in the City Code or in Permit #0218, intended that Advanced could achieve compliance with something less than actual sample results which were at, or below, the prescribed levels.²²

²⁰ While respondent's statistical analysis argument appears to be directed primarily to the civil penalty issue (*i.e.*, the extent to which the copper, lead, and pH levels were exceeded), it also may be fairly read as addressing the underlying liability issue.

²¹ Relying upon USEPA publication SW 846 to determine the standard of deviation, and employing a 95% confidence level, Huff determined that a copper reading of 2.0 mg/l would range from 1.78 mg/l to 2.22 mg/l. Also, the range for a lead reading of 0.5 mg/l would be between 0.44 mg/l and 0.56 mg/l, and a reading with a pH value of 9.0 S.U. would range from 8.76 S.U. to 9.24 S.U. See Tr. 433, 457-63.

²² While it is the provisions of Permit #0218, and hence the City ordinance, which are being challenged in this case, it is helpful to look at the manner in which EPA took into account sampling variability in adopting the categorical standards of 40 C.F.R. Part 433. In promulgating Part 433 as a Final Rule (July 15, 1983), the Agency stated that the daily and monthly average maximums were developed from the assessment of long term concentration averages multiplied by variability factors. It explained, "[t]he variability factors were derived by estimating 99th percentiles based on a lognormal distribution, and then dividing those

B. Civil Penalty Assessment

Section 309(g)(2)(B) of the Clean Water Act authorizes the assessment of a civil penalty against Advanced for the 107 violations found in this case. 33 U.S.C. § 1319(g)(2)(B).²³ As with liability, EPA bears the burden of proof on the penalty issue. *New Waterbury, Ltd.*, 5 EAD 529 (1994). The penalty sought by complainant in this matter is \$137,500. For the reasons explained below, a lesser, but still substantial, civil penalty of \$115,000 is assessed against respondent.

The civil penalty assessment process is set forth in Section 309(g)(3) of the Act. Describing the penalty factors that are to be taken into account, Section 309(g)(3) in part provides:

In determining the amount of any penalty assessed under this subsection, the Administrator ... 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.

33 U.S.C. § 1319(g)(3). These penalty criteria are next examined in light of the evidence presented in this case.

1. Nature, Circumstances, Extent, and Gravity

The “nature,” “circumstances,” “extent,” and “gravity” penalty criteria go to the seriousness of the violations. Included within this consideration are the negligence of the

numbers by the average. These Part 433 metal finishing standards are based on the variability expected for one-day and one-month periods.” C.Ex. 23 at p. 32469. See C.Ex. 24 at VII-260 (“Development Document for Effluent Limitations Guidelines, New Source Performance Standards for the Metal Finishing Point Source Category,” June, 1983) (discussing statistical approach in taking daily variability into consideration “to account for fluctuations in effluent levels expected in well operated treatment systems”). Thus, the fact that there is variability in sampling does not preclude the setting of specific discharge limits that must be met.

²³ Section 309(g)(2)(B) provides that the Administrator may assess a Class II civil penalty not to exceed \$125,000 for a violation of Section 307 of the Act. Pursuant to the Debt Collection Improvement Act, 28 U.S.C. § 2461, this penalty amount has been increased to \$137,500. See 40 C.F.R. Part 19 (“Adjustment of Civil Monetary Penalties for Inflation”).

respondent and the harm, or the potential for harm, to the environment and to human health. The evidence in this case supports a finding that the violations are serious and this, in turn, supports the assessment of a large penalty.

First, EPA has proven that a substantial number of violations took place over a considerable period of time. In all, EPA established that Advanced violated the Clean Water Act 107 times from June, 1995, to December, 1998. Of this number, 74 violations resulted from respondent's failure to meet pretreatment standards for copper, lead, and pH, and 33 violations resulted from its failure to comply with applicable monitoring and reporting requirements. The breadth of these violations, in terms of their numbers and the rather considerable period over which they occurred, shows widespread noncompliance with the Clean Water Act. This is a significant factor in determining the penalty in this case.

Second, 34 of the effluent violations involved excessive levels of copper, with the remaining 2 effluent violations involving excessive levels of lead. Both copper and lead are toxic metals. In promulgating 40 C.F.R. Parts 413 and 433 ("Electroplating and Metal Finishing Point Source Categories; Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards"), EPA stated that toxic metals such as copper and lead are "the most important pollutants of concern in metal finishing wastewaters." C.Ex. 23 (48 *Fed. Reg.* at 32464). The Agency further stated that "[t]hese and other chemical constituents degrade water quality, endanger aquatic life and human health, and in addition corrode equipment, generate hazardous gas, and cause treatment plant malfunctions and problems in disposing of sludges containing toxic metals." *Id.*

Consistent with the Agency's rulemaking concerns, Carol Staniec, EPA Region 5's Pretreatment Program Enforcement Manager, testified that a heavy concentration of metals in the effluent discharged to West Chicago would limit the POTW's ability to dispose of its sludge through land application. Tr. 60. EPA witness James Filippini, Chief of the Water Enforcement and Compliance Branch for Region 5, also testified that both copper and lead are toxic pollutants, and that copper presents a special hazard to the aquatic environment. Tr. 133, 223.²⁴ Also, Filippini added that contrary to an expressed intent of the West Chicago ordinance, an elevated presence of metals in the wastewater would limit the ability of the City to dispose of its sludge. Tr. 223; see Tr. 60.

In sum, EPA has shown the potential for environmental harm that existed as a result of the 74 effluent violations. Yet, Advanced is correct in criticizing EPA's case for a lack of

²⁴ In further arguing that copper is particularly toxic to the aquatic environment, EPA also cites to Complainant's Exhibit 21 ("Ambient Water Quality Criteria for Copper - 1984"). While Exhibit 21 generally appears to support EPA's assertion regarding the hazard posed by copper, given the technical nature of this document, and given the fact that no EPA witness sought to explain its scientific data, the extent to which it does so is unclear.

specificity as to the environmental harm that actually occurred. For example, EPA alleges that Advanced's excessive discharge of copper resulted in West Chicago's violating its National Pollutant Discharge Elimination System permit. EPA, however, failed to introduce evidence sufficient to prove this allegation. In that regard, respondent points out that when EPA filed, on September 15, 1998, a "Findings of Violations and Order for Compliance" against West Chicago, Advanced was not one of the companies cited by EPA as contributing to the POTW's exceeding its NPDES copper limit. See R.Ex. P. at ¶ 26.

Also, as respondent points out in its brief, EPA failed to call any witnesses from the affected West Chicago POTW to show the environmental damage that these effluent violations brought upon the municipal treatment works or upon the receiving waters of the POTW. Finally, EPA failed to explain the significance of some of its exhibits that may relate to the environmental damage and human health issues. For example, Complainant's Exhibits 37 and 38 consist of Illinois Water Quality Reports for the years 1994-95 and 1998, respectively. Despite seeking the admission of these reports into evidence by way of stipulation, no EPA witness discussed their merits, nor did the Agency comment upon them in its post-hearing brief. These documents were simply placed in the record and forgotten.

Along the same lines, EPA failed to show just how significant the more minimal copper and lead violations were with respect to environmental damage. In that regard, this court agrees with EPA's position that every copper, lead, and pH violation, no matter how small, warrants a civil penalty. However, it is EPA's responsibility to explain the seriousness in terms of environmental harm, or the potential for such, as well as health related risks, that are presented by all the violations. For example, in this case, 6 of the copper effluent violations were only .02 above the prescribed level. Also, 11 other copper violations were .10 or less above the limit. As for the two lead violations, one was only .01 above the allowable lead limit. There was no clear explanation by EPA as to the specific hazards presented by these violations.

EPA also failed to explain the significance of the pH violations. In that regard, the Agency showed that respondent exceeded its allowable pH limits, but it did not explain the adverse effect of respondent's exceeding the permit limits by a "standard unit," or by a portion of a standard unit. For example, on June 23, 1995, Advanced exceeded its pH upper limit by .15 standard units, and on February 27, 1998, it exceeded its upper limit by 1.64 standard units. While EPA showed that respondent violated the terms of its discharge permit, it didn't quite explain the practical significance of a violation of .15 standard units as compared to a violation of 1.64 standard units.

Certainly, the fact that each of these violations inhibited the West Chicago POTW from achieving its goal of preventing interference, pass-through, and the preservation of sludge disposal options was taken into account in assessing the penalty in this case. The fact that EPA did not receive the full penalty requested, however, rests in large measure upon its failure of proof relative to the seriousness of all the violations.

As for the monitoring violations, a review of their nature, circumstances, extent, and gravity likewise shows them to be serious.²⁵ Because copper and lead are toxic metals, it is understandable why the City of West Chicago would want each industrial user of its POTW to monitor its effluent for these metals and to submit periodic reports of what the industrial user finds. In that regard, Staniec explained:

Reporting is important to the control authority [here, West Chicago] because he needs to know what's coming into his treatment works so he can take appropriate actions to prevent the discharge of the pollutants into the receiving stream, or pollutants that would interfere with the treatment works or its sludge disposal options.

Tr. 67. Staniec added that the reporting of the discharge of toxic metals is important to regulators who rely upon this monitoring data to develop rules and regulations to protect the receiving streams. *Id.*

EPA witness Filippini echoed the concerns of Staniec regarding the importance of monitoring. He testified that its “especially important to the POTW ... to know what's coming into its plant so they can react, if necessary, if there are, for instance, slug loads or a discharge that may cause interference or pass-through or interfere with sludge disposal options that the POTW may have.” Tr. 189-190. Filippini likewise acknowledged the importance of reporting to the overall regulatory scheme. *Id.*

Moreover, it must be remembered that the City of West Chicago has its own National Pollutant Discharge Elimination System Permit with which it must comply. Accordingly, it has a substantial need to know the level of toxic pollutants being introduced into its sewage system by permitted industrial users such as Advanced. As the EPA explains, “[a] POTW's compliance with its own NPDES permit is at the mercy of the industrial users up the pipe.” EPA Br. at 52. As a result, knowledge as to exactly what is “up the pipe” is critical to every POTW.

Finally, the seriousness of the effluent and reporting violations is further shown by the fact that in seeking to protect its POTW from interference, pass-through, and limitation of sludge disposal options, West Chicago imposed upon its industrial users standards stricter than those contained in 40 C.F.R. Parts 403 and 433. Perhaps the fact that the City required Advanced to monitor for copper on a daily basis and to report its results on a weekly basis best illustrates the importance that the POTW places upon compliance with its discharge permits.

²⁵ Of the 33 monitoring violations, 18 were for failure to perform monthly monitoring for lead, and 15 were for failure to perform daily monitoring for copper.

2. Ability to Pay

There is no evidence in this case that Advanced would be unable to continue in business if it were assessed a civil penalty of \$115,000. The limited evidence on this point suggests the contrary. As EPA points out, a Dun & Bradstreet report, dated December 31, 1998, states that the company is in a strong financial condition, with annual sales in excess of \$8,000,000 and a net worth of \$1,869,147. C.Ex. 20. Respondent does not dispute these figures; nor does it otherwise argue that they do not indicate that the company has the “ability to pay” the penalty assessed in this case.

3. History of Violations

Advanced’s history of violating pretreatment standards for copper, lead, and pH is troubling. In that regard, prior to operating its plant in the City of West Chicago, Advanced manufactured circuit boards in Elk Grove Village, Illinois. Tr. 335. While operating in Elk Grove Village, Advanced discharged its effluent to the Village of Bensenville POTW. Daniel Rosenwinkel, the wastewater facility supervisor for the Bensenville POTW, testified that Advanced paid fines for 56 violations for discharging excessive levels of copper, lead, and pH to the Bensenville POTW. Tr. 97, 103-108, 122-127; C.Exs. 42, 43 & 46.

This history of similar violations is quite damaging to respondent’s argument for the assessment of a low penalty. If anything, Advanced’s “history” with the Village of Bensenville should have put the respondent on notice that its metal finishing operation generates pollutants that are closely regulated by publicly owned treatment works.

4. Degree of Culpability

The violations committed by Advanced were the result of a high degree of negligence. This is another significant factor in the assessment of the penalty in this case. First, as evident from the discussion of the “history” penalty criterion, the fact that the effluent discharged from its West Chicago metal finishing operation was subject to strict pretreatment standards is nothing new to respondent. When Advanced produced circuit boards in Elk Grove Village it had to comply with pretreatment standards established by the Village of Bensenville POTW. In that regard, Complainant’s Exhibit 40 contains a 1992 letter from the Bensenville POTW informing Advanced of the filing deadline for the “reissuance” of its Wastewater Discharge Permit. Advanced renewed this permit and in so doing informed the POTW that it discharged the “Priority Pollutants” copper and lead. *Id.* Prem Chaudari, respondent’s President, signed this renewal application.

Second, during the time that it discharged its effluent to the Bensenville POTW, the POTW charged Advanced with 104 violations of its discharge permit. Advanced admitted to 56 of the violations. Tr. 103-108, 122-127. These 56 violations establish a significant history of noncompliance with pretreatment standards. It is also significant that 101 of the 104

violations charged involved excessive levels of either copper, lead, or pH, with the 3 remaining violations involving various reporting requirements. See C.Ex. 42. This fact is telling because it put Advanced on notice, well before it began discharging to the West Chicago POTW, that the copper, lead, and pH levels of its effluent were a concern to the operation of publicly owned treatment works.

Yet, after respondent left the Village of Bensenville POTW for the City of West Chicago POTW, it continued to have trouble complying with the prescribed copper, lead, and pH limitations, as well as with applicable reporting requirements. In fact, the record shows that despite its trouble with the Bensenville POTW, no one within respondent's management carefully reviewed the terms of its West Chicago discharge permit in order to prevent a repeat of its copper, lead, and pH discharge problems, as well as its failure to meet its reporting obligations.

In its defense, Advanced states that it worked closely with the West Chicago POTW to ensure compliance. Essentially, respondent asserts that it believed that it was in compliance with the terms of its discharge permit because West Chicago gave it no reason to believe otherwise. In that regard, as evidence of its good standing with the municipality, Advanced states that it was fined a total of only \$100 by the POTW for failing to comply with its permit.

Advanced's reliance upon its relationship with the West Chicago POTW is misplaced. This case is not about the enforcement action, or the lack of such action, by the POTW. Rather, this case is about the 107-count complaint brought against Advanced by EPA. There is no dispute that the Agency has the statutory authority to bring this action. Accordingly, the focus of this case is upon whether EPA successfully carried its burden of proof and established the violations alleged in the amended complaint. The fact that West Chicago took no enforcement action against respondent for the various violations that EPA has established has no affect upon the outcome of this case.

5. Economic Benefit

The economic benefit received by Advanced for violation of the Clean Water Act in this case is minimal. EPA's claim that Advanced saved approximately \$4,000 by not sampling for copper and lead on the 33 occasions for which it was cited is accepted. In that regard, Filippini estimated that each sampling event would cost approximately \$125. Tr. 205-206, 248. Advanced did not show that Filippini's cost estimate was unreasonable. Therefore, respondent is found to have received an economic benefit of \$4,000 by failing to monitor its effluent for copper and lead.

EPA also claims that Advanced received an economic benefit of \$75,000 per year for not having a certified operator on duty during 1995 and 1996. This claim of economic benefit, however, is rejected. In raising this argument, EPA asserts that "[b]ut for the absence of a

certified operator knowledgeable of the equipments' operation and monitoring requirements, it is questionable whether the violations here would have occurred." EPA Br. at 59. Aside from the key fact that Advanced did not produce wastewater during the second shift when it admittedly did not have a "certified operator" on duty, EPA fails to show how this fact is in any way relevant to the issues that were tried. In addition, Advanced is correct in arguing that if EPA wanted to make this an issue in the case, it should have amended the complaint and charged an additional violation.

6. Other Matters as Justice May Require

There are no factors considered under this penalty criterion that would warrant a penalty reduction. Advanced did raise the point that by the terms of its West Chicago POTW discharge permit it was at a competitive disadvantage with companies that had only to comply with the less restrictive Federal categorical standards. This is not an acceptable reason for lowering the civil penalty in this case. Suffice it to say that Advanced chose to set up its business in West Chicago and accordingly, it is required to comply with the provisions of that city's code.

V. Order

Advanced Electronics, Inc., is found liable for 107 violations of Section 307(d) of the Clean Water Act. 33 U.S.C. § 1317(d). Pursuant to Sections 309(g)(2)(B) and 309(g)(3) of the Act, respondent is directed to pay a civil penalty of \$115,000 within 60 days of the date of this order. 33 U.S.C. §§ 1319(g)(2)(B) & 1319(g)(3).²⁶

Unless an appeal is taken to the Environmental Appeals Board pursuant to 40 C.F.R. 22.30 (July 23, 1999), this decision shall become a final order as provided in 40 C.F.R. 22.27(c) (July 23, 1999).

Carl C. Charneski
Administrative Law Judge

²⁶ Payment may be made by cashier's or certified check made payable to the Treasurer of the United States, addressed to The First National Bank of Chicago, EPA Region 5, (Regional Hearing Clerk), P.O. Box 70753, Chicago, IL 60673.