UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
	)	
Pleasant Hills Authority	)	Docket No. CWA-III-210
	)	
	)	
Respondent	)	

INITIAL DECISION

Clean Water Act. This proceeding is commenced by the U.S. Environmental Protection Agency, pursuant to Section 309(g) of the Clean Water Act for alleged violations by Respondent, a publicly-owned wastewater treatment plant, of its National Pollutant Discharge Elimination System (NPDES) Permit. **Held:** Respondent is found liable for discharging wastewater which exceeds its NPDES permit limits for phenolics, cyanide, and mercury; for failure to submit a timely pretreatment plan; and for failure to use adequate testing methods for monitoring its effluent. Respondent is assessed a civil penalty in the total amount of **$45,600**.

Before: Stephen J. McGuire Date: November 19, 1999
Administrative Law Judge

APPEARANCES:

For Complainant: Deane H. Bartlett, Esq.
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I. INTRODUCTION

This is a civil administrative proceeding instituted by issuance of a Complaint on March 31, 1998, by the United States Environmental Protection Agency, Region III, Philadelphia, Pennsylvania (Complainant/EPA). The Complainant commenced this action pursuant to Section 309(g) of the Clean Water Act (CWA, the Act) 33 U.S.C. § 1319(g), and pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22 (Consolidated Rules).

The Complaint charged Respondent with three counts of violating its National Pollutant Discharge Elimination System (NPDES) Permit No. 0027464 (Permit).[(1)] Specifically, Respondent was charged in Count I with violating effluent limitations in the Permit for free cyanide, phenolics, and mercury; in Count II with failure to use analytical testing methods sufficiently sensitive to demonstrate compliance with the effluent limitations in the Permit; and in Count III with failure to submit an approvable pretreatment program to EPA by May 30, 1997 as required by the Permit and Section 403.8 of the pretreatment regulations implementing the Act, 40 C.F.R. Part 403. The Complaint proposed a penalty of $70,000 for the alleged violations.

Respondent answered the Complaint and requested a hearing on April 24, 1998. EPA filed a Motion for Accelerated Decision as to Respondent's liability for the violations, and by Order issued February 3, 1999, EPA=s motion was granted as to Respondent's liability for Count II of the Complaint, and denied as to Counts I and III.

An evidentiary hearing was held in Pittsburgh, Pennsylvania on March 9 and 10, 1999, on the issue of Respondent's liability for Counts I and III of the Complaint, and on issues relating to penalty assessment [(2)] EPA offered into evidence 33 exhibits, CX-1 through CX-33 and called two fact witnesses. Respondent introduced seven

exhibits, RX-1 through RX-7, and called two fact witnesses.

II. FINDINGS OF FACT[3]

1. Respondent owns and operates a wastewater treatment facility (Publicly Owned Treatment Works/POTW), namely the Pleasant Hills Wastewater Treatment Plant (facility), located in South Park Township, Allegheny County, Pennsylvania.

2. Respondent's facility receives and treats wastewater and then discharges treated wastewater containing pollutants into Lick Run, a tributary of Peters Creek, which is in the Monongahela River Basin.

3. On June 17, 1991, pursuant to Section 402 of the Act, 33 U.S.C. § 1342, and the Pennsylvania Clean Streams Law, as amended, 35 P.S. § 691.1 *et seq.*, the Pennsylvania Department of Environmental Resources (PADER) issued NPDES Permit No. PA0027464 (1991 Permit) to Respondent, allowing it to discharge pollutants subject to limits specified in the 1991 Permit from its facility. The 1991 Permit became effective on June 17, 1991 and expired on June 17, 1996.

4. The 1991 Permit was administratively extended and in full force and effect until it was modified and reissued.

5. On September 13, 1996, pursuant to Section 402 of the Act and Chapter 92 of the Pennsylvania Clean Streams Law, as amended, 35 Pa. Stat. Ann. 691.1, the Pennsylvania Department of Environmental Protection (PADEP) modified and reissued NPDES Permit No. PA0027464 (1996 Permit), effective on that date. The 1996 Permit will expire on September 13, 2001.

6. Part A of the 1991 Permit, on pages 2a through 8, contains the monitoring requirements and effluent limitations for several pollutants at Outfall 001 at the facility, which discharges into Lick Run.

7. EPA notified Respondent of the requirement to develop and implement a pretreatment program by letter dated May 30, 1996, from the Program Development Section of the Water Protection Division of EPA Region III, to Thomas J. Cuppett, superintendent of the facility.

8. The letter dated May 30, 1996, identified the major pretreatment program elements required and enclosed guidance manuals to assist Respondent in development of its program.

9. Part C Section 9 of the 1996 Permit, entitled "Development, Operation and Implementation of an Industrial Pretreatment Program" provides, in pertinent part:

> A. General Requirement - The permittee shall develop, operate, and implement an industrial pretreatment program in accordance with the Federal Clean Water Act, the Pennsylvania Clean Streams Law, and the Federal Regulations at 40 CFR 403. The program shall also be implemented in accordance with the pretreatment program and any modifications thereto submitted by the permittee and approved by the Approval Authority.
>
> B. Development of a Pretreatment Program - The permittee shall develop a

pretreatment program which conforms to the provisions in 40 CFR 403.8 and ensures that all of the applicable requirements specified in this permit are attained.

C. Submittal of Pretreatment Program - The permittee shall submit the pretreatment program developed pursuant to Condition B. above to the Department and the Environmental Protection Agency (EPA) at the address set forth below by May 30, 1997. Permittees are encouraged to submit a program well before the above date so that necessary changes can be made in a timely fashion to make the submission approvable by the above date. CX 2.

10. Discharge Monitoring Reports (DMRs), submitted by Respondent to EPA from October 18, 1994 through June 10, 1996, were signed and certified as true, accurate and complete, by Mr. Cuppett. Tr. I 32-33, 37; CX 3-16. Mr. Cuppett was responsible, *inter alia,* for ensuring that tests are performed and records are kept. Tr. II 295.

11. Respondent reported on its DMR for July 1, 1994 to September 30, 1994, for the free cyanide parameter, a monthly average of 0.006 milligrams per liter (mg/l), which exceeds Respondent's permit limit of 0.0035 mg/l, and a daily maximum of 0.012 mg/l, which exceeds Respondent's permit limit of 0.007 mg/l. CX 3; Tr. I 33-34.

12. Respondent reported on its DMR for October 1, 1994 to December 31, 1994, for the free cyanide parameter, a monthly average of 0.008 mg/l, which exceeds Respondent's permit limit of 0.0035 mg/l, and a daily maximum of 0.008 mg/l, which exceeds Respondent's permit limit of 0.007 mg/l. CX 4; Tr. I 35-36.

13. Respondent reported on its DMR for April 1 through 30, 1995, for the total phenolics parameter, a daily maximum of 0.05 mg/l, which exceeds Respondent's permit limit of 0.028 mg/l. CX 6; Tr. I 37.

14. Respondent reported on its DMR for May 1 through 31, 1995, for the free cyanide parameter, a monthly average of 0.0205 mg/l which exceeds Respondent's permit limit of 0.0035 mg/l, and a daily maximum of 0.030 mg/l, which exceeds Respondent's permit limit of 0.007 mg/l. CX 7; Tr. I 38.

15. Respondent reported on its DMR for May 1 through 31, 1995, for the total phenolic parameter, a monthly average of 0.126 mg/l which exceeds Respondent's permit limit of 0.014 mg/l, and a daily maximum of 0.202 mg/l, which exceeds Respondent's permit limit of 0.028 mg/l. CX 7; Tr. I 40-41.

16. Respondent reported on its DMR for June 1 through 30, 1995, for the free cyanide parameter, a monthly average of 0.016 mg/l, which exceeds Respondent's permit limit of 0.0035 mg/l, and a daily maximum of 0.017 mg/l, which exceeds Respondent's permit limit of 0.007 mg/l. CX 8; Tr. I 42-43.

17. Respondent reported on its DMR for August 1 through 31, 1995, for the free cyanide parameter, a monthly average of 0.016 mg/l which exceeds Respondent's permit limit of 0.0035 mg/l, and a daily maximum of 0.020 mg/l, which exceeds Respondent's permit limit of 0.007 mg/l. CX 10; Tr. I 43-45.

18. Respondent reported on its DMR for November 1 through 30, 1995, for the total mercury parameter, a monthly average of 0.0003 mg/l, which exceeds Respondent's permit limit of 0, and a daily maximum of 0.0004 mg/l, which exceeds Respondent's permit limit of 0.0002 mg/l. CX 13; Tr. I 49-50. Complainant characterized the extent of this violation as minor. Tr. I 50.

19. Respondent reported on its DMR for December 1 through 31, 1995, for the total

phenolic parameter, a monthly average of 0.031 mg/l, which exceeds Respondent's permit limit of 0.014 mg/l, and a daily maximum of 0.046 mg/l, which exceeds Respondent's permit limit of 0.028 mg/l. CX 14; Tr. I 51.

20. Respondent reported on its DMR for February 1 through 29, 1996, for the free cyanide parameter, a monthly average of 0.006 mg/l, which exceeds Respondent's permit limit of 0.0035 mg/l, and a daily maximum of 0.008 mg/l, which exceeds Respondent's permit limit of 0.007 mg/l. CX 15; Tr. I 52.

21. Respondent reported on its DMR for May 1 through 31, 1996, for the free cyanide parameter, a monthly average of 0.0045 mg/l which exceeds Respondent's permit limit of 0.0035 mg/l, and for the total mercury parameter, Respondent reported a daily maximum of 0.003 mg/l, which exceeds Respondent's permit limit of 0 mg/l.[(4)] CX 16; Tr. I 53.

22. From the face of the April 1995 through December 1995 DMRs, the analyses performed were insufficient, as results were reported as less than ("<") a value which was higher than the permit limit. Tr. I 157-160. Specifically, the Respondent's DMRs reported that samples had less than 0.002, 0.0002, 0.0003 and 0.0004 mg/l of mercury, but listed the permit limit as 0 mg/l. CX 6, 7, 9, 10, 11, 12, 14. The DMRs reported that samples had less than 0.05 mg/l for total phenolics, but listed the permit limit as 0.014 mg/l for monthly average and 0.028 mg/l for daily maximum. CX 6, 8, 9, 10, 11, 12, 13 The DMRs reported that samples had less than 0.010, 0.0205. 0.021, 0.0115, and 0.013 mg/l of free cyanide, but listed the permit limit as 0.0035 mg/l monthly average and 0.007 mg/l daily maximum for free cyanide. CX 6, 9, 11, 12, 13, 14.

23. EPA's letter, dated May 30, 1996, formally notifying Respondent of the requirement to develop, submit for approval, and implement an EPA approved pretreatment program, stated that the program must be submitted no later than one year from the date of the letter. CX 17; Tr. I 168-169. Respondent's 1996 permit also required a pretreatment program to be submitted by May 30, 1997. CX 2; Tr. I 172.

24. Respondent did not submit a pretreatment program for approval by May 30, 1997. CX 22; Tr. I 178.

25. Lisa Pacera, environmental scientist/enforcement officer for EPA Region III's NPDES Branch, Water Protection Division, testified regarding Complainant's calculation of the proposed penalty. Tr. I 25-26.

26. Ms. Pacera considered Respondent's ability to pay the proposed penalty and concluded based upon median household income in the Pleasant Hills are for 1997 that Respondent would have the ability to pay the proposed penalty. Tr. I 94.

27. The Allegheny County Health Department reported to Complainant that Respondent had two prior violations, in 1993, for failure to report on a DMR the testing result for total suspended solids, and one prior violation for failure to report maximum pH on the DMR in 1994. Tr. I 80-81. In 1985, Respondent entered into a Consent Order with the State of Pennsylvania in regard to sanitary sewer overflows, where untreated sewage was discharged into a receiving stream. Tr. I 84-86.

COUNT I

28. The penalty proposed by Complainant for Count I is based upon 22 violations, comprised of 11 violations of daily maximum limits and 11 violations of monthly average limits, although Complainant alleges a total of 347 days of violation. Tr. I 55-56, 102, Tr. II 305; CX 33. The 347 days include 11 days of daily maximum violations, and 336 days (11 months) of violating monthly average limits. CX 33. Complainant calculated a base penalty of $1,000 for each of the 22 violations, and added $4,000 based upon the potential for environmental harm from the discharge of excess pollutants, for a penalty of $26,000 for Count I. CX 33. No economic benefit was calculated for Count I. Tr. I 154.

29. The discharge from Respondent's facility exceeded the monthly average permit limit for free cyanide by approximately 200 percent for the 20 month period from September 1994 through May 1996. Tr. I 60-61; CX 33.

30. The discharge from Respondent's facility exceeded the monthly average permit limit for total phenolics by approximately 450 percent for the 20 month period from September 1994 through May 1996. Tr. I 61; CX 33.

31. The discharge from Respondent's facility exceeded the monthly average permit limit for mercury by approximately 350 percent for the 20 month period from September 1994 through May 1996. Tr. I 61; CX 33.

32. Lick Run is classified by the State as designated for trout stock fishery. Tr. I 62.

33. The pollutants at issue...cyanide, phenolics and mercury, are toxic pollutants within the meaning of Section 307 of the Act. Tr. I 29; 40 C.F.R. § 401.15. The effluent limits for those pollutants set forth in Respondent's permit are based upon water quality standards, derived from criteria of the State of Pennsylvania. Tr. I 45-46.

34. Ms. Pacera testified that exceedences of limits for cyanide and phenolics have a potential for harm to aquatic life, and exceedences for mercury have a potential for harm to human health. Tr. I 58, 62; Tr. II 214.

35. Ms. Pacera testified that a biannual State report on water assessment, dated March 21, 1994, showed that a portion of Lick Run did not support aquatic life, due to organic enrichment and nutrients, and that "the source for that was a municipality," Tr. I 92, 119-126. She testified further that the report for 1996 showed that a portion of the Monongahela River "was impaired and that the source was a municipality." Tr. I 92. However, there was no evidence of an impact on the Monongahela River or on Lick Run specifically from Respondent's facility. Tr. I 132.

36. Mr. Edward Monroe, an engineer with a Master's degree in Sanitary Engineering, is the vice president of Gannett Fleming, Inc.("Gannett Fleming"), a consulting engineering firm for which he has worked for 33 years, and serves as consulting engineer to approximately 15 municipal authorities. Tr. II 211. He testified that Gannett Fleming was retained as consulting engineer by Respondent in 1982. Tr. II 221. In that capacity, Gannett Fleming was responsible, *inter alia,* for reviewing Respondent's DMR reports, preparing the annual budget, financing, training staff, working with operation staff, and ensuring compliance with EPA and State environmental regulations. Tr. II 222.

37. Mr. Monroe testified that in 1993, he had done aquatic surveys above and below Respondent's facility and that the aquatic life below Respondent's stream "was in

very good shape" and that above the stream the aquatic life was "poor." Tr. II 272-273, 279. In his opinion, the alleged exceedences of mercury, total phenolics, and free cyanide do not have an effect on aquatic life. Tr. II 272-273, 276, 279, 280. Mr. Monroe testified further that the exceedences at issue were extremely small, in terms of parts per billion, and that a glass of water might contain the same level of mercury as Respondent's permit limit, namely 0.0003 milligrams per liter. Tr. II 270-272, 277-278

38. DMR report forms provide a space for "comment and explanation of any violations." CX 3-16; Tr. II 286-287. The instructions on the DMR form provide, "Where violations of permit requirements are reported, attach a brief explanation to describe cause and corrective actions taken, and reference each violation by date." CX 3-16. Respondent did not provide on its DMRs any comment or explanation of violations of the permit limits. *Id.* However, Respondent recognized that permit limits were exceeded, as it reported the number of exceedences in the appropriate column on the DMR form. CX 3-16; Tr. II 288.

39. Respondent engaged Mack Laboratories, located down the street from Respondent's facility, to perform testing and analysis of Respondent's effluent in accordance with its NPDES permit. Tr. II 225, 298. Mack Laboratories tested and analyzed samples of Respondent's effluent from the first quarter of 1995 through October 1995. Tr. I 146-147, 225; RX 1.

40. Mr. Cuppett testified that he understood that Mack Laboratories "knew all about the national pollutant discharge elimination system permits and they would take care of the samples as we [Respondent] were supposed to have it done." Tr. II 299.

41. Mr. Monroe testified that in the summer of 1995, Gannett Fleming began investigating Respondent's laboratory testing procedures. Tr. II 234-236.

42. EPA sent Respondent a letter dated November 30, 1995, requesting information concerning noncompliance with permit limits. Tr. II 226-227. Mr. Monroe testified that he inspected the industries (presumably those discharging into Respondent's facility) and obtained information, and "did periodic sampling of industries to see if there was any cyanide, mercury, phenol ... coming from those different industries" in order to respond to EPA. Tr. II 227-228.

43. After receiving EPA's letter dated November 30, 1995, Respondent engaged Microbac Laboratories, Geochemical, and Gannett Fleming, Inc. to perform testing and analysis. Tr. II 227-228, 234, 237. Respondent then terminated its agreement with Mack Laboratories and retained Microbac Laboratories to perform effluent monitoring. Tr. I 146-147; Tr. II 238.

44. Mr. Monroe testified in the negative when asked, based upon his experience with laboratory operations and EPA requirements, whether Mack Laboratories complied with prudent laboratory practice. Tr. II 239-240. When asked at the hearing specifically what ways Mack Laboratories' work failed to comply with reasonable expectations, Mr. Monroe testified, "the first thing you do when you receive an assignment as a laboratory is you obtain the NPDES permit and find out what the prescribed testing requirements are, and then you set up your procedures so that you can comply with those testing requirements." Tr. II 240.

45. Mr. Monroe testified that the amounts of pollutants reported by Mack Laboratories, appearing on Respondent's DMRs from March 31, 1995 through August 31, 1995, "would not be reliable." Tr. II 281, 284.

46. Mr. Monroe testified that Respondent and Gannett Fleming "didn't have the

answers" as to the basis for the reported permit exceedences. Tr. II 292-293.

47. On DMRs submitted after August 31, 1995, and until May 1996, Respondent reported exceedences of permit limits . CX 11-16; RX 1.

48. Mr. Monroe was aware of the requirement that if a DMR report is found to be in error, a corrected DMR must be submitted. Tr. II 288. As to why Respondent did not submit corrected DMRs, Mr. Monroe testified, "I don't think that we were aware of the problem." Tr. II 289.

COUNT II

49. The penalty proposed by Complainant for Count II is based upon 24 violations...11 violations of the daily maximum and 13 violations of monthly average limits, although Complainant alleges 407 days of violation, which includes the 11 daily maximum violations and 396 days (13 months, for April 1995, and for June 1995 through December 1995) of monthly average violations. Tr. I 56-57, 66-68, 103; CX 33. Complainant calculated a base penalty of $1,000 for each of the 24 violations, and added $4,000 for the potential for environmental harm, and $1000 for the economic benefit to Respondent of its noncompliance, for a penalty of $29,000 for Count II. CX 33.

50. Complainant asserts on its penalty calculation worksheet that it would be more expensive for Respondent to have the samples analyzed using a lower detection limit. CX 33; Tr. 154-155. Complainant calculated an economic benefit of $1,000 by multiplying thirty dollars, which Complainant asserts is the "minimum cost of sampling", by 37 samples, which Complainant asserts is the minimum required. CX 33.

51. Gannett Fleming determined that Mack Laboratories' testing procedures "were not sensitive enough to meet the permit requirements." Tr. II 237. Mr. Monroe testified that in his opinion Mack Laboratories "did not...understand the whole testing procedure of the EPA NPDES permit." *Id.*

52. By letter to Mr. Monroe dated December 13, 1995, Mack Laboratories acknowledged that it was not reporting detection limits which were low enough to meet Respondent's permit limits. RX 3. The letter stated that Mack Laboratories was "currently reporting <.05 for phenols, <.0002 for mercury, and <.01 for cyanide." *Id.*

53. The instances of Respondent's insufficient monitoring analysis, as reflected in values "less than" ("<") a certain detection limit and as listed in Finding of Fact Number 22, are distinct from the instances of exceeding permit effluent limits as reflected in the specific numerical values listed in Finding of Fact Numbers 11 through 19.

COUNT III

54. Complainant calculated a penalty of $15,000 for Count III, consisting of a $1,000 base penalty for each of ten months that Respondent failed to submit its pretreatment program after the due date and before the filing of the Complaint, plus $2,000 representing the economic benefit of Respondent's noncompliance, plus

$3,000 representing the potential for environmental harm. CX 33.

55. Complainant's penalty calculation worksheet estimated (by use of a BEN computer program), an economic benefit of $2,000, asserting that the average cost to develop a pretreatment program for a medium sized POTW is $25,000. CX 33.

56. EPA's letter dated May 30, 1996, notifying Respondent of the requirement to submit a pretreatment program, enclosed several guidance manuals and warned Respondent, "It has been our experience that enactment of adequate legal authority throughout the entire service area is one of the more time consuming elements" of the program, and that "collection of data for establishment of technically based local limits may require a significant amount of time and resources." CX 17; Tr. I 174.

57. Respondent proposed to complete its pretreatment program for submission to EPA on April 30, 1997, and EPA found the proposed date acceptable. CX 19; Tr. I 175.

58. Respondent corresponded in writing with EPA concerning the pretreatment program on July 8 and 19, 1996, October 14, and 28, 1996, and January 9, 1997. RX 5.

59. EPA reminded Respondent of the due date for submission of the pretreatment program by letter dated January 13, 1997, to William Meinert of Gannett Fleming. CX 21; RX 5; Tr I 175-176.

60. By letter dated June 2, 1997, Respondent submitted part of its pretreatment program materials and requested an extension of time to complete its pretreatment program. Tr. I 183; CX 22. EPA did not grant Respondent the extension. Tr. I 178; CX 22.

61. Stephen Copeland, Environmental Scientist for EPA Region III Water Protection Division, Office of Municipal Assistance, testified as a witness for EPA in regard to the proposed penalty. Tr. I 164. He testified that a draft industrial user permit is considered approvable if it had all the elements for a permit, is adopted by the municipalities, and is signed by the parties. Tr. I 183-184.

62. Respondent's Manual for Implementation of the Industrial Pretreatment Program states that it was adopted in November 1997. RX 6; Tr. II 262. However, it includes documents, namely adoption of ordinances by the municipalities, dated after November 1997. Tr. I 180-181; Tr. II 264; RX 6. Mr. Monroe testified that the pretreatment program in place as of June 1997 was not substantively different from the manual. Tr. II 265.

63. EPA did not receive from Respondent an approvable pretreatment program until November 3, 1998, which is 17 months after the due date, eight months after Respondent was warned that Respondent was in significant noncompliance with the Act for failure to timely submit the program, and seven months after the Complaint was filed. Tr. I 189-190, 193-194; Tr. II 263-264; CX 25; RX 5.

64. Mr. Copeland testified that he responded in writing to Respondent's inquiries within 22 days and he responded to Respondent by telephone within three days. Tr I 192.

65. Respondent initiated a pretreatment program in 1982, monitoring and sampling effluent from the industries that discharged wastewater into Respondent's facility,

and advising them if they were not in compliance with an ordinance established by Respondent. Tr. II 242-243.

66. Mr. Monroe testified that only the adoption of resolutions by the municipalities and the solicitor's statement were not in place as of May 30, 1997. Tr. II 258-259; RX 5. He testified that service agreements with the municipalities had to be modified. Tr. II 258-259. He testified further that Respondent had some problem getting information from "significant" industrial users (dischargers into Respondent's POTW), in order for Respondent to calculate local limits for the pretreatment program. Tr. II 259, 265. He testified that delays resulted because some of the industries had to change pipelines and get access to sampling points and that this was not in their budgets and took some time. Tr. II 266. He testified that Respondent conducted numerous negotiations with two government facilities that discharge into Respondent's POTW, the U.S. Department of Energy and U.S. Department of Public Health Service, and that these facilities had "an intermingling of pipes." Tr. II 260.

67. Mr. Monroe testified that in implementing its pretreatment program, Respondent eliminated discharges into its POTW from two users, namely Southwestern Health Center's laboratory discharges, which may have contained mercury, and South Hills Disposal's garbage truck washing wastewater. Tr. II 267-268.

68. The record does not show that Respondent had significant exceedences of its permit limits between May 30, 1997, and the date it submitted its pretreatment program, as shown by Respondent's chart of DMR average monthly sample results for cyanide, phenol and mercury, its DMR reports, and a letter dated September 16, 1998, from Mr. Monroe to Mr. Copeland, addressing slight exceedences of cyanide for August 1998 and Respondent's intent to rectify the problem. RX 1, 2, 4.

III. LIABILITY

A. Respondent's Liability for Counts I and III

The parties do not dispute that Respondent exceeded the limits in its 1991 NPDES Permit for free cyanide, total phenolics, and mercury. Findings of Fact 11-21. Lick Run is a water of the United States as defined in Section 502(7) of the Act, 33 U.S.C. § 1362(7). Accordingly, Respondent is liable under Count I, for discharging wastewater in excess of its NPDES permit limits, in violation of Section 301(a) of the Act, which prohibits the discharge of pollutants into waters of the United States by any person except in compliance with, *inter alia,* Sections 301 and 402 of the Act.[(5)]

As to Count III, Respondent argues that it complied with the "spirit and intent" of the pretreatment program by implementing a pretreatment program prior to the due date for submitting such a program, which was "functionally equivalent" to that later approved by EPA. Respondent's Post-Hearing Brief at 16. However, Federal pretreatment regulations provide at 40 CFR § 403.8(b), that POTWs identified as needing a pretreatment program "shall develop and submit such a program for approval as soon as possible, but in no case later than one year after written notification from the Approval Authority [EPA] of such identification." (emphasis added). Section 403.8(b) further requires that the program "shall meet the criteria set forth in paragraph (f) of that section. Respondent's 1996 Permit requires Respondent to submit such program to EPA by May 30, 1997. Finding of Fact 9. The evidence shows that Respondent did not submit such a program meeting such criteria within the time provided. Findings of Fact 23, 24, 56, 60, 63. Accordingly,

Respondent is liable for failure to timely submit a pretreatment program as required by 40 C.F.R. § 403.8 and its 1996 Permit.

IV. PENALTY

The Act provides, "Whenever on the basis of any information available ... the Administrator finds that any person has violated section 1311 ... or has violated any permit condition or limitation implementing any of such sections in a permit ... the Administrator ... may... assess a ...class II civil penalty under this subsection." Section 309(g)(1) of the Act, 33 U.S.C. § 1319.

Section 309(g)(2)(B) of the Act provides that a Class II civil administrative penalty may not exceed $10,000 per day for each day during which the violation continues, and that the maximum amount of any civil penalty shall not exceed $125,000. Congress has provided in Section 309(g)(3) for determining the amount of the administrative penalty, that the following criteria be taken 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."

Upon a review of the legislative history of the Clean Water Act, the Supreme Court has commented that calculation of penalties under the Act is "highly discretionary" with the trial judge, and that retribution and deterrence, in addition to restitution, should be considered in assessing penalties under the Clean Water Act. *Tull v. United States*, 481 U.S. 412, 422 (1987) (citing 123 Cong. Rec. 39190-39191 (1977)(remarks of Sen. Muskie)). Perhaps in view of the highly discretionary nature of Clean Water Act penalties, EPA has chosen not to issue any penalty policy or guidelines for assessment of penalties under section 309 of the Clean Water Act.[(6)]

EPA has issued general penalty policies, the "EPA General Enforcement Policy" (February 14, 1984) and "Framework for Statute-Specific Approaches to Penalty Assessments" (February 1, 1984) referenced as "GM-21" and "GM-22," respectively (CX 30 and 31). However, an Administrative Law Judge(ALJ),is not required to calculate penalties in accordance with the framework supplied therein. *See,* 40 C.F.R. § 22.27(b), as amended, 64 Fed. Reg. at 40186 ("The Presiding Officer shall consider any civil penalty guidelines issued under the Act" (emphasis added)).

There is no specific formula in the statute, implementing regulations, or in any applicable penalty policy for calculating penalties under Section 309 of the Act. Therefore, it is useful to look to the methodologies used by the Environmental Appeals Board (EAB) and federal courts in assessing penalties under the Clean Water Act.

The EAB has not had frequent occasion to review penalty assessments under the Act. In the few cases in which a Clean Water Act penalty assessment was challenged, neither the EAB nor its predecessor, the Chief Judicial Officer (CJO), has set forth any specific methodology for assessment of penalties under the Act. For example, in reviewing a Clean Water Act penalty case, the CJO affirmed the ALJ's penalty assessment of $50,000 for illegally filling a wetland, and added another $50,000 penalty for a second wetland that was found to have been illegally filled. The penalty assessments, reduced from the Complainant's proposal of $125,000, were based on the respondent's culpability and economic benefit of noncompliance. *The Hoffman Group,* 3 E.A.D. 408, 1990 EPA App. LEXIS 92 (1990). In another case of unauthorized filling of a wetland, the Chief Judicial Officer affirmed the ALJ's

assessment of the $125,000 proposed penalty, based on evidence of significant actual harm to the environment and culpability, and noted that the respondent had "willful disregard for the Section 404 permit process." *Marshall C. Sasser,* 3 E.A.D. 703, 1991 EPA App. LEXIS 1 (1991), *aff'd,* 990 F.2d 127 (4th Cir. 1993), *cert. denied,* 507 U.S. 1004 (1993).

In a more recent opinion, also addressing unauthorized filling of wetlands, the EAB upheld the ALJ's assessment of a $2,000 penalty, reduced from a proposed $125,000 penalty. *Britton Construction Co.*, CWA Appeal Nos. 97-5 and 97-8 (EAB, March 30, 1999). The ALJ in the Initial Decision had not assigned specific reduction figures to any of the statutory factors, but had considered EPA's "dilatory" enforcement and the respondents' successful mitigation of the site, along with respondent's inability to pay a large penalty. The EAB noted that factor-by-factor numeric reductions from the proposed penalty are not required in the assessment of a penalty. *Id.,* slip op. at 29. *See also, Slinger Drainage , Inc.,* CWA Appeal No. 98-10 (EAB, Sept. 29, 1999), which also affirmed an ALJ penalty assessment.

The EAB further considered the general policies of GM-21 and GM-22 in that case, as well as in a case concerning violation of the Marine Protection, Research, and Sanctuaries Act, under which EPA also has not issued a penalty policy. *Britton Construction Co.,* slip op. at 27, 30; *Port of Oakland and Great Lakes Dredge & Dock Co.,* 4 E.A.D. 170, 185, 1992 MPRSA LEXIS 1 (EAB 1992). Noting that GM-21 and GM-22 "are not designed for direct application to specific violations" but "provide useful guidance" for the penalty analysis, the EAB in *Port of Oakland* adhered to the general methodology in GM-22 of first calculating a "preliminary deterrence figure", based on "economic benefit" and "gravity" of the violation, and then adjusting it upward or downward based on other factors.[(7)] 4 E.A.D. at 199.

In *B.J. Carney Industries, Inc.,* CWA Appeal No. 96-2 (EAB, June 9, 1997), *on remand,* Docket No. [CWA]-1090-09-13-309(g), 1998 ALJ LEXIS 112 (ALJ, January 5, 1998) (assessing full proposed penalty of $125,000), *appeal dismissed,* No. 98-70315, 1999 U.S. App. LEXIS 23005 (9th Cir., Sept. 23, 1999), involving unauthorized discharge into a publicly-owned treatment works, the EAB did not assess a penalty but remanded the case for recalculation of a penalty to include an economic benefit component. The EAB emphasized the importance of the economic benefit, even where an exact or full amount cannot be calculated, and held that a partial amount or a reasonable approximation is sufficient to include in a penalty assessment. Slip op. at 62-64, (citing, *inter alia,* S.Rep. No. 50, 99th Cong., 1st Sess. 25 (1985)).

Some federal courts also emphasize the economic benefit component of a penalty under Section 309(d) of the Clean Water Act by beginning their calculation with an amount representing the economic benefit and then adding it to a penalty amount based on the other statutory penalty assessment criteria ("bottom up" method). *See, e.g., United States v. Municipal Authority of Union Township and Dean Dairy Products Co.,* 929 F.Supp. 800, 806 (M.D. Pa. 1996), *aff'd ,* 150 F.3d 259 (3d Cir. 1998)(calculating "wrongful profits" - earnings defendant made by not cutting back production volume to come into compliance- and multiplying by two for deterrent effect, for total penalty exceeding $4 million); *Unites States v. Smithfield Foods, Inc,,* 972 F.Supp. 338, 353 (E.D. Va. 1997), *aff'd,* No. 97-2709, 1999 U.S. App. LEXIS 22092 (4th Cir., September 14, 1999); *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield,* 611 F.Supp. 1542, 1557 (E.D. Va. 1985), *aff'd,* 791 F.2d 304 (4th Cir. 1986), *vacated and remanded on other grounds,* 484 U.S. 49 (1987), *remanded,* 844 F.2d 170, (4th Cir.), *judgment reinstated,* 688 F.Supp. 1078 (E.D. Va. 1988), *aff'd in part, rev'd in part and remanded,* 890 F.2d 690 (4th Cir. 1989) (following a 1984 EPA Civil Penalty policy); *cf., Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 956 F.Supp. 588, 603 (D.S.C. 1994) (subtracting from economic benefit component an amount representing difficulty of achieving compliance, working with state agency, and no proven damage to the environment).

On the other hand, other Federal courts start with the statutory maximum ($25,000 per day) for each violation, and then reduce it as appropriate, considering the statutory factors for determining penalties ("top down" method). *See*, *e.g.*, *Atlantic States Legal Foundation, Inc. v. Tyson Foods,* 897 F.2d 1128, 1142 (11th Cir. 1990); *United States v. Gulf Park Water Company, Inc.,* 14 F.Supp.2d 854, 858 (S.D. Miss. 1998); *Hawaii's Thousand Friends v. City & County of Honolulu,* 821 F.Supp. 1368, 1395 (D. Haw. 1993); *Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., Inc.*, 786 F.Supp. 743, 746 (N.D. Ill. 1992); *PIRG v. Powell Duffryn Terminals, Inc.,* 720 F.Supp. 1158 (D. N.J. 1989), *aff'd in part, rev'd in part,* 913 F.2d 64 (3rd Cir. 1990), *cert. denied,* 498 U.S. 1109 (1991) (court found amount of benefit of noncompliance difficult to quantify but greater than statutory maximum); *United States v. Avatar Holdings, Inc.,* No. 93-281-CIV-FTM-21, 1996 U.S. Dist. LEXIS 12312 (M.D. Fla., August 20, 1996).

In sum, there is no specific formula for determining a penalty under the Clean Water Act. *Gulf Park Water Co.,* 14 F.Supp.2d at 868 (noting that there is "no mathematical formula which can be applied to the overall effort of assessing a fair penalty" and that "[e]ach case must be decided on its own facts"); *United States v. Marine Shale Processors, Inc.,* 81 F.3d 1329, 1338 (5th Cir. 1996)("calculation of discretionary penalties is not an exact science").

A review of federal court and EAB assessment of Clean Water Act penalties suggests that the methodology for calculating such penalties in administrative proceedings must depend on the specific facts of the case. The "top down" methodology may be appropriate where the Complainant proposes the statutory maximum total penalty of $125,000. *See, General Motors Corporation CPC - Pontiac Fiero Plant,* EPA Docket No. CWA-A-O-001-93, 1996 EPA ALJ LEXIS 3 (ALJ, October 31, 1996) (acknowledging the *Port of Oakland* ruling, assessing the proposed penalty of $125,000 as a gravity-based penalty and reducing it by 50% for "such other matters as justice may require"), *aff'd,* CWA Appeal No. 96-5 (EAB December 24, 1997)(penalty not challenged); *pet. for review denied,* 168 F.3d 1377 (D.C. Cir. March 23, 1999); *LaBarge, Inc.,* EPA Docket No. CWA-VII-91-W-0078 (ALJ, March 26, 1997)(proposed penalty of $125,000 assessed). On the other hand, where economic benefit of noncompliance is a significant or quantifiable factor in the penalty assessment, it is more appropriate to calculate that figure first, and then add a dollar amount representing the gravity of the violation and the other statutory factors.

Here, Complainant proposes a total penalty of $70,000, which includes a $26,000 penalty for Count I, a $29,000 penalty for Count II, and a $15,000 penalty for Count III. Findings of Fact 28, 49, 54. Complainant's methodology is to calculate a gravity-based penalty of $1,000 per violation and to multiply it by the number of violations, to get a gravity-based penalty for each count. Then, for each count, Complainant adds dollar amounts representing the potential for harm to the environment ($4,000 for each of Counts I and II, and $3,000 for Count III), and for Counts II and III adds the amount (respectively, $1,000 and $2,000) of economic benefit to Respondent resulting from the violations. *Id.* For the other statutory factors, Complainant does not make any further adjustments. Findings of Fact 26, 27.

The undersigned would prefer to assess a penalty through application of a "bottom-up" methodology. The circumstances of this case, however, do not easily permit such an approach as the economic benefit to Respondent, as calculated by EPA, is not well supported in the record. Thus, the undersigned, in assessing a penalty, shall consider in mitigation, each statutory factor as a *percentage reduction* from the statutory maximum of $10,000 per day of violation. Respondent's ability to pay the proposed penalty was not contested by Respondent, and therefore is not calculated in the penalty assessment.

A. Penalty Assessment--Counts I and II

1. *Nature, circumstances, extent and gravity of the violations*

The objective of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and a national policy to achieve that objective is to prohibit the discharge of toxic pollutants in toxic amounts, as stated in Section 301 of the Act. The NPDES permit program implements that policy, controlling discharges of pollutants pursuant to permit effluent limitations. Federal courts have considered each violation of a pollutant discharge limit in a permit to be subject to the statutory maximum of $25,000 per day.[(8)] *See, e.g., Universal Tool & Stamping,* 786 F.Supp. at 746-747; *Powell Duffryn*, 720 F.Supp. at 1159. The pollutants at issue in this case are toxic pollutants, and the effluent limitations in Respondent's permits are based upon water quality standards. Finding of Fact 33. Water quality standards are established for the attainment and maintenance of water quality "to assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of shellfish, fish and wildlife, and allow recreational activities" as stated in Section 302(a) of the Act. *See also,* Sections 301 and 303 of the Act; 40 C.F.R. § 122.44(d); 63 Fed. Reg. 36742 (July 7, 1998)(providing history and overview of water quality standards).

In view of the fact that the essence of the Act is to limit discharges of pollutants, and the fact that Respondent discharged pollutants which are toxic in amounts exceeding limits set pursuant to the Act, the nature of the violations in Count I do not warrant any decrease from the statutory maximum. As to Count II, Respondent's failure to use a proper analysis to determine whether permit limits were violated may have masked violations of the limits. However, it has been held that "monitoring violations are not considered serious unless they are found to have been made in bad faith." *Friends of the Earth v. Laidlaw Environmental Services,* 956 F.Supp. at 602 (detection level of mercury monitoring equipment at 2.0 parts per billion (ppb) rather than the required level of 1.3 ppb); *cf., Sierra Club v. Simkins Industries, Inc.,* F.2d 1109 (4th Cir. 1988)(monitoring violations were serious where defendant did not install proper monitoring equipment). Therefore, the violations in Count II will be mitigated slightly under the rubric of the nature of the violations.

With respect to the extent of violations, Complainant attempts to emphasize the reasonableness of its proposed penalty by stating that the maximum penalty that could be assessed for Count I, assuming 347 days of violation as Complainant alleges, is $3,470,000, and for Count II, assuming 407 days of violation, the maximum penalty is $4,070,000. Findings of Fact 28, 49. A violation of a monthly average limit could be treated as 30 separate violations under the Act for determining penalties. *United States v. Smithfield Foods, Inc.,* No. 97-2709, 1999 U.S. App. LEXIS 22092 (4th Cir., September 14, 1999). However, Complainant, using its enforcement discretion, treated the monthly average violations as single violations rather than 30 separate violations for Counts I and II. Findings of Fact 28, 49.

Although this is the minority view in federal court, such an approach is reasonable in the circumstances of this case. *See, Powell Duffryn,* 720 F.Supp. at 1160 (counting an exceedence of the 30 day average limitation as a single violation rather than 30 separate violations), 913 F.2d at 78 (plaintiffs waived argument as to whether district court should have counted violations of monthly average limit as 30 violations, so Third Circuit did not address the argument); *Student Public Interest Research Group of New Jersey, Inc., v. Monsanto Company,* No. 83-2040, 1988 U.S. Dist. LEXIS 16702, 29 E.R.C. 1078 (D.N.J. 1988)("It does not logically follow

... that because a DMR ... reports an excessive daily average for that month, that an excessive daily average discharge occurred on each and every day of that month"). Nevertheless, monthly average violations should result in a larger penalty than a penalty for daily average violations. Therefore, the violations of the monthly average limits in this case will not be mitigated in terms of the extent of the violation, but the violations of the daily maximum limits will be mitigated as such.

In regard to Count I, Respondent argues that 13 of the 22 exceedences of permit limits alleged were not demonstrated by the Complainant. The violations alleged for Count I span the time period from September 1994 to May 1996, and the violations alleged for Count II span a time period from April to December 1995, within the time period for Count I. Referring to Mr. Monroe's testimony that the analyses performed during April through August 1995 were not scientifically reliable, Respondent argues that there is no evidence of exceeding permit limits during that time, because the test results were based upon unreliable monitoring techniques. See, Finding of Fact 45.

Respondent's argument however, is premised on a faulty assumption, that all of the monitoring analyses from April to August 1995 were unreliable. The evidence shows that the tests were unreliable only to the extent that the detection limits of the tests were not low enough to indicate potential exceedences of the permit limits. Findings of Fact 22, 44, 51, 52, 53. The evidence does not show that test results were unreliable for values above the detection limits of the test. Mr. Monroe's general testimony that the pollutant levels reported by Respondent during the April through August 1995 time period are not reliable is not supported by any specific testimony or documentation in the record showing that the values above the detection limit were not reliable. His opinions as to Mack Laboratories' testing procedures related to the sensitivity of the detection limits. Finding of Fact 44, 51. He did not indicate that the exceedences were a result of laboratory error; he did not know the reason for the exceedences. Finding of Fact 46. Indeed, other laboratories also reported sampling results showing that Respondent's effluent exceeded its permit limits. Finding of Fact 47. Therefore, Complainant has established the 22 exceedences of Respondent's permit limits as alleged in the Complaint, Attachment A.

As to the gravity of the violations, Complainant emphasizes the percentages by which Respondent's effluent exceeded the monthly average permit limits, namely an average of approximately 200 percent above the limit for cyanide, an average of approximately 450 percent above the limit for phenolics, and an average of approximately 350 percent above the limit for mercury. Findings of Fact 29, 30, 31. Respondent argues against considering such percentages in mitigation of a penalty for Count I, asserting that the exceedences were not significant. Respondent emphasizes that the exceedences were of minute amounts, referring to Mr. Monroe's testimony that such amounts are measurable in terms of parts per billion, and that plain tap water may exceed Respondent's permit limits. Finding of Fact 37.

Federal courts consider the percentages of excess over permit limits to be a significant factor in determining penalties. *Gwaltney,* 611 F.Supp. at 1560 (gravity component of penalties assessed at $4,000 per day where fecal coliform monthly average limit was exceeded by 58 to 150 percent); *Powell Duffryn,* 720 F.Supp. at 1160, 1162(exceedences of 100 percent to 1000 percent of the permit limits are "very serious in nature", particularly those for toxic pollutants); *Smithfield Foods, Inc.,* 972 F.Supp. 343-344; *Friends of the Earth v. Laidlaw Environmental Services,* 956 F.Supp. at 510 (penalties assessed at $200 for each discharges up to 100 percent over permit limit, $700 for discharges of 101 percent to 400 percent over permit limit, $1,000 for discharges of 401 percent to 1000 percent over permit limit, $5000 for discharges of more than 1000 percent over permit limit); *Dean Dairy*, 929 F.Supp. at 807 (lower penalty is warranted for exceeding monthly average conventional pollutant permit limits by less than 100 percent).

Percentage of exceedences over permit limits has been considered also in administrative penalty assessments. *General Motors,* 1996 EPA ALJ LEXIS 3 at *5 (statutory maximum penalty of $125,000 warranted, for 92 days of exceeding permit limits, 18 of which were more than 200 percent over the permit limits); *LaBarge,* 1997 EPA ALJ LEXIS 6 at *8 (full $125,000 penalty assessed where several exceedences were more than 1000 percent over permit limit). Respondent's argument that its exceedences in terms of parts per billion were small does not take into account the level of toxicity of each pollutant and the effect of such exceedences, along with the discharges by other point sources, on the quality of the receiving water. *See, e.g., Smithfield Foods,* 972 F.Supp. at 346 (because other point sources and non-point sources also discharged phosphorus into the receiving waters, "[d]efendants are not the sole cause of the degradation and eutrophication to the river, but their exceedences of the phosphorus, TKN and ammonia limits clearly contributed to the degradation and eutrophication"); 40 C.F.R. § 122.44(d)(NPDES permits must include limits to "control pollutants which may be discharged a level which will cause ... *or contribute to* an excursion above any State water quality standard" (emphasis added)).

Respondent's discharges averaged approximately 200 to 450 percent over the permit limits over a 20 month period. Findings of Fact 29-31. These violations were not occasional or minor (less than 100 percent) excursions over its permit limits, which would warrant a substantial mitigation of the maximum penalty. However, the violations also were not in the extreme category of exceedences of more than 500 or 1000 percent over a period of several years, which may warrant no reduction from the maximum penalty in terms of the gravity criterion. Therefore, the relative gravity of Respondent's violations warrants some reduction from the statutory maximum for the violations in Count I.

As to Count II, any exceedences over the permit limits would be less than Mack Laboratories' detection limits, but those limits are significantly greater than Respondent's permit limits. Respondent's effluent could have exceeded its permit limits by up to approximately 300 percent for cyanide and 400 percent for phenolics without detection by Mack Laboratories. Findings of Fact 11-22, 52. Thus, the penalty for Count II will be mitigated on the basis that any such exceedences were not proven to have occurred and that they would have been less than 500 percent over the permit limits.

Respondent argues further that there was no evidence of any detrimental impact to Lick Run, the receiving stream. Referring to Mr. Monroe's testimony, Respondent asserts that uncontroverted evidence presented as to Lick Run shows that there was no impact from Respondent's facility. Mr. Monroe's testimony to that effect, *e.g.,* that the aquatic life below Respondent's facility was "in very good shape," is conclusory and not based on any specific expertise, testimony, or documentation in the record. Findings of Fact 36, 37. Although he refers to aquatic surveys that he conducted, such surveys are not documented in the record. Finding of Fact 37.

Respondent is correct that no <u>actual</u> impact on the receiving water by Respondent's discharge was shown. However, the <u>potential</u> for harm to human health or the environment is a key factor in determining penalties under the Clean Water Act and provides a basis for assessing substantial penalties in the absence of a showing of actual harm. *Smithfield Foods, Inc.,* 972 F.Supp. at 344 ("[a] court may justifiably impose a significant penalty if it finds there is a risk of environmental harm, even absent proof of actual deleterious effect"); *Dean Dairy,* 929 F.Supp. at 807 ("because actual harm to the environment is by nature difficult and sometimes impossible to demonstrate, it need not be proven to establish that substantial penalties are appropriate in a Clean Water Act case"); *Gulf Park Water Company,* 14 F.Supp. 2d at 860 ("the United States does not have the burden of quantifying the harm caused to the environment by the defendants"); *Powell Duffryn,* 720 F.Supp. at 1162 ("[a]ny violations of these water quality based effluent limitations causes

some degree of harm to the water quality..."); *N.R.D.C. v. Texaco*, 800 F.Supp. 1, 71 (D.Del. 1992), *rev'd on other grounds,* 2 F.3d 493 (3d Cir. 1993)("all pollutants create some harm or risk and ... it is hard to quantify precisely that harm or risk"); *Hercules,* 1989 U.S. Dist. LEXIS 16901 at *15 (long-term effects of pollutants on ecosystems not known, but violations of permit limit have at least a potentially destructive impact, so a relatively low penalty factor is not warranted).

Some courts have considered the absence of a showing of actual harm to be a mitigating factor in calculating a penalty, apparently in order to distinguish violations which result in measurable damage to the environment from those which do not. *Friends of the Earth v. Laidlaw Environmental Services,* 956 F.Supp. at 602; *Hawaii's Thousand Friends,* 821 F.Supp. at 1396 (lack of measurable material harm is a significant mitigating factor); *Universal Tool & Stamping,* 786 F.Supp. at 748 (lack of material environmental harm is significant mitigating factor); *Avatar Holdings,* 1996 U.S. Dist LEXIS 12312 at *16 (substantial reduction in the maximum statutory penalty is warranted where the violations caused minimal environmental damage).

Nevertheless, the parties in those cases generally presented documentation and/or expert testimony at least as to potential effects of the discharges. *Dean Dairy,* 929 F.Supp. at 803 (evidence of degradation of the receiving water by the POTW's discharge of pollutants); *Smithfield Foods,* 972 F.Supp. at 346 (court considered characteristics and degradation of receiving waters and potential effects thereon of each pollutant); *Gulf Park Water Company,* 854 F.Supp.2d at 860 (expert testimony about discharges of treated and untreated wastewater constituting public health threat and threat to environment); *Powell Duffryn,* 720 F.2d at 1161-1162 (citing to State water quality reports and EPA water quality publication, court noted potential adverse effects of the pollutants on oxygen levels and fish); *Hercules,* 1989 U.S. Dist LEXIS at *15 (parties submitted data on degree of toxicity of pollutants; court noted effect of pollutants on available oxygen); *Hawaii's Thousand Friends,* 821 F.Supp. at 1395 (testimony raised "serious questions about the potential risks involved in discharging sewage into the ocean"); *Friends of the Earth v. Laidlaw Environmental Services,* 956 F.Supp. at 601, 602-603 (toxicity testing data and fish tissue studies submitted; court noted mercury's extreme toxicity and potential to methylate in sediment, water or fish tissue).

It is troubling that in this case, given the Respondent's significant discharges of toxic pollutants, that Complainant has provided virtually no support in the record upon which to find a potential for harm. Complainant presented no data or information as to levels of toxicity or potential effects of the pollutants at issue, no expert testimony or specific testimony as to the potential for harm to health or the environment, and very little information as to the characteristics of the receiving waters. Ms. Pacera merely testified conclusively that exceedences of limits for cyanide and phenolics have a potential for harm to aquatic life, and that exceedences for mercury have a potential for harm to human health. Finding of Fact 34. She testified that Lick Run is designated for trout stock fishery. Finding of Fact 32.

It is acknowledged that judicial cases generally involve larger penalties and a greater investment of government resources than administrative enforcement cases. However, in order to prevail, something more is needed in an administrative proceeding than a bald statement by Complainant that toxic discharges have a potential impact on the aquatic life of the receiving stream or on human health. Complainant carries the burdens of presentation and persuasion that the penalty sought is appropriate, and each matter of controversy is decided upon a preponderance of the evidence standard. 40 C.F.R. § 22.24, as amended, 64 Fed. Reg. at 40185.

Thus, where the matter of the potential for harm is controverted, Complainant must

present some evidence, other than conclusory testimony, to satisfy its burden. For example, Complainant could have presented general information describing the potential impacts of the particular pollutants at issue, levels of toxicity and concentrations of the pollutants at issue, and the uses and characteristics of the receiving stream, without a large investment of time and resources on the part of Complainant.

For this reason, in terms of the circumstances of the violations, the penalty assessed will be significantly reduced to account for the lack of demonstrated actual harm and the lack of evidence as to the potential for harm.

2. *Economic benefit or savings from the violations*

Complainant does not claim that Respondent realized any economic benefit or savings from the violations in Count I. Finding of Fact 28. For Count II, Complainant claims an economic benefit of $1000 on the basis, according to Complainant's penalty calculation worksheet, that it would have been more expensive for Respondent to have samples analyzed with lower detection limits. Finding of Fact 50. However, there is no evidence in the record showing that another laboratory, or Mack Laboratories, would have charged more to analyze samples with a lower detection limit, or showing how much more it would have cost Respondent to have such analyses conducted. It is not clear whether the "minimum cost of sampling" asserted by Complainant (Finding of Fact 50) is the increased cost or the total cost to Respondent for the correct analyses to be conducted. Such a record does not provide a reasonable approximation of any economic benefit, and therefore there is no support in the record for calculating any economic benefit or savings from Respondent's noncompliance pertaining to Count II.

3. *Culpability*

Respondent argues in mitigation of the proposed penalty that it attempted in good faith to comply with the requirements at issue.[(9)] However, the fact that Respondent is a POTW which should have the expertise and primary responsibility of treating and monitoring wastewater so that it does not harm public health or the environment, is taken into account. Respondent knew that its effluent was exceeding permit limits for cyanide, phenolic and mercury, reporting such exceedences from September 1994 through August 1995, before it had its consultant begin to investigate such exceedences. Findings of Fact 11-17, 38, 41, 42. During the time period from April 1995 through August 1995, Respondent should have noticed from the face of the DMRs that the testing methods used by Mack Laboratories were not sensitive enough to meet the permit limits. Finding of Fact 22.

Respondent argues that it relied on a third party, namely Mack Laboratories, to conduct the testing and analysis and to notify Respondent if compliance with the permit limits could not be achieved. Findings of Fact 39, 40. Such reliance is not relevant to the penalty for Count I, as the exceedences of the permit limits were not within Mack Laboratories' control; the latter merely reported to Respondent the results of sample analysis. Respondent acknowledged the exceedences in its DMR reports, but did not explain the violations or take immediate action to investigate them. Findings of Fact 38, 41.

As to Count II, Respondent's reliance on Mack Laboratories to conduct analysis of samples using a methodology appropriate for its permit limits reflects a level of culpability far removed from the highest level of culpability, which is intentional

disregard for the monitoring requirements. Findings of Fact 40, 44, 51, 52. The penalty for Count II will be reduced to reflect Respondent's level of culpability.

Respondent's efforts to investigate the exceedences and to engage other companies to perform testing and analysis, albeit delayed and largely in response to the EPA letter dated November 30, 1995, are taken into account in assessing the penalty herein, warranting a reduction in the penalty for Count I. Findings of Fact 41, 42, 43. *Universal Tool & Stamping,* 786 F.Supp. at 752 (although defendant should have been "more expeditious in its approach to resolving the problems" with respect to exceeding permit limits, court considered good faith efforts as a mitigating factor).

4. *Prior history and other matters as justice may require*

Respondent's prior violations of sanitary sewer overflows and failure to report certain testing results on DMRs (Finding of Fact 27) do not evidence a continuing pattern of violations on the part of Respondent. Such a pattern of prior violations would justify no reduction from the statutory maximum for the criterion of prior history of violations. In contrast, the few prior violations here warrant some reduction from the maximum statutory penalty for Counts I and II.

There are no facts unique to this case which were not considered with regard to the other statutory criteria for penalty assessment. There is therefore no reason to make any penalty adjustment for "other factors as justice may require."

5. *Penalty calculation*

There are 22 violations in Count I, so, setting aside for the moment the statutory cap of $125,000, the statutory maximum penalty for Count I is $220,000. Considering the percentages of exceedence over the permit limits, the lack of evidence as to environmental harm, and the fact that half of the violations were only exceedences of the daily limit, the statutory maximum penalty will be reduced by 65 percent. The penalty is further decreased by 15 percent for Respondent's efforts to investigate the exceedences, and 10 percent for the lack of a significant history of prior violations. The penalty for **Count I** is therefore determined to be **$22,000**(10 percent of the statutory maximum penalty).

As to Count II, there are 24 violations, with a statutory maximum penalty of $240,000. Considering the potential for exceedences of the permit limits, the lack of evidence as to environmental harm, and the fact that almost half of the exceedences were of daily limits, the statutory maximum penalty will be reduced by 70 percent. Further reductions of 12 percent are made for Respondent's level of culpability, and 10 percent for lack of significant history of prior violations, resulting in a penalty under **Count II** of **$19,200**(8 percent of the statutory maximum penalty). The penalty is not increased for any economic benefit of Respondent's noncompliance.

B. Penalty Assessment--Count III

1. *Nature, circumstances, extent and gravity of the violations*

As to the nature of the violation, the requirement for POTWs to have in place an EPA-approved pretreatment program is vital to the NPDES program, in order to control discharges of pollutants which "Pass Through" the POTW (cause violation of the POTW's permit) or "Interfere," *i.e.,* inhibit or disrupt POTW's operations or processes. POTWs with a flow greater than five million gallons per day and receiving from industrial users (dischargers into the POTW) pollutants which Pass Through or Interfere or are otherwise subject to Pretreatment Standards, are required to establish a pretreatment program. 40 C.F.R. § 403.8(a). Without adequate pretreatment measures, a POTW cannot assure proper treatment of wastewater and discharges which meet the effluent limits in its permit.

Complainant assesses a separate penalty for each of the ten months from the May 30, 1997, due date until the date of the Complaint. Finding of Fact 54. The justification for a separate penalty for each month that Respondent failed to submit the pretreatment program is not apparent in the record. Although Section 309(g)(2)(B) of the Act provides that a maximum penalty of $10,000 may be assessed for each day during which the violation continues, a per-day or even a per-month penalty does not reflect the magnitude of the violation, *i.e.,* Respondent's delay in submitting its pretreatment program, in the circumstances of this case. Respondent is not being penalized in this proceeding for failing to have a pretreatment program; the penalty is assessed for failing to timely submit the program to EPA for approval. The length of time that Respondent delayed in submitting its program is more appropriate to consider in terms of the extent of the violation. Thus, the statutory maximum for Count III is $11,000.[(10)]

Respondent urges that it had the pretreatment program in place as of June 1997, just after the due date, that it was not substantively different from the complete program submitted November 3, 1998, and that only the adoption by the municipalities was not in place on the due date. Findings of Fact 62, 63, 66. Nevertheless, the adoption of the program by the municipalities discharging into Respondent's POTW is a significant part of the pretreatment program, and Respondent did not submit its complete pretreatment program until 17 months after the due date. Finding of Fact 63; See, 40 C.F.R. § 403.8(f)(POTW pretreatment program requirements). On balance, these facts warrant a 5 percent reduction in the penalty to reflect the extent of the violation.

Respondent also emphasizes that it implemented a pretreatment program in 1982, and that it eliminated certain discharges from two users in implementing its pretreatment program. Findings of Fact 65, 67. These facts mitigate the penalty to some degree, as Respondent was not required by EPA to develop and submit a pretreatment program until EPA issued the letter dated May 30, 1996. Respondent's efforts in reducing pollutants from the discharges of its industrial users may be recognized. Finding of Fact 56. Moreover, the record does not show any significant potential for harm to health or the environment by the delay in Respondent's submittal of the Pretreatment Program, as there is no showing that Respondent had significant exceedences of its permit limits between May 30, 1997 and the date it submitted its pretreatment program. Finding of Fact 68. The penalty will therefore be reduced by 25 percent to reflect the gravity and circumstances of the violation.

2. *Economic benefit or savings*

On its penalty calculation worksheet, Complainant proposes an economic benefit to Respondent of $2,000 as a "BEN program calculation." Finding of Fact 55. BEN is a computer program which computes the economic benefit a violator realizes during its noncompliance. Complainant asserts on the penalty calculation worksheet that the

average cost to develop a pretreatment program is $25,000. Finding of Fact 55. There was no testimony addressing this issue at the hearing, and there is nothing else in the record to explain the relationship between the figures of $2,000 and $25,000. One may presume that $2,000 is the amount Respondent may have saved by delaying submittal of the pretreatment program. However, a calculation of economic benefit or savings should be based upon evidence of record, not on a mere presumption or notation on a penalty calculation worksheet. Therefore, no increase in the penalty will be made for the criterion of economic benefit or savings.

3. *Culpability*

Complainant's comparison of other facilities that are able to meet deadlines for submittal of pretreatment programs is not appropriate for consideration as to the penalty, because the factors affecting each POTW may be different.

Respondent argues that its good faith efforts to comply with the requirement to develop and submit a pretreatment program warrant a reduction of the proposed penalty. Respondent acted soon after the May 30, 1996 notice to develop its pretreatment program for submittal to EPA. Findings of Fact 55, 57, 59, 62, 63. The delays cannot be attributed solely to Respondent's lack of effort; the delays appear to be based to some degree on the dischargers into Respondent's system, including municipalities and federal government facilities. Finding of Fact 61, 62, 66. Respondent evidenced good intentions in timely submitting the pretreatment program in its letter dated April 30, 1997; in subsequent correspondence with and inquiries to EPA; and in its submittal of part of the program and request for extension of time on June 2, 1997. Findings of Fact 57, 58, 60, 64.

There is no evidence that Respondent wilfully disregarded EPA's promptings to timely submit the program. Nevertheless, EPA had warned Respondent that collection of data may require significant time and resources. Finding of Fact 56. Due to the fact that Respondent's failure to submit the pretreatment program in a timely fashion to some extent was not within Respondent's control, the penalty will be reduced by 15 percent.

4. *Prior history and other factors as justice may require*

Complainant did not adjust its penalty calculation to reflect Respondent's prior history of violations in assessing the penalty for Count III. Finding of Fact 54. EPA's general policy stated in GM-22 is that a penalty should reflect a respondent's prior violations of similar requirements. CX 31. The prior violations in the record (Finding of Fact 27) are not similar violations to that alleged in Count III. Accordingly, the penalty for Count III will mitigated by 15 percent to account for the absence of a prior history of similar violations.

As stated in regard to Counts I and II, there are no facts unique to this case that were not considered with regard to the other statutory criteria for penalty assessment. There is therefore no reason to make any penalty adjustment for "other factors as justice may require."

5. *Penalty calculation*

The maximum penalty of $11,000 will be reduced by 5 percent to reflect the extent of the violation, by 25 percent to reflect the gravity and circumstances of the violations, by 15 percent to reflect Respondent's level of culpability, and by 15 percent to reflect the absence of prior similar violations. The total percentage of reductions is 60 percent, and subtracted from the statutory maximum of $11,000, the total penalty assessed under **Count III** is determined to be **$4,400** (40% of the statutory maximum penalty).

V. DECISION AND ORDER

Respondent is liable under **Count I** for discharging wastewater in excess of its permit limits for cyanide, phenolics, and mercury, in violation of Section 301(a) of the Act, and for such violation is assessed a penalty of **$22,000**. By Order dated February 3, 1999, Respondent previously has been found liable under **Count II**, for failure to use analytical testing methods sufficiently sensitive to demonstrate compliance with the effluent limitations in the permit, and is assessed a penalty of **$19,200**. Respondent is liable under **Count III** for failure to timely submit a pretreatment program as required by 40 C.F.R. § 403.8 and its 1996 permit, and for such failure is assessed a penalty of **$4,400**. Therefore, the total penalty assessed against Respondent in this proceeding is **$45,600**.

Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order 45 days after its service upon the parties, unless a party moves to reopen the hearing under 40 C.F.R. § 22.28, an **appeal** is taken to the Environmental Appeals Board (EAB) **within 30 days** of service of this Initial Decision, or the Board elects to review this Decision *sua sponte,* as provided in 40 C.F.R. § 22.30.

Unless this hearing is reopened and timely appeal of this Decision is taken, or the EAB chooses to review this Decision on its own initiative, **payment** of the full amount of this civil penalty shall be made **within 60 days** of the date that this Initial Decision is served on the parties, by submitting a certified or cashier's check in the amount of **$45,600**, payable to the Treasurer, United States of America, and mailed to:

EPA Region III
Regional Hearing Clerk
P.O. Box 360515
Pittsburgh, PA 15251

A transmittal letter identifying the subject case and docket number, and Respondent's name and address, must accompany the check. Respondent shall serve copies of the check on the Regional Hearing Clerk and on Complainant. Respondent may be assessed interest on the civil penalty if it fails to pay the penalty within the prescribed period.

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Stephen J. McGuire
Administrative Law Judge

Washington, D.C.

1. This proceeding involves two NPDES permits, both No. Pa 0027464. The first, the "1991 Permit", became effective on June 17, 1991 and expired on June 17, 1996. Counts I and II of the Complaint allege violations of the effluent limits and monitoring requirements in the 1991 Permit. The second permit, the "1996 Permit", was issued on September 13, 1996 and expires on September 13, 2001. Count III of the Complaint alleges violations of the requirement in the 1996 Permit for the Respondent to develop and submit an appropriate pretreatment program by May 30, 1997.

2. Hereinafter, citation to the official record in this proceeding shall be as follows: Hearing Transcript, Volume I (Tuesday March 9) as Tr. I ; and Hearing Transcript Volume II (Wednesday March 10) as Tr.II .

3. The first nine Findings of Fact were stipulated by the parties prior to hearing. CX-32.

4. Respondent's permit provides that mercury must be "not detectable using EPA Method 245.1 or 245.2, or equivalent, as approved by the Department." CX 1 p. 2c; CX 2 p. 2b. Although Respondent's DMRs indicate that the limit is zero, EPA alleges that the permit limit is 0.0002 mg/l. Complaint, Attachment A; CX 3-16.

5. Section 402 of the Act governs NPDES permits.

6. EPA has issued a Clean Water Act Settlement Penalty Policy, but it states that it is not to be used in determining penalties at a hearing or trial.

7. It is observed that some Administrative Law Judges have refused to follow this method on the basis of the EAB's observations in *Port of Oakland,* 4 E.A.D. at 199, that there is no requirement to apply in administrative litigation the methodology established by district courts for penalty assessment and that GM-22 does not require starting at the statutory maximum. *Mahoning Valley Sanitary District,* EPA Docket No. CWA-AO-08-09, 1996 EPA ALJ LEXIS 4 (ALJ, May 14, 1996); *Puerto Rico Urban Renewal & Housing Corp.,* EPA Docket No. CWA-II-89-249 (ALJ, June 29, 1993).

8. The statutory maximum for civil judicial actions, $25,000 per day of violation, differs from that for administrative penalties. The statutory criteria for civil penalties and administrative penalties also are somewhat different. For example, instead of the statutory criteria of "nature, circumstances, extent and gravity of the violation, or violations," Federal courts must consider instead the criterion of the "seriousness of the violation, or violations." *See*, sections 309(d) and 309(g)(3) of the Act.

9. "Good faith" is a criterion for civil penalty assessment under Section 309(d) of the Act; "culpability" is the relevant criterion for administrative penalties under Section 309(g)(3).

10. Pursuant to the Debt Collection Improvement Act of 1996, EPA issued a rule to adjust civil penalties for inflation, effective for all violations occurring after January 30, 1997. 40 C.F.R. § 19.4. The adjustment for administrative penalties under Section 309(g) is from $10,000 to $11, 000 per violation, and from a maximum of $125,000 to $137,500 in a single administrative action.