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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

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B. J. CARNEY INDUSTRIES, INC.) DOCKET NO. [CWA]-1090-
09-13-309(g)

RESPONDENT

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DECISION ON REMAND (1)

On June 9, 1997, the Environmental Appeals Board issued a Remand Order (CWA Appeal No. 96-2), 1997 NPDES LEXIS 1, in this case. The case was remanded to the presiding officer "for the limited purpose of determining: 1) how much of the \$167,000 economic benefit accrued within the limitations period, and 2) an appropriate penalty based upon all the factors required to be considered under the Clean Water Act § 309 (g) (3), including the amount of B. J. Carney's economic benefit within the limitations period." On October 3, 1997, a hearing was held and the parties filed proposed findings on the issues on November 20, 1997 and replies on December 10, 1997. Complainant's direct testimony was submitted in writing on July 31, 1997 and respondent replied on August 12, 1997. Respondent examined complainant's witness, Kimberly A. Zanier, on her direct testimony at the oral hearing session.

The EAB points out in the remand order that the Clean Water Act (CWA) and the agency's penalty policy require recapture of a violator's economic benefit from noncompliance. The EAB observed that assessing a penalty that reflects a violator's economic benefit of noncompliance serves two purposes: A penalty which is at least as large as the economic gain realized by the violator deters violations by taking away the economic incentive to violate the law and it ensures a level playing field among competitors. The purpose of the remand proceeding is to include in the penalty assessment the economic benefit the respondent received from noncompliance. And, in keeping with the EAB's remand order, the economic benefit determination will exclude the economic benefit respondent received outside the statute of limitations period.

During the initial hearing the complainant determined that respondent's economic benefit from noncompliance was \$167,000. The EAB upheld the process which complainant followed in deriving that benefit. Complainant initiated its analysis

by adopting the capital costs and annual maintenance and operation costs estimated by respondent's consultant, CH2M Hill. CH2M Hill determined that the capital cost of an evaporator to respondent in 1986 would have been \$62,550 and that the annual maintenance and operation cost in 1986 would have been \$1,550. Complainant selected January 25, 1984 as the date on which respondent was in violation of the pollution control requirements. In order to estimate the full economic benefit to respondent from the time respondent was noncompliant, complainant deflated the 1986 CH2M Hill estimates to the date of noncompliance in 1984. Applying a 16 % discount rate, complainant estimated that by the time of the initial hearing in 1993, the respondent had derived an estimated economic benefit of \$167,000. [\(2\)](#)

The EAB held that complainant's estimate was inaccurate because it included economic benefit derived by respondent during part of 1984 and 1985 when the statute of limitations precluded enforcement against respondent for any violations of the pollution control regulations. [\(3\)](#) The EAB remanded the hearing record to cure the problem presented by the statute of limitations. In its remand instructions the EAB directed that the full economic benefit should be reasonably approximated by "starting with [complainant's] calculation of \$167,000, and subtracting from it that portion of the benefit that accrued outside the five-year [statutory] limitations period."

The issue had to be remanded, the EAB concluded, because it could not determine from the record how much of the benefit occurred after October 1985 when the statute of limitations did not bar enforcement of the Clean Water Act. The EAB believed from its review of the existing record that it was possible, after excluding the "pre-limitations" period, the economic benefit to the respondent would exceed the \$125,000 maximum penalty permitted under the Clean Water Act.

The EAB considered at length respondent's arguments about the discount rate used by complainant. It concluded that there was no record support for respondent's contention that the discount rate was unreasonable. Moreover, the EAB held that complainant could select a discount rate as of the date of noncompliance, despite the fact that the pollution control regulations could not have been enforced on that date because of the statute of limitations.

The EAB also held that the record did not support the respondent's claim that it spent \$240,000 in complying with the zero discharge requirement. The EAB found that, nevertheless, respondent did benefit from that claim when Judge Head assessed the penalty. The EAB determined that Administrative Law Judge Head gave weight to respondent's asserted compliance efforts in two ways: First, Judge Head concluded that the violations resulted in only minor harm to the environment and, second, he reduced the penalty by 50% because, among other reasons, respondent exhibited good faith efforts at compliance. As a result of this, the EAB held, there should not be any additional adjustment in the economic benefit based on respondent's claims of compliance. The EAB also directed that the presiding officer, in assessing the penalty, should be guided by the principle that compliance with the law is the primary objective of the environmental statutes and regulations and that penalties play an important role in deterring violations. Consideration of the justice, or equitable, factor by the presiding officer, the EAB stated, is warranted only if the evidence of environmental good deeds is clear and unequivocal, and the circumstances asserted are such that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice.

The Evidence On Remand

The complainant submitted additional testimony from Kimberly A. Zanier. Zanier is an expert in economic benefit analysis and her testimony was the basis of the economic benefit findings and conclusions at the initial hearing. Zanier calculated that respondent's economic benefit from January 26, 1984, the date of noncompliance, through July 1, 1997 the hypothetical date the penalty was paid, was \$266,917. She estimated the economic benefit that accrued from January 26, 1984, the date of noncompliance, through October 12, 1985, the date when the statute of limitations no longer prohibited enforcement, to be \$14,689. That amount represents the difference between the required investment in 1984 of \$48,158 and the total

economic benefit to respondent as of October 12, 1985 of \$65,158. Zanier subtracted \$14,689 from the total economic benefit of \$266,917 to arrive at the enforceable economic benefit from October 12, 1985 to July 1, 1997, of \$252,228. If \$14,689 is subtracted from the \$167,242 economic benefit found by Zanier at the initial hearing, the amount of economic benefit derived by the respondent through October 19, 1993 would be \$152,553.

Zanier applied the same set of variables as she did originally to determine economic benefit from noncompliance outside the statute of limitations period. ⁽⁴⁾

Her estimate of the 1984 Cash Flow included investment at \$48,158, the operation and maintenance costs of \$687, and the opportunity cost of capital of 1.11860. (Zanier derived her estimate of the opportunity cost of capital by applying the following in 1984: 1984 Debt 6.59% (after tax) times 50.00% (weight) 1.11860.) According to Zanier, respondent received an accumulated economic benefit as of 12-84 of \$54,638. Zanier estimated the accrual of benefit to respondent in 1984 was \$6,480 (\$54,638 [which is the end of year accumulation] minus \$48,158 [which is the beginning of period capital requirement]). Her calculations of economic benefit as of 12-85 were as follows:

1985 Beginning of Year Cash	\$54,638
Current Year Cash Flow Adjustment	\$ 1,522
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Adjusted Cash Flow	\$56,160
Opportunity Cost of Capital	1.1601
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Economic Benefit As Of 12-85	\$65,151

Zanier then adjusted the 1985 amount excluding the amount from 1-1-85 through 10-12-85. The end of the year accumulation of economic benefit was \$10,513 (\$65,151 minus \$54,638 \$10,513). Since 78.0822 % (285 days [1-1-85 through 10-12-85]) of the benefit had to be excluded because of the statute of limitations, Zanier excluded \$8,209 of the economic benefit accrued to the respondent in 1985. Zanier concluded that the amount to be excluded from complainant's economic benefit calculations should be \$6,480 for 1984 and \$8,209 for 1985. Zanier then provided estimates of the accrued economic benefit to the respondent in every year through July 1, 1997 as follows:

Economic Benefit to Respondent by Year

12-86	\$77,380
12-87	\$82,622
12-88	\$89,693
12-89	\$102,906
12-90	\$117,330
12-91	\$133,105
12-92	\$151,000
10-19-93	\$167,242
12-93	\$171,303
12-94	\$194,334
12-95	\$220,462
12-96	\$250,104
7-1-97	\$266,917

The complainant estimates that the economic benefit to respondent of noncompliance from 10-12-85 to 10-19-93 is \$152,553 and from 10-12-85 to 7-1-97 is \$252,228. These amounts exclude the benefit derived in 1984 and 1985 which were barred from recapture because of the statute of limitations.

The respondent submits proposed findings about the gravity of its violations and the factors it believes ameliorate the penalty assessment because of gravity. The initial decision was largely not challenged in that regard and the EAB did not reverse the findings and conclusions of the presiding officer in those areas. The EAB directed the presiding officer not to retry matters already decided and

reviewed. For that reason, no further consideration will be given to the gravity factor.

Respondent concedes that the economic benefit it received from noncompliance was in excess of the statutory maximum of \$125,000. Nevertheless, respondent maintains that complainant's exclusion of \$14,689 from its estimation of economic benefit during the statute of limitation period, from January 26, 1984 through October 12, 1985, was incomplete because there was "compounding" of that amount in the years after October 12, 1985 in complainant's analysis. Respondent has not demonstrated how complainant's analysis is inconsistent with the EAB's finding about the application of the statute of limitation in this case. Respondent's argument is also inaccurate in its characterization of complainant's estimate.

The statute of limitations in this case prohibits enforcing a rule or policy during the period before October 12, 1985. It also requires that any economic benefit to respondent outside the limitations period must be excluded from the determination of total economic benefit. It does not mean that economic benefit accrued after October 12, 1985 may not be affected by factors arising before that date during the period of noncompliance. The EAB explained that "[t]he statute of limitations does not preclude a company from obtaining a benefit, it only precludes the Agency from recovering that portion of the benefit that was realized more than five years before the complaint was filed, outside the limitations period." The evidence demonstrates that the benefit derived before October 12, 1985 was excluded. Respondent has not shown that the benefit calculated after that date is not a reasonable approximation of its economic benefit from noncompliance.

Respondent makes two other arguments about the complainant's economic benefit showing which it claims undermine the reasonableness of complainant's estimate of economic benefit. It argues that complainant did not exclude operating and maintenance costs after respondent stopped operating the facility in 1990 and that a different weighted average cost of capital rate should have been used after October 1993 since it was not established during the initial hearing that the weighted average cost of capital rate used before that date would be applicable thereafter. Complainant responds that it did exclude operating and maintenance costs after 1990, as appendix A to Zanier's testimony clearly indicates. Respondent's second argument is immaterial to computing the economic benefit in this proceeding. No matter what average cost of capital rate complainant used after 1993, it would not reduce the economic benefit below the statutory maximum since the maximum benefit had been received by respondent by 1993.

In the initial decision, Judge Head held that respondent should pay a \$9,000 penalty. That finding, insofar as it was appealed, has been reviewed by the EAB and will not be reconsidered in this remand proceeding. The focus of the penalty assessment in this decision is on the economic benefit derived by respondent from noncompliance, a factor Judge Head did not weigh in his initial decision. The remand record establishes that after October 12, 1985, the respondent realized an economic benefit in excess of the statutory maximum of \$125,000. The respondent under the gravity criteria must already pay a penalty of \$9,000. However, because of the statutory maximum, the full penalty respondent must pay is only \$125,000.

Respondent argues that justice, or equitable, considerations require reducing the penalty in this proceeding because it was badly treated by the complainant and because it undertook compliance efforts. Those are issues that have already been reviewed. The EAB found that "the Region exercised great patience and restraint by working with [Carney and the City of Sandpoint] in an effort to achieve compliance." Respondent's argument that it has been denied justice is contrary to the facts found by the EAB. The EAB explained that:

For almost five years, the Region urged Sandpoint to fulfill [its enforcement] responsibility, all the while repeatedly advising Sandpoint about the Region's concern that B. J. Carney was not complying with the applicable standard. It was not until the Region was convinced that Sandpoint would not exercise its enforcement authority that the Region initiated this action.

The Board, after reviewing the penalty assessment in the initial decision, concluded that it would not be "appropriate in this case based upon any past expenditures on compliance costs" by respondent to adjust the economic benefit downward.

The complainant accurately points out that all of the arguments that respondent makes in its brief were made and rejected by the EAB in its opinion. There are some additional arguments that respondent now makes about the initial hearing which it failed to raise initially before the EAB. Those arguments are beyond the scope of the remand and will not be considered. Finally, the EAB points out that justice seldom requires reducing a penalty. A good deed warrants a reduction in penalty only if the evidence of the good deed is "clear and unequivocal" and "the circumstances must be such that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice." There are no facts asserted by respondent in this proceeding that meet that test. The record establishes that a just and reasonable penalty is the full statutory maximum of \$125,000.

ACCORDINGLY, IT IS ORDERED that respondent B. J. Carney IS ASSESSED a civil penalty of \$125,000 for the violations of the Clean Water Act.

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

U. S. EPA, Region X
(Regional Hearing Clerk)
Mellon Bank
P.O. Box 36090M
Pittsburgh, PA 15251

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

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

Pursuant to 40 C.F.R. § 22.27 (c), this initial decision shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceeding unless (1) an appeal to the Environmental Appeals Board is taken from it by a party to this proceeding or (2) the Environmental Appeals Board elects, sua sponte, to review this initial decision. If an appeal is taken, it must comply with § 22.30. A notice of appeal and an accompanying brief must be filed with the Environmental Appeals Board and all other parties within twenty (20) days after this decision is served upon the parties.

Edward J. Kuhlmann

Administrative Law Judge

January 5, 1998

Washington, D. C.

1. The complainant was represented in the remand proceeding by Mark A. Ryan, Esq. and the respondent was represented by Jeffrey L. Supinger, Esq. Administrative Law Judge Daniel M. Head issued the initial decision on March 11, 1996. Judge Head had retired by the time the EAB issued its remand order and, therefore, the case was

reassigned.

2. The EAB found that complainant had assumed in its calculation of avoided costs that respondent had taken some of the compliance steps identified in the CH2M Hill report. This assumption was made even though the hearing record reflected that respondent took none of the steps recommended in the CH2M Hill report. Overall, the EAB concluded, complainant's calculations resulted in a conservative estimate of avoided costs.
3. In making that finding, the EAB found that the presiding officer had raised the limitations issue in his decision and that the parties had not had an opportunity to address the issue. The complainant requested that the EAB remand the case in order that it might demonstrate what economic benefit the respondent enjoyed outside the statutory limitations period.
4. Zanier applied the following factors in her analysis: The date on which noncompliance began was 1-26-84, the date on which the statute of limitations did not bar enforcement was 10-12-85, the date on which respondent ceased operation was 7-1-90, a hypothetical date that respondent paid the penalty 7-1-97, capital investment avoided expressed in 1986 dollars was \$62,500, annual operating and maintenance costs avoided in 1986 dollars \$1,550, salvage value of equipment as of 7-1-90 was \$0, inflation rate for capital expenditures varies annually from 1.234% to 3.52%, weighted average cost of capital was 16.01%, tax rates- Idaho which vary from 0 to 8%, Federal rates of tax which vary from 0 to 48%, and resulting benefit \$252,228.

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Last updated on March 24, 2014