

12/8/92

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the matter of)
)
EASCO ALUMINUM CORPORATION,) Docket No. CWA-AO-V-13-89
)
Respondent)

INITIAL DECISION

CWA, section 309(g) - Directors Final Findings and Order (DFFO) delayed compliance with certain conditions of an NPDES permit where evidence showed that it was intended to have that effect.

CWA, section 309(g) - a respondent having as alternative means of stopping its illegal discharges, the building of a wastewater treatment plant or connecting to the city sewer system, may choose the less expensive means if it is effective and does not delay compliance.

CWA, section 309(g) - A respondent who has undertaken to stop its illegal discharges by connecting to the city sewer system cannot thereafter change and prolong its illegal discharges because it believed that it would be able to comply with proposed revised permit limits and considered this course of action to be more favorable for it.

CWA, section 309(g) - Respondent's failure to monitor its flow for 24 hours daily as required by its NPDES permit is not justified by the fact that compliance would have been expensive because of the intermittent nature of its flow.

CWA, section 309(g) - Respondent is not excused from complying with original permit limits in an NPDES permit by fact that incorrect guidelines were used to set the limits. Respondent's compliance may be measured against the more lenient modified limits, however, for purposes of determining the appropriate penalty.

CWA, section 309(g) - Penalty of \$45,000, assessed against respondent for violations of effluent limits and monitoring requirements.

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Opinion

This is a proceeding under the Clean Water Act ("CWA"), section 309(g), 33 U.S.C. 1319(g), to assess class II administrative penalties against Easco Aluminum Corporation for the unlawful discharge of pollutants into the Mahoning River and for failing to comply with the monitoring requirements of a National Pollutant Discharge Elimination System ("NPDES") permit issued to it.¹

¹ Clean Water Act, section 309(g)(1), 33 U.S.C. 1319(g)(1), authorizes the Administrator of the EPA to assess administrative civil penalties for violations of the Act and for violations of any condition or limitation in an NPDES permit. Section 309(g)(2)(B) provides for the assessment of Class II civil penalties in an amount not to exceed \$10,000 per day of violation up to a maximum penalty of \$125,000. That section further provides that such penalties are to be assessed and collected after notice and opportunity for a hearing on the record in accordance with 5 U.S.C. 554.

Summary Statement of Legal Authorities, Proceedings and Issues

The CWA, section 301, 33 U.S.C. 1311, prohibits the discharge of any pollutant with certain exceptions not pertinent here. Excepted from this general prohibition is the discharge of pollutants allowed under an NPDES permit issued pursuant to section 402 of the Act, 33 U.S.C. 1342, subject to the conditions prescribed in the permit by the issuing authority (the Administrator of the EPA or the authorized state agency under a state administered program).

During the period relevant to this proceeding, Easco discharged into the Mahoning River under a NPDES permit issued by the Ohio Environmental Protection Agency of the State of Ohio ("OEPA").² Among the conditions imposed by the permit were limitations placed on the discharges of total suspended solids ("TSS") and oil and grease ("O&G") and on the pH of the effluent. It is not disputed that TSS and O&G and the pH (a measure of alkalinity or acidity) of the effluent are pollutants the discharge of which into the Mahoning River would be unlawful except as allowed in Easco's permit.³ In addition to limiting the discharge of pollutants, the permit also contained requirements for

² The original permit, OEPA Permit No. 31C00057*DD, was issued with an effective date of July 23, 1985, and an expiration date of July 20, 1990, and is in the record as Complainant's Exhibit ("CX") 4 and Respondent's Exhibit ("RX") 4. This permit was revised by a modified permit issued on December 21, 1987, with an effective date of February 10, 1988. The modified permit is in the record as CX 5 and RX 31.

³ See CWA, sections 502(6), (7), (12) and (14), 33 U.S.C. 1362(6), (7), (12) and (14) (defining the terms used in the Act); see also Transcript of Proceedings ("Tr.") 1121-1122, 1126-1129.

monitoring Easco's discharges. The monitoring data had to be reported to OEPA each month and provided the data for determining compliance with the permit's limits.⁴

The complaint charges Easco with numerous violations of the effluent limitations for pH, TSS and O&G, and of the monitoring requirements during the period from August 1985 through March 1988. The maximum penalty of \$125,000 is requested.

The violations charged are based upon the report Easco had to file each month ("DMR"). A partial accelerated decision under 40 C.F.R. 22.20, was issued on August 16, 1991 (hereafter "Order on Partial Accelerated Decision), finding Easco liable for the violations on the grounds that there was no factual dispute that Easco had discharged TSS, O&G and pH in excess of the permitted effluent limitations and had failed to monitor its effluent as alleged.

Easco does not question that its DMR reports disclose the violations charged.⁵ It does, however, raise several defenses to the size of the proposed penalty and, indeed, to the imposition of any penalty at all. These defenses can be broadly summarized as follows:

First, Easco asserts that it should not be charged with any violations of the permit prior to October 1, 1986, because it was not required to comply with the permit until that date.

⁴ See CX 4, pp. 2, 6 (Par 4).

⁵ Tr. 459. The DMR reports are in the record as CX 6. The violations shown reported therein are tabulated in CX 20 (effluent limit violations) and CX 21 (monitoring violations).

Second, Easco contends that the proposed penalty is unreasonable in light of Easco's asserted good faith efforts to meet the permit conditions and the circumstances under which those efforts were made.

Third, Easco contends that the violations had no more than a de minimis impact on the quality of the Mahoning River.

The relevant facts will be considered in the following discussion of each of the above defenses. Proposed findings inconsistent with this decision are rejected.

Discussion

A. Easco's Operations

Easco operates a facility located in the City of Niles, Ohio, which recycles aluminum scrap, melting it down and alloying it and casting the alloy into aluminum billets. Easco uses a recirculating water system to cool the molds used in the casting process. Under the system, water taken from the Niles drinking water supply is circulated through the molds, pumped to a cooling tower and then into a holding tank to be used again. A certain amount of recirculating water is discharged from the system in the process. During the period involved in this proceeding, these discharges ("blowdown") were through a pipe into the Mahoning River.⁶ In July 1985, Easco was discharging about 38,000 gallons of water per day into the Mahoning River.⁷ Late in 1985, Easco installed a new

⁶ Tr. 540-545; RX 11. For definition of "blowdown" see 40 C.F.R. 401.11(p).

⁷ Tr. 546; CX 2.

Marley cooling tower which resulted in reducing the amount of discharge.⁸

B. The NPDES Permit

The NPDES permit involved in this proceeding is OEPA Permit No. 31C00057*DD, which regulated Easco's discharges into the Mahoning River effective July 23, 1985, with an expiration date of July 20, 1990.⁹ The permit as originally issued used the wrong category in setting the effluent limitations and a modified permit using the correct category was issued on December 21, 1987, with an effective date of February 10, 1988.¹⁰ On April 4, 1988, Easco ceased discharging its cooling tower blowdown into the Mahoning River and commenced discharging into the City of Niles' sanitary sewer system.¹¹

The original permit contained concentration and loading

⁸ Tr. 547; RX 26. Mr. Tierney estimated that the average flow to the river was 5,000 gallons per day. The City of Niles calculated Easco's flow after Easco had tied in to the City's sewer system as amounting to a maximum of 6000 gallons per day. Tr. 773. Also discharged through the pipe were stormwater runoff and ground water. RX 49, 50. Those discharges are not being questioned in this proceeding.

⁹ CX 4 & RX 4.

¹⁰ The permit had used as its regulatory base proposed effluent guidelines for metal molding and casting (foundry) industry, 50 FR 6572-80 (February 15, 1985). RX 2 (CX 3, complainant's version of the briefing memo, does not appear in the public record, see Tr. 317-318); RX 1. That guideline had been selected by the EPA and approved by OEPA. Tr. 170-174. It was subsequently determined that the proper regulatory base was the nonferrous metals manufacturing point source, secondary aluminum smelting subcategory, 40 C.F.R. 421.33(f). RX 29.

¹¹ RX 47.

limitations for several parameters including TSS and O&G.¹² Pertinent to this proceeding are the concentration limits for TSS and O&G, which were as follows:

	<u>30 day average</u>	<u>daily maximum</u>
TSS	6.8 mg/l	23.5 mg/l
O&G	2.6 mg/l	6.5 mg/l

Also pertinent is the pH level of the effluent which the permit stated shall not be less than 6.5 s.u. nor more than 9.0 s.u.¹³

The modified permit deleted loading limits for TSS and O&G and changed their concentration limits as follows:

	<u>30 day average</u>	<u>daily maximum</u>
TSS	20 mg/l	30 mg/l
O&G	10 mg/l	15 mg/l

The pH requirements remained the same.¹⁴

In addition to effluent limitations, the permit also contained monitoring requirements for each parameter named in the permit.¹⁵

¹² Concentration is the quantity of pollutant present in a sample expressed as a proportion of the sample, e.g., milligrams per liter ("mg/l") or micrograms per liter ("ug/l"). Load is the total discharge by weight during any given period, e.g., kilograms per day ("kg/day"). CX 4, p. 5.

¹³ CX 4 & RX 4.

¹⁴ CX 5 & RX 31.

¹⁵ In addition to concentration limits for TSS and O&G and a limit for pH, the permit also contained concentration and load limitations for total copper, total lead and total zinc. Monitoring was required to measure all these parameters as well as for measuring flow rate, water temperature and phenolics. The modified permit deleted concentration limits for lead and zinc and loading limits for copper, added loading limits for total aluminum and ammonia and deleted the monitoring requirement for phenolic. CX 4 & 5; RX 4 & 31.

The EPA charges and the DMRs show 739 violations of effluent limits for pH, TSS and O&G during the period August 1985 - February 1988. These can be broken down as follows:¹⁶

pH daily max. - 14 violations
O&G daily max. - 28 violations
O&G monthly avg. - 540 violations (18 months)
TSS daily max. - 7 violations
TSS monthly avg. - 150 violations (5 months)

The complaint further charges and the DMRS show 1234 monitoring violations for the same period.¹⁷

The effluent limitations used to determine the violations are those contained in the modified permit.

C. The Effective Date of the Permit

Although the permit contained an effective date of July 23, 1985, Easco contends that the effective date is October 1, 1986. It relies upon a letter dated April 17, 1985, from Mr. Winklehofer of the U. S. EPA, Region 5, to Mr. Lee of OEPA. In the letter, Mr. Winklehofer stated that he was forwarding the final draft of the permit that was subsequently issued in July 1985, the briefing memo and a draft of Director's Findings and Orders ("DFFO"), and that the draft permit was ready for public notice.¹⁸ Of significance is

¹⁶ CX 20. A violation of a monthly average is a separate violation for each day of the month. Atlantic States Legal Foundation v. Tyson Foods, 897 F. 2d 1128, 1139-40 (11th Cir. 1990); see also Order on Partial Accelerated Decision at 3-4.

¹⁷ CX 21.

¹⁸ Respondent's Exhibit ("RX") 1. The letter is part of the public record relating to the July 1985 permit. Tr. 306. The DFFO appears to have been issued on July 24, 1985, one day after the

the last paragraph of the letter which reads as follows:

Since the facility currently has an inadequate recycling facility and no wastewater treatment system, "Directors Findings and Orders" were included with this draft permit. As shown in the orders, the facility will have until July 31, 1986 to construct the BAT treatment and recycle system needed to comply with the attached permit and must attain final compliance with the permit by September 31, 1986. Until this date the effluent limitations from their expired NPDES permit will be in effect.¹⁹

Easco argues that it is clear from the letter that the monitoring requirements and the effluent limitations of the 1985 permit did not go into effect until October 1, 1986.

The EPA, on the other hand, argues that the DFFO referred to in the letter cannot modify the permit and does not excuse Easco from complying with the permit's requirements. Mr. Jones, the EPA employee who prepared the table of violations for the EPA, was of the opinion that the permit's terms become effective on the effective date of the permit unless modified by a schedule of compliance contained in the permit itself.²⁰ Along this same line, the EPA argues that a DFFO issued by OEPA is simply a type of enforcement action wherein Easco can be ordered to bring itself into compliance with a permit upon a finding that it is in

effective date of the permit. CX 13 & RX 14.

¹⁹ RX 1. "BAT" stands for Best Available Technology. See definition in Briefing Memo for permit, CX 3, p.3 The statute provides for the establishment of limitations requiring application of the best available technology economically achievable for categories and classes of discharges. CWA, section 301(b)(2)(A), 33 U.S.C. 1311(b)(2)(A).

²⁰ Tr. 495.

violation but cannot be pardoned from its failure to comply.²¹

The EPA's position completely dismissing the DFFO as having any effect on Easco's obligation to comply with the permit does not accord with the evidence. It is clear from the letter that both OEPA and the U.S. EPA recognized that Easco could not comply with the effluent limitations in the permit when the permit was issued because it lacked the equipment to do so and that it had to construct a BAT treatment and recycle system in order to comply. Accordingly, and this was so understood by OEPA, the effluent limitations in the July 1985 permit were not to go into effect until October 1, 1986. Until then Easco was to comply with the terms of its previous, expired permit.²² Consistent with this effective date, OEPA's DMR forms did not list copper, lead, zinc and phenol as parameters for which data was to be provided, although the permit set effluent limits for them, until the DMR form for October 1986.²³ Also, prior to October 1, 1986, Easco apparently was held to different effluent limits than those stated in the July 1985 permit.²⁴

Contrary to what the EPA argues, then, the record does show that the effluent limitations of the 1985 permit were not to be effective until October 1, 1986. The letter, however, referred only

²¹ EPA's post-hearing reply brief at 4-6.

²² Tr. 300, 335.

²³ Tr. 1057-1061.

²⁴ Tr. 335.

to a delay in meeting effluent limitations. It did not indicate that a delay in compliance with the monitoring requirements was also intended by the DFFO. Monitoring, while presenting certain problems for Easco discussed further below, would appear to be simply a matter of obtaining and analyzing samples or measuring flow and not dependent on the construction of BAT treatment and recycle systems which were regarded as needed to comply with the effluent limitations. With respect to copper, lead and zinc, since the DMR forms, prior to the one for October 1986, did not list them as parameters for which monitoring data was required, it is reasonable to infer that compliance with the permit's monitoring requirements for them was also not required. There is no basis for assuming, however, that monitoring for the other parameters included in the permit and for which the DMRs did request data was also intended to be delayed, simply because the new effluent limits were delayed. The evidence in the record on the matter is conflicting.²⁵

²⁵ This discussion is directed to the monitoring requirements for flow rate, water temperature, pH, O&G and TSS. In addition to the differences between the DMRs and the permit with respect to copper, lead and zinc already noted, there were two other parameters named in the permit, aluminum and phenolics, where there are inconsistencies between the permit requirements for the period prior to October 1986, and the DMRs. In both instances, the treatment in the DMRs would appear to be consistent with Easco's claim that the limits were governed by the DFFO and not the permit. Thus, the original permit did not list aluminum as a parameter to be monitored but the DMRs did for the period August 1985 - September 1986, and then omitted it as a parameter after that date. CX 4 & RX 4, CX 6. As to phenolics, they were named as a parameter in the 1985 permit for which monitoring was required. CX 4 & RX 4. The DMRs, however, did not start asking for data on phenolics until October 1986. CX 6. No violations for the reporting or monitoring of phenolics are charged in the complaint, presumably because

Easco relies on a letter written by Mr. Lee of OEPA in which Mr. Lee says that, "In addition, as of October 1, 1986, your NPDES permit requires you to monitor and report flows on a daily basis and report your other parameters on a weekly basis".²⁶ Easco argues that this shows that the monitoring requirements of the July 1985 permit were also deferred until October 1, 1986.

MR. Lee in his testimony, however, did not agree that the monitoring requirements in the July 1985 permit were not in effect until October 1, 1986.²⁷ In light of this, it would have been instructive to look at the DFFO to see what it actually provided with respect to monitoring. Since Easco never offered the DFFO into evidence notwithstanding Easco's implicit reliance upon it, and since the letter from Mr. Winkelhofer mentioned only Easco's difficulties in meeting effluent limits and not in meeting the monitoring requirements, the evidence on balance supports the finding that the monitoring requirements became effective on the date of the permit even though the effluent limits did not. The only exception would be for the monitoring of copper, lead and zinc, the data for which apparently did not have to be reported until October 1, 1986. Flow rate, water temperature, pH, O&G and

phenolics was dropped as a parameter in the modified permit. CX 5 & RX 31.

²⁶ RX 18.

²⁷ Tr. 337-338. In a letter commenting on the June 1986 DMR, Mr. Lee refers to the DFFO as requiring the daily monitoring of flow. RX 16. In view of Mr. Lee's testimony, this could simply be loose wording in calling Mr. Tierney's attention to the fact that there was no difference between the DFFO and the permit with respect to the need to daily monitor flow.

TSS did have to be reported on the effective date of the permit and if Easco wanted to rely on the DFFO as affecting compliance with the monitoring requirements for these parameters, it should have offered the DFFO into evidence.

It is found, accordingly, that the monitoring requirements, so far as they applied to flow rate, water temperature, pH, O&G and TSS, went into effect on the effective date of the July 1985 permit. As to all other conditions of the permit, however, for which violations are charged, the record does support Easco's claim that the effective date was extended by the DFFO to October 1, 1986.

The EPA in support of its position that the DFFO cannot stay the effective date of the permit and, therefore, cannot be a defense to Easco's violations cites two cases. In one of these cases, U.S. v. Sharon Steel Corp., 30 Env't Rep. Cas. (BNA) 1778 (N.D. Ohio, July 12, 1989), the court found no evidence that the DFFO suspended Sharon Steel's obligation to comply with the permit. Here, there is ample evidence that the DFFO did suspend Easco's compliance with certain requirements of the permit as already noted.

In the other case cited, U.S. v. City of Bedford, Docket No. C 85-2897 (N.D. Ohio, 1990), the court apparently assumed as a matter of law that a DFFO cannot modify a permit. This, however, is clearly contrary to what the evidence shows in this case, namely, that both the EPA and OEPA did understand that the DFFO had the effect of delaying compliance. Further, we do not know whether the

court had before it evidence such as is present here which under the court's ruling would require that Easco be penalized for not meeting requirements that it was recognized Easco could not meet with its existing recycling system.

The EPA glosses over the fact that Easco was not expected to meet the original limitations upon issuance of the permit, by saying that it is only seeking penalties for violations of the less stringent modified limitations, notwithstanding that Easco was bound by the original limitations until the modified permit became effective on February 10, 1988.²⁸ In short, The EPA attempts to impose its own equitable considerations in determining Easco's compliance, but they simply make no sense. To the extent that equitable consideration may be taken into account, they dictate in favor of imposing no penalty on Easco for its noncompliance with limitations that it could not meet and, in light of its dealings with OEPA, which had primary responsibility for administering the permit, could reasonably believe it was not required to meet until October 1, 1986.

The EPA also argues that the DFFO should not excuse Easco's noncompliance since it asserts that Easco has not shown that it relied upon the DFFO to its detriment. The record does show that Easco, faced with conditions in the 1985 permit it could not satisfy under its existing recycling system, did rely upon the DFFO as allowing it to October 1986, to meet the new limitations and that it constructed the new Marley cooling tower and installed an

²⁸ EPA's post-hearing reply brief at 2-3.

oil skimmer in attempting to bring itself into compliance, and as an alternative it also applied to the City of Niles to discharge the blowdown into the City's sewer system.²⁹ The EPA would apparently ignore such evidence of reliance, arguing that Easco's noncompliance can only be excused if Easco had shown that it had relied upon the DFFO limits.

I disagree. The complaint alleged noncompliance with the 1985 permit conditions. Easco demonstrated that the DFFO excused it from complying with those limitations until October 1986, and that it relied upon this compliance schedule. Whether or not Easco was at the same time in compliance with the limitations set by the DFFO, namely, those contained in the expired permit, was a different issue. If the EPA had thought this issue important enough, it could have pleaded it in the complaint, leaving Easco to introduce what evidence it had to defend against those violations. The EPA did not raise the issue and contrary to what the EPA argues, Easco did not make its compliance with the DFFO limits an issue in the case. This simply misconstrues the nature of Easco's defense. Nor does the record support the EPA's claim that the limits in the expired permit were identical to those ultimately set in the modified permit.³⁰

²⁹ CX 13 & RX 14, p. 2; RX 15. The oil skimmer was apparently installed in a holding tank used in connection with the cooling system. RX 11, p. 2; Tr. 697.

³⁰ EPA's post-hearing reply brief at 7. The EPA relies upon RX 17, but this shows a 20 mg/l daily maximum for O&G, while the modified permit, CX 5 & RX 31, has a daily maximum of 15 mg/l. Further, Mr. Lee in the letter does not mention any violations of the TSS limits for September 1986, while the EPA charges violations

It is found, accordingly, that the EPA has failed to establish that Easco violated the effluent limitations in the 1985 permit for O&G, TSS and pH during the period between July 1985 and September 1986, even if compliance is to be judged by the modified limitations, since the limitations in the 1985 permit did not go into effect until October 1, 1986. It is also found for the same reason that the EPA has failed to establish that Easco violated the monitoring requirements for lead, copper and zinc during that same period. This effects a sizeable reduction in the number of violations charged, but still leaves a considerable number of violations standing for which an appropriate penalty has to be assessed.³¹

D. Easco's Compliance Efforts August 1985 - February 1988

In assessing the appropriate penalty for violations of the Clean Water Act, one factor to be considered is the violator's "culpability".³² Easco argues that it is unreasonable to impose a penalty against it when it did everything that could reasonably be expected of it to bring itself into compliance with the permit conditions.

of both the daily maximum and the monthly average for that month. CX 20.

³¹ Deleting the effluent limit violations for the period July 1985 - September 1986, reduces the number of pH daily maximum violations to 2, the number of O&G daily maximum violations to 21, the number of O&G monthly average violations to 390 (13 months), the number of TSS daily maximum violations to 3, and the number of TSS monthly average violations to 60 (2 months). Excluding the monitoring violations for lead, copper and zinc during that period leaves 1078 monitoring violations.

³² CWA, section 309(g)(3), 33 U.S.C. 1319(g)(3).

Easco's compliance efforts must be judged from July 23, 1985, the effective date of the original permit, notwithstanding that many of the permit conditions did not go into effect until October 1, 1986. The delay was to allow Easco to develop the necessary technology to comply. Easco's culpability for the violations would be clear if Easco's noncompliance in October 1986, and the months thereafter was the result of doing little or nothing about its compliance prior to October 1986.

Easco's violations are of both the effluent limitations and the monitoring requirements. Each will be considered separately.

1. Monitoring Violations

As already noted, the monitoring requirements for flow rate, water temperature, pH, O&G and TSS became effective on July 23, 1985, while the monitoring for lead, copper and zinc was deferred until October 1, 1986. Monitoring for all parameters except flow rate was to be done by samples taken weekly at the end of the pipe surfacing on the banks of the Mahoning River and designated in the permit as sampling station 3IC00057001.³³ Flow rate was to be determined by measuring the actual flow through the discharge pipe over a 24 hour period. These monitoring requirements were not changed by the modified permit.

The record shows that Easco was extremely lax in meeting many of its monitoring requirements. As to weekly monitoring, in the

³³ CX 4 & Rx 4, p. 4. An additional sampling station, 3IC00057601, for monitoring pH, described as a point inside the plant representative of intake, is shown on the DMRs through May 1986, but the monitoring at this point does not appear to be involved in this proceeding. See CX 6

135-week period that the permit was in effect for Easco's blowdown discharges, Easco failed to monitor for O&G during 48 of those weeks (36% of the total), it failed to monitor for TSS during 43 of those weeks (32% of the total) and it failed to monitor for pH during 37 of those weeks (27% of the total).³⁴

With respect to the daily monitoring of flow, Easco monitored on only 104 days out of the total of 943 days, putting it in violation 87% of the time.³⁵

Since, for the reasons already noted, monitoring for copper, lead and zinc was not required prior to October 1, 1986, the violations are not as numerous as those claimed by the EPA, but they are still substantial. As to copper, lead and zinc, the DMRs disclose that there were 13 weeks during which Easco did not monitor for each of these parameters in the 18-month period from October 1986 through March 1988. Assuming 4 sampling periods per month, Easco failed to monitor for each parameter 18% of the time.

Finally, in the two months that the modified permit was in effect, Easco also failed to monitor for aluminum and ammonia.³⁶ In this case, however, the noncompliance can probably be explained by the absence of these two parameters from the DMRs for those two months.³⁷

Easco argues that the only times it did not take samples were

³⁴ CX 21; EPA's post-hearing brief at 13.

³⁵ Id.

³⁶ CX 21.

³⁷ CX 6.

when the outlet was inaccessible because of flooding. This is not supported by what is reported in the DMRs or in Easco's correspondence with OEPA.³⁸ Nor is Mr. Tierney's testimony on which Easco relies a persuasive explanation that flooding was the reason in every case where sampling was not done.³⁹

Easco argues that the reason flooding was not given as an explanation on the DMRs every time a sample was not taken was because of clerical error. This is argument and not supported by the record.⁴⁰ The more plausible explanation indicated by the record is that Easco did not regard frequency of sampling as important and, thus, did not concern itself with whether four samples or a lesser number were taken. It is self-evident, however, that the frequency of sampling directly bears upon the

³⁸ Inability to sample at the outlet because of flooding is reported in the DMRs for only the following four months: November 1985 (no samples taken), December 1985 (no samples taken), July 1986 (no samples taken) and November 1986 (samples taken at oil skimmer). CX 6. In addition, the taking of only two samples in October 1986, is explained by Easco as resulting from the river being flooded during the first half of the month. RX 20.

³⁹ See Tr. 581, 823. Mr. Tierney's testimony is inconclusive on whether he was merely referring to specific instances of flooding mentioned in the DMRs and in Easco's correspondence or whether he was referring to every instance where a sample was not taken.

⁴⁰ Thus, Easco argues that the DMR for January 1987, shows unusually high concentration for O&G and the overreporting of flow rates indicating that the samples like those reported for November 1986, were also drawn from the oil skimmer because of flooding even though not so reported on the DMR. This argument is unpersuasive. The sample could have been taken at the oil skimmer but for reasons other than flooding. See, e.g., Easco's letter (RX 13) apparently responding to CX 24, where Easco says with respect to its February 1986 DMR that the sample was taken directly at the "water source", not because of flooding but because of weather conditions (snow, mud and cold).

representativeness of the sample results for the month with respect to both the maximum concentration and the average concentration of the effluent discharge.

In short, Easco has failed to show any justification for its failure to meet the weekly monitoring requirements. Easco's reliance upon flooding as an excuse for not taking any samples is also a reflection of its lack of good faith in not meeting the monitoring requirements. As Mr. Lee explained, flooding would be more persuasive as an excuse for not sampling if it occurred only in one or two instances but if it happened as frequently as Easco claims, Easco could have demonstrated its good faith by attempting to obtain representative samples at some point prior to the outfall, even though technically not required to do so.⁴¹ Easco apparently did sample at the holding tank ("oil skimmer") in a few instances, which it regarded as not giving a representative sample.⁴² There is no evidence, however, that Easco made an effort to find some point in the system where a representative sample of the blowdown being discharged into the river could have been obtained.

With respect to the daily monitoring of flow, Easco contends

⁴¹ See Tr. 181-187, 343-344, 954-956, 1045-1052.

⁴² Tr. 580; CX 6 (DMR for November 1986), where the reference is to sampling prior to the oil skimmer. This apparently meant drawing from the holding tank in which the oil skimmer operated. Tr. 186, 823. The skimmer operated by removing the oil that had risen to the top of the tank. Tr. 697. See also RX 13 (relating to the February 1986 DMR) where Easco attributes the high O&G reading of 49 mg/l to the sample having been taken directly at the source and not at the discharge pipe and process lubricant having entered the sample bottle.

that it had not installed a system for obtaining daily flow data because of the problem of measuring the small intermittent flow through the pipe.⁴³ In the absence of a system for accurately measuring flow, Easco used the method of timing the filling of a five gallon bucket, a method which concededly was inaccurate.⁴⁴ This was done at the times samples were taken to measure the other parameters so that it was never done more than four times a month.⁴⁵

Easco claims that it was being held to an unreasonable requirement in having to provide accurate daily flow data.⁴⁶ An examination of the record discloses that what made it unreasonable

⁴³ See RX 20. The problem apparently arose after Easco had reduced the blowdown discharged into the Mahoning River by the installation of its new cooling tower. Supra, at 5-6.

⁴⁴ RX 14, CX 13 & RX 16, RX 20. Easco claims that the method overreported the flow. RX 20. The extent of the overreporting and how often is not disclosed in the record except as it could be inferred from the gallons reported. There are some months where the unusually high gallons reported is explained by the fact that the gallonage is taken from a meter and represents Easco's total use of water on the day reported. See DMRs for July, October, November and December 1986. CX 6; Tr. 817, 831. In other instances, the fact that the discharges are intermittent does not necessarily rule out that there could be daily flows in excess of Easco's calculated maximum flow of 6,000 gallons per day. The record indicates that the discharges came from Easco's periodically emptying a holding tank in the recirculating cooling system and also from occasional overflows from the tank. Tr. 748, 756.

⁴⁵ Tr. 709; CX 6.

⁴⁶ Easco's post-hearing main brief at 16; post-hearing reply brief at 13.

to Easco was the cost entailed in getting accurate flow data.⁴⁷ The record does not contain any reliable evidence on what that cost would be. The only actual figure provided is the rough estimate extracted from Mr. Tierney on cross examination that it would cost more than \$10,000.⁴⁸ Mr. Tierney, however, never obtained an expert professional opinion on how Easco's flow could be accurately measured and what the estimated cost would be.⁴⁹

The daily monitoring of Easco's flow had been a requirement of Easco's permit since the original permit became effective on July 23, 1985.⁵⁰ There is absolutely no evidence in the record that Easco ever made a serious effort to comply with this requirement even before it reduced its flow. It did not start reporting flow data until May 1986.⁵¹ When it used the method of measuring from a bucket, it did not do so daily, but only four times a month or less, depending on when it took weekly samples. Nor can Easco point

⁴⁷ Tr. 700; RX 20. Mr. Tierney's explanation to Mr. Lee in a letter dated December 23, 1986, for Easco's failure to report flow monitoring data in its DMR for October 1986 was that Easco had not found an economic method of measuring exact water discharge. RX 20. There is evidence that equipment for measuring Easco's actual flow over a 24-hour period, notwithstanding the fact that it was intermittent, was available. See Mr. Pycha's testimony, Tr. 145.

⁴⁸ Tr, 707.

⁴⁹ Tr. 696-709.

⁵⁰ Supra, p. 13.

⁵¹ The DMRs for August, September and October 1985, simply report that no monitoring of flow was done because of the absence of a flow meter. The DMRs for November and December 1985, contain no monitoring data for any of the parameters, stating that the sample site could not be accessed because of flooding. The DMRs for January - April 1986, have some monitoring data for the other parameters but give no information with respect to flow. CX 6.

to the expectation of tying in to the Niles sewer system as a justification for not going to the expense of installing a system for monitoring its flow. Indeed, the need for accurately monitoring its flow was also confronting Easco in its negotiations with Niles' sewer authorities.⁵² Thus, the installation of a system for accurately measuring flow may well have expedited Easco's connection to the sewer system.

In short, the evidence simply does not establish that Easco made any good faith effort to comply with the flow monitoring requirement.⁵³

It is true that Easco eventually persuaded the City of Niles to accept a tie-in on the basis of assuming a maximum flow of 6,000 gallons per day even though the City would have preferred a flow

⁵² CX 14 & RX 21 (memo of conversation between Lee and Burgess in January 1987); Tr, 739, 743.

⁵³ Easco points to the fact that Mr. Lee never suggested any flow monitoring equipment to Easco that would work. Easco's post-hearing brief at 16-17. More to the point is that Mr. Lee never suggested to Easco that it could ignore daily monitoring. The absence of daily monitoring data from the DMRs was called to Easco's attention several times. See CX 24 (letter of May 15, 1986), CX 25 (letter of June 13, 1986), RX 16 (letter of September 12, 1986), RX 18 (letter of December 12, 1986), CX 15 (letter of August 3, 1987). In his letter of September 12, 1986 (RX 16), Mr. Lee did say that the expense of acquiring accurate 24-hour flow data figures may not be justified if Easco can eliminate the discharges to the Mahoning River by connecting to the Niles sewer system in the near future. But it was not until 18 months later that the connection was accomplished. RX 49. Nothing said by Mr. Lee gave the impression that Easco could wait that long. In his testimony Mr. Lee explained that if the sewer tie-in could have been done in a short time, the money needed for a flow monitoring system would have been better spent in connecting to the sewer system, but if the tie-in was not accomplished, it would have been mandatory for Easco to accurately measure its flow whatever the expense. Tr. 1042, see also CX 15.

monitoring device.⁵⁴ But it was after Easco had resumed its negotiations with the City upon finding out that it could not comply with the modified NPDES permit without modifying its existing recycling system that the City agreed to accept Easco's discharge on this basis.⁵⁵ This does not show a good faith effort to comply with the monitoring requirement but simply Easco's determination to put its own interest in avoiding what it considered an unnecessary expense over and above its duty to provide accurate data to the OEPA.

Easco tries to minimize its noncompliance with the flow monitoring requirement by arguing that the amount of flow is irrelevant to the question of whether Easco violated the TSS and O&G effluent limits.⁵⁶ Flow is used to determine compliance with load limits, i.e., the total daily discharge by weight of a pollutant.⁵⁷ Easco points out that the modified permit contained no load limits for TSS and O&G. It also points out that there is no evidence that it violated the load limits for those parameters for which there were load limits in the modified permit, namely, total lead, total zinc, total aluminum and total ammonia.⁵⁸

Easco's argument is unpersuasive. It is based on faulty data with respect to not only the volume of its flow, but also the

⁵⁴ Tr. 773.

⁵⁵ RX 43, RX 45; Tr. 609, 724, 726-727, 743, 748, 765, 769-770.

⁵⁶ Easco's post-hearing brief at 14.

⁵⁷ Tr. 937-938.

⁵⁸ See CX 5 & RX 31.

concentration of lead, zinc, aluminum and ammonia, because of its frequent failure to sample these constituents weekly. Even if no violations of the load limits were reported in the DMRs, the question still remains whether significant deviations were not overlooked or whether the imprecise data did not obscure borderline violations which could be significant if prolonged.⁵⁹ OEPA considered the accurate daily measure of flow important enough that it would have insisted on Easco's complying with the requirement if it had continued to discharge into the Mahoning River.⁶⁰

2. The Effluent Limit Violations

In order to comply with the effluent limits set by the 1985 permit, Easco installed a new cooling tower in its recirculating cooling water system and also installed an oil skimmer to remove

⁵⁹ Tr. 1165, 1167. Easco argues that the quantity of its flow was in the range of 5,000 gallons per day after the cooling tower was installed. Actually, the City of Niles granted its permit on the assumption of a maximum flow of 6,000 gallons per day, apparently on the basis of a formula submitted by Easco, and the City was not entirely comfortable with this figure. Tr. 773-774. According to Mr. Burgess who looked into the matter in connection with Easco's application to connect with the City's sewer system, the intermittent flow came from Easco's periodically emptying a storage tank in its recirculating water cooling system. Tr. 748. Discharges from overflows were controlled by an electric solenoid in the tank. Tr. 719-720, 822. There is nothing in this method to indicate that Easco's daily discharge would be invariably restricted to 5,000 or even 6,000 gallons per day, or that there could not be days when an overly large amount was discharged because of a malfunctioning of the system.

⁶⁰ Tr. 1042, see also, Tr. 1032. The fact that the City ultimately accepted an estimated figure for flow does not mean that OEPA would also have accepted this method. Tr. 216, 1032. There is, of course, a difference between Easco discharging into a publicly owned treatment works plant with that plant being responsible for its discharges and Easco discharging directly into the Mahoning River. See Tr. 772-773.

the oil before the blowdown was discharged.⁶¹ This resulted in a greatly reduced discharge but it still did not enable Easco to meet the permit's concentration limits.⁶² As early as November 1985, Easco started exploring with the City of Niles the possibility of connecting to the City's sanitary sewer system.⁶³ Easco did eventually tie in to the Niles sewer system and stopped discharging its blowdown to the Mahoning River in April 1988.⁶⁴

The EPA contends that from July 23, 1985, when the permit became effective until April 4, 1988, when Easco commenced discharging into the Niles sewer system, Easco, concerned only with finding the cheapest way to dispose of its blowdown discharge, procrastinated in its efforts to tie in to the Niles sewer system notwithstanding its continued unlawful discharge of pollutants into the Mahoning River.

The argument overlooks or ignores the fact that Easco was given until October 1, 1986, within which to comply with the effluent limitations. Prior to that time Easco installed a new cooling tower and an oil skimmer in the holding tank. This was done for the purpose of complying with the DFFO schedule and there is no

⁶¹ RX 15. The cooling tower was apparently installed in December 1985 or January 1986. Tr. 614.

⁶² The volume of Easco's flow, which was around 38,000 gallons per day when the 1985 permit was issued, was apparently used in setting concentration limits in the permit. Tr. 176, 324-325. Flow was not a factor in setting the concentration limits for TSS and O&G in the modified permit. Tr. 112-113.

⁶³ Tr. 290-291, RX 6, RX 8.

⁶⁴ RX 48.

evidence to indicate that it was not a good faith effort to comply with the effluent limits of the permit.⁶⁵

Despite its effort to bring its effluent into compliance, Easco recognized that it would be unable to meet the permit limits with its existing equipment and that it was faced with two choices, build a wastewater treatment plant to pretreat its effluent before discharging into the Mahoning River or connect to the Niles sewer system.⁶⁶ Accordingly, in April 1986, Easco applied to the City of Niles to connect to its sewer system.⁶⁷ In fact, this is what Easco ended up doing, a choice which the EPA assumes was less expensive than building a wastewater treatment plant. There is nothing wrong with Easco having selected the least expensive solution if it was effective in eliminating the discharge of pollutants into the Mahoning River, and there is nothing in the record to indicate that it was not. Of course, the time needed to achieve compliance must also be considered. Obviously, it is questionable to what extent a company should be allowed to pursue the least costly method of compliance if it takes longer to accomplish than the more costly method. Since there is no evidence to the contrary, it is assumed that a tie-in to the Niles sewer system, if diligently pursued, would have taken no longer to accomplish than the construction of a wastewater treatment plant.

For the period up through December 1986, the record does

⁶⁵ CX 16, RX 15.

⁶⁶ RX 15.

⁶⁷ RX 11.

support Easco's claim that it did in good faith pursue its application to tie in to the Niles sewer system. There appear to have been two major problems that had to be settled, one was whether Easco had to pretreat its waste and the other was the need to have accurate flow data.⁶⁸ By January 1987, however, it had been resolved that Easco did not have to pretreat its wastewater in order to connect into the Niles sewer system.⁶⁹ The only major problem remaining, then, appears to have been the absence of accurate flow data, which, of course, was also a problem Easco was encountering in complying with the NPDES permit.⁷⁰

By the end of 1986, Easco had also discovered and called to OEPA's attention that the wrong standards had been used in the 1985 NPDES permit, a fact which OEPA came to agree with.⁷¹ Easco then

⁶⁸ See RX 6-8, RX 10-15, RX 20-21. Although the evidence of Easco's activities is somewhat sketchy, there is no indication that the lapse of time between Easco's application to the City in April 1986, and the end of December 1986, was caused by any delay on Easco's part. Tr. 745. Easco was apparently the first of what the City considered to be significant industrial polluters to apply for a permit. Tr. 753. Understandably, then, the City was not faced with simply the routine processing of a permit application.

⁶⁹ CX 14 & RX 21, Tr. 244-245. It would thus appear that Easco's discharges complied with the pretreatment standards for its category. See 40 C. F. R. 421.35(f).

⁷⁰ CX 14 & RX 21; Tr. 104-105, 740-741. Easco also mentions the absence of a rate structure and the completion of an addition to the City's plant as impeding Easco's tie in. Post-hearing reply brief at 13. The weight of the evidence is that by the end of 1986, these factors did not present any obstacle to the tie-in.

⁷¹ RX 20; Tr. 293, 349, 616-617. Easco raised the question whether the 40 CFR Part 464 guidelines, applicable to the metal molding and point source category, were the appropriate guidelines. The guidelines ultimately determined upon were the Part 421 guidelines. CX 16 & RX 29.

lost interest in connecting to the Niles sewer system because it thought that it would be able to meet the limits under the new standards.⁷² Although Easco had now decided to continue discharging into the Mahoning River, it had not installed any flow monitoring equipment and there is no evidence that it had any genuine intention of doing so. Upon finding it that it was still unable to meet the limits set by the modified permit, which was issued on December 21, 1987, with an effective date of February 10, 1988, Easco reversed course and, in its own words, "expeditiously" resumed its efforts to connect to the Niles sewer system.⁷³ The tie-in was accomplished in April 1988.

Easco's discontinuance of its efforts to connect to the Niles sewer system, resulted in its continued violations of its permit limits for an additional year.⁷⁴ Easco argues that its decision to suspend its efforts to connect to the Niles sewer system was justified by the advice it was receiving from Mr. Lee of the OEPA that its effluent would meet the new limits to be set under the appropriate guidelines. But Mr. Lee never indicated that Easco

⁷² Tr. 594-595; CX 15 & RX 26.

⁷³ RX 43; Tr. 726-727; Respondent's post-hearing brief at 19.

⁷⁴ CX 20. Although the precise point in time at which Easco lost interest in connecting to the Niles sewer system cannot be identified, the record does indicate that it was early in 1987, after Easco had learned that its permit limits would be modified, and the City was still insisting upon accurate flow data. Easco was being told by Lee as early as April 1987, that its O&G concentrations (for February 1987) of 25 mg/l daily maximum and 11 mg/l monthly average would not violate the limits under the Part 421 guidelines. RX 27.

could continue with its monitoring violations.⁷⁵ To the contrary, Easco was told that it must install a proper flow measuring device but it still simply continued with its sporadic and inexact monitoring.⁷⁶

Insofar as it is being charged with effluent limit violations, Easco argues that it is unfair to require it to meet standards when it did not know what they were. This is directed to the advice Easco received from Mr. Lee prior to the issuance of the modified permit that its discharges although violating the 1985 permit would not be violations under the Part 421 guidelines, notwithstanding it turned out that they did violate the limits as finally determined in the modified permit.⁷⁷ It is true, as Easco argues, that up until November 1987, Easco had reason to believe from what it was

⁷⁵ CX 15, see also supra, at 23, n. 53.

⁷⁶ CX 15, 21. Mr. Tierney did, apparently, continue to search for an available flow meter. Tr. 595: RX 26. There is no evidence, however, that Easco made any serious effort, if, indeed, any effort at all, to find if some equipment could not be designed to give actual 24-hour flow measurements.

⁷⁷ Easco's post-hearing brief at 21-25. For Mr. Lee's letters advising that although violations were shown under the 1985 limits, there would be no violations under the Part 421 guidelines see RX 27 (DMR for February 1987 - no violation of O&G effluent limit), CX 7 & RX 38 (DMR for July 1987 - no violation of O&G effluent limits and only minor excursion of TSS limits), RX 39 (DMR for August 1987 - no violation of O&G or TSS limits). The EPA charges O&G violations for those months. CX 20. The EPA also charges O&G violations for March 1987 (CX 20), but Lee's letter for that month mentions only a loading violation (RX 32). The EPA further charges a pH violation for June 1987 (CX 20), but Lee's letter for that month is silent on any such violation (RX 34). It was not until November 1987, when Easco was notified about its DMR for September that Easco was told that its discharge of O&G would also violate the proposed modified permit. CX 8.

told by Mr. Lee that it would be able to meet the modified limits.⁷⁸ The fact remains that Easco was not relying on Lee's assurance on what the modified limits would be, for Lee never gave such assurance, but on the hope that limits satisfactory to Easco could be negotiated.⁷⁹

The option to continue discharging into the Mahoning River was open to Easco because it did not have a proper flow measuring device. If it had one, it could have connected to the Niles sewer system by the end of 1986.⁸⁰ Thus, Easco was able to profit by its own inaction or unwillingness to install a proper flow measuring device and to turn back to the direct discharge of its blowdown into the Mahoning River when, because the permit limits were going to be revised, this seemed a more advantageous course of action

⁷⁸ The limits ultimately decided upon for O&G and TSS were not stated in the Part 421 guidelines but were developed on the basis of the best professional judgement. RX 29, RX 37. "Best professional judgement" means a technological standard based on what is commonly employed or could be achieved. Tr. 112. The EPA argues that Easco had knowledge of what the modified limits would be as early as July 1987, when the proposed permit was published, if not earlier. Post-hearing reply brief at 29 - 30. Neither Mr. Tierney nor Mr. Lee are clear as to what exactly was discussed with respect to the proposed modified limits for O&G, TSS and pH. Mr. Tierney said he thought that the limits (presumably for O&G and TSS) were going to be under 50 ppm. Tr. 655. As for Mr. Lee, it is to be noted that he still told Mr. Tierney in October 1987, that Easco's discharges for August of a monthly average of 20 mg/l and a daily maximum of 47 mg/l did not violate the limits under the Part 421 guidelines for O&G. RX 39. Since 421.33(f), the relevant guidelines under Part 421, contained no limits for O&G, the reference was necessarily to the proposed limits. Tr. 907, 1026. It turned out that the O&G discharges did violate the modified limits. Tr. 397-398; CX 20.

⁷⁹ Tr. 636-640, 813-815, 883-884, 981.

⁸⁰ RX 21 & CX 14; Tr. 220.

than pursuing the Niles sewer connection.⁸¹ In short, the delay of about a year in tying in to the Niles sewer system was entirely for Easco's convenience to accommodate its own interest in saving what it considered were unnecessary expenditures.

It is true that Mr. Lee apparently took an active role in helping Easco resolve the problem of its discharges and that Easco with constant prodding from Mr. Lee did cooperate, but never to the point of complying with the flow monitoring requirements. That Mr. Lee did assist Easco in achieving compliance instead of simply resorting to enforcement measures is to his credit, but this does not mean that Easco can escape from the consequences of its violations. If Easco had been as expeditious in pressing its Niles application prior to the time it decided to put the application on hold as it was after it found out that it could not comply with the modified limits, it may well have accomplished the connection in a shorter time and eliminated the continued unlawful discharges of pollutants into the Mahoning River.

In sum, Easco has shown that from the time the 1985 limits went into effect on October 1, 1986, up until the end of 1986, it was making a good faith effort to cease its unlawful discharges into the Mahoning River by connecting to the Niles sewer system,

⁸¹ The actual advantage to Easco of discharging into the Niles River over connecting to the Niles sewer system, if it could meet the revised limits, is not disclosed. Obviously, there was no cost saving with respect to the installation of flow monitoring equipment. Possibly, there might have been savings in connecting to the sewer and in sewer charges, but the record does not disclose what the savings would have been and whether they were of such significance as to warrant Easco in suspending its efforts to connect to the sewer system.

but not thereafter. Connecting to the Niles sewer system completely stopped the unlawful discharges, while continued discharging into the river would only stop the unlawful discharges if Easco could meet the new limits. Easco does not deny that it could not be sure of what those limits were until the modified permit was published.⁸² Although the lack of an accurate flow measuring device was in the beginning an obstacle, Easco eventually persuaded the City to accept a formula for measuring its flow. Under these circumstances, Easco's action in slacking off on its sewer application was not made in good faith. No doubt, continuing to press its sewer application would have meant giving up the option of continuing to discharge to the Mahoning River under standards it believed it could meet, but there is no evidence that this was or should be considered a material consideration in evaluating Easco's good faith efforts to cease as promptly as possible its unlawful discharges.

E. The Appropriate Penalty

An argument that needs to be initially addressed is Easco's claim that to impose a penalty against it would be the unfair enforcement of permit conditions *ex post facto*, since all alleged violations except those charged for the month of February and March 1988, occurred before the modified permit became effective.⁸³

One answer to the argument is that it is not applicable to the monitoring violations found. The monitoring requirements were not

⁸² Easco's post-hearing reply brief at 12 - 13.

⁸³ Easco's post-hearing brief at 11-12.

changed by the modified permit except for the addition of two new parameters which had to be monitored, aluminum and ammonia, and the deletion of phenolics. Terms and conditions of the original permit which were not changed by the modified permit continued in effect.⁸⁴

With respect to the effluent limits for TSS, O&G and pH, Easco, except as compliance was deferred by the DFFO, was required to comply with the 1985 limits even though erroneous until they were revised by the modified permit.⁸⁵ Even if it were shown that the 1985 limits were impossible to achieve, this would be no defense to liability although it may be relevant to the determination of the appropriate penalty.⁸⁶ In fact, there has been no showing here that the 1985 limits were impossible to achieve, but only that they could not be achieved without construction of a wastewater treatment plant with the alternative being that Easco connect to the Niles sewer system.⁸⁷ As already found, however, there came a point in time when Easco continued to discharge into the Mahoning River without pursuing either course. For the reasons

⁸⁴ See CX 5 & RX 31 wherein it is stated, "All terms and conditions of the existing permit not recommended for modification...will remain in effect."

⁸⁵ See United States v. CPS Chemical Co., Inc., 779 F. Supp. 437, 451 (E.D. Ark. 1991); Connecticut Fund for the Environment, Inc. v. The Upjohn Co., 660 F. Supp. 1397, 1413 (D. Conn. 1987); Student Public Interest Research v. Monsanto, 600 F. Supp. 1479, 1486 (D. N. J. 1985).

⁸⁶ See United States v. CPS Chemical Co., Inc., 779 F. Supp. 437, 453 (E.D. Ark. 1991); United States v. City of Hoboken, 675 F. Supp. 189, 198 (D. N. J. 1987).

⁸⁷ RX 15.

already noted, Easco's expectation that it would be able to meet the modified limits that it believed would be set was not sufficient justification for dropping its efforts to connect to the Niles sewer system. Thus, there would have been no grounds for mitigating a penalty even if this case had been brought for violation of the original limits, and Easco should not complain simply because its compliance is being judged by the more lenient limits of the modified permit.

The maximum penalty of \$125,000, proposed by the EPA has been based on the totality of the violations charged in the complaint. The violations found, however, are not as numerous or as serious as charged, and contrary to what the EPA argues, Easco during part of the period involved was attempting in good faith to stop its violations.

The EPA has charged a total of 739 effluent limit violations for the period from August 1985 - February 1988. As found, however, the effluent limits did not become effective until October 1, 1986, and the number of violations, accordingly, have been reduced as follows:⁸⁸

<u>Limit</u>	<u>Violations Charged</u>	<u>Violations Found</u>
pH daily maximum	14	2
O&G daily maximum	28	21
O&G monthly average	540 (18 mos.)	390 (13 mos)
TSS daily maximum	7	3
TSS monthly average	<u>150</u> (5 mos)	<u>60</u> (2 mos)
Total	739	476

⁸⁸ CX 20.

Further analysis of these 476 violations shows the following:

The two pH violations (June and September 1987) exceeded the permit limits by 3 percent.⁸⁹ Since there is no evidence to the contrary, it will be assumed that a pH of 9.3 is a significant exceedance.⁹⁰

As to the O&G violations, in one month (November 1987), Easco exceeded the daily maximum limit on one day by 733%, and the monthly average by 620%. This was the largest exceedance, but most of the other violations exceeded the limits by 50% or more.⁹¹

With respect to TSS, in one month (October 1987), Easco exceeded the daily maximum on one day by 210%, and the monthly average by 255%. In another month (November 1987), Easco exceeded the daily maximum on one day by 410%, and the monthly average by 160%. There was one other month (October 1987) in which Easco exceeded the TSS daily maximum on one day by 63%.⁹²

It is to be noted that most of these violations occurred after

⁸⁹ CX 20.

⁹⁰ See Tr. 1127 - 1129.

⁹¹ In November 1986, Easco exceeded the daily maximum by 120%, in December 1986, Easco exceeded the monthly average by 120%, in January 1987, Easco exceeded one daily maximum by 60% and another daily maximum by 133%, while the monthly average exceeded the limit by 70%. In February 1987, Easco exceeded the daily maximum by 67%. In August 1987, Easco exceeded one daily maximum by 93%, and another daily maximum by 80%, and exceeded the monthly average by 60%. In October 1987, Easco exceeded the daily maximum by 140%, and the monthly average by 150%. In January 1988, Easco exceeded one daily maximum by 153% and another by 80%, and it exceeded the monthly average by 80%. In February 1988, Easco exceeded one daily maximum by 80%, and another daily maximum by 713%, and the monthly average by 250%. CX 20.

⁹² CX 20.

1986, when Easco ceased its efforts to connect to the Niles sewer system because of its expectation that it could meet the modified limits, and then belatedly renewed these efforts.

While the violations are significant in terms of Easco's limits, the record is inconclusive on the extent to which Easco's discharges of TSS, O&G and pH may have actually contributed to the degradation and impairment of the Mahoning River.⁹³ The violations cannot simply be dismissed as minimal, as Easco claims, because any excess over the permitted level contributed in some degree to the degradation of the receiving water.⁹⁴ At the same time they do not appear to be of such duration or gravity as to merit the maximum penalty.

Easco seems to imply that the limits for O&G and TSS were arbitrarily set.⁹⁵ The record clearly shows, however, that these limits were set according to the best professional judgement as to what was technologically achievable in the industry and consistent with Ohio water quality standards and that they were reasonably related to what was needed to prevent the degradation of the Mahoning River.⁹⁶ In any event, if Easco had reason to object to

⁹³ Easco is not listed in the Ohio Water Quality Technical Support Document (CX 18) as one of the sources contributing to the degradation of the Mahoning River. Tr. 1173-1175, 1188-1192.

⁹⁴ Tr. 1194-1195; Student Public Interest Group of New Jersey, Inc. v. Monsanto, 29 ERC 1078, 1090 (D.N.J. 1988).

⁹⁵ Easco's post-hearing reply brief at 7.

⁹⁶ Tr. 1101-1104, 1121-1122, 1126-1129, 1131-1132, 1142, 1194-1195; see also CX 18, p. 7-13. I find that CX 18 is a credible document with respect to the degraded condition of the Mahoning River and the causes of that condition. See Tr. 115-116.

the limits, it should have done so in the permit proceeding. Such arguments are not properly made in this enforcement proceeding.⁹⁷ This is also true with respect to Easco's argument that the limits for O&G were excessive because Easco's discharges were inside and not outside the mixing zone.⁹⁸

The EPA charges a total of 1234 monitoring violations. Again, this number must be reduced by the fact the monitoring for lead, copper and zinc was deferred until October 1986. The number of violations is thus reduced to 1078, which is still a considerable number.⁹⁹

⁹⁷ See Public Interest Research Group of N. J., Inc. v. Powell Duffryn Terminals, Inc., 913 F. 2d 64, 77-78 (3d Cir. 1990), cert. denied, U.S. , 111 S. Ct. 1018 (1991). I find this case in point even though it was a judicial enforcement proceeding wherein review of matters that could be raised in a permit proceeding is expressly precluded. See CWA, section 509(b)(2), 33 USC 1369(b)(2). Administrative enforcement proceedings are similar in scope to judicial enforcement proceedings (though narrower in the scope of relief that can be granted) and serve the same purpose. If there is an adequate remedy specifically devised to grant the relief Easco is seeking, Easco should be required to pursue that remedy.

⁹⁸ Easco's post-hearing reply brief, pp. 5-6. Easco argues that the 10 mg/l daily maximum is excessive because that is the limit for outside the mixing zone under Section 3745-01-07 of the Ohio Administrative Code (attached to the reply brief). The fact is that the limits are set on the basis of the best professional judgement for what is achievable and would minimize the harm to the Mahoning River. Tr. 1090, 1103, 1148. Further, the Administrative Code states that surface waters shall at no time produce a visible sheen or color film. Table 7-1, p. 14 (p. 20, n. h). Typically 10 mg/l is associated with preventing an oily sheen on the water. Tr. 280, 1103.

⁹⁹ The 1078 violations include 8 violations for failure to monitor Aluminum and 8 violations for failure to monitor Ammonia (NH3-N) in the months of February and March 1988. CX 21. These two parameters, however, are not listed in the DMR forms for those two months for some unexplained reasons. CX 6. Easco could have reasonably believed, therefore, that it did not have to furnish monitoring data for them. Accordingly, these violations are also

The monitoring violations are more flagrant than the effluent limit violations, since they persisted over the entire period that the permit was in effect. They are not as serious as effluent limit violations because they do not of themselves necessarily contribute to the degradation of the receiving water. At the same time, they cannot be dismissed as minor because of their importance to the permitting authority, which necessarily relies upon the data to determine compliance with the permit and so ensure that the permit is achieving its objective of protecting the receiving waters against pollution.¹⁰⁰

The purpose of civil penalties under the CWA is to deter pollution by discouraging future violation.¹⁰¹ The penalty must be high enough to deprive polluters of any economic benefit, "otherwise the violators and potential violators would perceive that it pays to violate the law."¹⁰² Taking into account these principles and the extent, nature, gravity and circumstances of the violations found here, and giving consideration to the degree of culpability and the economic benefit of the violations found here, I find that an appropriate penalty is \$45,000.¹⁰³

excluded from the violations for which a penalty is being assessed.

¹⁰⁰ Tr. 937, 1032-1033, 1134-1135, 1141, 1170-1171 .

¹⁰¹ Chesapeake Bay Foundation v. Gwaltney of Smithfield, Inc.
611 F. Supp. 1542, 1557 (D. Va. 1985).,

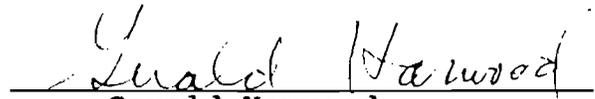
¹⁰² Id.

¹⁰³ Easco has not raised the issue of its ability to pay a penalty.

ORDER¹⁰⁴

Pursuant to the Clean Water Act, section 309(g), 33 U.S.C. 1319(g), a civil penalty of \$45,000, is assessed against Easco Aluminum Corporation. The full amount of the penalty shall be paid within sixty (60) days of the effective date of the final order. Payment shall be made in full by forwarding a cashier's check or a certified check in the full amount payable to the Treasurer, United States of America, at the following address:

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


Gerald Harwood
Senior Administrative Law Judge

Dated: December 8, 1992

¹⁰⁴ Unless an appeal is taken pursuant to 40 CFR 22.30, or the Environmental Appeals Board elects, sua sponte, to review this decision, this decision shall become the final order of the Agency. See 40 CFR 22.27(c).