UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Frederick-Winchester Service Authority	)	**Docket No. CWA-03-2024-0036**
and Frederick County Sanitation Authority,	)	
	)	
Respondents.	)	
	)	
Crooked Run	)	
Wastewater Treatment Plant	)	
	)	
Facility.	)	

ORDER DENYING PETITION TO SET ASIDE
CONSENT AGREEMENT AND PROPOSED FINAL ORDER

The parties to this matter are Complainant, the Director of the Enforcement and Compliance Assurance Division, U.S. Environmental Protection Agency ("EPA"), Region 3 and Respondents, the Frederick-Winchester Service Authority and the Frederick County Sanitation Authority, jointly known as "Frederick Water." On July 16, 2024, Alan Randolph Holland, Jr. ("Petitioner") filed a petition to set aside a Consent Agreement and proposed Final Order ("Proposed CAFO") agreed upon by the parties, as provided for by section 309(g)(4)(C) of the Clean Water Act, 33 U.S.C. § 1319(g)(4)(C), and the supplemental procedural rules governing public notice and comment in proceedings under section 309(g) thereof, 40 C.F.R. § 22.45(c)(4)(ii). The Petition alleges that Complainant failed to consider material evidence before issuing the Proposed CAFO. *See* 33 U.S.C. § 1319(g)(4)(C); 40 C.F.R. § 22.45(c)(4)(ii). After consideration of the Petition and Complainant's Response to Petition to Set Aside Consent Agreement and Proposed Final Order[1] ("Compl't's Resp."), it is concluded that Petitioner has not shown that Complainant failed to adequately consider any material evidence. The Petition is therefore **DENIED** without the need for a hearing. *See* 33 U.S.C. § 1319(g)(4)(C); 40 C.F.R. § 22.45(c)(4)(v), (c)(4)(vii).

I. Statutory and Regulatory Background

The objective of the Federal Water Pollution Control Act, also known as the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. § 1251 *et seq.*, is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). One method the

[1] Complainant submitted six exhibits along with the Response. Citations to these exhibits utilize the following format: Ex.[#].

Act employs to achieve this goal is through the use of permits to regulate the discharge of pollutants into waterways. Section 301(a) of the CWA prohibits "the discharge of any pollutant by any person" with exceptions for discharges compliant with other portions of the Act. *Id.* § 1311(a). This means that, without permission to otherwise do so, persons subject to the CWA may not make "any addition of any pollutant to navigable waters from any point source." *See id.* § 1362(12) (defining "discharge of a pollutant"). The Act goes on to define "navigable waters" as "the waters of the United States," and "point source" as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." *Id.* § 1362(7), (14). "Waters of the United States" include territorial seas, interstate waters, and waters that are "[c]urrently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce," as well as "[t]ributaries" of such waters "that are relatively permanent, standing or continuously flowing bodies of water." 40 C.F.R. § 120.2(a)(1), (a)(3).

As noted above, there are exceptions to the prohibition against adding pollutants to regulated waterways. One such exception is established by Section 402 of the Act, which created the National Pollutant Discharge Elimination System ("NPDES"). *See generally* 33 U.S.C. § 1342. The NPDES allows the Administrator of EPA to "issue a permit for the discharge of any pollutant, or combination of pollutants" on the condition that such discharges meet certain requirements prescribed by the Act, including those related to effluent limitations. *Id.* § 1342(a)(1). The Act goes on to authorize the Administrator to delegate responsibility for issuing permits under the NPDES to the individual states. *Id.* § 1342(b).

The CWA permits the Administrator to take various actions against parties found to be in violation of conditions established in permits issued by a State delegated authority. Relevant to this proceeding, upon finding a violation, first, the Administrator, "shall issue" an order ("Administrative Order on Consent" or "AOC") to the permitholder to comply with the statutory and permit requirements. 33 U.S.C. § 1319(a)(3). Second, the Administrator may assess an administrative penalty action for the violations. 33 U.S.C. § 1319(g). The Act establishes two classes of administrative civil penalties that may be levied by the Administrator against those the Administrator finds to be in violation of permit conditions. *Id.* § 1319(g)(1). Class II administrative civil penalties are imposed for more egregious conduct, and the procedural protections of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, requiring notice and opportunity for a hearing "on the record," apply to such cases. *Id.* § 1319(g)(2)(B). A class II civil penalty "may not exceed $10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty . . . shall not exceed $125,000." *Id.* These amounts have been adjusted for inflation and the daily limit is now $25,847 while the total limit is $323,081. 40 C.F.R. § 19.4 (Table 1); *see* 28 U.S.C. § 2461 (note), as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321x358, 1321x373 (Apr. 25, 1996).

In determining the appropriate amount of penalty to impose, the CWA requires the consideration of "the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." 33 U.S.C. § 1319(g)(3). As observed by the Environmental

Appeals Board, "The Act does not, however, 'prescribe a precise formula by which these factors must be computed' nor does it provide any guidance regarding the relative weight to be given to any of them." *Phx. Constr. Servs.*, 11 E.A.D. 379, 394 (EAB 2004) (quoting *Advanced Elecs., Inc.*, 10 E.A.D. 385, 399 (EAB 2002)); *see also Tull v. United States*, 481 U.S. 412, 427 (1987) (recognizing that the setting of penalties under the CWA is "highly discretionary").

When assessing a civil penalty, EPA must adhere to certain procedural requirements established by the CWA concerning third parties and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/termination or Suspension of Permits ("Procedural Rules"), 40 C.F.R. Part 22. Before any order is issued assessing a civil penalty for the violation of permit conditions, EPA must "provide public notice of and reasonable opportunity to comment on the proposed issuance of such order." 33 U.S.C. § 1319(g)(4)(A); *see also* 40 C.F.R. § 22.45(b)(1) (requiring complainant to notify the public before issuing a civil penalty under 33 U.S.C. § 1319(g)). "Any person who comments on a proposed assessment of a [civil] penalty . . . shall be given notice of any hearing" and must be provided "a reasonable opportunity to be heard and to present evidence" at such hearing. 33 U.S.C. § 1319(g)(4)(B); *see also* 40 C.F.R. § 22.45(c)(1)-(2) (establishing parameters for participation of third parties in hearings).

However, a hearing is not strictly required in order to assess a civil penalty. *See* 40 C.F.R. § 22.13(b) ("[W]here the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a consent agreement and final order."); *see also* 40 C.F.R. § 22.18(b)(2)-(3) (establishing terms consent agreements must include and the need for a final order ratifying the consent agreement to dispose of proceeding). Where EPA proposes disposing of an action through the issuance of a consent agreement and final order in lieu of a hearing, the CWA provides that:

> [A]ny person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the [EPA] Administrator . . . to set aside such order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator . . . shall immediately set aside such order and provide a hearing . . . . If the Administrator . . . denies a hearing under this subparagraph, the Administrator . . . shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

33 U.S.C. § 1319(g)(4)(C); *see also* 40 C.F.R. § 22.45(c)(4)(ii) (permitting commenters to petition the Regional Administrator to set aside a proposed CAFO "on the basis that material evidence was not considered").

If the Administrator does not grant the petition to withdraw a proposed CAFO, a Petition Officer shall be assigned "to consider and rule on the petition." 40 C.F.R. § 22.45(c)(4)(iii). The Procedural Rules provide, in relevant part, as follows:

> The Petition Officer shall review the petition, and complainant's response, and shall file with the Regional Hearing Clerk, with copies to the parties, the commenter, and the Presiding Officer, written findings as to:
>
> (A) The extent to which the petition states an issue relevant and material to the issuance of the proposed final order;
>
> (B) Whether complainant adequately considered and responded to the petition; and
>
> (C) Whether a resolution of the proceeding by the parties is appropriate without a hearing.

Id. § 22.45(c)(4)(v).

If the Petition Officer finds that a hearing is appropriate, "the Presiding Officer shall order that the consent agreement and proposed final order be set aside and shall establish a schedule for a hearing." *Id.* § 22.45(c)(4)(vi). However, "[u]pon a finding by the Petition Officer that a resolution of the proceeding without a hearing is appropriate, the Petition Officer shall issue an order denying the petition and stating reasons for the denial." *Id.* § 22.45(c)(4)(vii). The Petition Officer must then file the resulting order with the Regional Hearing Clerk, serve copies on the parties and commenter, and provide public notice of the order. *Id.*

II. Factual Background

Respondents are both municipal entities providing water and sewer services. Proposed CAFO ¶ 18. They own and operate the Crooked Run Wastewater Treatment Plant ("Crooked Run Facility") in Front Royal, Virginia. Proposed CAFO ¶ 19. The Crooked Run Facility discharges treated wastewater from an outfall into Crooked Run, a stream that connects with the Shenandoah River, itself a tributary of the Potomac River. Proposed CAFO ¶¶ 20-21. All three bodies of water are "Waters of the United States" within the meaning of 33 U.S.C. § 1362(7) and 40 C.F.R. § 120.2(a)(1), (a)(3). Proposed CAFO ¶ 21. Because the outfall, a point source as defined by 33 U.S.C. § 1362(14), discharges pollutants into these waters, Respondents were required to obtain a permit from the EPA Administrator pursuant to 33 U.S.C. § 1342. *See* Proposed CAFO ¶ 24. The Administrator delegated responsibility for issuing permits under the NPDES within the Commonwealth of Virginia to the Virginia Department of Environmental Quality ("VDEQ"), which issued the necessary permit to Respondents allowing for the discharge of pollutants in accordance with the terms and conditions of the permit. Proposed CAFO ¶¶ 15, 22-23.

Included in the Petition is a citation to Frederick Water's website which explains that the Crooked Run Facility serves a subset of Respondents' customers that live around Lake Frederick in Lake Frederick, VA ("Lake Frederick Community"). *Inter-County Service Area (ICSA)*, FREDERICK WATER, https://www.frederickwater.com/inter-county-service-area-icsa (last visited Feb. 4, 2025). The original developer of the Lake Frederick Community and Respondents entered into an agreement specifying that the developer would be responsible for designing, financing, permitting, and constructing the Crooked Run Facility, which would then be turned over to Respondents to operate. *Id.*

The 2008 recession delayed the development of the Lake Frederick Community, resulting in "drastically lower" wastewater flows than anticipated, which allowed Respondents to meet the permit's conditions. *Id.* But development of the Lake Frederick Community picked up in 2015, resulting in corresponding increases in the volume of wastewater flowing into the Crooked Run Facility. *Id.* A year later permit violations were occuring regularly. *Id.*

On May 17, 2017, VDEQ sent a Notice of Violation to Respondents after Respondents reported effluent limitation violations occuring between December 2016 and March 2017. Ex. 2 ¶ 30. On February 13, 2018, Respondents entered into a Letter of Agreement with VDEQ to address the violations within the Notice of Violation and other exceedances that subsequently occurred between October 2017 and December 2017. Ex. 2 ¶ 30.

Sometime after VDEQ issued the Notice of Violation, the current developer of the Lake Frederick Community and Frederick Water engaged in litigation over who was ultimately responsible for funding the improvements necessary to bring the Crooked Run Facility into compliance with the effluent limitations in its permits. *Inter-County Service Area (ICSA)*, FREDERICK WATER, https://www.frederickwater.com/inter-county-service-area-icsa (last visited Feb. 4, 2025). No improvements were made during the pendency of the litigation and violations continued. *Id.* However, during this time Respondents explored various solutions to the violations, ultimately concluding that no improvements to the plant would allow it to meet all effluent limitations in its permits. *Id.* The only viable option, according to Frederick Water, was to convert the Crooked Run Facility into a pump station that would convey sewer flows from the Lake Frederick Community to another treatment plant operated by Respondents that was better equipped to treat the wastewater. *Id.*

With violations continuing, on May 3, 2021, EPA sent its own Information Request Letter to Respondents pursuant to Section 308 of the CWA, which dictates:

> Whenever required to carry out the objective of this Act, including but not limited to . . . determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance . . . the Administrator shall require the owner or operator of any point source to . . . make such reports . . . and [] provide such other information as he may reasonably require . . . .

33 U.S.C. § 1318(a)(A); Proposed CAFO ¶ 25. Respondents submitted a response to EPA's request on May 26, 2021. Proposed CAFO ¶ 25. On January 26, 2022, EPA sent Respondents a Notice of Potential Violations and Opportunity to Confer ("Notice of Potential Violations"), listing a series of permit violations that EPA alleged occurred at the Crooked Run Facility. Proposed CAFO ¶ 26. Following the issuance of the Notice of Potential Violations, EPA met with Respondents and their attorneys to discuss Respondents' permit compliance, after which Respondents provided EPA with additional information. Proposed CAFO ¶ 25; Ex. 2 ¶ 27.

On December 19, 2023, EPA issued an Administrative Order on Consent ("AOC") pursuant to Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3). *See* Ex. 2 ¶¶ 1-2. The AOC pertained to 102 purported violations of effluent limit exceedances occuring between January 31, 2017, and July 31, 2023, that were reported by Respondents. Ex. 2 ¶ 29. These included exceedances of limitations for nitrogen, chloride, E. coli, ammonia, biochemical oxygen demand, and total suspended solids. Ex. 2 ¶ 29. The AOC ordered Respondents to address the violations by providing for EPA's review an Injunctive Relief Framework within 240 days of the effective date of the AOC. Ex. 2 ¶ 32. The Framework was to detail "plans to implement new wastewater collection and transmission infrastructure" that would connect the Crooked Run Facility with another wastewater treatment plant owned by Respondents. Ex. 2 ¶ 32(a). Respondents submitted their Injunctive Relief Framework on August 15, 2024, and EPA is currently reviewing the plan. Compl't's Resp. at 3. According to Respondents' website, the AOC will ultimately require Respondents to convert the Crooked Run Facility into a pump station as planned. *Inter-County Service Area (ICSA)*, FREDERICK WATER, https://www.frederickwater.com/inter-county-service-area-icsa (last visited Feb. 4, 2025).

After EPA issued the AOC, the parties agreed to enter into the Proposed CAFO to settle monetary penalties, this time stemming from what Complainant alleged were 67 violations of effluent limitations for nitrogen, chloride, E. Coli, and biochemical oxygen demand that occurred between June 30, 2019, and January 31, 2024. Proposed CAFO ¶¶ 1, 29-30, 32; Proposed CAFO at 5-7 (Table 1). Pursuant to the agreement, Respondents agreed to pay a civil penalty of $12,000 to settle the alleged violations. Proposed CAFO ¶ 32. This amount was reached:

> [B]ased upon EPA's consideration of a number of factors, including the penalty criteria ("statutory factors") set forth in Section 309(g) of the CWA, 33 U.S.C. § 1319(g), including the following: the nature, circumstances, extent and gravity of the violation(s), and the violator's ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings resulting from the violation, and such other matters as justice may require.

Proposed CAFO ¶ 33.

On April 3, 2024,[2] Complainant posted a public notice expressing an intent to file the Proposed CAFO. Ex. 3 at 1. The notice advised that anyone wishing to comment on the Proposed CAFO could do so within 40 days. Ex. 3 at 2. Complainant received numerous comments during the 40-day comment period, including one from Petitioner. Compl't's Resp. at 3; *see generally* Ex. 4a; Ex. 4b; Ex. 4c.

Upon termination of the comment period, Complainant sent a letter to each commenter declaring an intent to finalize the Proposed CAFO as originally planned. Ex. 5 at 1. Complainant attached a copy of the Proposed CAFO to the letter and advised commenters that they had 30 days from its receipt to petition the Regional Administrator to set aside the Proposed CAFO. Ex. 5 at 2. On July 16, 2024, Petitioner timely submitted his Petition, arguing that Complainant failed to consider certain material evidence when approving the Proposed CAFO. Ex. 6. After considering the issues raised in the Petition, however, Complainant declined to set aside the Proposed CAFO. On September 17, 2024, the Regional Administrator for Region 3 filed with the Office of Administrative Law Judges a Request to Assign Petition Officer in accordance with 40 C.F.R. § 22.45(c)(4)(iii). On October 25, 2024, an order issued in which the undersigned was assigned as Petition Officer, and among other things, Complainant was directed to present to this Tribunal a written response to the Petition. Order Designating Petition Officer & Directing Complainant to File a Response to the Petition at 2. Complainant timely filed a response, along with exhibits in support, on November 25, 2024.

III. Standard of Review

As noted above, the CWA requires that the Proposed CAFO be set aside "[i]f the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order," 33 U.S.C. § 1319(g)(4)(C), while the Procedural Rules require findings as to the "extent to which the petition states an issue relevant and material to the issuance of the proposed final order" and whether Complainant "adequately considered and responded to the petition," 40 C.F.R. § 22.45(c)(4)(v)(A)-(B). However, neither the CWA nor the Procedural Rules define the terms "relevant" and "material." Consequently, it is appropriate to look to the Federal Rules of Evidence and federal court practice for guidance. *Euclid of Va., Inc.*, 13 E.A.D. 616, 657 (EAB 2008) ("[I]t is appropriate for Administrative Law Judges . . . to consult the Federal Rules of Civil Procedure and Federal Rules of Evidence for guidance."); *City of Salisbury*, 10 E.A.D. 263, 285 n.31 (EAB 2002) ("[T]he Agency's trial level administrative law judges may appropriately look to the federal courts for guidance.").

Under the Federal Rules of Evidence, evidence is "relevant" when "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. The context in which evidence is offered will determine its relevance. *99 Cents Only Stores*, 2008 EPA ALJ LEXIS 46, at *7 (June 4, 2008) (Order on Respondents' Motion in Limine). Similarly, evidence is deemed "material" when, if presented, it reasonably has the potential to cause a different outcome.

[2] Complainant originally posted an incomplete public notice on March 25, 2024. Compl't's Resp. at 3 n.1. The April 3, 2024, notice corrected the deficiencies and restarted the 40-day comment period. *Id.*

See United States v. Bagley, 473 U.S. 667, 682 (1985). Therefore, I must determine whether the evidence presented in the Petition was considered by Complainant and, if not, whether the evidence presented would make a fact pertaining to the stated charges more or less probable such that its consideration reasonably had the potential to cause a different outcome.

IV. Issues Raised in the Comments and Petition

All comments were submitted by residents of the Lake Frederick Community, and although some of the comments varied slightly, by and large they all mirrored a form letter conveying a concern that residents will be burdened by Respondents' attempts to pass on to them the costs of the Proposed CAFO's fine and the infrastructure upgrades required by the AOC. *See generally* Ex. 4a; Ex. 4b; Ex. 4c. The letter expresses a belief that the Proposed CAFO is insufficient because "unless otherwise restrained Frederick Water will continue efforts it has made to raise the funds to pay for both this fine and later related upgrades to affected wastewater treatment plants through a surcharge that is discriminatory on the basis of age." Ex. 4a at 19. According to the commenters, this is because "[r]ather than spreading costs across their entire customer base, Frederick Water is taking action to raise the funds to pay EPA fines and build treatment plant upgrades through surcharges to only a subset of its customers," namely those living in the Lake Frederick Community, a community for residents aged 55 and up. Ex. 4a at 19. The letter asserts that "those of us in the Lake Frederick community are known to Frederick Water to primarily be those older than 55," and that by "[c]harging surcharges that have a disparate impact and/or result in disparate treatment to a group of customers primarily over 55 is age discrimination." Ex. 4a at 19. As a recipient of federal funding, the letter argues, "Frederick Water is supposed to be prohibited from discrimination in the provision of services on the basis of age." Ex. 4a at 19. The letter claims that "EPA can require actions in settlements in addition to monetary fines . . . and that there needs to be a further requirement in the CAFO that reiterates that Frederick Water shall not impose service charges or surcharges to a subset of their customers in a manner which have the effect—intended or not—of being discriminatory. Otherwise, Frederick Water will continue to unfairly try and have a 55+ community, comprised of many older people in retirement and on fixed incomes, fund their EPA fines and associated treatment plant upgrades." Ex. 4a at 20.

In the letter sent in response to the comments, Complainant stated that the proposed $12,000 penalty was calculated based on the EPA's Interim Clean Water Act Settlement Penalty Policy to be "fair, appropriate and protect[] public health and the environment." Ex. 5 at 1. Further, the letter explained that the compliance measures required by the AOC were developed after "extensive discussions that considered various alternatives explored by [Respondents]." Ex. 5 at 2. The letter clarified that "EPA does not specify how compliance actions should be funded, and it is the responsibility of [Respondents] to determine how to fund the agreed upon compliance actions." Ex. 5 at 2. The letter informed commenters that Respondents could pursue any number of options to reduce the burden on their customers and advised that any comments regarding how rates are set should be directed to Respondents. Ex. 5 at 2.

Petitioner, for his part, asserts three issues that he argues are relevant and material to the issuance of the Proposed CAFO, none of which were available to Complainant when negotiating the Proposed CAFO with Respondents. Two of the issues identified by Petitioner concern allegedly false statements made in a July 12, 2022, letter sent by Respondents' attorney to Complainant during the negotiation of the Proposed CAFO. The third issue pertains to an allegedly false certification made by Respondents.

Petitioner begins by claiming that a July 12, 2022, letter conveyed to Complainant that "the Crooked Run [Facility] serves only the Lake Frederick Community, whose users are charged an amount sufficient to cover the costs of service." Ex. 6 at 2. According to Petitioner, Respondents had previously made public statements to the contrary, admitting that the Crooked Run Facility's treatment costs surpass the revenue generated from the community. Ex. 6 at 2. Petitioner surmises that the allegedly false statement was made to suggest that Respondents obtained no economic benefit from the violations. Ex. 6 at 2.

Petitioner next claims that the letter communicated that Respondents' "Rules and Regulations for Wastewater Discharge already prohibit the discharge of [] brine to the wastewater system." Ex. 6 at 2. According to Petitioner there was no such prohibition in Respondents' regulations at the time of the violations. Respondents, Petitioner believes, falsely claimed otherwise in order to "justify, in part, a civil penalty which reflects Respondents having acted in good faith and without delay." Ex. 6 at 2.

In consideration of the two allegedly false statements, Petitioner goes on to claim that Respondents falsely certified in the AOC that "any information or representation they have supplied or made to EPA concerning the matter was, at the time of submission, true, accurate, and complete." Ex. 6 at 3. Petitioner contends that "[w]hether this was fraudulent or negligent, and whether the information itself was material or not (irrelevant to the certification itself), the certification was intended to induce the EPA to enter into the subject Consent Agreement and Final Order." Ex. 6 at 3. Petitioner further believes that such certification amounts to a violation of 18 U.S.C. § 1001's prohibition against making false representations to the Government and that "EPA has the resources and authority to determine a violation of 18 U.S.C. § 1001." Ex. 6 at 3.

According to Petitioner, because Complainant was unaware of the falsity of the two statements, and the unlawfulness of the subsequent certification, Complainant was unable to consider the true facts before entering into the Proposed CAFO. Ex. 6 at 2-3. Petitioner asks that "EPA set aside the Consent Agreement and Final Order on the basis that material evidence was not considered, pursuant to 40 C.F.R. § 22.45(c)(4)(ii), and recommence negotiations with the Respondents regarding the violations giving rise to subject Consent Agreement and Final Order." Ex. 6 at 4.

A. Issue 1: Allegedly False Representation that User Charges Cover Cost of Service at the Crooked Run Facility

I begin with Petitioner's claim that Respondents' attorney falsely stated in a July 12, 2022, letter to Complainant that "the Crooked Run [Facility] serves only the Lake Frederick Community, whose users are charged an amount sufficient to cover the costs of service." Ex. 6 at 2. While Petitioner advances no evidence that Respondents ever made such an assertion, I will accept it as true that they did for purposes of resolving the Petition. Petitioner goes on to argue that "[t]his false statement/representation in the referenced letter was made to justify, in part, a claim of 'no economic benefit' to Respondents." Ex. 6 at 2.

The CWA mandates that a civil penalty imposed for a violation of the Act must take into account, in part, the "economic benefit (if any) resulting from the violation." 33 U.S.C. § 1319(d). This consideration is meant to prevent a violator from profiting or otherwise gaining an unfair competitive advantage from violating the Act. *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 529 (4th Cir. 1999); *United States v. Mun. Auth.*, 150 F.3d 259, 263 (3d Cir. 1998). An economic benefit calculation is meant to approximate the amount of money the violator saved by failing to comply with permit requirements, removing or neutralizing the economic incentive to violate environmental regulations. *Smithfield Foods, Inc.*, 191 F.3d at 529 (citing *Mun. Auth.*, 150 F.3d at 264). A precise economic benefit is difficult to prove, however, with the CWA not defining how to compute the benefit. *Id.* There are two general approaches that courts have taken to calculate economic benefits under the CWA: "(1) the cost of capital, i.e., what it would cost the polluter to obtain the funds necessary to install the equipment necessary to correct the violation; and (2) the actual return on capital, i.e., what the polluter earned on the capital that it declined to divert for installation of the equipment." *United States v. Citgo Petroleum Corp.*, 723 F.3d 547, 552 (5th Cir. 2013) (quoting *United States v. Allegheny Ludlum Corp.*, 366 F.3d 164, 169 (3d Cir. 2004)).

Complainant argues that "[w]hether Respondents' revenue is sufficient to cover treatment costs is not a relevant consideration for the economic benefit component of a penalty assessment under the CWA." Compl't's Resp. at 5. This appears correct as it is not clear that Respondents would have profited from the violations, and therefore obtained an economic benefit, whether they operated the Crooked Run Facility at a loss or at the breakeven point; in either scenario there is no profit stemming from the violation to disgorge. *See United States v. Mun. Auth.*, 929 F. Supp. 800, 805 (M.D. Pa. 1996) (calculating economic benefit of $2,015,500 to account for the increase in profits attributable to the CWA violation); *see also Ogeechee-Canoochee Riverkeeper, Inc. v. T.C. Logging, Inc.*, No. 608CV064, 2010 U.S. Dist. Lexis 25317, at *13 (S.D. Ga. Mar. 18, 2010) (holding "a penalty of any amount would thus have the desired punitive and prophylactic effect on Defendants" because they continually operated at a loss). Further, Petitioner does not explain how Respondents' allegedly false statement would put them in a better position to claim to have obtained no economic benefit than if they had, as Petitioner argues is the truth, stated that the Crooked Run Facility operated at a loss. In fact, the position Respondents took would seem to put them in a weaker position to claim that they obtained no economic benefit. By claiming to be in a better financial position than they purportedly were, Respondents would also appear to be in a better position to perhaps divert

funds to complete the necessary infrastructure upgrades. By contrast, if Respondents acknowledged that they sustained a loss operating the Crooked Run Facility, they could have more easily argued that they did not profit from the violations or otherwise gain a competitive advantage, thereby making it easier to show no economic benefit.

Moreover, it is not clear from Petitioner's evidence that Respondents' claim was materially false. Petitioner points to a portion of Frederick Water's website that explains a February 2024 decision by the Frederick Water Board of Directors to create an Inter-County Service Area (ICSA), covering the Lake Frederick Community and other nearby communities served by Respondents. *Inter-County Service Area (ICSA)*, FREDERICK WATER, https://www.frederickwater.com/inter-county-service-area-icsa (last visited Feb. 4, 2025). The purpose of creating the ICSA was to "adopt[] an associated fee structure designed to fund necessary water and sewer improvements within the designated area." *Id.* The Board explained that "the catalyst for the decision was the treatment limitations and permit violations at the Crooked Run Wastewater Treatment Plant in the Lake Frederick community." *Id.* According to the Board, Frederick Water, when taking over operation of the Facility, agreed to charge residents of the Lake Frederick Community the same rates as the rest of Frederick Water's customers. *Id.* The cost to treat wastewater at the Crooked Run Facility, however, was more than twice the cost to treat wastewater at Frederick Water's other treatment facility. *Id.* The Board acknowledged that, because of the high cost of treatment, "revenues generated by Lake Frederick customers [fell] short of the basic operational costs." *Id.* This meant that "[e]ffectively, the rest of [Frederick Water's] customer base has subsidized sewer operations within the Lake Frederick community . . . ." *Id.*

From this account, Respondents' statement was largely accurate. True, the fees paid by residents of the Lake Frederick Community were not sufficient on their own to cover the cost of operating the Crooked Run Facility. However, fees paid by other Frederick Water users subsidized the residents of the Lake Frederick Community. It would have been perhaps more accurate for Respondents to have framed their statement as such: "the Crooked Run [Facility] serves only the Lake Frederick Community, whose users are charged an amount sufficient to cover the costs of service *when combined with charges levied on other Frederick Water users*." However, the basic premise of Respondents' claim—that user charges were sufficient to cover the cost of operating the Crooked Run Facility—was accurate. As Complainant points out "[p]otential information regarding *how* the Respondents obtained *sufficient* funds to pay for ongoing expenditures for the [Crooked Run] facility" is not relevant to EPA, and the Petition did not explain how it would be. Compl't's Resp. at 6 (emphasis in original).

Because Respondents accurately represented that user charges were generally sufficient to cover the cost of operating the Crooked Run Facility and any information on how Respondents obtained those funds would not have changed the economic benefit analysis, there is no relevant and material evidence that Complainant did not consider, and a hearing is not necessary to reevaluate the proper penalty on this basis.

B. Issue 2: Allegedly False Representation that Respondents' Policies Prohibited the Discharge of Brine

I turn next to the second allegedly false statement identified by Petitioner: the representation made by Respondents' attorney in the July 12, 2022, letter that ". . . Frederick-Winchester Service Authority Rules and Regulations for Wastewater Discharge already prohibit the discharge of this brine to the wastewater system. . . ." Ex. 6 at 2. Again, Petitioner advances no evidence that such a claim was made, but for purposes of ruling on the Petition I will accept as true that Respondents made the statement to Complainant. According to Petitioner, the statement was false because "Respondents only added such a prohibition to the Water Sewer Standards and Specifications to restrict brine discharge by a vote by its Board on July 18, 2024—two full years later than claimed in the letter." Ex. 6 at 2. Petitioner goes on to assert that "[t]his false statement/representation in the referenced letter was made to justify, in part, a civil penalty which reflects Respondents having acted in good faith and without delay." Ex. 6 at 2.

Complainant argues in response that "[t]his issue of brine discharge is not relevant and material to the issuance of the CAFO because the underlying violations are predicated on exceedances of the effluent limits in Respondents' permit." Compl't's Resp. at 6. As alluded to in this response, the Proposed CAFO does not cite brine discharge as a basis for liability, instead the violations were predicated on exceeding allowances for the discharge of biochemical oxygen demand, nitrogen, chloride, and E. Coli. Proposed CAFO at 5-7 (Table 1). Complainant goes on to state:

> To the extent the petition asserts that the presence of brine from water softeners was the cause of those exceedances, then the issue is captured within the violations addressed by the CAFO. To the extent the petition asserts that an alleged delay in the effect of the prohibition meant that there were ongoing violations during and subsequent to the negotiations, those alleged violations are not part of the violations resolved by the CAFO and therefore are not relevant and material to the CAFO and do not warrant a hearing for resolution. Nothing in the CAFO would prevent Complainant from bringing an action to address violations subsequent to those identified in the CAFO.

Compl't's Resp. at 6-7. Complainant appears to be arguing that the issue raised by Petitioner does not put forth material and relevant information not considered by Complainant because liability for any violations resulting from the discharge of brine were either already captured by the Proposed CAFO or can form the basis for a future enforcement action. This focus on Respondents' liability, however, seems to slightly misread Petitioner's argument, which focuses on the penalty assessment rather than liability. Petitioner is not arguing that Complainant missed the true extent of Respondents' liability. Rather, he is arguing that a false statement was made to present Respondents in a good light, hoping for leniency in the assessment of their culpability when calculating a penalty. This argument, nonetheless, fails because the

evidence Petitioner details in support directly refutes his position that Respondents made a false statement.

Petitioner attached to the Petition a June 11, 2024, memo addressed from Frederick Water's Executive Director to the Board of Directors that Petitioner claims supports his assertion that Respondents falsely maintained in 2022 to have already enacted a policy to prohibit the discharge of brine. *See generally* Ex. 6, Att. 3. In the memo, the Executive Director states that "Frederick Water utilizes the Water and Sewer Standards and Specifications manual to ensure that new development and expansions to the water and sewer system adhere to commonly accepted practices and AWWA [American Water Works Association] design standards." Ex. 6, Att. 3. According to the memo, occasional revisions are warranted, and he was advocating that revisions proposed by Frederick Water's Planning Committee should be adopted by the Board. Ex. 6, Att. 3. A summary of the revisions included "disallow[ing] water softener brine from being discharged to sanitary sewer." Ex. 6, Att. 3.

Petitioner then provided a link to the Frederick Water website cataloging the minutes from each meeting of the Board of Directors. *Board Meetings*, FREDERICK WATER, https://www.frederickwater.com/board-meetings (last visited Feb. 4, 2025). The Board addressed the proposed revisions during a meeting on June 18, 2024.[3] *Minutes of the Frederick Water Board Meeting, June 18, 2024*, FREDERICK WATER, https://www.frederickwater.com/sites/default/files/2024-09/jun_18_2024_executed_meeting_minutes.pdf (last visited Feb. 4, 2025). The minutes from that meeting reflect that "[t]he proposed revision includes several minor changes, including a more explicit prohibition of discharges of ion-exchange brine into the sewer system." *Id.* Concerning this prohibition on discharging brine, the minutes explain:

> Mr. Lawrence [Frederick Water's Executive Director] noted that while the ban represents new language in the Standards and Specification document, it is not a new policy. The Frederick Water Statement of Policy, which dates to 1977, states that all wastewater discharged to Frederick Water's collection system must be compatible with the system's ability to treat the wastewater and not interfere with the system's operation. The policy aligns with requirements established by the Frederick-Winchester Service Authority, which owns all Winchester and Frederick County wastewater treatment facilities.
>
> Mr. Lawrence clarified that the Standards and Specifications are used with new development and that changes to existing infrastructure are not required. Rather, updating the standards prevents future problems and raises awareness that wastewater treatment plants cannot treat ion-exchange brine.

[3] The Petition refers to a Board meeting occuring on July 18, 2024. This seems to be in error as no meeting took place on that date. *See Board Meetings*, FREDERICK WATER, https://www.frederickwater.com/board-meetings (last visited Feb. 4, 2025).

Id. The Board adopted the revised standards by a vote of 4-1. *Id.*

Far from supporting Petitioner's argument, these minutes demonstrate that the Board understood Frederick Water's policy as already having prohibited brine discharge since 1977. The 2024 changes cited by Petitioner simply reiterated and clarified that prohibition, which predated Respondents' 2022 statement to Complainant. Consequently, because the statement was in fact true, the allegedly false statement was not material and relevant to calculating the penalty in the Proposed CAFO and does not justify setting aside the Proposed CAFO and holding a hearing.

C. Issue 3: Allegedly False Certification

Petitioner goes on to argue that, because Respondents made the two allegedly false statements, Respondents falsely certified that all information provided to Complainant during the course of negotiating the Proposed CAFO and AOC was "true, accurate, and complete." Ex. 6 at 3. But Complainant suggests that such an argument is merely a re-packaging of Issues 1 and 2 and cannot itself be relevant and material to the issuance of the Proposed CAFO. Compl't's Resp. at 7. Petitioner claims otherwise, arguing that "whether the [certified] information itself was material or not (irrelevant to the certification itself), the certification was intended to induce the EPA to enter into the subject Consent Agreement and Final Order." Ex. 6 at 3. But it does not follow that any and all false certifications, even those related to irrelevant and immaterial statements, are themselves elevated to being material and relevant. It is the purportedly false statements that might induce EPA to enter into an agreement, not the certification itself, the purpose of which is simply "to deter violators from providing false statements to the EPA and to reserve the EPA's rights." Compl't's Resp. at 7. Regardless, as Petitioner has not presented evidence tending to support that Respondents made materially false statements, he likewise has not provided support for his insistence that Respondents falsely certified that their statements were true and accurate. Therefore, the allegedly false certification was not material and relevant to calculating the penalty in the Proposed CAFO and does not justify setting it aside and holding a hearing.

Because Respondents did not appear to provide a false certification, there is no indication that a violation of 18 U.S.C. § 1001 occurred as Petitioner alleges. Even if there was a violation of 18 U.S.C. § 1001, it would be irrelevant to the Proposed CAFO. 18 U.S.C. § 1001 states:

> Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years . . . or both."

18 U.S.C. § 1001(a). Consequently, as a criminal matter, any potential violation of 18 U.S.C. § 1001 would be outside the scope of the Proposed CAFO and its resulting penalty, which are meant to settle civil liabilities. *See* 33 U.S.C. § 1319(g)(1) (limiting penalties in administrative actions brought under the subsection to class I or class II civil penalties).

V. Petitioner's Request to Restart Negotiations

As part of his Petition, Petitioner "respectfully ask[s] that the EPA set aside the Consent Agreement and Final Order . . . and recommence negotiations with the Respondents regarding the violations giving rise to subject Consent Agreement and Final Order." Ex. 6 at 4. Because there is no material and relevant information that Complainant failed to consider, there is no basis to grant this request. Even if there were, ordering the parties to recommence negotiations would not be the appropriate remedy. The Procedural Rules require that "[u]pon a finding by the Petition Officer that a hearing is appropriate, the Presiding Officer shall order that the consent agreement and proposed final order be set aside and shall establish a schedule for a hearing." 40 C.F.R. § 22.45(c)(4)(vi). It is not clear that holding a hearing on this matter would benefit Petitioner, who is a resident of the Lake Frederick Community. As the comments against the Proposed CAFO portended, any resulting fine could potentially be passed along to residents by means of higher service charges or surcharges. Petitioner's arguments that Respondents received an economic benefit or potentially acted in bad faith could result in a higher fine than the Proposed CAFO's $12,000 fine. Indeed, that fine is significantly lower than the maximum fine that could be imposed under the CWA at a hearing, which could be up to $25,847 per day for each day during which the violation continues up to a maximum of $323,081. 33 U.S.C. § 1319(g)(2)(B); 40 C.F.R. § 19.4 (Table 1).

VI. Findings

For the reasons stated above, the undersigned finds as follows:

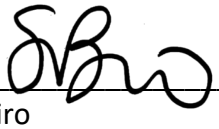
1. The Petition fails to state an issue that is relevant and material to the issuance of the proposed final order.

2. Complainant adequately considered and responded to the issues raised in the Petition.

3. Resolution of this proceeding without a hearing is appropriate.

Given this Tribunal's finding that a resolution of the proceeding without a hearing is appropriate, the Regional Administrator of EPA Region 3 may issue the proposed final order. 40 C.F.R. § 22.45(c)(4)(viii). Such order shall become final 30 days after both this Order and a properly signed consent agreement are filed with the Regional Hearing Clerk, unless further petition for review is filed by a notice of appeal in the appropriate United States District Court within the 30-day period, with notice simultaneously sent by certified mail to the Administrator of EPA and the Attorney General. *Id.* "Written notice of appeal also shall be filed with the Regional Hearing Clerk, and sent to the Presiding Officer and the parties." *Id.* "If judicial review of the final order is denied, the final order shall become effective 30 days after such denial has been filed with the Regional Hearing Clerk." *Id.*

SO ORDERED.



Susan L. Biro
Chief Administrative Law Judge

Dated: February 14, 2025
Washington, D.C.

In the Matter of *Frederick-Winchester Service Authority, and Frederick County Sanitation Authority, d/b/a Frederick Water*, Respondents.
Docket No. CWA-03-2024-0036

CORRECTED CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Denying Petition to Set Aside Consent Agreement and Proposed Final Order**, dated February 14, 2025, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.

Mary Angeles
Paralegal Specialist

Original and One Copy by U.S. Mail and Email to:
Bevin Esposito
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 3
1600 John F. Kennedy Boulevard
Philadelphia, PA 19103-2852
Email: esposito.bevin@epa.gov

Original by OALJ E-Filing System to:
Mary Angeles
Headquarters Hearing Clerk
Office of Administrative Law Judges
U.S. Environmental Protection Agency
https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf

Copy by Email to Petitioner:
Alan Randolph Holland, Jr.
100 Teal Court
Lake Frederick, VA 22630
Email: randy.holland@lycos.com

Copy by Email to Representatives for Complainant:
Promy Tabassum, Esq.
Attorney for Complainant
Assistant Regional Counsel
U.S. EPA, Region 3
1600 John F. Kennedy Boulevard
Philadelphia, PA 19103-2852
Email: tabassum.promy@epa.gov

Peter Gold
Enforcement Officer
U.S. EPA, Region 3
1600 John F. Kennedy Boulevard
Philadelphia, PA 19103-2852
Email: gold.peter@epa.gov

Copy by Email to Representatives for Respondents:
Gary R. Oates, Chairman
Frederick County Sanitation Authority
d/b/a Frederick Water
315 Tasker Road
Stephens City, VA 22655
Email: oatesgr@aol.com

Candice Perkins , Executive Director
Frederick-Winchester Service Authority
P.O. Box 43
Winchester, VA 22604
Email: cperkins@fredwin.com

Dale G. Mullen
Attorney for Respondents
Whiteford, Taylor & Preston L.L.P.
Two James Center
1021 East Cary Street
Suite 2001
Richmond, VA 23219
Email: dmullen@whitefordlaw.com

Michael H. Brady
Attorney for Respondents
Whiteford, Taylor & Preston L.L.P.
Two James Center
1021 East Cary Street
Suite 2001
Richmond, VA 23219
Email: mbrady@whitefordlaw.com

Dated: February 18, 2025
Washington, D.C.