

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
Service Oil, Inc.,) **Docket No. CWA-08-2005-0010**
)
Respondent)

**ORDER ON MOTION TO STRIKE ADDENDUM,
MOTIONS FOR LEAVE TO FILE, AND MOTION FOR RECONSIDERATION**

I. Procedural Background

The Complaint in this matter, filed on April 26, 2005 by the United States Environmental Protection Agency Region 8 under Section 309 of the Clean Water Act (CWA), alleges in Count 1 that Respondent violated Section 301(a) of the CWA and its implementing regulations, by failing to obtain, on or before the date it commenced construction activities at its facility, a North Dakota Pollutant Discharge Elimination System (NDPDES) permit authorizing storm water discharges from its facility. The Complaint alleges in Count 2 that after Respondent obtained the permit, it failed to conduct storm water inspections at the frequency required by the permit, and/or to maintain inspection records on-site. The penalty proposed in the Complaint for the two alleged violations is \$80,000.

Respondent answered the Complaint and the parties filed prehearing exchanges. Several motions were filed and ruled upon. One ruling was an Order, dated March 7, 2006, granting Complainant's Motion for Accelerated Decision on liability for Count 2, and denying it as to liability for Count 1 and as to penalties. Another ruling, issued on January 23, 2006, was an Order on Respondent's Motions to Dismiss and Motion for Additional Discovery, requiring Complainant to submit certain information concerning the calculation of the proposed penalty.

On February 16, 2006, Respondent submitted a Prehearing Brief and "Addendum Re: Total Discovery Failure" (Addendum). On February 23, 2006, along with a request for leave to file out of time, Complainant filed a "Response to Respondent's Addendum Re: Total Discovery Failure" (Response to Addendum) and requested that the Addendum be stricken (Motion to Strike). On March 13, 2006, Respondent filed a brief in opposition to Complainant's requests (Opposition), a motion for leave to file its Addendum as a motion, motion for leave to file a supplemental prehearing brief, motion for reconsideration of Complainant's Motion for Accelerated Decision (collectively, Respondent's Motions), and motion for issuance of subpoenas (which will be addressed by separate order).

II. Motions for Leave to File and Motion to Strike

An Order Scheduling Hearing, issued November 10, 2005, set a deadline of December 15, 2005 to file any pre-hearing motions such as motions to amend and motions in limine. On February 23, 2006, Complainant filed a Request for Leave to File Motion to Strike Respondent's Addendum, or In the Alternative, Request for Leave to Respond to Respondent's Addendum (Complainant's Request for Leave). On March 13, Respondent filed a motion for leave to file the Addendum as a motion, and to file Respondent's Supplemental Prehearing Brief.

Respondent opposes Complainant's Request for Leave on grounds that the Motion to Strike is simply a means to get before this Tribunal a response to the Addendum, and that Complainant does not address the "real problem" of its lack of calculation of the proposed \$80,000 penalty.

The document upon which arose the Request for Leave, namely, the Addendum, was filed after the pre-hearing motions deadline, and therefore it was impossible for the Motion to Strike to be filed by the deadline. Furthermore, neither the Motion to Strike nor the Response to the Addendum appear to be filed frivolously, in bad faith or for purposes of delay, and should not prejudice Respondent's preparations for the hearing. Thus, the Presiding Judge should address them on their merits, and the Complainant's Request for Leave to File Motion to Strike Respondent's Addendum, and the Request for Leave to Respond to Respondent's Addendum, is **granted**.

In its Motion to Strike Respondent's Addendum, Complainant argues that the Addendum is essentially a motion requesting that no penalty, or a penalty in the amount of \$2,702.19, be assessed against Respondent. As such, in accordance with 40 C.F.R. § 22.16 and prehearing orders issued in this proceeding, it should have been filed as a dispositive motion, along with a request for leave to file past the November 23rd deadline for dispositive motions. *See*, Prehearing Order, dated July 19, 2005, and Order Re-Establishing Prehearing Deadlines, dated September 1, 2005. Furthermore, Complainant argues that the Addendum requests relief, *i.e.* amendment of the Complaint *sua sponte* to decrease the amount of the proposed penalty from \$80,000 to \$2,702.19, which the Presiding Judge is not authorized to grant. In response, Respondent moves to file the Addendum as a motion, and revises the relief requested to reconsideration of the Order on Complainant's Motion for Accelerated Decision, and imposition of a penalty of \$2,702.19.

A document must meet the criteria set forth in 40 C.F.R. § 22.16(a) of the Consolidated Rules of Practice (40 C.F.R. Part 22)("Rules") to be considered as a motion. That provision states that "All motions. . . shall: (1) Be in writing; (2) State the grounds therefor, with particularity; (3) set forth the relief sought; and (4) be accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon." 40 C.F.R. § 22.16(a). The Addendum meets these criteria, but it was not filed within the dispositive motions deadline of November 23, 2005 or the pre-hearing motions deadline of December 15, 2005, and, as pointed out by Complainant,

it requests relief not specifically authorized under the Rules.¹ Respondent's Motions request alternative relief, which cure the latter flaw. Respondent's request for leave to file the Addendum points out that the facts upon which the Addendum arose, namely the Complainant's response to the discovery request, occurred after the motions' deadlines. It does not appear to be filed frivolously, in bad faith or for purposes of delay, and should not prejudice Complainant's preparations for the hearing. Therefore, it may be accepted after the motions' deadlines.

Another flaw is that the Addendum is not titled as a "motion" and is filed as an attachment to a Prehearing Brief. A motion is not required under the Rules to be entitled as a "motion" and is not prohibited from being attached to another document. However, for reasons of clarity, efficiency, and courtesy to other parties and this Tribunal, a motion should be filed and served, either alone or together with other motions, as a separate document with the word "motion" in the title (*e.g.*, "Motion for . . ."), and not as an attachment or within the body of another document. In any event, the flaw is cured by Respondent's request to file the Addendum as a "motion."

Accordingly, Complainant's Motion to Strike Respondent's Addendum is **denied**, and Respondent's Request for Leave to File its Addendum as a Motion is **granted**.

In its Motion for Leave to file Respondent's Supplemental Prehearing Brief, Respondent offers additional arguments relevant to the Order on Motion for Accelerated Decision, dated March 7, 2006. There is no reason to wait for a response from Complainant, as there is no argument that could succeed to deny Respondent leave to file a supplement to its prehearing brief, particularly where Respondent filed it promptly after the March 7th Order was issued. Therefore, Respondent's Motion for Leave to file Respondent's Supplemental Prehearing Brief is **granted**.

III. The Addendum and Respondent's Motion for Reconsideration

The Order on Respondent's Motions to Dismiss and Motion for Additional Discovery required Complainant to submit:

- A. A statement identifying, and a copy of, any and all documents and things considered and/or relied upon by Complainant in the calculation of Complainant's proposed penalty;
- B. A copy of EPA's proposed Penalty Policy for use in cases involving violations of storm water discharge permit requirements under the NPDES program;

¹ The Rules provide that "The *complainant* may amend the complaint . . ." and do not refer to a Presiding Judge amending a complaint *sua sponte*. 40 C.F.R. § 22.14(c)(emphasis added).

- C. A statement identifying all work papers utilized and/or relied upon by Complainant in arriving at the proposed penalty;
- D. A statement identifying all persons involved in calculating and/or arriving at the proposed penalty.

Complainant filed its Response to the Order on February 9, 2006 (“Response to Discovery”), attaching several documents, including an EPA guidance document dated January 19, 1989 entitled, “Guidance on the Distinctions Among Pleading, Negotiating and Litigating Civil Penalties for Enforcement Cases Under the Clean Water Act” (“1989 Guidance”), and several documents concerning the economic benefit calculation.

The 1989 Guidance emphasizes that the EPA CWA penalty policy (which preceded the CWA Settlement Policy) is intended only for settlement of cases and should not be used to determine a proposed penalty in a complaint or otherwise in litigated cases. It provides that in litigation, EPA counsel should “argue for assessment of a penalty amount which is well above the internal bottom-line settlement amount derived through application of the CWA penalty policy . . . [and] should support its arguments for the ‘litigation amount’ based upon reasoned application of the statutory penalty assessment criteria and citation to precedent, *not through arithmetic calculations* derived according to the CWA civil penalty policy.” Response to Discovery, Exhibit A at 1. (emphasis added). The 1989 Guidance instructs that “The facts supporting the reasoning – *but not itemized arithmetic calculations* – underlying the requested penalty (e.g., facts showing extent and history of violations, environmental impact, economic benefit, or good faith) should be incorporated in the case file which becomes part of the administrative record. These materials will form the basis for EPA penalty arguments before an Agency judge if the matter is litigated . . .” *Id.* at 4 (emphasis added). The 1989 Guidance instructs further that:

In many cases, it will be necessary to name the statutory maximum amount . . . in the administrative complaint to preserve EPA’s ability to negotiate and litigate for as high a penalty as is possible under the facts of the case. Nevertheless, EPA Regions have discretion to plead for a lesser amount by weighing other case-by-case considerations such as what amount is likely to produce an adequate settlement, as well as a duty to consider what amount, taking into account the statutory penalty factors, is supported by the facts.

* * * *

Government litigators are to argue for the highest civil penalty appropriate under the law, considering the applicable statutory factors, our ability to prove the allegations in the complaint, and whatever financial burdens may be placed upon the government by continuing litigation. Government litigators must provide legal arguments and may introduce testimony or other evidence supporting facts related to the application of statutory penalty criteria to a violator’s conduct to advance EPA claims for civil penalties. We should draw on favorable civil penalty precedents [case citations omitted]. . . . We strongly advise you to . . .

recommend a total penalty amount, after discussion of the appropriate statutory factors, *but do not provide specific amounts* (other than for economic benefit, where applicable) *for each factor*.

Id. at 3, 6-7 (emphasis added). The 1989 Guidance provides that, after the calculation of the economic benefit component, with respect to the gravity component of a proposed penalty, “the government should . . . offer into evidence facts that are related to the gravity-oriented statutory criteria . . . [and] should argue as an advocate that the presence of these facts warrant assessment of a civil penalty of a given amount.” *Id.* at 8. The 1989 Guidance states that the results of EPA’s gravity analysis under the settlement policy “are irrelevant to our litigation approach and should never be introduced into evidence . . . ,” and that “attempts to depose EPA personnel on the gravity calculations for settlement purposes under the CWA penalty policy . . . should be vigorously opposed” *Id.* at 9.

Some reasoning behind this procedural approach to penalties is apparent in the statements, “To the extent possible, we intend to treat administrative and judicial enforcement complaints the same, both procedurally and substantively,” and that “we place ourselves in a stronger negotiating position by pleading for penalties . . . retaining the option of litigating for civil penalties well in excess of settlement policy amounts,” with the observation that “administrative judges [sic] more often lower a penalty policy amount requested . . . than maintain it” *Id.* at 3, and 1989 Guidance cover letter at 2.

In its Addendum, Respondent argues that Complainant still has not provided any calculation of the proposed penalty, depriving Respondent of its “due process right ‘to know precisely how the Agency calculated the penalty requested.’” Addendum at 2 (quoting Order dated January 23, 2006).² Therefore, Respondent concludes that EPA never did a calculation resulting in the \$80,000 proposed penalty, and therefore cannot present at the hearing any such calculation, except for the economic benefit calculation. In its Motions, Respondent urges that this Tribunal should send a message to Complainant and other EPA Regions that in every Clean Water Act case, the Region must perform a calculation of the proposed penalty, disclose it in the prehearing exchange in compliance with 40 C.F.R. § 22.19(a)(3), or risk entry of an accelerated

² Respondent’s insistence on EPA providing a calculation of the proposed penalty appears to challenge the 1989 Guidance on its face. However, because the 1989 Guidance expands rather than curtails discretion in assessing CWA penalties, there is no basis for invalidating the 1989 Guidance in this proceeding. *Cf., Employer’s Insurance Company of Wausau*, 6 E.A.D. 735, 761 (EAB 1997)(EPA adjudicators must refrain from treating penalty policy as a rule, and must be prepared to re-examine the basic propositions on which the policy is based where those basic propositions are genuinely placed at issue); *United Technologies Corp. v. EPA*, 821 F.Supp. 714, 719-20 (D.C. Cir. 1987)(policy statement is an invalid legislative rule because it substantially curtails EPA discretion and thus has present binding effect).

decision with the penalty amount limited to the respondent's economic benefit of noncompliance. Respondent asserts that it has spent thousands of dollars in attorney fees attempting to ferret out the calculation of the proposed penalty, only to find out it does not exist. Therefore, Respondent requests reconsideration of the Order on Complainant's Motion for Accelerated Decision and summary disposition of this matter by imposing a penalty of \$2,702.19 against Respondent.³

Complainant opposes Respondent's request to assess \$2,702.19 representing economic benefit only, and asserts that the proposed penalty is appropriate because it reflects the consideration of each statutory penalty fact as set out in its Penalty Justification - C's Ex. 23. Complainant emphasizes that penalty calculations under the CWA are highly discretionary with the trial judge, citing, *inter alia*, *Tull v. United States*, 481 U.S. 412, 426-27 (1987).

Complainant asserts that the proposed penalty was determined in accordance with the 1989 Guidance in this case. Response to Discovery at 1. Indeed, in its Response to Discovery, Complainant presents documents in support of the calculation of the economic benefit, describes the 1995 Interim CWA Settlement Penalty Policy as used only to determine if the proposed penalty exceeded the bottom-line settlement amount, and lists in its privilege log a Penalty Justification created using the 1995 Interim Settlement Penalty Policy which contains the proposed bottom-line penalty for settlement purposes.

There are two EPA policies which are in tension regarding the issues presented. One is a policy favoring explanations of the calculation of the proposed penalty, embodied in the Rules, 40 C.F.R § 22.19(a)(3) and (4) ("complainant shall explain in its prehearing information exchange how the proposed penalty was calculated in accordance with any criteria set forth in the Act) and § 22.27(b)(presiding judge "shall explain *in detail* in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act"; if different from the proposed penalty, the presiding judge "shall set forth in the initial decision the *specific* reasons for the increase or decrease")(emphasis added).

The other is a policy favoring broad discretion of the judge in determining a penalty under the CWA, reflected in the 1989 Guidance. This policy is consistent with Federal court practice. *See, e.g., Tull v. United States*, 481 U.S. 412, 426-27 (1987) ("Congress [made the] assignment of the determination of civil penalties to trial judges . . . [H]ighly discretionary calculations are . . . necessary in order to set civil penalties under the CWA"). In order to derive a monetary penalty from the CWA statutory factors, judges in Federal court frequently assess penalties using the "top-down" (reductions taken from the statutory maximum) or "bottom-up"

³ Motions for reconsideration are only referenced in the Rules in regard to reconsideration of a final order issued by the Environmental Appeals Board (EAB). 40 C.F.R. § 22.32. Respondent's request for reconsideration of the Order on Motion for Accelerated Decision appears to be in the nature of a cross-motion for accelerated decision, requesting assessment of a penalty of \$2,702.19.

method (increases made to a gravity based penalty, including the economic benefit). See, *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1142 (11th Cir. 1990)(top-down); *United States v. Municipal Authority of Union Township*, 150 F.3d 259 (3rd Cir. 1998)(bottom-up). These methods have been used by Administrative Law Judges in EPA administrative enforcement cases also. See, e.g., *C.W. Smith*, EPA Docket No. CWA-04-2001-1501, 2004 EPA ALJ LEXIS 128 (ALJ, July 15, 2004)(given the circumstances of the case, the top-down method was deemed appropriate).

There are several cases which tend to support the policy favoring explanations of the calculation of the proposed penalty. In some administrative CWA enforcement cases, the complainant (apparently declining to apply the 1989 Guidance), has calculated particular dollar amounts representing the statutory penalty factors. See, e.g., *Pepperell Associates*, 9 E.A.D. 83, 108 (EAB May 10, 2000)(EPA Region calculated base penalty representing seriousness of violation, then made monetary adjustments to reflect the other factors); *Pleasant Hills Authority*, EPA Docket No. CWA-III-210, 1999 EPA ALJ LEXIS 87 (ALJ, November 19, 1999). Where the complainant does not provide a specific proposed penalty calculation, ALJs and the EAB have often resorted to using EPA's general civil penalty policy, "A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties" ("EPA General Enforcement Policy # GM-22") (Feb. 16, 1984), to calculate a penalty, using the methodology therein of first calculating a gravity based penalty and then adjusting that amount by certain percentages to account for the other statutory factors. *Vico Construction Corp.*, CWA App. No. 05-01, 2005 EPA App. LEXIS 26 (EAB, Sept. 29, 2005), slip op. at 50; *Robert Wallin*, CWA App. No. 00-03, 2001 EPA App. LEXIS 8 (EAB, May 30, 2001) *Phoenix Construction Services, Inc.*, CWA App. No. 02-07, 2004 EPA App. LEXIS 9 (EAB, April 15, 2004). In other cases, the ALJ simply assessed a penalty without specifying dollar amounts or percentages representing the various penalty factors, as did the complainant in proposing the penalty. In some of those cases, the complainant on appeal complained of the very lack of specificity on the part of the ALJ that complainant itself lacked in proposing the penalty. *Britton Construction Co.*, 8 E.A.D. 261, 281-282 and n. 10 (EAB 1999)(Neither complainant nor the ALJ allocated penalty amount among separate counts or provided dollar figures for each penalty factor (except economic benefit)); *City of Marshall, MN*, CWA App. No. 00-9, 2001 EPA App. LEXIS 18 (EAB, Oct. 31, 2001). Such lack of specificity was alleged by complainant to lead to inconsistencies in the decision, possible improper double consideration of certain penalty factors, and erroneous results. *Britton*, 8 E.A.D. at 281-82. A proposed penalty could also include such problems, but without an explanation of the calculation of the proposed penalty, such problems would go undetected at the hearing and in the ALJ's penalty assessment. If the case is appealed, the problems would potentially go undetected into the final decision of the EAB, as the EAB "will generally defer to the ALJ's judgment unless an appellant can demonstrate that the ALJ's judgment is clearly erroneous or otherwise constitutes an abuse of discretion." *Vico*, slip op. at 49-50.

The EAB discussed the importance of the ALJ's specific calculation of the penalty in *City of Marshall, MN*, CWA App. No. 00-9, 2001 EPA App. LEXIS 18 (EAB, Oct. 31, 2001). The EAB stated, "In view of the highly discretionary nature of penalty assessment, the

requirement that a presiding officer provide a detailed discussion of how the applicable statutory penalty criteria relate to the assessed penalty serves the purposes of ensuring both that interested parties are fairly informed of the reasons driving the presiding officer's penalty assessment and that the (presiding officer's) reasons for the penalty assessment can be properly reviewed on appeal," and "[i]n this vein, we have observed that we should not have to engage in conjecture . . . in order to discern a Presiding Officer's reasons for deviating from a recommended penalty." *City of Marshall, MN*, CWA App. No. 00-9, 2001 EPA App. LEXIS 18 * 34-35 (internal quotations and citations omitted). The EAB noted that the preamble to the amendments of 40 C.F.R. § 22.27 indicates that the obligation to explain in detail how the penalty corresponds to the penalty criteria of the Act is not limited to circumstances where the ALJ assesses a penalty different from that in the complaint, citing 64 Fed. Reg. 40138, 40166 (July 23, 1999). *City of Marshall* at n. 27.

The presiding judge, however, cannot provide a proper analysis and calculation of the various penalty factors with only a dollar figure of the total proposed penalty along with a calculation of economic benefit. Without a calculation specifying figures or relative amounts for the penalty factors, from either a penalty policy or an explanation of the calculation of EPA's proposed penalty, the presiding judge does not have the benefit of specific guidance based on the specialized expertise of EPA program officers, who draft and apply penalty policies, on various policy issues and relative gravities of different violations. *See, CasChem, Inc.*, EPA Docket No. II-TSCA-PMN-89-0106, 1992 EPA ALJ LEXIS 146 *34 (ALJ, Oct. 30, 1992). The judge may be then in the position of trying to rationalize a specific dollar amount by listing facts in evidence and then casting numbers to total up to the proposed penalty. Where the EPA does not provide an explanation of the calculation of the proposed penalty, a simple dollar amount of a total proposed penalty, with a calculation only of the economic benefit, is unsupported and thus of very limited assistance to the presiding judge in assessing the penalty. In such cases, an appropriate remedy is that the proposed penalty be given little or no weight by the presiding judge, who then may calculate a penalty independently, perhaps using the top-down, bottom-up or GM-22 method, as appropriate, based on the facts in evidence. *See, City of Marshall*, 2001 EPA App. LEXIS 18 at * 36 ("While the Presiding Officer must consider the complainant's penalty proposal, he or she is not constrained by it, even if that proposal is shown to have 'taken into account' each of the prescribed statutory factors."). This result is not inconsistent with the 1989 Guidance.

Respondent's proposed remedy of simply disposing of the \$80,000 penalty figure and instead assessing a penalty representing only the economic benefit of Respondent's noncompliance is not appropriate. Respondent has not requested that the proposed exhibits and testimony in this case should be stricken, and its arguments do not demonstrate that such relief is warranted. Respondent has not asserted or shown that "no genuine issue of material fact exists" in this case and that Respondent is entitled to judgment as a matter of law on the penalty, under 40 C.F.R. § 22.20(a). Therefore, the presiding judge has the responsibility to determine the penalty "based on the evidence in the record and in accordance with any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). Accordingly, Respondent's Motion for Reconsideration is **denied**.

ORDER

1. Complainant's Request for Leave to File Motion to Strike Respondent's Addendum, and the Request for Leave to Respond to Respondent's Addendum, are **GRANTED**.
2. Complainant's Motion to Strike Respondent's Addendum is **DENIED**
3. Respondent's Request for Leave to File its Addendum as a Motion is **GRANTED**.
4. Respondent's Motion for Reconsideration is **DENIED**.
5. Respondent's Motion for Leave to file Respondent's Supplemental Prehearing Brief in view of the ruling on motion for accelerated decision is **GRANTED**.

Susan L. Biro
Chief Administrative Law Judge

Dated: March 27, 2006
Washington, D.C.