Hastings Environmental Law Journal

Volume 10
Number 1 *Fall 2003*

Article 5

1-1-2003

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I. Introduction

Congress authorizes district courts to assess civil penalties against any person who violates the Clean Water Act ("CWA").[1] Penalties assessed pursuant to the Act serve an important purpose because they prevent economic gain at the expense of the environment.[2] It is often economically beneficial for a company to delay the commitment of funds for compliance with environmental regulations and to avoid operation and maintenance expenses.[3] Civil penalties are intended to deter this behavior.

In *United States v. Smithfield Foods*, the Virginia district court stated: "The main purpose of the penalty is to deter the violator and others from committing future violations."[4] In *Tull v. United States*, the US Supreme Court further emphasized the deterrent aspects of the CWA stating, "[c]ongress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties."[5] To attain this goal of deterrence, the penalty

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1. Atlantic States Legal Found., Inc. v. Universal Tool & Stamping Co., Inc., 786 F. Supp. 743, 746 (N.D. Ind. 1992); Clean Water Act, 33 U.S.C. § 1365(a), 1319(d) (2003).

2. Tull v. United States, 481 U.S. 412, 422-425 (1987).

3. Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, 64 Fed. Reg. at 32949 (1999).

4. United States v. Smithfield Foods, Inc., 972 F. Supp. 338, 352 (E.D. Va. 1997).

5. *Tull*, 481 U.S. at 422 (citing 123 CONG. REC. 39191 (1977) (remarks of Sen. Muskie citing Environmental Protection Agency memorandum outlining enforcement policy)).

must deprive the party of any economic benefit that the party would realize through noncompliance with the CWA and include a punitive component which accounts for the degree of seriousness and/ or willfulness of the violations.[6]

To reinforce the deterrent and punitive nature of the act, Congress set a particularly high maximum for civil penalties. However, although the court may order a violator to pay the maximum penalty, the court has broad discretion to assess an appropriate civil penalty in light of the specific facts of a case.

This article explores cases in which courts have assessed penalties and examines how each court arrived at its respective penalty figure. Part I sets forth the structure that courts use to assess civil penalties, including the way in which courts use the six factors listed in CWA section 309(d). Part I also discusses the two most common methods courts use to assess penalties. Part II discusses the factors that should be emphasized in order to make a strong case for assessing substantial penalties against a defendant as well as the level of proof generally expected.

II. Structure of Penalty Assessment

Congress authorizes courts, upon finding a violation of the CWA, to assess appropriate civil penalties under section 309(d) of the CWA.[7] Section 309(d) provides six factors for courts to consider when determining the amount of civil penalties. A court must consider each of the enumerated factors, as well as any other factors they determine to be important, when assessing a fair penalty.[8] Although the CWA provides these factors, basically a framework for deciding civil penalties, the CWA does not specify a method for calculating them. Because the CWA does not mandate a specific process, courts are free to use their discretion when choosing the appropriate approach.[9] The two approaches most commonly applied by courts are the "top-down" or "bottom-up" approaches.

A. Methods of Calculating Civil Penalties for CWA Violations

1. "Top-down" Approach

In the "top-down" approach, the court determines the maximum possible penalty, and then reduces it according to an examination of the six factors enumerated in Section 309(d).[10] Courts calculate

6. Catskill Mountains Chapter of Trout Unlimited, Inc., v. The City of New York, 244 F. Supp. 2d 41, 48 (N.D. N.Y. 2003) (citing United States v. Mun. Auth. Of Union Township, 929 F. Supp. 800, 806 (M.D. Pa. 1996), *aff'd*, 150 F.3d 259 (3d Cir. 1998)).

7. 33 U.S.C. §1319(d), 1365(a) (2003); U*niversal Tool*, 786 F. Supp. at 746.

8. Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1141 (11th Cir. 1990).

9. S*mithfield Foods*, 972 F. Supp. at 354.

10. Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc., 73 F.3d 546, 574-576 (5th Cir. 1996); Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 80 (3d Cir. 1990); T*yson Foods*, 897 F.2d at 1142; U*niversal Tool*, 786 F. Supp. at 746-747.

the maximum penalty by multiplying the maximum penalty amount ($25,000 or $27,500 depending on the date of the violations) by the number of violations per day.[11]

In determining the number of violations, courts look to a violator's permit requirements. In cases involving permit violations where there are many different pollutants with different acceptable limits, "[e]ach limit is a separate, distinct requirement of the Permit which can be violated. Accordingly, where multiple violations of defendants' Permit occur in one day, the maximum penalty on that day may exceed $25,000 [or $27,500]."[12] Furthermore, each day that a defendant fails to comply with reporting requirements is considered to be a day of violation.

For example, in *Smithfield Foods*, an employee of the defendant company destroyed the company's laboratory analysis records and bench sheets in violation of its permit, which required the defendant to maintain records for at least three years.[13] The defendant company did not have the required records covering a period of two years and five months.[14] Each day of that twenty-nine month period constituted a separate violation of defendant's permit. At $25,000 a violation, the maximum penalty that could have been imposed was more than $21 million.[15]

As illustrated by the case above, maximum penalties can reach extraordinary amounts. After calculating the maximum penalty, courts may, and often do, adjust downward based on the mitigating factors listed in Section 309(d).[16] This top-down method is fairly straightforward as long as the number of violations is easily ascertainable. Otherwise, the "bottom-up" approach, as discussed below, may be more appropriate.

2. "Bottom-up" Approach

The other method used by courts to assess penalties is known as the "bottom-up" approach. When using the bottom up approach, courts first determine the economic benefit that the defendant gained by failing to comply with the CWA. This economic benefit serves as the baseline amount of the civil penalty. The court then adjusts the penalty upward or downward based on the remaining five factors set forth in Section 309(d).[17] The court may choose this method if the economic benefit can be calculated based on the facts of the case, or if the number of violations is difficult or impossible to ascertain.

A court may choose not to use this approach because an exact figure representing economic benefit may be difficult to support with adequate proof.[18] However, to overcome this difficulty, the Third Circuit found that the plaintiff's bur-

11. *Cedar Point*, 73 F.3d at 573-574.

12. *Smithfield Foods*, 972 F. Supp. at 341.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Cedar Point*, 73 F.3d at 573 (citing *Tyson Foods*, 897 F.2d at 1142).

17. *Smithfield Foods*, 972 F. Supp. at 354.

18. *Powell Duffryn*, 913 F.2d at 80 (citing S. REP. No. 50, 25 (1985)).

den for proving the economic benefit "will not require an elaborate or burdensome evidentiary showing. Reasonable approximations of economic benefit will suffice."[19]

For example, in *United States v. Municipal Authority of Union Township*,[20] the Third Circuit awarded civil penalties using the bottom up approach. In that case, the defendant, a dairy, could have remained in compliance with its permit by reducing production.[21] Knowing this, the defendant chose not to reduce its production in order to prevent the loss of a valued customer.[22] The court calculated the economic benefit to be the amount that the defendant dairy would have lost if it had forfeited the valued customer ($417,000 each year).[23] The court assessed a penalty on the defendant in the amount of the profit earned from the valued customer multiplied by the number of years that the defendant violated the CWA ($2,015,500).[24] The court held that this penalty achieved the leveling of the playing field intended by Congress when it enacted the CWA.[25]

B. Six Factors Enumerated in the Clean Water Act

Courts have broad discretion to decide which approach, "top-down" or "bottom-up," will best suit each situation, based on the facts and on the court's judgment. After the court decides whether it will use the maximum penalty or the economic benefit as the base figure, the court must evaluate the impact of each of the six factors enumerated in Section 309(d) to arrive at a final penalty.

Section 309(d) of the Clean Water Act provides that "any person who violates . . . this title, or any permit condition or limitation . . . shall be subject to a civil penalty not to exceed [$27,500] per day for each violation. In determining the amount of a civil penalty the court shall consider:

> [1] the seriousness of the violation or violations, [2] the economic benefit (if any) resulting from the violation, [3] any history of such violations, [4] any good-faith efforts to comply with the applicable requirements, [5] the economic impact of the penalty on the violator, and [6] such other matters as justice may require.[26]

District courts are to take into account each of the enumerated factors as well as any other factors they determine to be important to imposing fair penalty.[27] To determine the seriousness of a violation, courts consider the frequency and severity of violations, and the effect that the violations have on the environment and on the public.[28]

19. *Id.*

20. *Union Township*, 150 F.3d 259 (3d Cir. 1998).

21. *Id.* at 262.

22. *Id.*

23. *Id.*

24. *Id.* at 265.

25. *Id.* at 267.

26. 33 U.S.C. § 1319(d), *See also* 40 C.F.R. § 19.1-19.4 (Dec. 31, 1996). Prior to December 31, 1996, the maximum penalty for CWA violations was $25,000 per day for each violation. The maximum penalty for violations occurring after December 31, 1996, is $27,500.

27. *Tyson Foods*, 897 F.2d at 1141.

28. *Smithfield Foods*, 972 F. Supp. at 343.

Courts must consider economic benefit in its penalty evaluation. A court using the bottom-up approach will determine the economic benefit resulting from the violation(s) and use that amount as the starting point for its determination of an appropriate penalty based on the remaining five factors. However, even for a court using the top-down approach, the economic benefit that the violator enjoys as a result of violating the CWA is "[a] critical component of any penalty analysis . . . ."[29]

The court also examines a party's history of CWA violations. To determine whether a defendant has a history of violations courts typically look to "the duration of defendants' current violations, whether defendants have committed similar violations in the past, and the duration and nature of all the violations, including whether the violations were perpetual or sporadic."[30]

The "good-faith efforts" factor is a policy-based consideration meant to lessen the punitive effect of a civil penalty for a defendant who has attempted to comply with the CWA. Congress recognized that parties often deal with complex technological problems that may be difficult to solve, and "if a defendant can demonstrate they have been proceeding in a good faith attempt to come into compliance with the CWA, then credit is given under the mitigating factor of good faith efforts."[31] However, good faith is not assumed, and in many cases, defendants are unable to mitigate penalties based on this factor.

A court may reduce the civil penalty against a party if the court determines that imposing the maximum statutory penalty would work an undue burden on the defendant.[32] Conversely, courts may penalize a defendant in an amount greater than the economic benefit it received if loss of the economic benefit alone would not deter the defendant, or others, from violating the CWA in the future.[33]

Under the sixth factor of Section 309(d), courts may either increase or decrease the penalty in light of other matters, such as bad-faith conduct on the part of the violator, a violator's attitude toward achieving compliance, and the violator's ability to comply with the CWA.[34] In general, this factor provides courts with the option to consider any other facts that it may deem relevant.

III. Making the Strongest Case for Assessing Substantial Penalties

In order to win a substantial penalty, plaintiffs must address each of the six factors specifically and in detail. In almost every opinion awarding civil penalties, whether using the top-down or bottom-up approach to calculate penalties, the court in question has analyzed each factor, often pointing out instances where plaintiffs could have made a better, or more

29. United States v. Allegheny Ludlum. Corp., 187 F. Supp. 2d 426, 436 (W.D. Pa. 2002).

30. *Smithfield Foods*, 972 F. Supp. at 349.

31. *Universal Tool*, 786 F. Supp. at 751-752.

32. *Universal Tool*, 786 F. Supp. at 753-754 (citing SPRIG of New Jersey v. Hercules, 29 ERC 1417, 1423 (D.N.J. 1989).

33. *Id*. at 353.

34. *Smithfield Foods*, 972 F. Supp. at 353.

complete, case for increased penalties. The majority of courts use the bottom-up approach to calculate penalties: the economic benefit defendant gained by violating the CWA is the starting point, and the most heavily weighed factor, in the court's penalty calculation. Even in cases where the court chooses the top-down approach, or a hybrid approach, economic benefit is a substantial factor in a court's penalties analysis. Economic benefits aside, the factors weighed most heavily by a given court tend to be fact specific and not easily categorized into essential and nonessential factors. None of the six factors alone will secure a substantial penalty, nor can any factor be ignored completely. However, we can make some generalizations as to what kinds of facts courts consider under each of the six factors.

A. Seriousness of the Violation or Violations

The ideal fact situation establishing serious violations would consist of several, long lasting discharges of a toxic substance into protected, relatively clean waters, resulting in provable, actual harm to the environment, human health and economic interests. In reality, some lesser degree or combination of these elements will exist. For example, the court in S*mithfield Foods* determined violations to be severe where defendant vastly exceeded its discharge limits, resulting in violations that had a negative impact on the environment and the public. In this case, defendant's violations caused eutrophication and degradation of a river used for fish spawning, commercial and recreational fishing, crabbing, and shellfish harvesting.[35]

1. Number and Frequency of Violations

Much has been written on methods of counting individual violations for purposes of the CWA's penalties calculation, so that subject will not be addressed at length in this article. However, the Third Circuit has given some parameters that are useful to keep in mind. In Powell Duffryn, the Third Circuit considered "386 violations over a seven year period . . . a large number" of violations."[36] In U*nited States v.* M*unicipal* A*uthority of* U*nion Township*, the court characterized "2,360 violations over six years" as a "very large" number of violations.[37]

In an effort to distinguish habitual violations from isolated incidents, the Environmental Protection Agency (EPA) has issued guidance allowing courts to treat a single operational upset as one violation of the CWA. EPA's guidance on single operational upsets "defines an 'exceptional' incident as a 'non-routine malfunctioning of an otherwise generally compliant facility'caused by an unusual or extraordinary event . . . . [A] sudden violent storm, or bursting tank . . . a single operational upset [is] not any single non-complying discharge."[38] In some situations, violations coincide with natural factors, such as rain. Because the frequency of the natural event will determine, at

35. I*d*. at 344-346.

36. A*llegheny* L*udlum*, 187 F. Supp. 2d at 426.

37. I*d*. at 431 (citing U*nion Township*, 929 F. Supp. 800, 807 (M.D. Pa. 1996)).

38. A*llegheny* L*udlum*, 187 F. Supp. 2d *at* 443-444.

least in part, the number of violations attributable to the event, such information must be provided to the court. In response to an instance where plaintiffs failed to provide such information, the court chastised; "Plaintiffs presented insufficient information upon which to base a finding regarding the exact dates of rain since operations began. The Court suspects that these dates are numerous, but is not inclined to factor the suspected large number of these dates into the penalty equation based upon mere suspicion."[39]

2. Severity of Violations

In determining the severity of permit violations, "some courts consider the extent to which a violator's discharges exceed the permit limits."[40] This consideration has played a substantial role in cases where permit limits were exceeded by 8 percent to more than 1,000 percent[41]. While not the majority view, some courts weigh a lack of state enforcement action against a finding that a violation is serious. *Natural Resources Defense Council v. Texaco Refining and Marketing, Inc.* provides an example, "Texaco delayed its application for a renewal of the . . . permit out of fear of stricter limits. On the other hand, DNREC [State Department of Natural Resources and Environmental Control] has not taken legal action with regard to this incident."[42]

Most courts consider toxicity of discharges in their analysis of the severity of violations, and often weigh toxicity very differently. In *Powell Duffryn*, the district court found a very small number, only "10 violations of toxic pollutant limits" to be serious,[43] making it easy for the court in *Allegheny Ludlum* to find that a defendant "liable for 893 days of violations of toxic pollutant limits" had committed serious violations.[44] The *Allegheny* court justified its emphasis on toxicity by stating that "toxic pollutants generally pose a greater threat to human life" than conventional pollutants.[45] Conversely, courts have also found violations to be less serious based on their perception of lack of toxic elements. In *Weber v. Trinity Meadows Raceway*, the court cited as a mitigating factor the fact that, "raceway's discharge of pollutants is largely, if not wholly, comprised of natural, organic materials, such as wood shavings and equine waste, as opposed to, for example, a toxic chemical."[46] In *Catskill Mountains Chapter of Trout Unlimited, Inc., v. The City of New York*, the Northern District of New York found violations to be less serious where the violative discharges were not toxic and, in part, were the result of natural conditions.[47]

There is a decided split among courts regarding the seriousness of violations of reporting requirements. Interestingly, both sides cite the purposes of the CWA to bolster their position. On one hand, "reporting deficiencies do not produce the type of direct environmental impact which is the primary purpose behind the

39. Weber v Trinity Meadows Raceway, Inc., 42 ERC 2063 1996 WL 477049 (N.D. Tex. 1996).

40. *Smithfield Foods*, 972 F. Supp. at 343-344.

41. *Smithfield Foods*, 972 F. Supp. at 344; *Allegheny Ludlum*, 187 F. Supp 2d at 431.

42. NRDC v Texaco, 800 F. Supp. 1, 26 (D. Del. 1992).

43. *Powell Duffryn*, 913 F. 2d at 79.

44. *Allegheny Ludlum*, 187 F. Supp. 2d at 431.

45. *Allegheny Ludlum*,187 F. Supp. 2d at 431.

46. *Trinity Meadows*, 42 ERC 2063 at 46.

47. *Trout Unlimited*, 244 F. Supp. 2d at 49.

[CWA]."[48] In stark contrast, "when a permittee falsifies [compliance reports], fails to maintain supporting records, or destroys records, the permittee may be covering up serious violations of effluent limitations. Thus, the court cannot assume that violations of monitoring and reporting requirements in a permit are trivial. . . . Such violations undermine the Act and are considered serious by this court . . . ."[49]

3. Effect of Violations on the Environment and Human Health

Some courts have linked the seriousness of a violation to the level of actual environmental harm caused by the violation, while other courts have acknowledged that "a significant penalty may be appropriate even absent proof of actual negative effect."[50] In *Universal Tool*, the court found that, even though the defendant had violated its CWA permit more than 1,900 times during the relevant period, the lack of material environmental harm from those violations was a significant mitigating factor in the court's determination of the seriousness of the violation.[51] The court in *Smithfield Foods* agreed that "a substantial reduction in the maximum statutory penalty is warranted where the violations caused minimal environmental damage."[52]

In contrast, several courts take the view that, "because actual harm to the environment is by nature difficult and sometimes impossible to demonstrate, it need not be proven to establish that substantial penalties are appropriate in a CWA case."[53] Also, "the court may justifiably impose a significant penalty if it finds there is a risk or potential risk of environmental harm, even absent proof of actual deleterious effect."[54] Despite the claim that, "in recognition of the difficulty of proving harm where the violation is usually temporally distant from the penalty, and the science is incomplete, a particularized showing of actual harm is not necessary," some showing of the probability of harm is often helpful.[55] In a situation where actual environmental harm can be shown, all courts agree with the possibility that; "although they are unquantifiable … violations are significant."[56] In *Borden Ranch Partnership v. United States Army Corps of Engineers*, a case that involved the illegal dredging and filling of a wetland area, the Eastern District of California assessed the severity of defendant's violations by looking to the violations' impact on the environment, even in the absence of specific economic harm to the public.[57]

48. *Smithfield Foods*, 972 F. Supp. at 348 (quoting Friends of the Earth, Inc., v. Laidlaw Environmental Services(TOC), 956 F. Supp. 588, 603 (D.S.C. 1997).

49. *Smithfield Foods*, 972 F. Supp. at 348.

50. Piney Run Pres. Ass'n v. County Comm'rs of Carrol County Maryland, 82 F. Supp. 2d 464, 471 (D. Md. 2000) (citing *Smithfield Foods*, 972 F. Supp. at 344).

51. *See Universal Tool*, 786 F. Supp. at 747-749.

52. *Smithfield Foods*, 972 F. Supp. at 343 (quoting *Friends of the Earth*, 956 F. Supp. at 602).

53. *Alleghaney Ludlum*, 187 F. Supp. 2d at 432 (quoting *Union Township*, 929 F. Supp. 807).

54. *Smithfield Foods*, 972 F. Supp. at 344 (citing NRDC v. Texaco, 800 F. Supp. at 21; United States v. Roll Coater, Inc., 21 ELR 21073, 21075 (S.D. Ind. 1991)).

55. *Alleghaney Ludlum*, 187 F. Supp. 2d at 432.

56. *Smithfield Foods*, 972 F. Supp. at 347.

57. Borden Ranch Partnership v. Unites States Army Corps of Engineers, 1999 WL 1797329, 16.

The court emphasized the effects that filling wetlands would have on the environment in the future; particularly, the "diminished effectiveness of these [wetland] features in filtering pollutants in the water system and the decrease in exotic plant and animal life."[58]

Concerning risks to human health, courts make similar distinctions to those made when analyzing environmental harm. Conceding environmental degradation by the defendant, the court in *Trinity Meadows Raceway* stated that "no evidence was presented demonstrating that the discharges caused potential harm to human health;"[59] alluding to the possibility that a showing of actual harm to human health was not necessary for a serious violation to be found. Another court found a serious violation where "failure to timely report spills potentially put public drinking water at risk."[60] United States v. Gulf Park Water Park, Co., exemplifies a case where it could be shown that "a direct, proximate result" of defendant's actions "was the closing by the state of oyster beds along the shore … for public health reasons.[61]

The court in *Smithfield Foods* pointed out a common situation: "defendants are not the sole cause of the degradation and eutrophication to the river, but their [actions] clearly contributed to the degradation and eutrophication of the … river and connected waters."[62] The court in *Gulf Park Water* asserted that lessening penalties in this situation would create undesirable results when it noted, "[i]f we required specific proof that particular violating discharges caused discrete, identifiable harms, we would encourage a permittee to ignore the requirements of its permit "with impunity so long as it discharged into already polluted water."[63] In contrast, the court in *Piney Run* took the position that at least the extent of causation is important to a determination of culpability when it stated that "although the association proved that the plant … had a deleterious effect on Piney Run, it did not prove the extent of harm attributable to the Plant or even that the Plant is the major factor in the demise of Piney Run as a trout stream."[64]

B. Economic Benefit

As discussed above, "[t]he goal of economic benefit analysis is to prevent a violator from profiting from its wrongdoing."[65] Since it is often difficult to prove precise economic benefit, reasonable approximations will suffice.[66] In making this determination, "the court must

58. *Id.*

59. *Trinity Meadows Raceway*, 42 ELR 2063 at 47.

60. *Alleghney Ludlum*, 187 F. Supp. 2d at 431.

61. United States v. Gulf Park Water Co., 14 F. Supp. 2d 854 (S.D. Miss. 1998).

62. *Smithfield Foods* 972 F. Supp. at 346.

63. *Gulf Park Water*, 14 F. Supp. 2d at 860.

64. *Piney Run*, 82 F. Supp. 2d at 471.

65. *Id.* (citing *Union Township*, 150 F.3d at 263); *see also Union Township* 929 F. Supp. at 806. "It would eviscerate the [CWA] to allow violators to escape civil penalties on the ground that such penalties cannot be calculated with precision."

66. *Piney Run*, 82 F. Supp. 2d at 470 (quoting *Smithfield Foods*, 191 F.3d at 529); *see also Allegheny Ludlum*, 187 F. Supp. 2d at 437. "A court may exercise its discretion under the Act in accepting proof that is imprecise and approximate at best."

endeavor to reach a 'rational estimate of [the violator's] economic benefit, *resolving uncertainties in favor of a higher estimate.*'"[67]

There are two main elements to the calculation of economic benefit: "(1) the benefit that the [defendant] received from delayed capital spending (i.e., money saved by delay in issuing and making payments on general obligation bonds to finance the construction of the required pollution control equipment); and (2) the operating and maintenance (O & M) expenses for the pollution control equipment that the [defendant] avoided operating during the period compliance was delayed."[68] However, "the estimate 'must encompass *every* benefit that violators received from violation of the law.'"[69]

In *Allegheny Ludlum*, the court calculated economic benefit by examining the amount that a violator saved by failing to adequately staff its wastewater treatment plants, and by delaying expenditures necessary to fund improvements to the wastewater treatment plant and capital projects at its facilities.[70] The court calculated the "benefits of [defendant's] pollution control efforts that would have resulted from twenty-four hour staffing," after making a determination that "more than 90% of comparable [facilities] had 24 hour staffing during [the relevant period]."[71] In NRDC v Texaco, the court found that "the refinery had benefited economically from its failure to improve internal investigation practices and had never evaluated the impact of its violations on the receiving waters"[72] In *Cedar Point*, the court considered the amount of money that the defendant corporation did not spend on compliance and was therefore able to use for other income producing activities, such as investing money back into the business, when it calculated the economic benefit.[73]

Additionally, the court may apply an interest rate to determine the present value of the avoided or delayed costs.[74] Costs avoided by violating the CWA are calculated using the weighted average cost of capital (WACC) as a discount interest rate. The WACC is the average rate of return a company expects to make to maintain its current level of business operations.[75] The Fourth Circuit has accepted this as an acceptable method of calculating economic benefit.[76]

C. History of Violations

In *Smithfield Foods* the court noted ominously that "this is not the first time defendants have been sued for violations under the CWA."[77] In *Allegheny Ludlum*, the court noted that defendant had previously "settled almost a thousand CWA violations . . . in administrative actions."[78] The court also considered "pollution incidents reported by . . . inspectors but not includ-

67. *Union Township*, 929 F. Supp. at 806.

68. Hawaii's Thousand Friends v. City and County of Honolulu, 821 F. Supp. 1368, 1387 (D. Hawaii 1993)..

69. *Id.* at 806.

70. *Allegheny Ludlum*, 187 F. Supp. 2d at 437.

71. *Allegheny Ludlum*, 187 F. Supp. 2d at 437.

72. NRDC v. Texaco, 800 F. Supp. 1 (1992).

73. *See Cedar Point*. 73 F.3d at 574.

74. *Smithfield Foods*, 191 F.3d at 531.

75. United States v. Smithfield Foods, Inc., 191 F.3d 516, 530-31 (4th Cir. 1999) (citing *Smithfield Foods*, 972 F. Supp at 349 n.18).

76. *Id.*

77. *Smithfield Foods*, 972 F. Supp. at 349.

78. *Allegheny Ludlum*, 187 F. Supp. 2d at 433.

ed in the allegation in this case, and the violations resolved by . . . consent orders, to fall within the broad range of information available for assessing [defendant's] history of CWA violations."[79]

However, "whether defendants have committed similar violations in the past"[80] is only part of the court's analysis of a history of violation. The duration of defendant's current violations are also considered."[81] Although some courts consider duration of current violations as part of their determination of the seriousness of a violation, the categories often overlap. For example, where "defendants' violations occurred daily and uninterrupted for over twelve (12) years," the court found that "the discharge is serious solely by virtue of its duration."[82]

D. Good Faith Efforts to Comply

Defendants' eventual compliance with the CWA have been placed by courts at most every level of the good faith spectrum. The court in *Allegheny Ludlum* looked favorably upon defendant's "compliance record in years since the lawsuit was filed, the substantial amount it has spent of environmental compliance in that time, and an uncontested record of keeping commitments to regulatory agencies."[83] In noting that "defendants do get some credit for their steps, although slow, that they have taken to eliminate their future effluent violations,"[84] the court recognizes progress towards compliance as a showing of good faith. In NRDC *v. Texaco*, even though "it took Texaco some eight years to solve a problem it considered to be pressing" the court found good faith because the delay could be attributed to the fact that Texaco "worked assiduously to obtain and install the best available technology in the area."[85]

As noted in *Piney Run*, not all courts are so forgiving: "the county's leisurely pace, the court finds, cancels out its earlier efforts to come into compliance."[86] In *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, the Eleventh Circuit held that defendant's expenditure of $2.5 million to correct past violations, was insufficient to avoid paying penalties under the CWA.[87] In that case, the court found that the only way the defendant could have avoided a penalty would have been for it to cease operations until it could operate without violating the requirements of its NPDES permit.[88] Because the defendant chose to continue operations, it must "bear the consequences of that decision."[89] The court in *Gulf Park Water* had no patience at all for foot dragging by the defendants when it held that "[defendant] has not acted promptly, has not acted reasonably, and has not acted in good faith to the public … or this court."[90]

The court in *Smithfield Foods* refused to find any good-faith efforts at compliance because the defendant's violations of the CWA became more frequent over time and

79. *Id.*
80. *Smithfield Foods*, 972 F. Supp. at 349.
81. *Smithfield Foods*, 972 F. Supp. at 349.
82. *Gulf Park Water*, 14 F. Supp. 2d at 859.
83. *Allegheny Ludlum*, 187 F. Supp. 2d at 433.
84. *Smithfield Foods* 972 F. Supp. at 350.
85. NRDC v Texaco, 800 F. Supp. at 26.
86. *Piney Run*, 82 F. Supp. 2d at 472.
87. *Tyson Foods*, 897 F.2d at 1141-1142.
88. *Id.*
89. *Id.*
90. *Gulf Park Water*, 14 F. Supp. 2d at 864.

their apparent regard for the importance of achieving compliance eventually vanished."[91] Using similar reasoning, the court in NRDC *v Texaco* found that while "Texaco has consistently violated its permit, its violations have historically declined in number and size. This argues against imposition of the maximum possible penalty."[92]

The court in S*mithfield* F*oods* stated that to show good faith a defendant must do more than merely hire consultants to recommend ways that a facility may come into compliance with the CWA.[93] If a defendant hires consultants but ignores the consultants' advice and fails to implement suggestions, then the defendant has not shown good-faith efforts to comply with the CWA.[94]

Courts have sometimes found that a defendant's failure to take affirmative steps to ensure compliance with the CWA precludes a finding of good-faith efforts at compliance. The S*mithfield* F*oods* court refused to find good faith efforts, noting that "defendant's efforts at compliance could have been more vigorous," and that the defendant "did not take all of the necessary steps to investigate the disappearance of the documents, or prevent such destruction in the future"[95]

Courts in general are sympathetic to violations that are the result of apparent mistakes of fact or law. The P*iney* R*un* court stated that was "aware that the CWA is a strict liability statute, but courts have discretion to adjust damages based on culpability."[96] Good-faith efforts at compliance have been found when "[defendant] did not consider these discharges to be permit violations, and the court finds that this interpretation was not unreasonable."[97]

Courts also consider a defendant's compliance with state regulations to be a showing of a good-faith effort to comply with the requirements of the federal CWA.[98] For example, the court in P*iney* R*un* held that "because the law was unclear and the County had a good faith belief in the permit shield doctrine, the court finds that a downward adjustment of the penalty would be appropriate."[99] Similarly, courts have little patience for defendants who are keenly aware of their lack of compliance. Where, breaches were not due to a lack of knowledge, for instance if employees self-reported their frequent violations,[100] courts have not found that defendants acted in good faith. Similarly, the court in M*arine* S*hale* stating that defendant "knew that it needed an NPDES permit ... and simply decided to operate without one,"[101] characterized defendant's "violations willful and flagrant."[102]

The court in S*mithfield* F*oods* found that a defendant's reasons for coming into

91. S*mithfield* F*oods*, 972 F. Supp. at 350.
92. NRDC v Texaco, 800 F. Supp. at 25.
93. S*mithfield* F*oods*, 972 F. Supp. at 351.
94. I*d*.
95. S*mithfield* F*oods* 972 F. Supp. at 352.
96. P*iney* R*un*, 82 F. Supp. 2d at 471.
97. I*d*.
98. S*mithfield* F*oods*, 972 F. Supp. at 353.
99. P*iney* R*un*, 82 F. Supp. 2d at 472.
100. A*llegheny* L*udlum*, 187 F. Supp. 2d at 436.
101. G*ulf* P*ark* W*ater*, 14 F. Supp. 2d at 858.
102. I*d*.

compliance with their permit had no bearing on the question of whether the action was taken in good faith. The court argued that coming into compliance exhibited good faith "regardless of whether they elected to [come into compliance with their permit] for environmental or economic reasons or both."[103] Several other courts hotly contest this assertion. When defendant "failed to apply for [a permit] until one day prior to the preliminary injunction hearing," the *Trinity Meadows Raceway* court stated that it could not find good-faith attempts to comply with a court order, much less the CWA.[104] When the stated reasons for a sudden focus on environmental compliance—"increased agency enforcement, increasingly punitive enforcement, . . . growth in criminal prosecutions," and "increased expenditures for spill prevention and control projects"—only commenced when enforcement increased, the court in *Allegheny Ludlum* refused to make a finding of good faith.[105] The court also stated that "these notes and documents … portray a corporate management and legal department that is recalcitrant, reactive and loath to fully disclose is problems."[106]

E. Economic Impact of the Penalty on the Violator

Courts consider a variety of indicators of financial stability in order to assess the economic impact of a penalty on a given defendant. "One such indicator is the stockholder's equity, which is the net of a company's total assets minus total liabilities, and which gives a good indication of the size of the company."[107] Other indicators are a company's book value, 10-K and gross sales or liquidity.[108] Courts have also held that "it is appropriate to consider parent's financial condition in assessing a penalty under the CWA."[109] Internal documents can also be relevant, as was the case in *Allegheny Ludlum* where the court noted a document that "specifically references this lawsuit and states that 'management does not believe the disposition [of this matter] is likely to have a material adverse effect on the company's financial condition or liquidity.'"[110] The court may also draw the conclusion that continued violations in the face of past fines are an indication that past "substantial fines apparently were inadequate to deter continued violations of the act"[111] and that larger penalties will not be unduly burdensome. Similarly, if a court is convinced that "imposition of the

103. *Smithfield Foods*, 972 F. Supp. at 350.

104. *Trinity Meadows Raceway*, 42 ERC 2063 at 48.

105. *Allegheny Ludlum*, 187 F. Supp. 2d at 435.

106. *Id.*

107. *Smithfield Foods*, 972 F. Supp. at 353.

108. *Allegheny Ludlum*, 187 F. Supp. 2d at 441-442.

109. *Allegheny Ludlum*, 187 F. Supp. 2d at 442 (citing *Union Township*, 150 F. 3d at 268).

110. *Allegheny Ludlum*, 187 F. Supp. 2d at 441-442.

111. *Allegheny Ludlum*, 187 F. Supp. 2d at 445 (citing NRDC v. Texaco, 800 F. Supp. at 25).

maximum penalty will have a more drastic effect on the [defendant] than is needed to ensure future compliance,"[112] the court will take aspect of the case into account. However, "defendants have the burden of showing that the impact of a penalty could be ruinous or otherwise disabling."[113]

Courts also take into account factors beyond the financial resources of a specific defendant. One such court, in *Allegheny*, noted with sympathy that "the steel industry in the United States is undergoing a brutal restructuring."[114] In that particular case, "the evidence at trial, however, did not demonstrate that a substantial penalty would damage the overall health of [the defendant]."[115]

In recognizing the unique situation of municipalities regulated by the CWA, the court in *Piney Run* pointed out that while "a large penalty passed on to consumers in the form of higher prices may have a significant effect on a private polluter, a municipal polluter merely passes the costs on to its taxpayers who, in turn, have no option other than to pay the tax."[116] However, in *Trout Unlimited*, the court found that the economic impact of a substantial penalty would not work an undue burden on the defendant, a Water Board, where the board maintained a large reserve fund and was able to pass the cost onto consumers, with minimal negative effect on those consumers.[117]

F. Other Matters as Justice May Require

Defendants may be "entitled to some credit for their lack of bad faith."[118] However, when a court is convinced that defendants acted in bad faith, it takes note. A classic example of a court finding bad faith action by a defendant is noted in *Allegheny Ludlum*:

> One notorious ALC oil spill … spread … nearly 30 miles downstream … The Coast Guard estimated that the oil must have been flowing for nearly a day to have reached that far downstream … Even though the spill was miles long, and the ALC was told by the Coast Guard about the spill, ALC eventually reported the spill as a "small quantity of water containing oil" being discharged.[119] In general, however, there is a high bar to be overcome to actually show bad faith. For example the court in NRDC v Texaco, in finding no bad faith present, stated that "there are instances where Texaco and its employees acted incompletely, incompetently, or even irresponsibly, but nothing convinces us that the company acted with an evil motive."[120]

Aside from bad faith action, courts often give weight to a defendant's bad attitude toward compliance. In *Smithfield*

112. *Trinity Meadows Raceway*, 42 ERC 2063 at 17.

113. *Gulf Park Water*, 14 F. Supp. 2d at 868.

114. *Allegheny Ludlum*, 187 F. Supp. 2d at 445.

115. *Id.*.

116. *Piney Run*, 82 F. Supp. 2d at 472.

117. *See Id.*

118. *Smithfield Foods*, 972 F. Supp. at 351.

119. *Allegheny Ludlum*, 187 F. Supp. 2d at 431.

120. NRDC v. Texaco, 800 F. Supp. at 26.

Foods, the court found that the defendant's bad attitude towards compliance was enough to outweigh the defendant's apparent lack of bad-faith actions.[121] The court in *Allegheny Ludlum* took similar notice of the defendants attitude toward compliance when it noted that, "the case has not reached this level of enforcement without serious questions about the level of ALC's commitment to the obligations imposed by the Act."[122] The court went on to conclude that "if the attitude that began to prevai l... in the face of heightened enforcement and scrutiny had existed in 1988, then most of the violations at issue in this lawsuit would not have occurred."[123] The court inferred the defendant's attitude from the fact that when, "defendants only achieved compliance after the United States filed a Motion for an Order of Contempt."[124]

Courts may also consider a defendant's inability to comply with the terms of his/her permit "due to a lack of necessary technology or to a lack of financial resources."[125] Conversely, the court weighs a defendant's ability to comply. For instance, the court in *Allegheny Ludlum* noted that the defendant "easily could have afforded to make the necessary environmental expenditures and would have remained very profitable."[126]

IV. Conclusion

In conclusion, there is no magic bullet to ensure that substantial penalties will be ordered against violators of the Clean Water Act. The more negatively a defendant appears with regards to the six factors in Section 309(d), the more likely the defendant is to receive a substantial penalty from the court. Each court has been careful to note, the six factors are part of a balancing test that is specific to the facts of each individual case. In the end, if the weight of even one factor is extremely compelling, a stronger case will need to be made for the others. For example, when a court is convinced that a defendant made significant good faith efforts to comply with the CWA, a substantial penalty is less likely to be ordered if plaintiffs cannot show actual harm to human health or the environment. Conversely, when a court is convinced that a defendant has acted in bad faith, it is likely to order substantial penalties even in the absence of any showing of actual deleterious effects.

121. *Smithfeild Foods*, 972 F. Supp. at 353.

122. *Allegheny Ludlum*, 187 F. Supp. 2d at 433.

123. *Id.* at 436.

124. *Gulf Park Water*, 14 F. Supp. 2d at 864.

125. *Allegheny Ludlum*, 187 F. Supp. 2d at 436; *see also Smithfield Foods*, 972 F. Supp. at 353.

126. *Allegheny Ludlum*, 187 F. Supp. 2d at 442.

Civil Penalties in Citizen Suits Resource Guide

1. The Yellow Book: The EPA's Guide to Environmental Enforcement and Compliance at Federal Facilities: at www.epa.gov/compliance/resources/publications/civil/federal/yellowbk.pdf.

   A comprehensive informational tool to help agencies comply with environmental regulations and understand the enforcement and compliance processes.

2. Save the Clean Water Act: at www.savethecleanwateract.org

   Website with news links and means to send interactive letters to the U.S. Congress.

3. Boyer & Meidinger, Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws, 34 Buff. L. Rev. 833 (1985).

   Analyzes the first wave of citizen suits brought by environmental organizations under the Clean Air Act (CAA) and Clean Water Act (CWA) and their efficacy as devices for regulatory enforcement.

4. EPA "Enforcement Alert" Newsletter at www.epa.gov/compliance/resources/newsletters/civil/enfalert/index.html

   Website informing the public and regulated community of important environmental enforcement issues, trends and significant enforcement actions.

5. Environmental Media Services: at www.ems.org/cleanwater/sub2_cleanwater.html

   Current information on environmental issues, including organizations filing amicus briefs in support of CWA citizen suit enforcement.