IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO ex rel WILLIAM J. BROWN, ATTORNEY GENERAL OF OHIO	:	CASE NO. 78-694
	:	(Judge Donald L. Ziegel)
Plaintiff	:	OPINION; FINDING IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT;
v.	:	PLAINTIFF'S COUNSEL TO PREPARE AND CIRCULATE APPROPRIATE
DAYTON MALLEABLE, INC.	:	JOURNAL ENTRY
Defendant	:	

* * * * *

The Attorney General of Ohio has brought this action on behalf of the State, pursuant to a request from the Director of the Ohio Environmental Protection Agency (OEPA), against Dayton Malleable, Inc. (DMI) to enforce Chapter 6111, Ohio Revised Code, as to water pollution abatement. The complaint charges DMI with seven counts of violation of a National Pollutant Discharge Elimination System (NPDES) permit, and seeks the imposition of the civil penalty authorized by Section 6111.09, Revised Code. The complaint also demands the issuance of a mandatory injunction to require DMI to comply with the terms of its NPDES permit.

The complaint was filed on March 24, 1978. The case came on for hearing on January 3, 1979. It was agreed that by November, 1978, DMI was in full compliance with its NPDES permit. The demand for an injunction is thus moot, and will be dismissed.

In its Answer, DMI admitted the operative allegations of fact in Counts Two, Four and Six, and denied those contained in the other counts. Before trial, however, by stipulation, DMI admitted the operative allegations in Counts One and Three. Count Five, which charges DMI with discharging iron from its Outfall 001 at its Ironton Division into the Ohio River in excess of the dissolved iron limitations specified in its NPDES permit on February 23, 1978, and Count Seven which makes the same complaint as to Outfall 004 were denied up to and including the trial. Plaintiff offered no proof to substantiate these two counts, and they will accordingly be dismissed.

As to the remaining Counts, DMI has admitted the violations alleged, so that the

sole question before the Court is what civil penalties, if any, should be imposed for these admitted violations.

DMI is a large corporation which operates a number of facilities both in Ohio and elsewhere. The facility subject to the present complaint is known as the Ironton Division, is located in Ironton, Ohio, and is engaged in the business of manufacturing nodular iron castings. In the process of its operations, it caused pollution, as defined in Section 6111.01 (A), Revised Code, by discharging industrial wastes, defined in Section 6111.01 (C) and (D), Revised Code, into the Ohio River. It is admitted that the Ohio River comes within the definition of waters of the state as defined in Section 6111.01 (H), Revised Code. On September 2, 1975, the OPEA, pursuant to Section 6111.03 (J), Revised Code, issued DMI a NPDES permit which authorized DMI to discharge certain amounts of pollutants from its Ironton Division into the Ohio River, and directed DMI to construct water treatment facilities which would bring the pollutant discharge into established limits pursuant to a prescribed schedule. Plans for the wastewater treatment facilities were to be submitted to OEPA by January 2, 1976, which date was later extended ninety days. Construction was supposed to start by September 2, 1976, the facilities were supposed to be completed by May 2, 1977, and full and final compliance with effluent limitations was to be achieved by July 1, 1977. DMI was further required to submit periodic progress reports to OEPA.

It is stipulated that DMI submitted its plans for the wastewater treatment facilities at its Ironton plant to OEPA on April 1, 1976, which is within specified time, and that OEPA approved these plans on September 15, 1976. It is also stipulated that DMI failed to comply with its NPDES permit as follows:

1. It did not commence construction on September 2, 1976. As to Outfall 001 construction of the waste water treatment facilities did not begin until April, 1978. As to Outfall 004, construction did not begin until April, 1977.

2. DMI did not complete construction by May 2, 1977. Outfall 001 was not completed until October 17, 1978, and the Outfall 004 completion did not occur until July, 1977.
3. Final compliance with effluent limitations was not achieved by July 1, 1977. As to Outfall 001, it was not achieved until November, 1978. As to Outfall 004, it was not achieved until March, 1978.
4. DMI was required to furnish OEPA certain progress reports within fourteen days of September 2, 1976, May 2, 1977, and July 1, 1977, which it failed to do.
5. While the NPDES permit authorized a discharge of pollutants into the Ohio River in excess of those permitted by regulations during the period of construction of improved treatment facilities, there was a limit beyond which pollution would not be permitted under any circumstances. It is agreed that as to Outfall 001 DMI exceeded this limit on thirteen different dates, and that as to Outfall 004, the limit was exceeded on three different dates.

By way of mitigations, DMI presented evidence which established the following: At the time construction was supposed to begin on the wastewater treatment facilities for Outfalls 001 and 004, DMI was engaged in the installation of a cupola melting facility designed to meet OEPA standards for both air and water discharge standards, which was completed prior to its May 2, 1977, completion date. This cupola project was so large that DMI not only had to hire an outside engineering firm to do the detailed engineering, but also had its internal staff completely immersed in the installation, so that little time was available for work on the projects for Outfalls 001 and 004. DMI originally thought that its cupola project would be completed by August 1, 1976, so that it would not interfere with the start of the water pollution control projects on September 2, 1976. Material, etc., for the cupola were stored where the work on Outfall 001 was to take place until the cupola project was completed and that storage space freed, and this space did not become available until March or April, 1977. On the basis of the foregoing, DMI argues that it was impossible for it to comply with the OEPA scheduled date of completion of July 1, 1977.

Subsequent to that date, other things occurred which DMI contends should minimize its civil penalty. First, DMI had difficulty getting a modified duplicate of the sludge tank at Outfall 004 because the plans for the original tank had been lost, and that therefore new drawings had to be made. Secondly, a strike practically shut down the Ironton Division from November 1, 1977, to February 6, 1978. During this time the engineering staff was required to maintain the plant and to perform functions to safeguard the facility. Further, deliveries and outside contractors were not permitted in during the strike.

Thirdly, during early 1978, there was a harsh winter so that the foundations for Outfall 001 could not be commenced until snow had cleared and the ground dried up enough for heavy equipment to be used on it. Fourthly, DMI had difficulty finding a proper chemical treatment system for the outfalls, which caused a postponement in both the starting and completion dates of constructions. Lastly, promised delivery dates were not met by suppliers, and a tank was damaged in delivery which caused further delay since it had to be repaired.

By way of showing its good faith, DMI pointed out that when it became apparent that it could not meet its July 1, 1977, completion date, it expended some $9,500 trying to rehabilitate its old equipment. This effort was successful during July, 1977, but to little avail in ensuing months, some of which problem was due to sabotage. Further, while its permit only required the installation of a single polymer system, DMI went even farther and installed a dual polymer system at an additional cost of $2,700, which since the completion of the project has functioned better than OEPA requirements. DMI further emphasizes that it began working on upgrading its pollution control facility before the NPDES program took effect, that this is the first time it has been sued for violations, and that except for suspended solids problem it was always in compliance with regard to other kinds of polluting substances.

In response to these mitigating claims, Plaintiff submits that DMI's claim of "impossibility" emphasizes its lack of diligence and willfulness. First, the compliance

schedule set forth in the NPDES permit of September 2, 1975, was arrived at after extensive conferences with the cupola project in mind, and was agreed to at the time by DMI. Secondly, arguendo conceding that DMI's engineering staff was too small for all of its required anti-pollution projects, it is pointed out that DMI has now shown why it could not have hired additional engineering help. Thus, it was its own conduct that placed DMI in a position where it could not comply, so that such "impossibility" of compliance is neither a defense nor a mitigating factor.

As to what happened after the July 1, 1977, projected completion date, Plaintiff's response is that if DMI had performed in accordance with the schedule, to which it had agreed, none of the post July 1, 1977, problems would have been of any significance.

In response to DMI's contentions as to its good faith, Plaintiff's brief calls this Court's attention to evidence which established that air pollution control equipment at DMI's Columbus plant was installed twenty-two months after the legal deadline, and that only recently had DMI made an appropriation to purchase air pollution control equipment to bring its Dayton plant into compliance with regulations enacted in 1972. Further, Plaintiff's evidence established that DMI was one of two "major" dischargers in the southeast district of OEPA, but that it was only one of two companies which failed to commence construction as required by their compliance schedule; that it was the only company which failed to keep OEPA posted as to its progress as required by its NPDES permit; that it was the only company which failed to maintain and operate its existing equipment prior to installing upgraded pollution controls; and that it failed to report properly wastewater flow and comply with various other special terms and conditions in its permit.

Section 6111.09, Ohio Revised Code, provides in pertinent part:

> "Any person who violates section 6111.04, 6111.042, 6111.05, or division (A) of section 6111.07 of the Revised Code shall pay a penalty of not more than ten thousand dollars, to be paid into the state treasury to the credit of the general revenue fund."

Section 6111.07 (A), Revised Code, provides:

> "No person shall violate or fail to perform any duty imposed by sections 6111.01

> to 6111.08 of the Revised Code, or violate any order, regulation, or terms or condition of a permit issued by the director of environmental protection pursuant to such sections. Each day of violation is a separate offense.

Although the NPDES permit scheduled September 2, 1976, as the date on which construction of the new facilities should be commenced, since OEPA did not approve DMI's plans until September 15, 1976, Plaintiff agrees that that was the first date of violation. Compliance was not achieved until November 1, 1978, a total of 714 days. The maximum penalty, therefore, could reach $7,140,000. Plaintiff does not seek any such award, but does rationalize in his brief a penalty of $725,302. Although DMI has admitted its default, and thus has admitted that it is subject to being penalized pursuant to Section 6111.09 of the Revised Code, DMI has not assisted the Court by suggesting any penalty it thinks ought to be assessed. The closest it comes to making any suggestion is in its reference to U.S. v. Velsicol Chemical Corp., U.S. Dist. Ct., W.D. Tennessee, cited in 8 ELR 20745. There, for violations which as reported are more serious than those with which DMI is charged here, the Court assessed a penalty of $30,000 under the Federal Statute which is similar to Section 6111.09 of the Ohio Revised Code. On the basis of Velsicol, DMI suggests that the penalty imposed against it should be substantially smaller than $30,000. The reported decision in Velsicol, however, does not mention the size of that corporation, or anything about its assets and income, factors which will be commented upon as this decision progresses.

The parties agree that the purpose of a civil penalty is remedial, not punitive, that it is for deterrence or compensation, not retribution. As a practical matter, this is probably a distinction without a difference. While the parties do agree on a standard for determining the civil penalty, what a standard should be, by way of comparison, for assessing a punitive penalty, is not discussed. It is noted that Section 6111.99, Revised Code, the criminal section of this Chapter, does provide for a penalty up to $25,000, per day, which would seem to indicate that anything $10,000 or less per day is civil, not punitive. As far as DMI is concerned, any penalty that approaches $30,000 would probably be considered criminal, not civil.

It is well settled that violations of general police regulations passed for the safety, health or well being of the community must be penalized whether or not there was any intent to commit the act. United States v. Balint, 58 U.S. 250,252, 42 S. Ct. 301,302; Morrissette v. United States, 342 U.S. 246, 72 S. Ct. 240. Water pollution abatement statutes are such general police regulations. United States v. White Fuel Corp., 498 F. (2d) 619. Sections 6111.04 and 6111.07 (A), Revised Code prohibits all violations, not just "intentional" or "negligent" violations. Thus, the defenses alleged in DMI's Answer, such as impossibility and substantial compliance, are not defenses at all insofar as the imposition of a civil penalty is concerned. See United States v. Atlantic Richfield Co., 429 F. Supp. 830. These allegations are relevant only in mitigation, not in defense.

DMI points out that in Ohio penalties are not favored either in law or equity and should be imposed only when clearly justified, State ex rel. Reed v. Industrial Commission, 2 Ohio St. (2d) 200, and that statutes imposing penalties are to be strictly construed, State ex rel. Lukens v. Industrial Commission, 143 Ohio St. 609, State ex rel. Foster v. Evatt, 144 Ohio St. 102. Each of these cases, however, deals with the question of whether the factual situation justifies the imposition of a civil penalty at all. No guidelines are furnished in any Ohio case where, as here, it is clear that there is a sound basis for the imposition of some civil penalty.

As indicated, the parties do agree that the civil penalty policy issued by the United States EPA on April 11, 1978, reported in Environmental Reporter (BNA), dated April 21, 1978, at pg. 2011, should be applied here. Basically, the "determination of the amount of penalties within the maximum is committed to the informed discretion of the (trial) judge." U.S. v. J. B. Williams Co., Inc., 498 F, (2d) 414,438; U.S. v. Ancorp National Services, 516 F. (2d) 198,202. While the USEPA policy was designed to give guidance to district attorneys in their settlement agreements as to these cases, and this Court is probably not bound by them, they are helpful in enabling the Court to apply its "informed discretion."

According to the policy, the amount of civil penalty should be determined as follows (Pg. 2014):

> Step 1 — Factors comprising Penalty
> Determine and add together the appropriate sums for each of the four factors or elements of this policy, namely:
>
> the sum appropriate to redress the harm or risk of harm to public health or the environment,
> the sum appropriate to remove the economic benefit gained or to be gained from delayed compliance,
> the sum appropriate as a penalty for violator's degree of recalcitrance, defiance, or indifference to requirements of the law, and
> the sum appropriate to recover unusual or extraordinary enforcement costs thrust upon the public.
>
> Step 2 — Reduction for Mitigating Factors
> Determine and add together sums appropriate for mitigating factors, of which the most typical are the following:
> the sum, if any, to reflect any part of the non-compliance attributable to the government itself,
> the sum appropriate to reflect any part of the non-compliance caused by factors completely beyond violator's control (floods, fires, etc.)
>
> Step 3 — Summing of Penalty Factors and Mitigating Reductions
> Subtract the total reductions of Step 2 from the total penalty of Step 1. The result is the minimum civil penalty . . .

While Plaintiff called the Court's attention to the civil penalty policy of the USEPA as set forth above, in his own analysis of what total penalty should be assessed, he did not make any recommendations as to the fourth penalty factor listed under Step 1. Since there was no proof of any unusual or extraordinary enforcement costs, this Court will also ignore that factor.

With regard to the first factor, the evidence established that the material with which DMI was polluting the Ohio River was not toxic, and that, while the amount of material entering the river was in excess of OEPA standards, in view of the volume of water in the river DMI's pollutant in and of itself would have little effect on water quality. Testimony, however, also indicated that if DMI's quantity was duplicated by other potential pollutors with manufacturing businesses along the river, the sum total of all of them could cause serious harm. In such a case the part cannot be separated from the whole. American Frozen Food Institute v. Train, 539 F (2d) 107. A civil penalty may be imposed even if the harm to the public as to the violator is not quantifiable. See U.S. v. J.

B. William, supra. It is not necessary to prove actual damages. This first factor is what this law suit is all about. The Court will accordingly assess the sum appropriate to redress the harm or risk of harm to public health or the environment at $50 per day. DMI was in violation in this respect for 683 days, so that the total amount to be applied to the first factor is $34,150.

While there may not be in the record sufficient proof to establish a violation of each and every one of the 683 days, the Court does find that for the harm, or risk of harm, that DMI's polluting of the Ohio River created as to public health or the environment, a penalty of $34,150 is fair and reasonable.

It is agreed DMI experienced an economic benefit as a result of its delayed compliance. There is a difference of opinion as to the amount. Plaintiff's expert witness reached the conclusion that DMI's economic benefit from delayed compliance was $12,551, while in his brief counsel for DMI rationalizes that this benefit should be $565.

In arriving at this figure, Plaintiff's expert used a 12.6% rate of return on equity, which was the historic rate for the 1974-1978 fiscal years, while DMI's rate of return for the period of August 1, 1977, through November 1, 1978, was established at 4.4%, which counsel suggests would result in a lesser amount of, round figure, $1,000. This Court believes that DMI's actual rate of return during this critical period should be the measure, not some outside standard, and will accordingly accept the $1,000 deduction.

Counsel for DMI also argues that what it spent rebuilding its old sludge tanks so that it was able to obtain compliance for the month of July, 1977, a project it undertook because it was not able to meet the completion deadline of July 1, 1977, should also be deducted from Plaintiff's figures on economic benefit. This was a stop-gap measure and had nothing to do with DMI's actual compliance with the OEPA schedule. Had it complied with the schedule this expense would not have been necessary, and accordingly this Court will not consider that amount deductible.

Other items which counsel for DMI advance as deduction possibilities, such as what kind of cycle should be used for operation and maintenance expenses saved, and whether

or not DMI should receive credit for installing a double polymer system, which was more than OEPA required, while worthy of consideration, are factually too speculative to produce a clear cut figure. As the finder of fact, this Court will assess DMI's economic benefit at $8,000.

The final factor to be considered in applying the USEPA civil penalty policy is the amount which should be assessed against DMI for its recalcitrance, indifference, etc., to the requirements of the law. Some of the facts on which this assessment should be based are set forth in the earlier parts of this decision. If this Court were to comment on all of the facts and conclusions as to attitude considered appropriate for consideration by counsel, this decision would become as long as the briefs of counsel, Plaintiff's basic brief covering 88 pages, and DMI's basic brief 29 pages. In the final analysis, the assessment of the civil penalty under this factor particularly rests in the informed discretion of the Court, a discretion which is not necessarily subject to complete rationalization.

That DMI, particularly in the early stages of its time schedule demonstrated recalcitrance and indifference, if not outright defiance, to requirements of the law is clear. At least from September 2, 1975, when OEPA issued DMI a NPDES permit, it knew the schedule to which it was committed. Although construction of the required facilities was supposed to commence on September 2, 1976, during the preceding months little, if any, effort was directly toward meeting that deadline. There was little preliminary planning and practically no contact with equipment suppliers. DMI's house engineer in charge of the project testified that he did not give any thought to beginning construction until after the plans were approved on September 15, 1976, indicating a complete lack of any sense of urgency. Further, OEPA was not even notified that there were any problems, no request was made for any extension of time, and no report was made as to the failure to begin construction as scheduled. Although the NPDES permit required DMI to maintain its existing equipment in good working order during the interim, it failed to do so.

DMI's excuse for failure to perform, that it did not have a sufficiently large engineering staff, is lame. There was no showing whatsoever as to why additional staff

was not hired. Certainly additional staff would have been acquired if the project redounded to its economic benefit. In this Court's opinion, the pollution control project was just as important.

In his brief, Plaintiff suggests that at various periods during the total days DMI was in default, there were degrees of recalcitrance and indifference, and that different daily penalty rates should be assessed for each such period. This system of assessing a penalty unduly complicates the matter. Each period is a part of the whole, and the total non-compliance period of 714 days is predicated upon what happened at the beginning. From all the facts and circumstances, the Court finds that a penalty of $750 per day for each of the 714 days is fair and reasonable, and accordingly will assess a total penalty against DMI for its recalcitrance and indifference of $535,500.

The plus penalty to be assessed against DMI under Step 1 of the civil penalty policies of the USEPA is summarized as follows: for environmental harm, $34,150; for economic benefit, $8,000; and for recalcitrance and indifference, $535,500, making a total of $578,000.

Under Step 2 of the USEPA policy, there are some positive mitigating factors for which DMI should be given credit. While there was no evidence that any part of the non-compliance was due to governmental interference, there were factors beyond DMI's control which, even if they did not excuse performance, at least did delay completion. The first was a strike at the Ironton Division which lasted from November 1, 1977, to February 6, 1978. This prevented the delivery of equipment and also prevented some workers from getting into the plant. For this period of 98 days, the Court will allow a credit to DMI of $500 per day, a total of $49,000. Complete credit is not allowed since, if the basic schedule had been complied with, the project would have been completed before the strike began.

Secondly, it is admitted that the winter of early 1978 was unusually harsh, so that construction of the foundation for the tank at Outfall 001 could not be commenced until the snow had cleared and the ground had thawed and dried up sufficiently to support the

heavy equipment needed, which did not occur until April 1, 1978. For the period of 52 days between February 7, and March 31, 1978, because of this weather problem, the Court finds that a credit of $250 per day should be allowed DMI as a mitigating factor, a total of $13,000.

Thirdly, DMI calls the Court's attention to the failure of equipment suppliers to meet their time commitments, a factor clearly beyond the control of DMI, for which it claims it was delayed three months. There is no question that DMI experienced some delay due to lack of promptness on the part of equipment suppliers. Part of this delay, however, was due to DMI's failure to get the order for the needed equipment promptly placed. There also was a certain amount of overlapping between the strike and the weather problems in the time period of equipment receipt delay. Accordingly, for the delay caused by the failure of equipment suppliers to respond on schedule, the Court will allow DMI as a positive mitigating factor a credit of $250 per day, or a total of $22,500.

Thus, under Step 2 of the USEPA policy, DMI will be allowed a credit against the basic penalty of $578,000 the sums of $49,000 for the strike, $13,000 for weather problems, and $22,500 for the delay caused by equipment suppliers, totaling $84,500. The total penalty to be assessed therefore comes to $493,500.

As this point DMI may well ask why the civil penalty here assessed is so much greater than that assessed in U.S. v. Velsicol Chemical Corp., supra, where from the facts given in the report of that case the violations there were more severe than they were in the case at bar. The answer lies in the comparative size of the enterprises concerned. As indicated previously, the report of Velsicol does not indicate the size of that business. The same can be said of other cases cited by DMI. A $30,000 civil penalty against DMI, considering its size, would amount to little more than "a slap on the wrist," while it might throw a small enterprize out of business. U.S. v. J. B. Williams Co., supra. The penalty is supposed to be a deterrent to violation, insofar as the violator is concerned, and an example to others, not just an effluent or discharge fee which might be considered nothing more than the cost of doing business. U.S. v. ITT Continental Baking Co., 420 U.S.

223,231, 95 S. Ct. 926,932, 43 L. ed. 148; U.S. v. Papercraft Corp., 393 F. Supp. 408,420. Thus, DMI's ability to pay is a significant factor.

DMI's President testified that DMI is the "largest independent foundry company in the United States, if not the world." The evidence established that DMI has been a very profitable firm in the past few years. Its profits after taxes averaged more than 5.5 million dollars for the period 1975-1978, during which time it paid an average of over two million each of these years in dividends, while in 1978, the Ironton Division showed a loss of four million dollars before taxes, probably due to the long strike, for the three years before that it was a profitable division. The financial well-being of the Ironton Division, standing alone, however, is irrelevant, since it is appropriate to assess the civil penalty against the company as a whole. Federal Trade Com. v. Consolidated Foods Corp., 396 F. Supp. 1353.

Accordingly, the Court will render judgment against the Defendant, Dayton Malleable, Inc., and in favor of the State of Ohio by way of a civil penalty in the amount of $493,500, together with the costs of these proceedings. Counsel for Plaintiff should prepare and circulate the appropriate journal entry which must be filed within 30 days after receipt of this opinion.

APPROVED:

DONALD L. ZIEGEL, JUDGE

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