ATTACHMENT I

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

STATE OF OHIO, ex rel.
Anthony J. Celebrezze, Jr.
Attorney General of Ohio

Plaintiffs,

CASE NO. 86 CIV 265

-vs-

FARM SERVICE CENTER
OF SPENCERVILLE, OHIO,
INC., et al

Defendants.

MEMORANDUM DECISION

This matter came on for trial on its merits on May 4, 1987 with all parties present in Court and represented by counsel. The parties presented the Court with written stipulations for its utilization and evidence was adduced. All parties were granted leave to file post-trial briefs and each has availed itself of this opportunity.

The complaint in this case was filed by plaintiff, State of Ohio on May 27, 1986 on behalf of the Ohio Environmental Protection Agency (hereafter O.E.P.A.) and the Ohio Department of Natural Resources (hereafter D.N.R.). After a hearing on July 28, 1986 this Court granted a preliminary injunction against the defendants Farm Service Center of Spencerville, Inc. (hereafter F.S.C.), John Pisle and Russell Pisle. No order was made as to defendant Farm Service Center of Scott's Crossing (hereafter Scott's Crossing).

After the original complaint was filed the plaintiffs allegedly discovered additional events which resulted in an Amended

Complaint. The Amended Complaint added a water pollution claim for May, 1986 against F.S.C. and the Pisles; added Farm Service Center of Hume (hereafter Hume) as a party-defendant and alleged a water pollution claim against Hume; and added an air pollution claim against F.S.C. and the Pisles for noxious odors.

By stipulation of the parties, the evidence adduced at the July 28, 1986 hearing is to be adopted by the Court for purposes of final hearing. For that reason, the Court hereby adopts by reference all of the factual findings enumerated in its Memorandum Decision filed on August 14, 1986.

In addition to the stipulations presented the Court, it was also agreed among the parties that all claims of compensatory damages by D.N.R. have been compromised and settled. This settlement resulted in the dismissal of Counts 6 through 18 and Counts 22 through 26 on May 1, 1987. The monetary amount of this settlement was not disclosed to the Court.

As to the remaining Counts of the Amended Complaint, the defendants admit through their stipulations their liability for the violations alleged; the impact of the violations upon the environment; and the defendants' recalcitrance. These various admissions leave the sole question before the Court to be what civil penalty, if any, should be imposed to the respective defendants for the admitted violations. This case presents issues concerning the appropriateness of a civil penalty to be imposed against F.S.C.,

Hume, Scott's Crossing, John Pisle and Russell Pisle under the Ohio Clean Water Act (Revised Code Chapter 6111) and the Ohio Clean Air Act (Revised Code Chapter 3704). The Court will address the water pollution issues first and then address the incidents of air pollution admitted by defendants.

The state regulatory scheme for water, as well as air quality control, is designed to implement and enforce the relative federal legislation which has like stated goals. This includes the issuance of permits for the discharge of waste materials (R.C. 6111.03); prohibition of acts of pollution in excess of permissive levels (R.C. 6111.04); adoption of standards of water quality (R.C. 6111.041); and enforcement of the prohibitions through injunctive and/or civil penalty relief (R.C. 6111.07 and R.C. 6111.09).

R.C. 6111.04 establishes a strict prohibition against water pollution, wherein it states in pertinent part:

> No person shall cause pollution or place or cause to be placed any sewage, industrial waste, or other wastes in a location where they cause pollution of any waters of the state, and any such action is hereby declared to be a public nuisance, except in such cases where the director of environmental protection has issued a valid and unexpired permit, or renewal thereof, as provided in sections 6111.01 and 6111.08 of the Revised Code, or an application for renewal is pending.

While in the case at bar it is admitted that defendants had no permit, it is also important to note that a need for a permit for any discharge, regardless of its content, was brought to defendants' attention as early as July, 1974. This information has been ignored.

In accordance with Brown vs. Dayton Malleable, Inc. (1982), 1 O.S. 3d 151 this Court is employing the methodology of that trial court as tempered by the dissent of Justice Holmes in Dayton Malleable. According to the policy adopted by the U.S.E.P.A., as reported in the Environmental Reporter (4-21-78) at page 2014, the civil penalty considerations should be as follows:

Step 1 - Factors comprising penalty

Determine and add together the appropriate sums for each of the four factors or elements of this policy namely:

A. the sum appropriate to redress the harm or risk of harm to public health or the environment,

B. the sum appropriate to remove the economic benefit gained or to be gained from delayed compliance,

C. the sum appropriate as a penalty for violator's degree of recalcitrance, defiance, or indifference to requirements of the law, and

D. 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:

A. the sum, if any, to reflect any part of the non-compliance attributable to the government itself,

B. 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.

The following discussion is this Court's implementation of these considerations.

A. Redress for harm or risk of harm to public health or the environment.

The parties have stipulated to 58 days that F.S.C. discharged pollution into Sixmile Creek from April 15, 1982 to October 8, 1986. These discharges contained exceedingly higher concentrations of amonia-nitrogen and phosphorus than permitted and created toxic conditions for aquatic life in the waters. One need go no further than a comprehensive review of Exhibits 56, 102 and 145 to conclude that F.S.C. and its operation has been harmful to the public health and environment along the Auglaize River and its tributaries from Spencerville, Ohio downstream at least ten (10) miles, and more probably further downstream to at least Ft. Jennings, Ohio.

The F.S.C. discharges chemically devastated ten (10) miles of prime fish habitat into a non- productive water body with a ". . . fish community . . . dominated by more pollution tolerant species and (with) the incidence of external anomalies on fish increased." (Ex. 145, p.7). The importance of this 1985 finding is that the Auglaize River was still demonstrating the effects of the May, 1982 incident, combined with 27 separate incidents between May 6, 1982 and the study of July 1, 1985 (Stip. 3). The pollution kill of May, 1982 took 53,278 victims and practically eliminated the fish population. The fish kill of May, 1986 claimed 76,075 fish and crayfish which was 50% greater than the first kill and, as pointed out in Exhibit 102

involved some animals, frogs and turtles, before they could avoid the toxic ammnonia. As demonstrated by Exhibit 145 at page 6, the toxicity of the F.S.C. discharges also destroyed the macroinvertebrae population in Sixmile Creek thereby eliminating much needed food source for the fish population.

Based upon the admission of defendants (Stip. 5) that F.S.C. was the only discharger into Sixmile Creek which adversely affected the Auglaize River, and in the face of what this Court characterizes as extraordinary environmental consequences as a result of said discharges, the Court assesses a civil penalty as follows:

F.S.C.	58 days at	$1,000.00	=	$58,000.00
Russell Pisle	58 days at	$ 250.00	=	$14,000.00
John Pisle	58 days at	$ 50.00	=	$ 2,900.00
Total environmental harm				$74,900.00

B. Removal of ecomomic benefit gained or to be gained from delayed compliance.

The evidence in this case demonstrates that the issues raised are not new between these parties. Exhibit 117 dated July 9, 1974 is a response by F.S.C., through Russell Pisle, to an inquiry from the O.E.P.A. relative to F.S.C.'s lack of a proper permit for discharges into Sixmile Creek. While this document could lead to an inference that no illegal discharges were occurring there can be no question about this issue after reviewing Exhibit 119. Under date of May 25, 1977 F.S.C. and Russell Pisle were notified of the specific pollution concerns at that time which continue to be the allegations admitted herein.

However, in the trial of this action the State failed to produce any evidence to establish the costs saved or other economic benefits gained by the defendants by lack of compliance with O.E.P.A. regulations. For this Court to impose a civil penalty under such circumstances would be speculative and therefore impossible.

C. **Penalty for violators' recalcitrance, defiance, or indifferance to the law.**

As noted above, the relationship of the parties herein commenced on pollution concerns approximately July, 1974. The following exhibits exemplify the written communications between the parties from July 9, 1974 to June 16, 1981:

Ex. 117 July 9, 1974 letter from R. Pisle to District Manager
Ex. 118 Oct. 20, 1975 letter from R. Pisle to Emerg. Response
Ex. 119 May 25, 1977 letter from J. Orlemann to R. Pisle
Ex. 120 June 3, 1977 letter from R. Pisle to J. Orlemann
Ex. 121 August 1, 1977 letter from J. Orlemann to R. Pisle
Ex. 122 August 29, 1977 letter from R. Pisle to J. Orlemann
Ex. 125 June 17, 1978 letter from R. Pisle to K. Schultz
Ex. 126 December 5, 1980 letter from J. Pisle to K. Schultz
Ex. 127 June 11, 1981 letter from R. Manson to R. Pisle
Ex. 128 June 16, 1981 letter from R. Pisle to J. Pisle

Because this history does not directly relate to allegations of the Amended Complaint, it is only considered by the Court as evidence of knowledge by all defendants of the State's position on violations. However, the only conclusion that can be drawn from this evidence by any reasonable person is that F.S.C.'s activity was an environmental accident waiting to happen. The events which occurred subsequent thereto proved the O.E.P.A. correct and the defendants indifferent to both the law and possible consequences.

By stipulation of the parties, the defendants illegally discharged waste beginning April 15, 1982. The correspondence between the parties continues in the same vein as shown by the following exhibits:

Ex.	1	May 4, 1981 letter from R. Manson to R. Pisle
Ex.	2	June 7, 1982 letter from R. Manson to R. Pisle
Ex.	3	August 22, 1983 letter from R. Manson to R. Pisle
Ex.	4	Jan. 10, 1984 letter from R. Manson to R. Pisle
Ex.	5	June 19, 1984 letter from R. Manson to M. Foley
Ex.	6	Dec. 10, 1984 letter from R. Manson to R. Pisle
Ex.	7	June 24, 1985 letter from R. Manson to R. Pisle
Ex.	129	April 26, 1982 letter from R. Manson to R. Pisle
Ex.	130	Sept. 3, 1982 letter from R. Manson to R. Pisle
Ex.	131	May 16, 1983 letter from R. Maynard to R. Pisle
Ex.	132	Jan. 2, 1985 letter from R. Manson to R. Pisle
Ex.	133	April 29, 1985 letter from R. Manson to R. Pisle
Ex.	A	July 3, 1985 letter from R. Pisle to R. Manson
Ex.	179	Oct. 30, 1986 letter from R. Manson to R. Pisle

During the period of these correspondences there were several meetings between various O.E.P.A. personnel and the defendants. None of this resulted in an application for a permit or a cessation of discharges. When a plan was finally submitted in June, 1984, it was deficient. Defendants were notified of the deficiency by letter to defendants' engineer on June 19, 1984 (Ex. 5) and reiterated directly to F.S.C. on December 10, 1984 (Ex. 6). From all of the exhibits, defendants continued to violate the water pollution laws of Ohio. While it is acknowledged that several of these occurrences were a result of either winter thaw or rain conditions causing excessive ground run-off from defendants' premises, all of the occurrences are not of that nature.

One admitted violation constituting intentional indifference to the law was construction within the dyke area of a manhole discharging directly into a field tile which ran to Sixmile Creek. This manhole was identified as the source of several illegal discharges including the devastating fish kill of May 19, 1986. The active conduct of F.S.C. and Russel Pisle on May 19, 1986 gives rise to the very strong inference that not only were these defendants indifferent to their obligations under the law, but they were recalcitrant to the enforcement of the law by agents of D.N.R. (Tr. pp. 80-82).

The defendants have further stipulated that they have illegally discharged since this litigation was filed on May 27, 1986. The following violations occurred between June 16, 1986 and the preliminary injunction issued August 15, 1986:

6-16-86 containment pit overflowed discharging into sewer;
6-17-86 fire hose used to discharge into manhole;
6-20-86 dyke field allowed to open for discharge into manhole;
7-1-86 containment pit overflowed discharging into sewer.
(Tr. pp. 46-53)

In addition defendants agree to five (5) violations after the preliminary injunction was issued.

The record in this case evidences twelve (12) years of promises by defendants, followed by little or no results. Short of the proposal dated July 24, 1986 (Ex. B and C) there has been a display of lack of urgency to address the hazards. The defendants have failed to pursue permit procedures; failed to maintain their facilities and equipment to avoid further pollution; employed

avoidance techniques such as the dyke manhole and fire hose; and failed to obtain sufficient technical advice to remedy the situation. Therefore, the Court finds a recalcitrance and indifference by the defendants from May 6, 1982 to May 27, 1986. A civil penalty should be imposed for this four (4) year period at $10,000.00 per year and apportioned as follows:

F.S.C.	$30,000.00
Russell Pisle	$10,000.00
John Pisle	-0-
Total recalcitrance penalty	$40,000.00

D. Recovery of unusual or extra-ordinary enforcement costs thrust upon the public.

The O.E.P.A. has failed to provide this Court with any evidence on enforcement costs. Based upon the extensive investigation depicted in the record of the July 28, 1986 hearing there were costs. However, again the Court cannot speculate on this subject since the assessment is to be founded upon recovery of costs advanced by the public. None were shown in the case at bar.

As noted above, this Court is required to analyze any mitigating factors which account for the non-compliance by defendants. In the case at bar no evidence was presented to reflect that any part of defendants' non-compliance was attributable to the O.E.P.A. or from factors completely beyond the control of defendants.

While it is recognized and accepted by this Court that rain run-off attributed to much of defendants' problem, properly

processing the run-off was not beyond defendants' control. The defendants were continually advised to keep the containment pit pumped down. It is true that such a procedure would require either manpower or equipment or both. Defendants acknowledge this solution when they state there is no problem when the plant is operational 24 hours per day and the pit can be pumped (Ex. 125). Obviously the intentional circumvention of pollution controls was under defendants' control. Therefore the mitigating factors in this case are negligible and do not have a monetary value for reduction purposes.

In Count 21 of the Amended Complaint plaintiff alleges that the Hume plant discharged industrial waste into Two Mile Creek on July 9, 1986. Under Stipulation No. 2 defendants admit this allegation and the parties agree that no environmental harm occurred. The Court has no evidence of the nature of the discharge, the cause, the consequences, or any other evidence which the Court can utilize to calculate a civil penalty. The Court will not speculate on this issue and therefore will assess no penalty for the occurrence of July 9, 1986 at the Hume site.

In Counts 19 and 20 of plaintiff's Amended Complaint plaintiff alleges defendants have violated R.C. 3767.13 by air pollution. Defendants admit these nuisance occurences on six different occassions. Again, the State has failed to present any evidence on this issue other than as stipulated. Without more, the Court cannot assess a civil penalty against these defendants. Therefore no penalty will be assessed as to any nuisance violation.

Having reviewed all of the evidence on civil penalty herein and concluded that a civil penalty should be assessed each defendant in the stated amount, the Court will now turn to the issue of whether such a penal sum should be charged, in whole or in part, to any defendant or forgiven based upon his inability to pay. This was the primary issue addressed by testimony and exhibits presented the Court on May 4, 1987.

Since the Ohio Supreme Court's decision in Dayton Malleable there is no question that in a case involving civil penalty assessment in pollution violations the defendants' ability to pay the assessment is an integral factor to be considered by the trial court. In approving the use of financial data in Dayton Malleable, the Court makes clear that such evidence must be utilized to determine that the penalty will be a deterrent and not merely a "discharge fee" absorbed as a cost of doing business. However, consistent with the exercise of sound discretion the assessing Court must not be punitive nor bankrupt the violator.

This Court has determined above that the parties should be assessed total civil penalties as follows:

F.S.C.	$88,000.00
Russell Pisle	$24,000.00
John Pisle	$ 2,900.00

It is acknowledged that John Pisle can reasonably pay a $5,000.00 penalty. The Court will not further review his financial condition. His $2,900.00 civil penalty shall be payable October 1, 1987.

However, it is apparent from the respective parties argument that great disagreement is present relative to the financial condition of both F.S.C. and Russell Pisle. After review of all of the financial data and testimony this Court concludes that some adjustment is required as to the penalties assessed to both F.S.C. and Russell Pisle.

The greatest elements in analyzing F.S.C.'s financial picture are the debt structure and its 1986 claimed loss from the For-all Ag investment. A review of Exhibit H, page 10 reveals that long term debt for the period ending August 31, 1986 was $100,000.00 less than for the preceding year. A further review of Exhibit E covering the six month period ending February 28, 1987 would reflect that long term debt is being reduced further during the current fiscal year. Some of this reduction is explained by the restructuring of debt from bank loans to suppliers' lines of credit. (Ex. U-1, U-2, V-1 and V-2). However, the trade accounts payable (Ex. E, p. 2) do not reflect a comparable increase. It is also worthy to note that Banc Ohio, as well as the three suppliers who have extended lines of credit, all have done so with the knowledge of the pending litigation and possible costs involved. (Ex. H, p. 13) This fact indicates a perception by the creditors that the future viability of F.S.C. is positive.

The evidence shows that F.S.C. intends to write-off $740,000.00 as a loss from an investment in an agricultural related

company known as For-all Ag (Ex. E, p. 4). According to the testimony of Robert G. Schlantz, F.S.C. is presently a 100% owner of For-all Ag and the estimated loss of $740,000.00 is based on a 75% write-off due to its insolvency. However, on cross-examination, Mr. Schlantz testified that the insolvency of For-all Ag resulted from an employee embezzlement problem and that the employee was bonded for some of the loss, the extent of which he did not state. While this loss is presented for write-off in tax year 1986 (September 1, 1986 - August 31, 1987) it is acknowledged that for tax purposes it may be carried forward a maximum of 15 years and obviously would not be taken only in 1986.

This Court recognizes that retained earnings for F.S.C. for 1986 are estimated at $717,000.00, but for the For-all Ag loss (Ex. E, p. 7 and Schlantz testimony). F.S.C. has shown an increase in retained earnings since 1983. However, not one of F.S.C.'s audited statements (Exs. F, G and H) mention, through footnote or otherwise, the problem at For-all Ag. No entry as an asset can be identified to establish the relationship between F.S.C. and For-all Ag except on an accounts receivable basis (Ex. G., p. 12). This information is noticeably absent in Exhibit H, page 12 for the next fiscal year. Since Exhibit E is an unaudited statement, this Court discounts the appropriateness of considering this loss in full for the short term.

Based upon all of the foregoing this Court finds that F.S.C. does have the ability to pay the civil penalty of $88,000.00

without insolvency if the same is amortized over 8 years with interest at 10% per annum. The first installment of $11,000.00 shall be payable July 1, 1987 with like installments plus interest due on July 1 of each successive year until paid in full.

A review of the financial data for Russell Pisle individually can be limited to his testimony, his personal tax returns for tax years 1984-86 (Exs. 181, 182 and 183), and his personal financial statement (Ex. 188). While the testimony of Mr. Pisle relative to the asset value of each of his companies differs from his March 17, 1986 financial statement, it is clear that the penalty of $24,000.00 is not punitive in relation to his net worth or his annual income. The effect of the penalty should have the result required by law, i.e. deter further illegal discharging by commercial entities under Mr. Pisle's direct and sole control.

Based upon this information this Court finds that Russell Pisle does have the ability to pay the civil penalty of $24,000.00 without insolvency if the same is amortized over 4 years with interest at 10% per annum. The first installment of $6,000.00 shall be payable July 1, 1987 with like installments plus interest due on July 1 of each successive year until paid in full.

Pursuant to the stipulations of the parties, the injunctive relief requested by the E.P.A. is appropriate to prevent further environmental harm or risk of harm and the following orders shall issue against the defendants, jointly and severally:

1. an injunction prohibiting F.S.C., Hume, and the Pisles from polluting waters of the state or constructing treatment facilities without first obtaining a O.E.P.A. permit;

2. an order requiring F.S.C., and the Pisles to submit for approval detailed plans and application to O.E.P.A. for the permanent lagoon in 30 days;

3. an order requiring F.S.C. and the Pisles to implement any changes to the lagoon found necessary by O.E.P.A. within 90 days of notification by O.E.P.A.;

4. an order requiring F.S.C. and the Pisles to prevent overflow of the collection pit at F.S.C. by forthwith making those improvements to prevent overflows when no person is at the site to pump the pit to the lagoon by the immediate installation of an automatic pumping device;

5. an order requiring Hume and Russell Pisle to submit an application and detail plans to O.E.P.A. for these facilities within thirty days and to construct whatever permanent facilities are necessary to prevent contaminated wastewater from running off the Hume site; and

6. an injunction prohibiting F.S.C. and the Pisles from operating the F.S.C. facility in a manner that causes or allows offensive odors to be discharged into the atmosphere which will permit said odors outside of the facility boundaries.

There was no evidence presented herein as to any claims against Scott's Crossing. Therefore, all claims against it will be dismissed.

All costs of the action to be paid by F.S.C.

Mr. Van Kley is instructed to prepare a Judgment Entry in

accordance with this decision and forward to counsel for filing pursuant to Local Rule 4.01.

DATED: May 28, 1987

MICHAEL A. RUMER, JUDGE

cc: Jack Van Kley
Malcolm D. Basinger
David E. Northrop
David A. Cheney