

L. JUNIOR MORRIS
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS SEP 5 8 33 AM '84

MONTGOMERY COUNTY, OHIO MONTGOMERY COUNTY
CLERK OF COURTS
COMMON PLEAS

State of Ohio, ex rel
William J. Brown
Attorney General of Ohio,

Plaintiff,

VS.

K&S Circuits,

Defendants.

CASE NO. 79-950
MEMORANDUM OPINION

FACTS

Defendant operates a small plant in Phillipsbury, Ohio, and during the course of their manufacturing process has discharged industrial waste into a storm sewer which empties into Brush Creek.

Defendant was issued a "National Pollutant Discharge Elimination System" wastewater discharge permit by the Ohio EPA, with the approval of the U.S. EPA.

The permit was effective April 21, 1975, and contained certain limitations of discharge, the requirements and a schedule of constructing proper facilities to eliminate such discharge. Final date for construction was to be April 21, 1977. It was accomplished May 14, 1979.

In reality, the pollution control system was not in place and operating entirely effectively until May of 1979. Meanwhile, suit had been filed by the Attorney General in April of 1979.

On October 31, 1981, the Defendant stipulated to its liability for the violations of the final effluent limitations alleged by Plaintiff in counts six through fifteen of the amended complaint which occurred on or after July 1, 1977; violations of the monitoring and reporting requirements of its permit, as alleged by Plaintiff in counts sixteen through twenty-two, and violation of the final daily maximum copper limitations of

its permit which occurred on January 8, 1980, and September 24, 1980.

All in all, Defendant admits Three Hundred twenty-eight violations of its permit and the State alleges additional final daily maximum copper limitation violations between 1979 and 1982.

It is for the Court to determine what should be assessed by way of civil penalties for these violations.

NATURE OF THE PENALTY

The Defendant admits to at least Three Hundred twenty-eight violations.

Any penalty consideration must begin with an assessment for economic benefit and for the harm done to the environment.

The evidence establishes that by delaying the installment of the pollution control equipment for approximately twenty-two (22) months this Defendant realized an "after-tax" operation and maintenance savings of One Hundred Sixty-One Thousand, One Hundred Fifty Dollars (\$161,150.00), plus a savings was realized by a delay in the capital expenditure for the installation of the equipment. The total savings from both sources by the delay in installation totals Five Hundred Thousand, Two Hundred Twenty-Four Dollars (\$500,224.00)

Next, any penalty consideration must consider the harm inflicted on the environment. This item is not easy to quantify. The testimony reveals incredible devastation to the community for a distance of at least five (5) miles along the course of the creek. Copper is still present in the creek at toxic levels some seven (7) years after the permit was issued.

True, nickel, lead and some other "heavy metals" have been eliminated, but the harm from the copper deposits will continue ad infinitum.

While there is no hard evidence that the animals lost died from copper poisoning, at least the symptoms they

exhibited were consistent with the animals that had been thus poisoned. They apparently developed what is known to horsemen as a "stove-pipe gut" and literally starved to death.

When, if ever, this creek valley will be restored to its original natural condition is unknown and unpredictable with any degree of accuracy.

Next in a consideration in a determination of damages is a consideration of the recalcitrance of Defendant. Defendant was not only recalcitrant, but its conduct bordered on open defiance. It failed to submit reports, failed to meet construction deadlines and failed to meet the effluent limitations set by their permit. The Court is of the opinion that this recalcitrance can be explained or mitigated to some small degree by the change in corporate management of the defendant and the change in assignment of EPA employees working with Defendant.

Of course, in reaching a final determination of the damages to be assessed, the Court must consider the deterrent effect, if any, such damages may have on other polluters or prospective polluters and the Court has incorporated this deterrent effect in decision.

PENALTIES ASSESSED

It is therefore the finding of the Court and it is uncontroverted that Defendant committed pollution in violation of its permit and that it failed to meet the July 1, 1977, deadline for the installation of its treatment system and did not, in point of fact install such system until some twenty-two months later.

For these violations the Court computes and assesses penalty as follows:

Savings by delay in capital expenditure
and
Savings in maintenance and operating costs

TOTAL: \$500,224

The Court finds further the Defendant has been guilty of recalcitrance, if not outright defiance, resulting in utter desolation of five miles of Brush Creek.

For this recalcitrance the Court assesses a penalty of One Hundred Five Thousand Dollars, Two Hundred Ten Dollars (\$105,210.00), the amount of the personal loan from the corporation to Kneisley.

The Court further finds that a deterrent effect is hopefully built into these sums already assessed against the Defendant. They are substantial in nature and it is the earnest desire of the Court that other possible violators will take cognizance of these substantial penalties and thus be deterred from such possible activity. Whether or not this is so is questionable.

The Court finds further that substantial devastation was caused by such violations for a five mile stretch of Brush Creek. Such harm is difficult to measure in terms of dollars and cents.

However, the demand by the state for the sum of Three Hundred Forty-One Thousand, Five Hundred Dollars, (\$341,500.00) is supported by the evidence and is reasonable and just under the facts and circumstances of this case and such an amount is therefore awarded.

RECAPITULATION

Savings by delay in capital expenditure and savings in maintenance and operating costs	\$500,224.00
Recalcitrance and Bad Faith	105,210.00
Damage to Brush Creek	<u>341,500.00</u>
TOTAL	\$946,934.00

The Court finds further that those penalties should be and are mitigated by the following factors:

Internal problems and change in corporate management of Defendant	\$ 73,467.00
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Changes and transfers personnel in the E.P.A.


73,467.00
\$146,934.00

Gross penalties assessed	\$946,934.00
Mitigating factors	<u>- 146,934.00</u>
Net penalties assessed	\$800,000.00

Counsel for Plaintiff will prepare and submit an entry reflecting the findings of the Court and submit the same to Defendant for endorsement. If Defendant refuses or neglects to endorse the same, the entry will reflect this fact and be placed of record without the endorsement.

The said entry will save exceptions to both parties as their interests are adversely affected.

Enter this 31 day of August, 1984.



PAUL E. RILEY, Judge
by assignment