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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 THE NEW PORTLAND MEADOWS,)
 LLC, formerly known as THE NEW)
 PORTLAND MEADOWS, INC.,)
)
 Defendant.)
 _____)

Civil No. 00-507-KI
FINDINGS & CONCLUSIONS

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11
12 KING, Judge:

13 I previously adopted the Findings and Recommendation filed by the Honorable Donald
14 Ashmanskas and held that defendant The New Portland Meadows, LLC (“TNPM”): (1) was
15 liable under the Clean Water Act (“CWA”), 33 U.S.C. § 1311, for discharging wastewater and
16 other pollutants without authorization by an NPDES permit for the dates between February 1,
17 1995, and May 1, 2001, on which tests of the discharge into the drainage ditch show the presence
18 of *E.coli* or fecal coliform; and (2) violated a July 28, 1999, Environmental Protection Agency
19 (“EPA”) Administrative Order requiring TNPM to immediately cease discharges of contaminants
20 from its facility.

21 I held a court trial to determine the size of the civil penalty to assess TNPM for the
22 violations. The government contends that a penalty of at least \$2 million is appropriate. TNMP
23 argues that I should assess a modest penalty in the same range as the \$100,000 penalty assessed
24 in a settlement with the successor operator of the facility, Thomas Moyer. The following are my
25 findings of facts and conclusions of law as required by Fed. R. Civ. P. 52.

1 **BACKGROUND FACTS**

2 TNPM leased the Portland Meadows racetrack complex (“Facility”) from its twelve
3 owners beginning in late 1991.

4 TNPM received its first Notice of Noncompliance from the Oregon Department of
5 Agriculture (“ODA”) on February 7, 1992. TNPM entered into a Stipulation and Final Order on
6 April 28, 1992, which required TNPM to submit a waste management plan for approval by
7 March 31, 1993; begin construction of the approved schedule of Best Management Practices
8 (“BMPs”) by April 1, 1994; attain operational level of the wastewater treatment facility by
9 October 1, 1995; and meet all requirements of its WPCF Permit by April 1, 1996. TNPM was
10 allowed to request extensions of time.

11 On December 23, 1994, ODA agreed that a water-quality monitoring program would be
12 helpful to characterize the various sources of contamination at the Facility and revised the
13 compliance schedule accordingly. On August 15, 1995, TNPM submitted a document prepared
14 by SRI/Shapiro, Inc., entitled “New Portland Meadows Waste Management Plan” (“1995
15 Shapiro Plan”) based on Shapiro’s study of the discharges. The 1995 Shapiro Plan proposed
16 rerouting all wastewater and runoff from the Facility to Portland’s sanitary sewer system for
17 treatment, with the connection completed by October 1, 1996, if the plan was approved by
18 September 15, 1995. ODA did not approve the 1995 Shapiro Plan until July 1996.

19 On July 28, 1999, the EPA issued an administrative order that required TNPM to submit
20 by August 31, 1999, a plan to permanently eliminate the discharge from the Facility and achieve
21 continuous compliance with the CWA. TNPM responded with the 1999 Shapiro Plan which
22 proposed separating off-site storm water from the Facility’s wastewater and rerouting the
23 wastewater discharges to the sewer system. TNPM retained a civil engineering firm, Otak, to
24 work with Shapiro to implement the 1999 Shapiro Plan. In 1999 and 2000, TNPM’s consultants
25 worked with the relevant governmental bodies to obtain consensus on the storm water

1 management plan. They also revisited a number of alternative approaches to collecting the
2 Facility's wastewater and rerouting it to the sewer. Some of the alternatives were estimated to
3 have implementation costs in the neighborhood of \$2 million.

4 From March 1995 to December 2000, TNPM spent approximately \$196,220 on
5 environmental/engineering studies related to a wastewater collection system. It also spent
6 \$14,058 to cover a number of stall waste bunkers as an interim measure. TNPM did not build
7 the Otak systems with the retention pond or detention pipes. Instead, TNPM built a dry-waste
8 transfer building designed to prevent stall wastes from coming into contact with storm water
9 before being shipped off-site. The ODA approved the proposal in September 2000 and the dry-
10 waste transfer building became operational on March 6, 2001. In conjunction with the new
11 building, TNPM implemented BMPs concerning waste management. TNPM spent \$292,497 in
12 capital costs and \$2,622 in demolition costs to build the dry-waste transfer building. Although
13 the ODA approved construction of the building, it warned TNPM that the ODA did not believe
14 that the building addressed all possible sources of contamination at the Facility and additional
15 improvements might have to be made.

16 Wastewater discharged from the Facility into the drainage ditch show the presence of
17 *E.coli* or fecal coliform on 167 dates from August 2, 1999, to May 10, 2001. Two additional
18 dates between February 1, 1995, and August 1, 1999, also tested positive.

19 After the dry-waste transfer building was operational, wastewater discharged from the
20 Facility was contaminated with *E.coli* in some amount on the eight days in March 2001, eight
21 days in April 2001, and four days in May 2001 on which samples were taken. In these tests, 13
22 of the 16 tests conducted in March and April exceeded the bacteria water quality standard for
23 waters in the Willamette River Basin. None of the four tests taken in May exceeded this
24 standard. In a separate analysis of all samples taken after the dry-waste transfer building was
25

1 operational, Joseph Roberto, an EPA inspector, states that 45 separate samples were taken and
2 fecal bacteria was present in every one, sometimes in very high amounts.

3 Moyer paid the EPA a civil penalty of \$100,000 to resolve the CWA violations at the
4 facility resulting from his exercise of or failure to exercise control of the Facility, for all dates
5 prior to the lodging of the Consent Decree on April 3, 2002. Moyer had an ownership interest in
6 the Facility since at least 1992 and operated the Facility from May 2001 until he subleased it to
7 MEC Oregon Racing, Inc. ("MEC") in July 2001.

8 The Consent Decree also required the operators of the Facility, MEC at that point, to
9 obtain full compliance with the CWA no later than April 30, 2005, and to implement interim
10 measures designed to eliminate approximately 95% of the wastewater discharges from the
11 Facility. The measures include connecting to the sewer system and performing specified BMPs.
12 The interim measures have not resulted in full compliance with the CWA but there have been
13 only three days since completion of the storm water retention and sewer connection during which
14 wastewater from the Facility was discharged to the drainage ditches. The discharges on those
15 three days contained *E.coli*.

16 TNPM entered into a Lease Termination and Settlement Agreement with one of the
17 owners of the Facility, Thomas Moyer, which assigned TNPM's operating agreement to Moyer
18 effective May 15, 2001, and paid TNPM \$3,250,000 in May 2001.

19 **LEGAL STANDARDS**

20 Any person violating the Act

21 shall be subject to a civil penalty not to exceed \$25,000 per day for each violation.
22 In determining the amount of a civil penalty the court shall consider the
23 seriousness of the violation or violations, the economic benefit (if any) resulting
24 from the violation, any history of such violations, any good-faith efforts to comply
25 with the applicable requirements, the economic impact of the penalty on the
violation, and such other matters as justice may require.

33 U.S.C. § 1319(d).

1 A reasonable approximation of economic benefit is sufficient to meet plaintiff's burden
2 on the factor. Public Interest Research Group of New Jersey v. Powell Duffryn, 913 F.2d 64, 80
3 (3rd Cir. 1990), cert. denied, 498 U.S. 1109 (1991).

4 DISCUSSION

5 I. Rule Fed. R. Civ. P. 52(c) Motion

6 TNPM moved for partial judgment under Rule 52(c) that the EPA failed to carry its
7 burden of proving that TNPM gained any economic benefit from noncompliance because it did
8 not present expert testimony on the least expensive means of compliance. The issue was
9 discussed in In re Harmon Electronics, Inc., 1994 WL 730509 (No. RCRA-VII-91-H-0037,
10 Dec. 12, 1994), rev'd on other grounds, Harmon Industries, Inc. v. Browner, 19 F. Supp.2d 988
11 (W.D. Mo. 1998), aff'd, 191 F.3d 894 (8th Cir. 1999). The administrative law judge concluded
12 that it was unreasonable for the government to prove that all other conceivable compliance
13 alternatives would be more costly than the one used in the economic benefit calculation. Instead,
14 the respondent had the burden to prove another alternative was cheaper and then the government
15 had the burden of persuasion to rebut the respondent's proposed economic benefit penalty. Id. at
16 30-34.

17 I find Harmon persuasive and deny TNPM's motion for partial judgment under
18 Rule 52(c).

19 II. Statutory Maximum Penalty

20 The statutory maximum penalty of \$25,000 per day for each violation, 33 U.S.C.
21 § 1319(d), results in a penalty of over \$4.2 million, which would be doubled if I agreed with the
22 government's contention that a discharge and a violation of the EPA administrative order on the
23 same day counts as two separate violations. Moreover, there is no evidence or argument that
24 discharges did not occur on the days in between the testing days. These are factors I will also
25 consider when reviewing the statutory factors below.

1 III. Factors to Consider

2 A. Seriousness of Violations

3 The government provided expert testimony that the horse waste and associated pollutants
4 were consistently present in discharge from the Facility. The bacteria concentrations typically
5 exceeded standards, impaired water quality in the ditch leaving the Facility, and reached the
6 Lower Columbia Slough. The government experts concluded that the pollutant discharge from
7 the Facility is similar in concentration to other recognized Columbia Slough pollutant sources. In
8 particular, the Facility is the source of 10% of the nitrogen and 25% of the phosphorus reaching
9 the Slough. These nutrient types of pollutants cause eutrophication and growth of excess algae,
10 resulting in reduced water clarity and oxygen depletion. According to the government's experts,
11 discharges from the Facility have contributed to environmental degradation of the Lower
12 Columbia Slough, although the Facility is not the largest source of pollutants to the Slough.

13 Horse waste also contains a number of pathogens which are harmful to humans, the three
14 most significant being *Giardia lamblia*, *Cryptosporidium parvum*, and *Salmonella spp.* All are
15 life-threatening and waterborne outbreaks do occur. Based on the number of horses at the
16 Facility, the prevalence of pathogens in a normal horse, and the level of fecal indicators found in
17 samples, the discharge from the Facility is a very real risk to public health.

18 TNPM's expert concluded that the primary source of contaminated water was the
19 wastewater coming in contact with the soiled bedding stored in the uncovered bunkers. He
20 conceded, however, that covering the contaminated bedding and using ambitious BMPs in
21 uncovered areas might not have stopped the contaminated discharge unless extensive cleaning of
22 the entire water conveyance system occurred.

23 Another TNPM expert concluded that because the horses generate little waste out of their
24 stalls, BMPs used along with either covered bunkers or a dry-waste transfer building are adequate

1 to solve the problem. His opinion is belied, however, by tests conducted after the dry-waste
2 transfer building was operational continuing to show contaminated discharge.

3 A TNPM expert also concluded that due to the amount of rainfall typical in this part of
4 Oregon, the dry-waste transfer building would provide better environmental performance and
5 reduction of pollutant discharges than conventional water retention methods built to the
6 regulation's 25 year, 24 hour rainfall exception.

7 Overall, the TNPM experts did not fully rebut the opinions of the government experts. I
8 conclude that the risk generated by the contaminated discharge was significant but that due to the
9 other polluters, the discharge from TNPM was not a significant factor in increasing the
10 contamination in the Columbia Slough.

11 The factor of the history of the violations weighs heavily against TNPM because the
12 Facility was never in compliance during the ten years that TNPM operated it.

13 B. Good-Faith Efforts to Comply

14 TNPM spent over \$500,000 on environmental/engineering studies and the construction of
15 the dry-waste transfer building. It also improved the situation with BMPs and education in their
16 use by the people at the track. I commend TNPM for making these efforts. But the studies'
17 proposals were not acted upon due to the high estimated costs and the dry-waste transfer
18 building, even when used in conjunction with BMPs, never stopped the contaminated discharge.

19 Although the TNPM witnesses cannot remember the name of the City employee who told
20 them, I credit their testimony that the City told them in the spring of 1996 that it would take the
21 water from the Facility into the sewer system but that it could not do so at that time because of
22 the upgrade of the Columbia Boulevard site. TNPM did not follow-up with the City, however, to
23 check on the progress of the construction. Based on the evidence, it is likely that TNPM could
24 have connected to the sewer in 1997.

1 TNPM contends that the fighting among its principals and between TNPM and the
2 13 landowners severely limited its options to resolve the problems. Although this may be true, it
3 is not an excuse for failing to bring the Facility into compliance with the CWA for the ten years
4 during which TNPM operated the Facility. One possibility which is contemplated in the MEC
5 Consent Order is the ultimate closure of the track. The infighting suggests that this option should
6 have been considered sooner.

7 There was also testimony that TNPM was concerned that its connection to Portland's
8 sewer would increase the amount of Combined Sewage Overflow ("CSO"). The City's estimates
9 based on the capacity of the Lombard interceptor do not support this fear. Moreover, the City
10 had started constructing the solution for the CSO problem. Any delay on TNPM's part due to
11 this fear was unreasonable.

12 After considering the evidence, I conclude that TNPM generally acted in good faith but
13 that it was not diligent in following through on solutions to correct the discharge.

14 C. Economic Benefit from the Violations

15 TNPM argues that because the appropriate compliance measure is the dry-waste transfer
16 building, it enjoyed no economic benefit as a result of noncompliance. I disagree with the basic
17 premise. Discharges still occurred after the dry-waste transfer building was operational and the
18 samples were polluted. Although the effort was a good one and did improve the situation, it was
19 not adequate.

20 I stress to the parties that this calculation must only be a "reasonable approximation of
21 economic benefit." Here, we must work with hypotheticals since compliance has not been fully
22 achieved by any entity.

23 I conclude that the best compliance measure on which to base the economic benefit is the
24 MEC scenario of the connection to the Portland sewer system with additional measures taken to
25 build the underground detention pipe and roof gutter system. The MEC sewer connection has

1 come closer to compliance than the dry-waste transfer building used alone. The fact that a
2 business actually took the step is a solid indication that it is the least expensive means of
3 compliance.

4 I assume a 1997 date for connection to the sewer for reasons explained above. I also
5 assume the United States Treasury's short-term cost of capital for the calculations because I
6 believe it results in a more reasonable economic benefit estimate. Based on questions I presented
7 to the parties at the close of evidence, the government economic expert provided revised
8 calculations. The economic benefit based on these assumptions is \$866,130.

9 D. Economic Impact of Penalty

10 TNPM had the following assets just before the trial: (1) approximately \$9,000 in a
11 checking account; (2) \$630,100 in a money market fund; and (3) a \$100,000 loan owed by Gene
12 Ferryman.

13 Concerning Moyer's allegedly invalid draw against TNPM's letter of credit, I do not
14 know if or when TNPM will recover that money. I have only considered this issue to the extent
15 that TNPM does not now have the money as an asset.

16 The government also contends that I should consider the distributions made to Gene
17 Ferryman in determining TNPM's ability to pay an appropriate penalty. In the analysis above, I
18 did include the \$100,000 loan to Gene Ferryman as an asset of TNPM. Beyond that, I saw no
19 evidence that any distributions to Gene Ferryman were other than distributions typically made in
20 this type of corporate structure with a limited number of shareholders. Thus, I give no weight to
21 this consideration.

22 The economic impact factor has great importance in this case due to TNPM's financial
23 situation. The government seeks a penalty that is nearly three times the assets currently held by
24 TNPM. TNPM is winding down its business, with this litigation and litigation against Moyer
25 being the last major activities. I agree with the government that TNPM should not be able to

1 profit by violating the environmental laws. But the financial state of the company makes it
2 obvious that there will not be any assets left. I see no point in assessing a civil penalty that is far
3 greater than TNPM could ever pay.

4 E. Other Matters

5 I have considered what weight I should give the \$100,000 settlement the EPA entered
6 into with Moyer. The situations vary greatly even though the Facility is at issue in both cases.
7 Moyer entered into the Consent Decree in March 2002, less than a year after he took over
8 operation of the Facility in May 2001. This is quite a contrast to the period of time between the
9 Notice of Noncompliance TNPM received from the ODA in February 1992 and the end of its
10 operation of the Facility over nine years later. Further, Moyer agreed as part of the Consent
11 Decree to implement costly interim compliance measures which reduced the discharge to a great
12 extent. Compliance efforts made by TNPM were never as successful. I also note that MEC paid
13 \$82,500 in stipulated penalties pursuant to the Consent Decree for the discharge events on
14 December 30, 2002, and January 30-31, 2003, which occurred after MEC connected to the sewer.
15 Roberto Decl. ¶ 50. Consequently, I see few reasons to reduce TNPM's civil penalty so that it is
16 similar in size to Moyer's settlement.

17 IV. Adjusted Civil Penalty

18 After considering these factors, and the size of the statutory maximum penalty, I conclude
19 that the appropriate penalty for TNPM's violations of the CWA is \$500,000.

20 **CONCLUSION**

21 I assess a civil penalty against TNPM in the amount of \$500,000.

22 Dated this 29th day of July, 2003.

23
24 /s/ Garr M. King
Garr M. King
United States District Judge
25