IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO ex rel. WILLIAM J. BROWN ATTORNEY GENERAL OF OHIO	:	
Plaintiff-Appellee	:	
vs.	:	CASE NO. 6722
DAYTON MALLEABLE, INC.	:	
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 21st day of April, 1981

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CRAMER, J. (By Assignment)

This case presents numerous issues concerning the propriety of an award of damages of $493,500 assessed by the Court of Common Pleas against Dayton Malleable, Inc., Appellant herein, as civil penalties at the instance of the Ohio Attorney General on behalf of the Ohio Environmental Protection Agency pursuant to the Ohio Clean Water Act, Ohio Revised Code Chapter 6111. The Act promulgates a state regulatory scheme for water quality control designed to comply with national pollution effluant limitations

under the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 846, 33 U.S.C. 1311, 1316, and 1317. Ohio Revised Code Sec. 6111.042. As part of the scheme the act defines the regulatory and enforcement powers of the environmental protection agency which include issuance of permits for the discharge of industrial waste. Ohio Revised Code 6111.03. In addition, the Act prohibits certain acts of pollution which are designed to embrace discharge of waste in excess of permissive levels. Ohio Revised Code 6111.04.

The damage award by the trial court corresponds with the failure of the Ironton Division of Dayton Malleable, Inc. (DMI) to comply with the terms of its National Pollutant Discharge Elimination System (NPDES) permit.[1] That permit required construction of wastewater treatment facilities and fixed final effluant limitations. Authority for civil penalties for noncompliance is provided within the framework of the Act. In pertinent part, Section 6111.07(A) states,

> 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 term or condition of a permit issued by the director of environmental protection pursuant to such sections. Each day of violation is a separate offense.

While this section defines what constitutes a violation, Section 6111.09 fixes the range of penalties or such violations. That section reads:

> 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 civil penalty of not more than ten thousand dollars, to be paid into the state treasury to the credit of the general revenue fund. The attorney general, upon written request by the

> director of environmental protection, shall commence an action under this section against any person who violates sections 6111.04, 6111.042, 6111.05, or division (A) of section 6111.07 of the Revised Code. Any action under this section is a civil action, governed by the Ohio rules of civil procedure and other rules of practice and procedure applicable to civil actions.

Within the upper range of $10,000 for a violation, the appropriate penalty imposed for noncompliance is entrusted to the broad discretion of the courts. That discretion must be utilized with an eye to the factual setting giving rise to the prosecution.

DMI's Ironton Division located in Ironton, Ohio manufactures malleable iron castings. DMI is perhaps the nation's largest foundry for such castings in an industry that is a major source of industrial pollution. DMI-Ironton discharges its industrial waste into the Ohio River. Its waste consists of suspended solids, oil and grease, iron and acidic and alkaline wastes. The Ohio Environmental Protection Agency (OEPA) issued an NPDES permit to DMI which became effective September 2, 1975. Such permits ultimately require discharges to be treated by the "best practical control technology currently available."

The permit allows discharge of certain levels of industrial waste, but required that the quality of the discharge be upgraded by July 1, 1977 to levels acceptable under the new technology. The existing unacceptable quality of discharge is controlled in the permit under interim effluent limitations. Final effluant limitations establish the upgraded quality of discharge achieved through new technology. In addition to fixing limitations on discharge, the permit incorporates a schedule of compliance which

places time limitations on utilization of the new technology designed for upgrading the discharge.

DMI-Ironton's permit called for submission of wastewater treatment plans by January 2, 1976. Pursuant to request by DMI, OEPA granted a ninety day extension. The plans were finally submitted April 1, 1976 and were approved by the Director of the OEPA on September 15, 1976. The permit had required commencement of construction on September 2, 1976 but approval was delayed by reason of certain omissions by DMI in its plan and negotiations with the OEPA which followed.

This action was filed because DMI failed to comply with the schedule for two of its points of discharge into the Ohio River, outfalls 001 and 004. Commencement of construction at outfall 001 in April 1978 was nineteen months late. The delay was seven months for outfall 004 with commencement in April, 1977.

Completion of construction was scheduled for May 2, 1977 with attainment of operational levels and compliance with State and Federal laws and regulations required by July 1, 1977. The completion deadline was likewise violated. Construction of wastewater treatment facilities at outfall 001 was not finished until October 17, 1978. Construction at outfall 004 was completed during July, 1977.

In addition to violations of the construction schedule, DMI exceeded the effluent limits of its permit for Total Suspended Solids at outfall 001 on at least thirteen occasions from August, 1977 through October, 1978. Similar violations occurred at outfall 004 on at least three occasions from August, 1977 through

February, 1978. Continual compliance with the final effluent limitations contained in the permit by means of the use of the wastewater treatment facilities in the approved plans was not achieved at outfall 001 until November, 1978 and at outfall 004 until March, 1978.

The delays experienced by DMI-Ironton in achieving compliance with its permit were to some extent attributable to variables not entirely within the company's control. The company experienced a labor strike from November 1, 1977 through February 6, 1978. As a result of the strike, production at the plant ceased and the engineering staff required for the waste control project were needed for plant maintenance. Additionally, pickets blocked deliveries and outside contractors. Thus, the strike delayed the project for nearly three months.

Harsh weather conditions experienced during the winter of 1978 caused delay. Frozen earth and heavy snow presented initial obstacles to construction of a foundation at outfall 001.

Interference at the construction site of outfall 001 due to a project for construction of a cupola for improvement of air quality was but an additional factor contributing to delay. When that aspect of the overall project was delayed, it in turn delayed access to the site for placement of a sludge tank at outfall 001.

DMI-Ironton also experienced difficulties with its various contractors on the project in that the engineering for one sludge tank at outfall 004 was lost and new drawings were required.

DMI admitted violations and the parties entered into various stipulations at trial. As a result, the sole question before the

Court of Common Pleas concerned what civil penalties should be imposed for the violations. The case is now before us on appeal, some five assignments of error having been presented. Due to the impact of this case on the field of environmental law the states of Wisconsin, Illinois, Maryland and Texas sought and were extended leave to file amicus curiae briefs in support of Appellee.

Before proceeding to the first assignment it is necessary to review the manner in which the trial court computed the penalties.

As we have previously noted, the determination of the proper amount of penalties within the maximum permissable range of $10,000 per violation under Ohio Revised Code section 6111.09 is committed to the informed discretion of the court. Cf. United States vs. J.B. Williams Company, 498 F. 2d 198, 202 (2d Cir. 1974); Federal Trade Comm. vs. Consolidated Foods Corp., 396 F. Supp. 1353 (S.D. N.Y. 1975) (considering penalties for violations of FTC orders). As a guide the trial court utilized a methodology adopted by the United States Environmental Protection Agency in its Civil Penalty Policy for supervision of the NPDES regulatory process reported in Environmental Reporter dated April 21, 1978 at page 2011.[2]

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 extra-ordinary 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....

Accordingly, the trial court assessed a penalty of $50 per day to redress the harm to public health. Appellant was found to be in violation for 683 days. This portion of the penalty was therefore $34,150, which the court reasoned was fair and reasonable to compensate for the risk of harm to the public health for pollution of the Ohio River over this period. Importantly, the court found that the waste effluent in excess of OEPA standards was not toxic in that the amount of waste entering the Ohio River from DMI-Ironton would, of itself, have little effect on water quality. The trial court continued, however, that if DMI's quantity was duplicated by other potential polluters, the pollution could cause serious harm.

The trial court assessed a penalty of $8,000 for the economic benefit to be gained by DMI-Ironton for delayed compliance.

Next the court considered DMI's degree of recalcitrance, defiance, or indifference to regulation. The trial court found

that DMI did exhibit recalcitrance and indifference, if not outright defiance, particularly in the early stages of scheduled upgrading. There was little preliminary planning and practically no contact with suppliers in the months immediately preceding the construction initiation deadline. Supervisory personnel displayed a lack of sense of urgency for scheduled compliance. Its delays were not accompanied with requests for extensions in time. Moreover, the company failed to maintain existing pollution control devices in good order through the project. The failure to employ an adequate engineering staff was another aggravating circumstance.

The trial court found that the total period of non-compliance of 714 days was largely predicated upon DMI's misconduct in the early stages under the schedule. As a penalty the court made an assessment of $750 per day for a total of $535,500.

The gross penalty thus assessed under Step 1 was $578,000 computed as follows: $34,150 for environmental harm, $8,000 for economic benefit, and $535,500 for recalcitrance and indifference. No assessment was made for extraordinary enforcement costs.

The trial court then proceeded to the second step for consideration of those positive mitigating factors for which DMI was entitled to a credit. The trial court found that no aspect of DMI's non-compliance was attributable to interference from the state or federal government. The court did find that certain mitigating factors existed which delayed completion.

For the ninety-eight day strike the court allowed a partial credit of $500 per day for a total of $49,000. The trial court

reasoned that DMI was not entitled to a full credit for this period since, if DMI-Ironton had complied with the schedule, the project would have been completed before the strike began.

The trial court also allowed a credit due to the harsh winter weather in 1978. For the period from February 7, 1978 through March 3, 1978, a total of fifty-two days the court allowed a credit of $13,000 computed at $250.00 per day.

Another credit was allowed for the failure of DMI's equipment suppliers to respond in a timely fashion. At $250 per day a total credit for this delay was $22,500.

Total credits were $84,500. Subtracting this credit from the gross penalty of $578,000, the total penalty assessed was $493,500. The trial court justified this overall penalty as a deterrent to violation.

I.

Appellant's first assignment of error charges that the penalty of $493,500 is punitive in nature and is therefore contrary to the policy of the Ohio Costitution, Chapter 6111 of the Revised Code, the Federal Water Pollution Control Act, and the Civil Penalty Policy of the EPA. Appellant argues that the figure is in gross excess of the amount necessary for compensation and deterrence and has no purpose other than to punish.

Appellee argues to the contrary that a substantial penalty serves legitimate ends of the regulatory scheme in terms of compensation and deterrence. We are in agreement with Appellee as was the trial court.

Appellee presents the rationale that since the penalty seeks to compel the person subject to it simply to do what he is legally required to do, the penalty is remedial and not punitive in purpose. The fact that the penalty may incidentally exact a degree of punishment on the polluter in achieving its remedial purpose does not detract from its validity in terms of civil enforcement.

Appellant argues, even assuming a valid deterrent function, the penalty in the instant case is excessive in that it extends far beyond the measure of environmental harm resulting from the pollution and the economic advantage of delay, which were the first two criteria addressed by the trial court. To Appellant, compensating actual harm and deterring economic advantage of delay must be the primary factors on which the penalty assessment must rest. Under this analysis, any penalty disproportionate to this first measure would therefore be excessive and would constitute an abuse of discretion.

The factors of actual environmental harm and economic advantage from delay are an important starting point. To penalize for the harm done exacts compensation for the violation, and it is remedial in nature. Oftentimes, however, the actual damage cannot be precisely ascertained or is incapable of measurement. This is especially the case in environmental law when pollution from more than one source acts in concert to cause an unquantifiable harm to the ecosystem, sometimes with irreversible effects.

The economic benefit factor is important because it removes economic justification for noncompliance. In encouraging timely

compliance, it is also remedial.

The deterrent effect from assessment for environmental harm and economic benefit alone is questionable. Taken together these factors may represent no more than an acceptable cost of violation. To be an effective deterrent the penalty must be substantial and should exceed social and business costs of the violation. It will thus serve as a specific deterrent for future violations by the same individual, and will also serve a general deterrent function in discouraging violations on an industry-wide basis throughout the regulatory scheme.

Assessing a penalty for indifference to the regulatory authority and for recalcitrance in compliance is a particularly useful tool respecting the deterrent function. It serves the institutional concern for accomplishing the goals of environmental laws. By deterring violations and encouraging voluntary compliance it eases the regulatory burden and seeks to prevent environmental harm before it occurs. Bad faith in noncompliance becomes a costly factor which in the business setting must first be justified before it is exhibited.

Having determined the imposition of a substantial penalty, especially when the violator has displayed a defiant attitude toward compliance, is rationally related to achievement of the State's interest we must consider whether the penalty here is nonetheless excessive. Appellee responds to the claim of excessiveness by turning to the evidence before the court.

DMI is a large independent foundry in sound financial condi-

tion. This company's management was cognizant of the fact that the foundry industry has serious pollution problems. It is apparent that DMI-Ironton was involved in numerous pollution abatement projects at the time of its violations. Despite the output of great amounts of capital and energy in these projects, it is obvious from the record that corporate management took an indifferent stance to achievement of full compliance in a timely manner as it was required to do by law. DMI's projects were poorly orchestrated, which only complicated the delays resulting from the initial indifference it evidenced toward environmental regulation.

Appellee berates the corporate management structure of DMI for its environmental unawareness and its obsession for trimming personnel waste in the strictest business sense. Appellee argues that additional engineering staff was necessary and that the company should have appointed a monitor for its environmental programs. These factors we believe do not bear directly on the issues before us. Management technique is not regulated and remains within the exclusive province of the corporate enterprise. The duty is one of compliance with the environmental goals which may be approached in different ways by different concerns. Appellee is correct that given a legislative policy favoring environmental laundering, many businesses will be required to change and so may DMI change in the future.

We are satisfied that the record supports that DMI was insensitive to the regulatory scheme and that the substantial penalty levied by the trial court was not excessive, even though the largest increment responded to

the company's recalcitrance and indifference over actual harm and economic gain from delay. Thus, the penalty in this case must be justified more as a deterrent than as compensaton for the wrong. The considerable delays in achieving compliance with the permit were clearly unjustified and we find no abuse of discretion by the trial court.

Now we reach the issue of whether such a substantial penalty is constitutional. We are satisified that the penalty here is a civil penalty as it has been labeled by the General Assembly. Compare, Ohio Revised Code section 6111.09 with section 6111.99. See, United States vs. Ward, 65 L. Ed. 2d 742 (1980). In our view, the cruel and unusual punishment clause of Article I Section 9 of the Ohio Constitution is conterminous in its application with the Eighth Amendment which has been held to apply only to criminal sanction. Ingraham vs. Wright, 430 U.S. 651 (1977). The language of the two provisions is nearly identical and both are preoccupied with a concern for avoiding historical abuses in punishing for criminal acts.

This first assignment is overruled.

II

In its second Assignment Appellant argues the trial court erred in considering Appellant's financial condition in formulating its penalty. Appellant reasons that the financial posture of the violator bears no relation to the legitimate compensatory and deterrent functions of the penalty. Insofar as actual environmental harm resulting from the violation is concerned, Appellant

is correct. But we are impressed with Appellee's formulation that economic condition of the violator is an important factor in formulating a penalty based on the deterrent function. Within the regulatory scheme of water pollution control, civil penalties discourage violations through imposition of economic sanction substantial enough to assure that the non-economic environmental goals are not sacrified for traditional measures which favor economic efficiency alone.

A penalty that would be substantial to an enterprise of small size may be no more than a slap on the hand to large businesses such as DMI. For this reason the trial court may in the exercise of sound discretion properly consider the economic status of the violator in assessing a penalty, Cf., United States vs. J.B. Williams Co., 354 F. Supp. 521 (S.D. N.Y. 1973), aff'd in part and rev. in part, 498 F. 2d 414 (2d Cir. 1974).

From our review of this case we are unable to say that the trial court gave undue consideration to the corporation's size. The total penalty of $493,500 is within DMI's ability to pay according to expert testimony adduced at trial. More importantly, the court was confronted with conduct which it characterized as approaching definance to the regulatory scheme. This corporation's largesse was an important consideration in furtherance of an assessment that would stand as a specific deterrent to future violations by this company and would signal other violators that such conduct will not be tolerated.

Finding no abuse of discretion by the trial court in consid-

ering the financial status of DMI, the second assignment is overuled.

III.

The third assignment of error challenges the penalty as against the manifest weight of the evidence and as an abuse of the trial court's discretion.

First Appellant suggests there was an error in the trial court's computation of environmental harm. Appellant's position is that the per diem assessment of $50 should not have been applied to the entire 683 day period. Moving a step further, Appellant complains that even this per diem assessment is unjustified in that there was no environmental harm occasioned by its excessive levels of waste effluent and delay. Appellant concludes that this is not a case where the environmental harm is not quantifiable; it is a case where there was simply no environmental harm.

The trial court emphasized that the plaintiff did not need to prove actual damages. It stressed that while there may not be sufficient proof to establish a violation for each day the court found that for the harm and risk of harm resulting from DMI's pollution of the Ohio River, the overall penalty of $34,150 was fair and reasonable. This aspect of the court's rationale was repeated in its entry denying Appellant's motion for a new trial.

We are satisifed upon our review of the record that, except as indicated herein, there was a sufficient showing of environmental harm to justify the penalty. While it is difficult to determine what harm actually results, it is clear that the cumulative effect of all discharges has an adverse impact on water quality, albeit an unquantifiable harm. We concur with Appellee that the trial court's analysis

accurately reflects the expert testimony before it.

On a second score, Appellant complains that the $8,000 penalty for removal of economic benefit for noncompliance is contrary to law. Appellant urges that it should have received a credit of $5,435 for rebuilding of sludge tanks. Characterizing this move a stop-gap measure, the trial court rejected that expenditure since it did not relate to DMI's actual compliance according to the OEPA schedule. Had there been full and timely compliance this expense would not have been necessary.

The expenditure for rebuilding of the tanks was not made with the expectation of achieving continual compliance under the permit. It was only encountered once Appellant recognized that it would not achieve timely compliance with installation of new pollution control equipment. As such, the expenditure was ineligible for a deduction under the Civil Penalty Policy utilized by the trial court.

Having concluded the deduction was properly rejected, we find adequate evidentiary support for the $8,000 assessment relating to DMI's economic benefit.

Next Appellat argues the $35,500 increment for DMI's recalcitrance and indifference is unjustified. Response to this allegation recalls our consideration of the first and second assignments. A substantial penalty for a defiant attitude toward environmental regulation is justified in serving the deterrent ends of the scheme. DMI has a history of tardy installation of pollution control equipment. Indeed, the company's longstanding disregard for the pollution it causes has posed an enforcement dilemma for the OEPA.

The protracted and unjustified delays on the facts before us, highlighted by a history of environmental insensitivity is symbolic of this company's bad faith which, in turn, calls for the imposition of a substantial penalty. DMI's lack of compliance extended beyond delays in construction and completion and failure to meet effluant limitations. It also failed to report wastewater flow under the permit. DMI's conduct compares unfavorably with the high rate of compliance experienced by officials with other major discharges with the terms of their permits.

Under this assignment, Appellant also claims that it was entitled to complete credit for mitigating factors rather than the partial credit it received. We disagree. The trial court soundly exercised its discretion in allowing only a partial credit. As regards both the labor strike and the harsh weather during the Winter of 1978, had DMI complied with its permit, construction would have been completed and final effluent limitations satisifed before either event occurred. The delays thus encountered were not solely attributable to these events. They coincided with DMI's own delays and for that reason are not subject to full credit.

As conceded by the appellee the issue at trial level was the determination of the amount of the civil penalty and the number of days of admitted violations. The determination of the amount of the compensatory and exemplary penalty in an EPA case, while difficult, is within discretionary power of the trial judge and where supported by credible evidence may not be reversed or modified except upon a clear showing of an abuse of discretion or error of law.

The argument of the appellant that the daily amount of the penalty assessed by the trial court was excessive must be viewed in the light of the firm legislative purpose to require compliance with the EPA regulations as evident by its provision for a civil penalty of $10,000 per day and a greater penalty for a criminal violation. The exemplary nature of the punitive daily statutory provision has a legitimate purpose of enforcing conformity to the law by removing the profit motive from pollution, stabilizing the economic burden and encouraging others to avoid similar non-compliance. A small penalty could operate as a license and tolerate continued violations indefinitely.

A penalty upon a large corporation of a daily amount a small fraction of that permitted by law does not appear to be arbitrary or excessive. A substantial reduction of in excess of ninety percent of the maximum of $10,000 per day reflects a consideration of the impact of the penalty and of other circumstances involved in this case. However, it appears that the number of days of violation is excessive

The purpose of the EPA law is to encourage compliance by a reasonable method which permits a continued limited discharge during the period required for completion of such improvements as are necessary to eliminate the problem. A target date for completion is arrived at and until that date arrives there is no violation subject to sanctions unless the discharge is in excess of the permitted amount, unless the permit is modified or canceled.

It appears here that the trial court, using the reasons and criteria for determination of the amount of the penalty for

violations, reached back to the date of the issuance of the permit in September of 1976 to calculate the number of days of violation and failed to distinguished between excess discharge under the permit and unlawful discharge after the date of July 1, 1977 set for completion.

It appears that during the permit period there were approximately sixteen (16) days of violation of the permit according to tests that were made and admitted in evidence. We are unable to find evidence of similar violations on other days from September 1976 to the target for completion on July 1, 1977.

One may argue that where sample tests showing an excess discharge are made a presumption arises that similar discharges took place on other days, for which no tests were made. However, such a presumption is of doubtful application for the separate determination of daily civil damages and, fails to reach the issue of whether such discharges each day exceeded the amount authorized in the permit. Each day is a separation violation under the statute. Accordingly, we find it error to find a violation exists and to impose a penalty on any day or days for which a violation of the discharge permit was not established in the evidence.

The trial court found a deliberate failure to submit preliminary plans, a failure to proceed with construction and a recalcitrant failure to complete the project as contemplated in the permit. We cannot disagree with these findings. Nor can we disagree with the imposition of the penalty commencing on July 1, 1977, the date when the project was to have been completed and the permit expired.

However, we do not believe the penalty provisions apply to a failure to proceed with construction in the absence of proof of a discharge in excess of that authorized in an existing permit. The statutes in question expressly authorize the modification or cancellation of a permit in event such action is deemed necessary. R.C. 6111.04; R.C. 6111.04(F); R.C. 6111.03(J)(4). In the absence of such action by the OEPA authority the permit holder is not in violation of the penalty provisions unless the discharge on given days exceeds the limits authorized in an existing permit. Our attention has not been directed to any statute that creates a violation and authorizes a penalty solely for inactivity, however flagrant, under a valid permit. The remedy under such circumstances is for the OEPA to take the appropriate steps to modify or cancel the permit. Sanctions by way of fines, even of a civil nature, are to be strictly construed within the language of the statutes. Delay and inactivity by the OEPA permit holder may be grounds for modification or cancellation of the permit, but they are not in themselves subject to sanctions in the absence of a violation of an express statutory condition.

Since we find error in the calculation of the number of days of violation and otherwise sustain the findings and conclusions of the trial court as to the amount per day, this assignment will be reversed in part and sustained in part, as indicated, and the case remanded to the trial court specifically for a redetermination of the days of violations and amount of the penalty or penalties according to this opinion. However, in event the parties agree in writing

to a remittur based upon the elimination of the days prior to the expiration of the permit, less those days prior to such expiration on which a violation of the permit was admitted, then, in that event the judgment will be affirmed in the agreed amount.

IV.

The fourth assignment of error is that the penalty violates the policy of the Clean Water Act. Appellant charges that the award is inconsistent with other cases and detracts from a uniform national system of enforcement. However, in speaking to the issue of national uniformity, even Appelalnt notes that the primary responsibility for enforcement of the Act, 33 U.S.C. Sec. 1251-1376 has been relegated to the states. See, Note, Assessment of Civil Monetary Penalties for Water Pollution, 30 Hastings L.J. 651, 658 (1979). The converse is, of course, that the national interest in uniformity is not so great that Congress has determined to preempt the field with exclusive federal enforcement. State enforcement is encouraged, provided certain minimum criteria have been satisfied in terms of local regulatory authority to issue permits which meet federal clean water standards. As noted in our brief summary in the introduction, Ohio's Act speaks to the federal standards.

Appellant's further allegation is that the penalty here is not in conformity with other reported cases. Given the broad range of available penalties for Clean Water violations, the underlying facts must necessarily control the assessments. Most influential to the trial court was the duration of the violation in this case. This factor was reflected in the penalty. A modest

penalty was awarded to compensate for the actual environmental harm since the harm was not great. An additional consideration was DMI's ability to pay so that the deterrent function of the penalty might be fulfilled.

Appellant directs our attention to other cases primarily, United States v. Velsicol Chemical Corp., 8 E.L.R. 20745 (W.D. Tenn. 1978) in which the environmental harm from the violation was much greater than in the instant case. Large quantities of chlorinated hydrocarbons with prolonged residual effects were discharged into the Mississippi River. The penalty in Velsicol was only $30,000. From the penalty aspect, the case is not readily reconciled. However, the district court in Velsicol did not utilize the Civil Penalty Policy adopted by the trial court here. This alone could have a definite impact on the formulation of damages. The Velsicol court did not consider the elements of economic benefit and recalcitrance of the violator. In addition, it does not appear as if the district court considered the defendant's ability to pay. This we have held is a proper consideration in fulfilling the penalty's deterrent function. These differences in approach provide a principled basis for distinction, and partially account for the great disparity in penalties. In Velsicol, primary emphasis was placed on the highly toxic nature of the defenant's waste which it translated into a greater responsibility in achieving compliance, but, its analysis seemed

to stop there. Inasmuch as the approach we adopt holds the violator to a higher level of accountability in penalty assessment, that approach is justified in the vigilant pursuit of environmental regulation for the public interest.

A prolonged discussion of every principle environmental law case in which large civil penalties were assessed would be a superfluous gesture. Ample authority exists for the imposition of a substantial penalty against pollution violators when it is justified on the facts. See, e.g., Puerto Rico v. SS Zoe Colocotroni, 456 F. Supp. 1327 (D. Puerto Rico 1978) ($6,164,199.09 including maximum penalty for gross negligence of defendant in causing oil spill); United States v. Reserve Mining Co., 412 F. Supp. 705 (D. Minn. 1976), aff'd 543 F. 2d 1210 (8th Cir. 1976) ($850,000 for dumping taconite tailings in violation of state discharge permit with sanctions for violations of court rules).

The fourth assignment is overruled.

V.

Appellant's fifth and final assignment of error urges that the penalty imposed violates rights of due process guaranteed by the United States and Ohio Constitutions. The argument is made in two parts: first, that the statute and regulations thereunder are void for vagueness and are therefore violative of due process and second, that section 6111.09 as applied by the trial court does not bear a real and substantial relation to public health and is unreasonable and arbitrary and is thus violative of due process.[3]

In its initial response to Appellant's fifth assignment,

Appellee asserts these issues were not raised before the trial court and cannot be raised for the first time on appeal. The Ohio Supreme Court has spoke to this issue,

> It is a general rule that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.

State v. Childs, 14 Ohio St. 2d 56 (1965) (syllabus paragraph 3); accord, State v. Lancaster, 25 Ohio St. 2d 83 (1971) (syllabus paragraph 1). The waiver doctrine espoused by the Supreme Court is founded on legitimate institutional considerations and is applicable to loss of constitutional rights the same as any other right. 14 Ohio St. 2d at 62.

Applying this principle, we find that Appellant did fail to litigate the void for vagueness and arbitrary exercise due process issues before the trial court. It offers the justification in reply, however, that it is now precluded from raising on appeal a question which did not arise until judgment when the penalty was assessed. See, 4 Ohio Jur. 3d Appellate Review Sec. 140 at 306 (1979).

In examining Appellant's brief, it is clear that the "void for vagueness" due process argument attacks the statute on its face, not only its application. In essence, DMI argues the penalty provision, Ohio Revised Code Sec. 6111.09, is standardless and it fails to inform a defendant of the manner in which a penalty will be assessed.

Before the trial court, DMI moved for partial summary judg-

ment arguing that the enforcement provision was unconstitutional as a delegation of legislative power. The void for vagueness issue should likewise have been presented to the trial court for its consideration. This issue bears directly on the conduct of the defendant on the merits of the case.

As a result of Appellant's failure to litigate this issue before the trial court, it was not perfected for appeal.

Appellant's attack on the alleged arbitrariness of the penalty actually imposed is of a different nature. This is not a challenge to the statute on its face as was the case on the previous issue, but concerns only the court's particular application of the statute. It is not an issue which could have been anticipated and therefore litigated prior to final judgment when the penalty assessment was made.

The thrust of the arbitrariness - due process argument is that the penalty bears no rational relationship to the defendant's conduct and specifically, the actual environment harm resulting from the violation. This argument runs hand in hand with Appellant's proposition that the penalty is excessive as more fully discussed in part III of the opinion. Appellant argues for an external limitation not found in the statute which would require that the amount of the penalty must bear some direct relationship to the actual amount of damage.

Chapter 6111 containing the water pollution control provisions for Ohio was adopted in the legislative determination that it was a necessary emergency measure for the "preservation of the public

peace, health, and safety." Amended substitute Senate Bill No. 80, encodified Section 3 (September 4, 1973). Legislation in favor of the public health and welfare is directly within the State's police power. Board of Health v. City of Greenville, 86 Ohio St. 1 (1912); City of Canton v. Whitman, 44 Ohio St. 2d 62 (1975). As noted in Justice Stern's opinion for the Whitman Court, "An exercise of the police power necessarily occasions some interference with other rights, but the exercise is valid if it bears a real and substantial relationship to the public health, safety, moral or general welfare, and if it is not unreasonable or arbitrary. Id. at 68.

Appellant's analysis fails in its underlying assumption that the State's interest, hence its power to regulate, is limited to compensating for the actual environmental harm resulting from a violation. While environmental integrity is the foremost component in defining the State's interest - as Judge Ziegel wrote in his opinion "This first factor is what this lawsuit is all about," that regulatory interest extends to vindication of its regulatory authority for the violation. As we have made clear elsewhere in this opinion, the penalty assessed in the instant case serves valid remedial and deterrent ends of the regulatory scheme which include, but are not limited to compensation for the immediate environmental harm. We hold that a substantial penalty is not arbitrary and is reasonably related to the public welfare. Appellant was not thereby deprived of its constitutional right due process of law.

The fifth assignment is overruled.

Having rejected all assignments of error except the third, which was sustained in part as indicated herein, the amount of the penalty imposed will be vacated and set aside and the case remanded to the trial court specifically for a redetermination of the days of violations and the amount of the penalty or penalties according to this opinion. However, if the parties, agree by entry to a remittitur based upon the elimination of the days prior to the expiration of the permit, less those days prior to such expiration on which a violation of the permit was admitted, then the judgment will be affirmed in the agreed amount.

In view of the foregoing and of the possibility of remittitur or of appeal, the Court will not prepare an entry unless counsel fail to prepare and file a final entry within fourteen (14) days after the filing of this opinion.

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SHERER, P.J. and McBRIDE, J., concur.

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[1] A prayer for an injunctive mandating compliance was dismissed at trial once DMI had achieved compliance.

[2] The trial court regarded this police, not as binding upon the court, but as instructive in informing the court's discretion. We can conceive of some cases when other additional factors may weigh heavily in the court's discretion, although they may not be addressed in the regulatory policy of the administrative agency.

[3] A third argument that section 6111.09 as interpreted by the trial court was a criminal statute and that Appellant was denied constitutional rights otherwise available under criminal prosecutions was withdrawn prior to hearing. See, United States v. Ward, 65 L. Ed. 2d 742 (1980).