ISSUED cb

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 3:97 CV 7044

-vs-

JUDGMENT ENTRY

HOGE LUMBER COMPANY,

Defendant.

KATZ, J.,

For the reasons stated in the Memorandum Opinion filed contemporaneously with this entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Hoge Lumber Company shall pay a civil penalty for violations of the Clean Air Act, 42 U.S.C. § 7413, in the amount of $650,000 (six hundred and fifty-thousand dollars) to be paid over a period of four (4) years commencing March 1998, and each March thereafter, until paid in full, in equal annual installments of $150,000 (one-hundred and fifty-thousand dollars) for the first three (3) years and a final installments of $200,000 (two-hundred thousand dollars). Defendant shall pay with each said payment an amount equal to accrued interest on the unpaid balance at the statutory rate for judgments in federal court.

IT IS SO ORDERED.

DAVID A. KATZ
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 3:97 CV 7044

-vs-

MEMORANDUM OF DECISION

HOGE LUMBER COMPANY,

Defendant.

KATZ, J.,

This matter is before the Court on the issue of civil penalties to be awarded under the Clean Air Act, 42 U.S.C. § 7413 and Ohio Rev. Code § 3704.06(C) against Defendant Hoge Lumber Company ("Hoge"). This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. §§ 7413(b) and 7604(a).

PROCEDURAL BACKGROUND

Plaintiffs, the United States of America and the State of Ohio, seek relief for violations of excess emissions and violations of Ohio's Implementation Plan. On May 17, 1997, this Court granted partial summary judgment to Plaintiffs on the issue of liability under both federal and state law claims. Subsequently, the Court entered a Partial Consent Decree which addressed the issue of injunctive relief and requires Hoge to install an Electrostatic Precipitator ("ESP") on the

offending boiler to control its emissions. The issue of damages was tried to the Court on June 10 and 11, 1997. In conjunction with Fed. R. Civ. P. 52, the Court sets forth the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

A. Introduction.

1. On February 4, 1992, the State of Ohio filed a suit against Hoge Lumber Company and John Hoge in the Auglaize County Common Pleas Court, Case No. 92-39. The complaint alleged that Defendants were in violation of Ohio's air pollution control statute. O.R.C. Chapter 3704. In addition, the State alleged that Defendants were in violation of Ohio's water pollution statute (O.R.C. Chapter 6111), and Ohio's hazardous waste law (O.R.C. Chapter 3734). The State filed a motion for Preliminary Injunction with its complaint. That motion sought an immediate order requiring the Defendants to comply with Ohio law. That motion was never scheduled for a hearing.

2. On January 24, 1995, the United States filed this action against Defendant Hoge Lumber Company ("Hoge"). The complaint alleged that Defendant operated a wood-fired boiler, which is a source of air contaminants. The United States alleged that Defendant operated and continues to operate this boiler in violation of Section 113(b) of the Clean Air Act ("the Act"), 42 U.S.C. § 7413(b), by failing to comply with the Act and all applicable regulations in the federally-approved Ohio State Implementation Plan ("SIP").

3. On September 12, 1996, the State of Ohio voluntarily dismissed its state court action without prejudice.

4. On September 23, 1996, the State intervened in this action and filed a complaint against Hoge alleging violations of both the Act and State air pollution control law.

5. The United States' and State's complaints allege three claims under state and federal law. First, that Hoge is operating a boiler, which is a source of air contaminants, without a permit to operate. Second, that the boiler is operating in violation of the emission limit established under Ohio's rules. Third, that the boiler is operating in violation of its source-specific emission limit established in the Permit to Install ("PTI") issued to the source.

B. Background of Hoge Lumber Company.

1. Defendant Hoge is an Ohio corporation with its principal place of business located in New Knoxville, Auglaize County, Ohio. Hoge is a lumber manufacturing business. It purchases trees and lumber (dried and undried) and manufactures a variety of wood products, including rough kiln dried lumber, bowling alleys, kitchen cabinets, broom handles, brush blocks, trusses, residential flooring, and a variety of other furniture components and components for the home and agricultural markets.

2. In the course of manufacturing its wood products, the company employs a number of processes and uses a variety of equipment including saw mills, grinders, and sanders. This equipment produces wood waste, varying in size from chunks of wood to saw dust. In addition, the company utilizes spray booths to apply lacquers, stains and/or paints onto its wood products. Since the beginning of Hoge's operations in 1904, Hoge has burned its wood waste. Hoge has used its waste-burning operations since at least 1941 as a means to generate electricity for very limited uses, such as running clocks, and weekend electrical needs when its facility is not running, as well as to minimize "voltage spikes."

3. In July, 1980, Hoge purchased a used boiler from the old Celina Power Plant, a decommissioned power plant, in an "as is/where is" condition for $10,000 and an agreement to demolish and remove the building. In approximately 1983, Hoge began to install this wood-fired boiler at its facility to replace two older boilers as part of a replacement power plant to run the facility. This boiler was designated by Ohio EPA as source No. B004 (Air Source No. 0306000120). Boiler B004 came on line by December, 1995, but did not start actual permanent daily operations until April, 1986.

4. Boiler B004 is a steam generating boiler and burns the various wood wastes generated by Hoge. The company produces approximately 6 tons of wood waste per hour of production, all of which is burned in B004. Boiler B004 has a maximum heat input capacity of 55 million British thermal units ("MMBTU") per hour.

5. Boiler B004 is connected to two turbines, both of which are driven by the steam produced by the boiler and which generate electricity. Hoge uses the electricity generated by the turbines connected to Boiler B004 to power the facility, and sells excess electricity produced to two neighboring towns, the Village of New Knoxville and the City of St. Mary's. These arrangements have existed since 1986 when the power plant generated by Boiler B004 went into operation. Hoge's sale of its electricity over the past eleven years has generally been at less than market value.

6. The operations of Boiler B004 emit particulate matter into the air. The only air pollution device for Boiler B004 is a Breslove Two-Stage Regenerative Collector. The Breslove Collector was installed on Boiler B004 by 1986 at a cost of $50,000-$60,000, not including installation. Hoge employees installed the Breslove.

7. From at least April, 1986, to the present, Boiler B004 has been in operation at Hoge. Boiler B004 generally operates 5 days/week, for 24 hours/day. The boiler is occasionally shut down for maintenance, and has been shut down at various times for purposes of making changes and repairs to the boiler. The parties have stipulated that Hoge has operated Boiler B004 for at least 2,700 days.

8. O.A.C. Rule 3745-31-02, requires a PTI for any new source of air contaminants before installation, except as provided by rule. The Ohio EPA informed Hoge prior to the installation of the boiler that it needed a PTI for Boiler B004.

9. O.A.C. Rule 3745-35-02 prohibits a person from operating an air contaminant source without a permit to operate. Hoge never obtained a permit to operate from the Ohio EPA for Boiler B004 as required by O.A.C. 3745-35-01.

C. Emissions from Boiler B004.

1. Hoge has conducted eight stack tests on Boiler B004, beginning April, 1986, to determine the actual particulate emissions from the boiler. The results of those tests are summarized in Joint Plaintiffs' Exhibit 13.

2. These stack tests were conducted on behalf of Hoge by Envisage Environmental, Inc. Hoge admits that each stack test was conducted pursuant to U.S. EPA Test Methods 1-5, 40 C.F.R. Part 60, Appendix A. Hoge admits that it received these stack test results in the regular course of its business.

3. On June 15, 1982, Hoge submitted a PTI application for Boiler B004 to Ohio EPA. The PTI application was returned on August 9, 1982 by the Ohio EPA with a letter from Gerald Rich indicating the reason for return was a need for a particulate collector. Mr Rich stated that at

Hoge's stated maximum heat input of 93.3 MMBTU/hr, the allowable particulate emissions are .204 lb/MMBTU, and that a collector with an efficiency of at least 89 percent was needed.

4. On August 27, 1982, Hoge resubmitted its PTI application which was prepared and signed by John Hoge. Hoge sought a PTI for a "wood-fired boiler, 55 MMBTU [per hour] max[imum] heat input w[ith] Breslove 2-stage regenerative collector." Joint Plaintiffs' Exh. 24. The application makes the following inquiry:

> If the air contaminant emissions are an anticipated waste, state the anticipated emissions in lbs/day and the effect of this discharge on environmental surroundings.

In response to this inquiry, Hoge asserted that it expected the particulate emissions from its proposed Boiler B004, with its associated Breslove collector, would be .14 lb/MMBTU of heat input.

5. On March 30, 1983, Ohio EPA notified Hoge that it had made a preliminary recommendation to the Director of Ohio EPA to issue a PTI for Boiler B004. The draft permit includes a particulate emissions limitation for the proposed Boiler B004 of 0.02 lb/MMBTU of heat input. Notice of the draft permit was given to Hoge and published in an area newspaper for purposes of receiving public comment. Joint Plaintiffs' Exh. 25.

6. On May 25, 1983, Ohio EPA issued PTI No. 03-1209 to Defendant Hoge Company for Boiler B004. In the PTI, Ohio EPA calculated a particulate emission limitation for the boiler

based on the "best available technology" ("BAT")[1]. *See* O.A.C. 3745-31-05(A)(3). Ohio EPA determined that for Boiler B004, the BAT limit was 0.02 lb/MMBTU heat input.

7. The cover letter to the PTI from Ohio EPA informed Hoge that the issuance of the PTI was a final decision and could be appealed to the Environmental Board of Review. Hoge did not seek a review of its permit.

8. Under O.A.C. 3745-17-10, the maximum allowable emission rate for B004 at its maximum heat input capacity of 55 MMBTU is 0.36 lb/MMBTU.

9. On May 8, 1985, Ohio EPA Inspector Dean Twining sent a letter to Hoge discussing limiting the steam load to the boiler to enable B004 to meet the limit of 0.2 lb. particulate/MMBTU heat input "with more ease." The letter states that the limit of 0.20 is based on BAT as determined by Ohio EPA and, therefore, will not change.

10. On November 8, 1985, John Hoge sent a letter to Ohio EPA inspector Dean Twining. In the letter, Mr. Hoge describes Hoge's ongoing efforts to "minimize particulate emissions from

---

[1] BAT, which is a requirement of the Ohio SIP, is defined by Ohio EPA as a:

> case-by-case determination of an emission limit and/or control techniques which, taking into account environmental, energy and economic considerations, represents the maximum emission control achievable by the source. In no instance shall the emission level or control measure specified in the BAT determination be less stringent than that allowed under any applicable state or federal rule.

The primary purpose of BAT is to assure that all new sources are controlled with BAT at the time of source installation. A secondary purpose is to "ensure that any new source must meet uniform emission requirements regardless of the proposed location," to ensure that the sources in the state do not gain economic advantage over each other due to location. According to Ohio EPA Engineering Guides, the BAT determination is made with state and federal rules providing a ceiling wherever applicable and may be more stringent, but not more lenient that those rules. *See* Plaintiffs' Joint Exh. 86.

our new power plan." Those efforts and additional work involved making physical and operational changes to the boiler, as noted in the letter. Joint Plaintiffs' Exh. 28.

11. On April 10, 1986, Envisage Environmental performed the first stack test on Boiler B004. On April 22, 1986, Hoge filed an application for a Permit to Operate ("PTO").

12. On July 8, 1985, Ohio EPA Inspectors Twining and Rich visited Hoge. At that time, they were informed by John Hoge that a "pre-test" had been conducted on Boiler B004, and that the pretest had missed compliance. On July 10, 1986, John Hoge sent a letter to Twining confirming the visit and that preliminary testing "indicated that additional work will be necessary." Joint Plaintiffs' Exh. 29.

13. In a September, 1986 letter to Ohio's EPA Twining, John Hoge indicated that the company intended to rebuild the combustion chamber and fuel bed of the boiler. Joint Plaintiffs' Exh. 30.

14. On December 10 and 11, 1986, Envisage Environmental performed the second stack test on Boiler B004.

15. Hoge informed Ohio EPA, on August 5, 1987, that it was considering the purchase of an additional air pollution device, specifically, an "Electro Static Precipitator" ("ESP"). By letter, on September 4, 1987, John Hoge confirmed that the company was exploring purchasing an ESP. Joint Plaintiffs' Exh. 32.

16. On October 9, 1987, Envisage Environmental performed the third stack test on Boiler B004.

17. On January 25, 1989, Ohio EPA Inspectors Don Waltermeyer and Twining visited Hoge. At that time, Ohio EPA discussed with Hoge that the existing control technology (the

Breslove Collector) was incapable of meeting the limit established in the PTI. On February 13, 1989, Waltermeyer sent John Hoge a letter which confirmed the prior meeting and requested a plan and time table for bringing the source into compliance. Plaintiffs' Joint Exh. 33.

18. On March 10, 1989, John Hoge wrote to Waltermeyer to inform him that the company had "engaged other consulting engineering firms to evaluate possible use of ESP units, which I have no longer been considering." John Hoge also indicated that the company was waiting for information from Ohio EPA before committing to the installation of a scrubber and communicated his concerns that the company's neighbors would not like "the condensing moisture-laden stack gasses which I think will leave watermarks on windshields, etc. And I also fear our trading a particulate problem which has no harmful effects for a water pollution problem which may affect groundwater." Plaintiffs' Joint Exh. 34.

19. On July 26, 1989, Waltermeyer wrote to confirm a conversation with John Hoge regarding Hoge's modification of the over fire system. Waltermeyer expressed Ohio EPA's concern that the work be done as soon as possible and requested a control plan/schedule. This correspondence also contained information on other wood-fired boilers, including control equipment. Joint Plaintiffs' Exh. 35.

20. By letter of September 11, 1989, John Hoge notified Waltermeyer that, "After further testing here, hiring consultants, and some plant visits, we have concluded the best solution to the particulate problem is installation of a scrubber." The timetable suggested by Hoge was that the system would be operational by May of 1990. Joint Plaintiffs' Exh. 36.

21. In March, 1990, Watermeyer contacted John Hoge and was informed that Hoge was not going ahead with the installation of the scrubber for the following three reasons: (1) costs

associated with the scrubber due to the water pollution problem; (2) the boiler is only emitting particulate, not sulfur dioxide like a big utility, and therefore is causing no harm; and (3) that there should exist regulatory relief for small wood-fired boilers.

22. In July 1990, Hoge communicated to Ohio EPA that it was considering several technologies to control particulates from the boiler. Hoge concluded that each technology was unacceptable and requested Ohio EPA to contact it with any further questions.

23. In August 1990, and upon Hoge's request, Pat Walling, then Chief of the Division of Air Pollution Control for Ohio EPA, met with John Hoge to discuss the boiler situation and possible resolutions.

24. In October, 1990, the U.S. EPA first assigned an engineer to investigate and monitor Boiler B004 . Prior to this date, however, the U.S. EPA was kept aware of Boiler B004 during periodic monthly meetings and/or teleconferences between representatives of the U.S. EPA and Ohio EPA.

25. By letter, dated March 21, 1991, U.S. EPA requested that Hoge provide certain information and to conduct stack testing relating to compliance of Boiler B004 with emissions limitations.

26. On March 26, 1991, representatives of Ohio EPA, Hoge, their respective attorneys, met to discuss the boiler situation and potential resolutions.

27. In April, 1991 and in partial response to the March 1991 letter from the U.S. EPA, Hoge set up a stack test on Boiler B004 . Hoge notified the U.S. EPA of this stack test.

28. On April 11, 1991, Envisage Environmental performed the fourth stack test on Boiler B004.

29. On April 15, 1991, Hoge, through counsel, submitted a written proposal to Ohio EPA, through its counsel at the Ohio Attorney General's Office, to select and install a dry ESP on B004 to address the boiler situation. The dry ESP was not installed.

30. On May 9, 1991, Envisage Environmental performed the fifth stack test on Boiler B004.

31. On May 22, 1991, after Hoge attempted to contact Ohio EPA, the Director of EPA sent a letter to Hoge instructing Hoge to stop direct contacts with Ohio EPA and to direct all future contacts to the Ohio's Attorney General since the matter had been referred to the Attorney General's office.

32. In January 1992, a representative of the Ohio EPA, Hoge, and respective counsel met to discuss potential resolutions.

33. On February 4, 1992, the Attorney General of Ohio filed suit in state court. On February 28, 1992, U.S. EPA, Region 5, issued Hoge a Notice of Violation pursuant to Section 113 of the Clean Air Act, which, in part, invited Hoge to meet with U.S. EPA representatives to discuss the alleged boiler violations.

34. After having been retained in the fall of 1991, Schmidt Associates, Inc., Consulting Engineers, submitted its Particulate Emission Report on its BAT study in March 1992. This study was revised in May 1992. Ohio EPA was provided a copy of the Schmidt BAT study.

35. On March 26, 1992, and in response to the U.S. EPA's Notice of Violation, the parties met to discuss the boiler situation and potential resolutions.

36. From March, 1992 through the summer of 1992, representatives from Ohio EPA, Schmidt Associates, and Hoge reviewed and discussed the Schmidt BAT Study Report and the Hoge boiler situation.

37. On August 13, 1992, U.S. EPA sent an amended Notice of Violation to Hoge, which corrected one of two emissions limitations indicated in the Notice of Violation, dated February 28, 1992.

38. On August 26, 1992, representatives from Hoge and Schmidt, representatives of the Ohio EPA, including its director, and counsel met to discuss the boiler situation, potential resolution and the pending state court litigation.

39. In 1994, Hoge performed work retrofitting the "front end" of the boiler to improve boiler efficiency and to lower stack emissions.

40. In January 1995, the United States filed the instant action against Hoge.

41. On March 7, 1995, Envisage Environmental performed the sixth stack test on Boiler B004.

42. On May 16, 1995, Envisage Environmental performed the seventh stack test on Boiler B004.

43. On October 10, 1995, Envisage Environmental performed the eighth stack test on Boiler B004.

44. Hoge, through its counsel, continued to submit information through August, 1996, regarding proposals to install emissions control devices in the forms of core separators and a multi clone. Neither devices were installed.

D. Hoge's History of Improvements to Boiler B004 and Use of Boiler Consultants.

1. In 1982, Hoge first consulted with representatives of Breslove, a manufacturer of air pollution control equipment regarding Boiler B004.

2. Over the years, Hoge has consulted with no less than seven other boiler industry experts regarding Boiler B004 and improvements that should be made to the boiler to improve collection of particulate emissions. Since 1986, Hoge, in reliance on advice and consultations from these boiler industry experts, has made large capital expenditures to the boiler system. From 1986 through 1996, Hoge has spent approximately $900,000.00 on boiler improvements recommended by its consultants.

3. From 1986 to 1994, Hoge made the following improvements to the boiler/combustion system: (1) changed the grate configurations several times; (2) changed the furnace configurations; (3) changed the under fire air configurations; (4) changed the overfire configurations; (5) changed the method of bringing in heated air; (6) side wall modifications; and (7) improved the fuel feed system.

4. Hoge also relied upon consultants' advice in considering the possible use of a dry ESP on Boiler B004. In the late 1980's, Hoge consulted with a boiler industry expert who expressed a concern over the resistivity of the ash as ultimately impacting on the effectiveness of the dry ESP system.

5. In 1992, during the Schmidt BAT study, questions were again raised regarding the dry ESP system due to concerns of fire.

6. The Schmidt BAT study also considered and advised Hoge regarding other control technologies, including a wet scrubber. The cost of the west scrubber was estimated at approximately 5 million dollars to properly handle both air and water pollution problems.

7. The bottom line of the Schmidt BAT study was that a mechanical collector was the best available technology for Boiler B004. However, engineers with the Ohio EPA disagreed with this conclusion.

8. Starting in 1992, acting upon the advice and consultation of boiler industry experts, Hoge proposed a number of different control technologies. First, the Ohio EPA, then the U.S. EPA disagreed with Hoge's consultants' recommendations and/or were reluctant to accept them.

E. Size of the Business.

1. Hoge is a closely-held corporation formed and organized under the laws of the State of Ohio and with its principal place of business in New Knoxville, Ohio.

2. Currently, Hoge employs approximately 120 individuals

3. The company is developing a market in China for its bowling alleys. The company estimates that 80,000 lanes, both plastic and wood, will be sold in China in the next 10 years. Hoge does not manufacture plastic lanes. Previously, Hoge's wood bowling lanes have sold to markets in Taiwan, Korea and Japan. It is presently exploring these markets again for replacement business. Over the last year and a half, John Hoge has made over eight extended business trips to China, with each trip approximating two weeks, to help develop bowling lane sales to the China market. Hoge is looking to possible joint ventures with other Asian companies to market bowling lanes in China, and has made sales there to date.

4. John Hoge is one of the officers of Hoge and is the Secretary/Treasurer of the company. Mr. Hoge has been the Secretary/Treasurer since approximately 1971. He is also the prime decision-maker for the company and has been so since at least 1980. From at least 1980 to date, Mr. Hoge has been the highest ranking employee with Hoge with responsibility for air pollution compliance at Boiler B004. Mr. Hoge has a bachelors degree in both chemical engineering and mechanical engineering, and is a licensed professional engineer in the State of Ohio.

F. Financial Information Regarding Hoge Lumber Co.

1. Hoge has filed annual federal income tax returns. Accurate copies of Hoge's federal returns for the years 1988 through 1996 were presented to the Court along with copies of Hoge's annual financial reports for the same years. In addition, an accurate copy of its unaudited quarterly report for the first quarter of 1997 was presented. Except for a couple of unusual years, Hoge's net profit has consistently approximated $200,000 per year.

2. Hoge's Board of Directors determines officers salaries on an annual basis. The Board does not apply a specific formula in making this decision. The company has, from time to time, decreased director's salaries.

3. Though their actual salary amounts are not determined until the end of each year, the officers draw against their salaries throughout the year from an account into which the company makes monthly payments. The quarterly deposits into this fund are determined on the basis of the officer salaries from the previous year.

4. In 1994-95, sales of bowling lanes to Brunswick constituted 35-40% of Hoge's gross revenues. When Brunswick developed and began marketing a plastic lane, as a substitute to

wood, Hoge's bowling lane sales dropped by over $5.4 million dollars. Hoge began to experience this dramatic, precipitous loss of bowling lane sales shortly after investing over $1.5 million dollars to improve and increase production capacity to meet Brunswick's bowling lane demand, which peaked in 1994.

5. As a result, in 1996, Hoge suffered a net loss, of over $800,000 after taxes.

6. In response to these declining sales and production orders, Hoge has reduced its production staff by approximately one-third and instituted the first layoffs in Hoge's ninety-year history.

7. Hoge continued to sustain losses and in the current year through April, Hoge lost an additional $815,000 in revenues.

8. As a result of Hoge's continuing operating deficits and cash shortfalls, John Hoge has extended several personal loans to Hoge for over $450,000 in the past year, with the last loan of $200,000 being provided at the end of March, 1997, to help meet current expenses.

9. During this same time period, Hoge was forced to increase its debt with its bank, Fifth Third Bank. Hoge's short-term and long-term debt, along with bank overdraft line, was increased by over 2 million dollars.

10. At the end of 1996, and throughout 1997, Hoge has been in violation of several significant loan covenants and obligations with Fifth Third Bank. The lending institution is concerned that Hoge, given its financial problems, will not be able to repay these loans. Fifth Third Bank has required Hoge to sign security agreements pledging all of Hoge's business assets as collateral.

11. As a result of Hoge's current financial condition, Fifth Third indicated it would be reluctant to loan any additional funds to Hoge.

12. If any of Hoge's assets or inventory are sold, Fifth Third Bank would insist that those funds be used to pay down the bank loans. If assets were liquidated and the funds were not turned over to the bank, the bank would take whatever legal steps necessary to protect its assets.

13. Fifth Third is closely monitoring the present litigation and, depending on the outcome of this litigation, Fifth Third may initiate foreclosure and/or bankruptcy proceedings to protect the bank's collateral.

14. Under the Partial Consent Decree entered by the Court, Hoge has made the legal commitment to install a dry ESP unit on Boiler B004 within the next year at a total cost of approximately $350,000. Estimated annual operations and maintenance for the dry ESP is estimated at $50,000.

G. Duration of the Violation.

1. The Ohio EPA conceded that Boiler B004 had an actual, normal operating rate of 39 MMBTU and that the B004 could have been derated to that level. However, in order to have B004 derated there needed to be a request. The testimony indicated that Hoge did not make such a request of the Ohio EPA.

2. Ohio EPA admitted that the only applicable regulation, O.A.C. § 3745-17-10(C), dictates use of the P-2 curve for sources in attainment counties, such as Auglaize County. Ohio EPA conceded that it follows a different internal policy; i.e., use of the P-1 curve, but Ohio EPA admitted that there is no statute or regulation supporting use of the P-1 curve.

3. Both Plaintiffs conceded that the only way to determine actual particulate emissions was through stack tests. Stack tests are performed under worst-case scenarios and do not represent actual operating conditions.

4. Plaintiffs do not know what the actual particulate emissions were from Hoge's Boiler B004 when operated under normal operating conditions.

5. The State of Ohio did not seek or file enforcement and, in part, monetary penalties, against Hoge until August, 1990. Prior to referring the matter for enforcement to the Central Office of the Ohio EPA, the Northwest District Office was working with Hoge, and was satisfied with its good-faith efforts to comply.

6. The U.S. EPA did not file the above captioned action seeking, in part, monetary damages, until January 24, 1995.

H. Seriousness of the Violation.

1. The evidence demonstrated that at actual, normal operating capacities, Hoge's Boiler B004 had actual particulate emissions at levels of .23, .27, and an average of .29 during the May, 1995 stack test.

2. Testimony by the Manager of the Engineering Section of Air Pollution Control for the Ohio EPA indicated that the total emissions for the eleven year period commencing in 1986 was in excess of 700 tons of non-complying emissions.

3. No evidence was presented that any resident of New Knoxville or Auglaize County complained, suffered, or sustained any harm to their health, nor is there any evidence of harm to the environment, as a result of the particulate emissions from Hoge's Boiler B004 from 1986 to the present.

4. Auglaize County has been designated by the Ohio EPA and the U.S. EPA as a county in attainment for federal and state ambient air particulate standards from 1986 to the present time. By so designating Auglaize County, Ohio EPA and U.S. EPA admitted that the quality of air meets the national ambient air quality standards for particulate matter. These national standards have been established giving an adequate margin of safety to ensure and protect human health.

I. Economic Benefit/Ability to Pay Civil Penalty.

1. At trial, Plaintiff's expert, James W. Fagan ("Fagan") opined that the economic benefit reaped by Hoge's failure to install the ESP in 1986 was between $1,200,00 and $1,600,00. The period of delay Fagan attributable to Hoge's economic benefit was calculated to run from April, 1986 to April, 1998 (the date upon which Hoge has agreed to install the ESP) and did not include installation costs.

2. Regarding Hoge's ability to pay a civil penalty, Fagan testified that through the reduction of administrative costs, specifically officer compensation, as well as the refinancing of debt capacity, Hoge could afford to apply a considerable amount of money towards a penalty. Fagan did acknowledge that at the end of 1996, Hoge was in "technical default" of its loans and that the business assets of the company were security for the long term debt.

J. Other Penalties.

1. The parties stipulated to the fact that in 1995, Hoge pled guilty to two felony counts of illegal disposal of hazardous waste in violation of R.C. §§ 3734.02(F) and 3734.99. Said plea was entered by the company in Auglaize County Common Pleas Court, Case No. 95-C-164. The

hazardous waste involved in that violation involved waste generated within the cabinet division of the company.

CONCLUSIONS OF LAW

A. Applicable Law.

The methodology for assessing a civil penalty under the Clean Air Act is based upon Section 113 of the Act, 42 U.S.C. § 7413, and contains specific factors which the Court may take into consideration and include:

> (1) the size of the business; (2) the economic impact of the penalty on the business; (3) the violator's full compliance history and good faith efforts to comply; (4) the duration of the violation as established by credible evidence; (5) payment by the violator of penalties previously assessed for the same violation; (6) the economic benefit of noncompliance; and (7) the seriousness of the violation.

42 U.S.C. § 7413(e)(1). The Court will consider each of these criteria separately.

The Court may assess a penalty for each day of violation. 42 U.S.C. § 7413(e)(2). The statutory maximum is $25,000 per day. 42 U.S.C. § 7413(b).

In making its assessment, the proper starting point is the statutory maximum, and any downward adjustments must be based upon evidence introduced at trial. *United States v. Midwest Suspension and Brake*, 824 F. Supp. 713, 735 (E.D. Mich. 1993), *aff'd* 49 F.3d 1197 (6th Cir. 1995).

When determining whether or not to mitigate a defendant's civil penalty amount, a court may reduce the statutory maximum penalty in accordance with the criteria set forth above. The Act does not specify how much weight a court should give to each factor when considering mitigation, nor does the Act specify whether each factor should be weighed independently.

The assessment of a civil penalty is addressed to the informed discretion of the Court. *See United States v. ITT Continental Baking Co.*, 420 U.S. 223, 229 n.6 (1975). In addition, the Court should give effect to one of the prime purposes of a civil penalty, deterrence. *See Tull v. United States*, 481 U.S. 412, 422 (1987) (general purposes of a civil penalty include retribution and deterrence).

Similar to the federal statute, the Ohio statute provides a statutory daily maximum, per violation of $25,000. However, unlike the Clean Air Act, the Ohio statute does not provide any specific factors for the Court to consider in assessing a penalty. The Ohio Supreme Court has approved using federal policy in a State water pollution penalty case. *State, ex rel. Brown v. Dayton Malleable, Inc.*, 1 Ohio St.3d 151, 438 N.E.2d 120 (1982). The Court finds that the federal penalty criteria under the Clean Air Act is appropriate to guide its discretion under similar Ohio law.

The Court also will assess a single civil penalty against the Defendant under the above stated factors and will order that the penalty then be divided evenly between the State and federal governments as Plaintiffs have agreed to this approach.

B. Application of Section 113 Factors.

1. Size of Defendant's Business.

The evidence at trial provides an unclear picture of the "size" of the Defendant's business. It is clear that the Defendant is a major player in its industry and seeks to expand its sales of bowling lanes throughout China, Japan and the Pacific Rim. The financial statements as at April 30,1997, reveal a company with $5.58 million net worth (Defendant's Ex. CCCC). A review of the assets reflects $7.6 million in inventory, which is pledged to a bank, $2.8 million in

hard fixed assets (significantly depreciated) and $200,000 in cash value of life insurance. Sales were off $800,000 against the comparable period of the prior year. The size of the business is substantial, and testimony indicated clearly that as to its position as a supplier of wood lanes for bowling it was a major force in the industry. However, the net worth of the company clearly indicates that a reduction in the maximum penalty is justified if the Defendant's business is not to be confiscated or at least driven to bankruptcy.

2. Economic Impact on the Business.

In considering the economic impact of a penalty on the business of the Defendant, the Court has reviewed the financial statements for the fiscal years 1988 through 1996, and the stub period ended April 30, 1997, all of which statements were admitted into evidence at the trial. For the 10 years ending December 31, 1996 the average annual net income of the business was $284,558. In all but two of those years, 1992 and 1993, the cash flow provided by depreciation significantly exceeded net income. The highest two years of net income, 1992 and 1993, so far exceed the other eight years as to appear to be clear aberrations. It is further evident that the Plaintiffs' position regarding executive salaries is inconsistent with reasonable business practices; it would fly in the face of reason to totally disregard those salaries in determining a minimum annual payment should the Court deem the penalty assessed to be payable over a period of years.

The testimony of Fifth Third Bank, coupled with a review of the financial statements, clearly compels the conclusion that a penalty in an amount roughly 7 times the average annual net income over the last full ten (10) year period would create a situation in which continuing financial support of operations would be extremely difficult, if not impossible, even if the

assessed penalty were spread over a period of years. This is true because of the accrual method of accounting and the impact upon financing relationships. Thus, this factor compels the Court to conclude that a $2.1 million fine, as requested by the Plaintiffs, would destroy the viability of the Defendant's business and is inappropriate.

3. History of Compliance and Good Faith Efforts to Comply.

The history of compliance and good faith efforts to comply reveals a checkered pattern. The Government presented ample evidence of noncompliance, and the evidence of the Defendant to the contrary is unavailing. Likewise, it is clear that the equipment to be installed in the Spring of 1998 pursuant to the Partial Consent Decree entered August 19, 1997 was available in the 1980's, but Defendant rejected that approach. Defendant's chief executive testified that his "advisors" led him to believe that the installation of an electrostatic precipitator (ESP) on Boiler B004 would not properly control the emission problem. That problem was first "addressed" in 1985 when the Defendant installed a Breslove Collector; it became clear by April, 1986, when emission tests were first completed (all of which failed miserably) that the Breslove was ineffective. Over the ten years from 1986 through 1996, it appears from the evidence that Defendant expended approximately $900,000 on improvements recommended by various consultants, none of which "solved" the emission problems.

In contrast, the Ohio EPA did not begin earnest efforts to address the violations until January, 1989, and the U.S. EPA's efforts regarding the violations commenced much later. At no time did either agency make serious attempts to force Defendant into compliance; even though the State sought injunctive relief in 1992, no hearing was ever held in the state action or the case *sub judice* as to the issue of injunctive relief. This, of course, does not excuse non-

compliance nor justify the Defendant's feeble "efforts" to comply. This factor does not weigh heavily in favor of any adjustment in the penalty.

4. Duration of the Violation.

This factor clearly does not justify deviation from the statutory penalty. The parties have stipulated to 2,700 days of violations over a twelve (12) year period.

5. Prior Penalties.

The only evidence bearing on this factor adduced at trial was that in 1995 the Defendant had a criminal conviction in state court in connection with hazardous waste disposal. While not directly related to the issues *sub judice*, that conviction ties in with the discussion at (3) and (4) above, demonstrating the Defendant's lack of attention to, in fact disregard for, statutes related to protection of the environment.

6. Economic Benefit of Non-compliance.

The Plaintiffs contend that the failure to install the ESP in the 1980's resulted in an economic benefit to Defendant of $1,600,000. Fagan, Plaintiffs' expert, assumed the delayed capital cost was between $241,000 and $450,000 and the avoided annual operation and maintenance costs were $50,000. Using those assumptions, Fagan testified that the Defendant enjoyed an economic benefit of at least $1,200,000 to $1,600,000. John Hoge, the executive of Defendant who testified, indicated that the lowest bid he received for the acquisition and installation of the ESP was $350,000 to $400,000.

If one assumes a $400,000 cost of installation in April, 1986, when Boiler B004 went on line, the economic value of the failure to make that expenditure (over a 12 year period until April, 1998) is $500,877, utilizing a conservative 7% interest figure. If one addresses the

economic benefit from the time the Schmidt BAT study was completed (mid-1992) regarding the possibility of installing a dry ESP, the economic benefit is $200,292 using a 7% interest rate. ($400,000 compounded annually at 7% becomes $600,292 over 6 years; since the expenditure was not made in 1992 but will be made in 1998, the $400,000 is subtracted. A similar calculation was used for the 12 year period: $400,000 at 7% over 12 years, compounded annually, becomes $900,877, minus $400,000 equals $500,922).

There was no testimony concerning the difference between annual maintenance costs of the boiler before and after the ESP installation; therefore, the Court will disregard the annual operating costs.

7. Seriousness of the Violation.

Unlike the offending emissions in *United States v. Midwest Suspension and Brake,* 824 F. Supp. 713 (E.D. Mich. 1993), this case does not involve exposure to asbestos fibers. However, the Court may impose a significant penalty if it finds there is a risk or even a potential risk of environmental harm, even though proof of actual harm is absent. *Natural Resources Defense Council, Inc. v. Texaco Refining & Marketing, Inc.*, 800 F. Supp. 1, 23-24 (D. Del. 1992); *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 344 (E.D. Va. 1997); *United States v. Roll Coater, Inc.*, 1991 WL 165771, 21 Envtl. L. Rep. 21073, 21075 (S.D. Ind. 1991). In *Roll Coater*, the court noted that lack of damage, while not an excuse to the offending emissions, can be a mitigating consideration.

The non-complying emissions in this case appear by testimony adduced at trial to have been in excess of 700 tons since 1996. That is serious. However, no evidence was produced indicating any harm to people, crops or animals in the area of the Defendant. Further, Auglaize

County, the county where Defendant's plant is located, is in compliance with the ambient air standards established by the relevant governmental agencies. Had the emissions been deemed harmful to the environment to any serious extent, the Court assumes that the Plaintiffs would have vigorously pursued, now or in the past, injunctive relief. Therefore, the Court will consider this factor, along with all other six factors, in determining an appropriate penalty.

C. The Appropriate Penalty.

As previously noted, the parties have stipulated to 2,700 days of operation of the Boiler B004. Assuming, *arguendo*, that each day created a violation subject to civil penalty assessment pursuant to Section 113(b) of the Clean Air Act, the maximum civil penalty would be $25,000 per day or $6,750,000, substantially more than the Plaintiffs seek and approximately $1,000,000 more than the net worth of Defendant.

In crafting an appropriate penalty the Court is charged with balancing the need for deterrence, the infliction of financial pain on Defendant for past and future harm to the environment, the economic benefit of 12 years of non-compliance; and the financial realities of the Defendant's ability to pay. A reading of cases addressing comparable type violations reveals a clear reluctance of courts to destroy the offender in the absence of an egregious wrong. Such wrong is not present in this case.

After a thorough review of the law, both statutory and case law, the Court concludes that a civil penalty of $650,000 is sufficient to deter the Defendant and others from future violations and penalize it for past wrongs. While this amounts to only $240 per day of violations, this Court deems it appropriate after considering all relevant factors. In light of the Defendant's net worth and its relatively low earnings record (in fact, for the first 4 months of this year it lost

$816,000 and in fiscal 1996 lost $1,023,000), this penalty is aggressive. It represents between $150,000 and $450,000 as an economic benefit component, and $200,000 to $500,000 as a deterrent and pure civil penalty component, all depending upon the use of either 6 or 12 years in determining economic benefit.

The parties have agreed that Defendant will expend approximately $400,000 in the first part of 1998 for installation of an ESP. The civil penalty assessed here shall be paid over a period of four (4) years commencing March, 1998 and each March thereafter until paid in full, in equal annual installments of $150,000 the first three (3) years and a final installment of $200,000. In addition, Hoge shall pay with each said payment an amount equal to accrued interest on the unpaid balance at the statutory rate for judgments in federal court. 28 U.S.C. § 1961(a).

On final word about the parties. The trial of this case was significantly shortened by two occurrences: the partial consent decree, and the extensive stipulations at the penalty phase. Those stipulations cover 33 pages and involved subjects which, if not so stipulated, would have added several days to trial. The Court appreciates that cooperative effort of the parties, even though it played no part in the consideration of the civil penalty.

CONCLUSION

For the reasons stated above, the Court finds that Hoge Lumber Company has violated both state and federal emission statutes totaling 2,700 violations. Having considered the relevant factors pertaining to a civil penalty under 42 U.S.C. § 7413(e)(1), the Court orders Hoge Lumber Company to pay a civil penalty in the amount $650,000, to be paid over a period of four years commencing March, 1998, and each March thereafter, until paid in full, in equal annual

installments of $150,000 the first three years and a final installment of $200,000. Finally, Defendant shall pay with each said payment an amount equal to accrued interest on the unpaid balance at the statutory rate for judgments in federal court.

IT IS SO ORDERED.

DAVID A. KATZ
UNITED STATES DISTRICT JUDGE