UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
American Cyanamid Company,	)	CAA Docket No. VI-84-120-101
	)	
Respondent	)	

Clean Air Act - § 120 Noncompliance Penalties - Payment - SIP Revisions - It having been determined that Respondent violated an applicable legal requirement within the meaning of § 120 of the Act, Respondent could be assessed and required to pay a noncompliance penalty in accordance with 40 CFR Part 66, Subparts F & G, notwithstanding continued EPA inaction on a SIP revision submitted for approval prior to issuance of the notice of noncompliance, which, if approved, would have obviated the violation.

Appearance for Complainant: Michael C. Barra, Esq.
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Appearance for Respondent: Theodore L. Garrett, Esq.
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ACCELERATED DECISION

In this proceeding under § 120 of the Clean Air Act (42 U.S.C. § 7420), an initial decision of liability, dated July 15, 1985, has been affirmed by the Chief Judicial Officer (Final Order, September 27, 1985) and Cyanamid's petition for review of that decision is currently pending before the Court of Appeals for the Fifth Circuit (No. 85-4899). The proceeding was initiated by the issuance of a notice of noncompliance on September 28, 1984, charging Cyanamid with violations of the Louisiana SIP as to emissions from certain tanks at its Fortier Plant, Westwego, Louisiana. Cyanamid's defenses, which included the fact that under a "bubble plan" revision to the SIP, approved by the State on May 6, 1982, Cyanamid would be allowed credits for emissions reductions from other sources at the plant, which would obviate the violations, were rejected. The SIP revision was forwarded to EPA for approval, pursuant to § 110(a)(3)(A) of the Act, on July 22, 1982, and not acted upon. the mentioned Final Order held that Louisiana's approval of the bubble plan was ineffective, absent EPA's approval, as an offset against emissions from Cyanamid's tanks, that noncompliance proceedings under § 120 are not barred pending EPA's determination of whether to approve a bubble plan SIP revision[1/] and the matter of whether a proposed SIP revision should be approved is not for determination in a noncompliance proceeding.

1/ Cyanamid has consistently maintained that because EPA has not acted upon the proposed SIP revision within the statutory four-month period, the assessment and collection of a noncompliance penalty is barred by the decision in Duquesne Light Co. v. EPA, 698 F.2d 456 (D.C. Cir. 1983). Duquesne does hold that once the four-month deadline for acting on a SIP revision passes, the noncompliance penalty should be held in abeyance pending final action on the revision. The four-month period for acting on SIPs is not contained in § 110(a)(3)(A) of the Act dealing with SIP revisions, but in § 110(a)(2) concerning initial SIP approvals and the Court decided without discussion that the four-month period applied as well to SIP revisions.

On January 6, 1986, Cyanamid, under protest, submitted a penalty calculation, pursuant to 40 CFR § 66.13, showing the amount due as $17,800, assuming a single payment made in January 1986. By letters, dated February 6 and 25, 1986, the Director, Pesticides and Toxics Division, EPA, Region VI, informed Cyanamid that the correct penalty, based on a period of violation running from October 1, 1984, through February 1985, and, assuming that a methanol tank involved in the violation would be in compliance by August 6, 1986, was $13,378.35.

Under date of April 14, 1986, Cyanamid submitted a Petition For Reconsideration of Penalty Recalculation. The petition set forth four grounds: "(1) EPA's failure to act on pending SIP revisions bars the Agency from assessing or collecting a penalty against Cyanamid, as the D.C. Circuit held in the Duquesne case [note 1, supra]; (2) EPA's response to the Duquesne decision is legally and practically inadequate; (3) the imposition of a penalty in any amount is incorrect and unlawful, because Cyanamid has been in complete compliance with relevant regulations at all applicable times; (4) and a stay of these proceedings pending appeal of the decision of noncompliance is warranted as a matter of fairness to Cyanamid." In the penultimate sentence, Cyanamid asserted "For all of the foregoing reasons, EPA must hold in abeyance its proceedings to assess and collect noncompliance penalties against Cyanamid." The last sentence of the petition stated: "In the alternative, Cyanamid urges that EPA reconsider its penalty recalculation and set the penalty at zero."

By letter, dated May 22, 1986, the Regional Administrator granted the request for a hearing without ruling on the motion for a stay. By an

order, dated September 15, 1986, the motion for a stay was denied for the reason the Act and regulations contemplated that § 120 proceedings be expeditiously resolved.

On October 15, 1986, Cyanamid filed a motion for discovery, moving that Complainant be directed to furnish copies of all documents and records pertaining to the methods, assumptions and actual calculation of the penalty. The motion recited that the records were necessary to enable Cyanamid to determine how the noncompliance penalty was calculated so that it could precisely frame the issues raised in its appeal. On October 17, 1986, Complainant filed a motion for an accelerated decision, contending that no genuine issues of material fact exist and that it was entitled to judgment as a matter of law. In support of the motion, Complainant pointed out that the motion for a stay had already been denied, that the validity of EPA's response to the Duquesne decision was not for determination in this proceeding inasmuch as, in accordance with § 307(b) of the Act, challenges to regulations can only be heard in the U.S. Court of Appeals for the District of Columbia,[2/] and that Cyanamid was not challenging the accuracy of the penalty recalculation, but was attempting to relitigate the issue of liability. Complainant opposed the motion for discovery for essentially the same reasons, arguing that there were no factual issues in dispute for which discovery could be relevant.

By an order, dated November 10, 1986, Cyanamid's position that its petition was sufficiently broad to encompass the claim that the penalty was improperly calculated was accepted and its motion for discovery

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2/ In acting on the Court's directive in Duquesne, EPA adopted what it referred to a "reconciliation approach" under which, in calculating the final penalty adjustment, it would be assumed that the period of covered noncompliance ended on the date four months from submission of a subsequently approved SIP revision (50 FR 36732-766 at 36733).

granted. Complainant furnished documents in response to the discovery order under date of November 21, 1986.

On December 12, 1986, Cyanamid submitted a statement that, while it continued to maintain that it was not liable for any penalty, it would not challenge EPA's penalty calculation.3/ Cyanamid maintained, however, that the issue of whether it could be forced to pay a noncompliance penalty prior to the time EPA acts on the pending SIP revision was still open and that EPA had admitted in briefs to the Fifth Circuit that it may not attempt to collect the penalty until it acts upon the SIP revision. According to Cyanamid, the issue remaining before the ALJ is whether EPA will be required to honor its position as represented to the Fifth Circuit.

Complainant responded to the foregoing assertions under date of December 24, 1986, saying that the matter is now ripe for an accelerated decision (Response to Cyanamid's Statement of Outstanding Issues). Complainant disputes, as baseless and wholly in error, Cyanamid's contention that EPA has admitted in its briefs to the Fifth Circuit it may not collect the penalty until it acts upon the SIP revision. In fact, Complainant says that its position is precisely the opposite and quotes from page 30 of its brief which is to the effect that, under the revised payment and reconciliation regulations, § 120 penalties assessed for more than four months after the State submitted a complete SIP revision

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3/ Statement of Outstanding Issues. Pursuant to Complainant's motion, the decision denying its motion for an accelerated decision was certified for interlocutory appeal pursuant to 40 CFR 22.29 on December 2, 1986. In a letter, dated January 2, 1987, the Chief Judicial Officer ruled that Cyanamid's statement it would not challenge EPA's penalty recalculation had mooted the issues raised in the interlocutory appeal and stated that the period for deciding the interlocutory appeal would be allowed to lapse.

package would be refunded, if EPA eventually approved Cyanamid's bubble proposal. It is argued that Cyanamid's attempt to raise the issue of whether it must pay the penalty prior to EPA action on the SIP revision is precluded by the 40 CFR Part 66 regulations, which are not subject to review in this forum. Complainant says that the only issue herein is the accuracy of the penalty recalculation and that, inasmuch as Cyanamid has decided not to challenge that recalculation, an accelerated decision affirming the recalculation should be issued forthwith.

Replying to the foregoing arguments, Cyanamid quotes from EPA's brief to the Fifth Circuit at 29: "However, the precise holding [in Duquesne] on which Cyanamid relies--a remand with instructions that EPA hold a portion of the penalty in abeyance pending final action on the SIP revision--applies only to the collection of penalties after the polluter's liability is determined." (Reply, dated January 5, 1987). Cyanamid asserts that this is a concession that Duquesne prevents the collection of a penalty while a SIP revision is pending, that this statement was essential to EPA's position before the Fifth Circuit and that Complainant should be bound thereby in the instant proceeding.

C O N C L U S I O N S

1. The foregoing summary of the procedural and factual background of this proceeding is adopted as findings of fact.
2. Cyanamid has violated an applicable legal requirement, the Louisiana SIP, and is liable for a civil penalty in accordance with § 120 of the Act and 40 CFR Part 66.

3. The correct amount of the initial penalty is $13,278.35.[4/]

D I S C U S S I O N

Cyanamid has withdrawn its challenge to EPA's penalty recalculation and the only question warranting discussion is whether the ALJ has jurisdiction to delay or defer payment of the same, pending EPA action upon the SIP revision. It is concluded that this question must be answered in the negative. Cyanamid insists that the quote from EPA's brief to the Fifth Circuit to the effect that the decision in Duquesne applies only to the collection of a penalty after a polluter's liability is determined, amounts to a representation that EPA may not collect the penalty herein until it acts upon the SIP revision. The quoted statement does not support the interpretation Cyanamid seeks to place upon it[5/] and, even if it did, any such interpretation is negated by the references, on subsequent pages of the brief, to the revised reconciliation and payment provisions added to the regulations (40 CFR Part 66, Subpart F), which are assertedly applicable to Cyanamid.

Under § 307(b) of the Act, challenges to regulations may be heard only in the U.S. Court of Appeals for the District of Columbia and Cyanamid

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4/ The Director's letter to Cyanamid's counsel, dated February 25, 1986, states the total amount of the penalty is $13,378.35. This figure, however, is derived by adding the amount attributable to violations at acrylonitrile tanks ($9,558.95) to the sum for violations at the methanol tank ($3,719.40), which totals $13,278.35.

5/ I have previously ruled that the quoted language stops short of an admission that the penalty herein may not be collected until EPA rules on the SIP revision and that any such admission would be tantamount to a partial invalidation of the regulations promulgated as a result of Duquesne (Order Denying Motion For An Accelerated Decision And Granting Motion For Discovery, November 10, 1986, footnote 1).

has acknowledged in its brief before the Fifth Circuit that it is not challenging the revised regulation (footnote 1, at 38, 39). The regulation is obviously not subject to question in this proceeding. It follows that I am without jurisdiction to grant the relief Cyanamid seeks and that an accelerated decision determining the amount of the penalty may appropriately issue.6/

O R D E R 7/

American Cyanamid Company, having violated an applicable legal requirement, a penalty in the amount of $13,278.35 is assessed against it in accordance with § 120 of the Clean Air Act and 40 CFR Part 66, Subpart F. Payment of the mentioned sum together with the nonpayment penalty specified by 40 CFR § 66.63 shall be made in accordance with § 66.62.

Dated this 14th day of January 1987.

Spencer T. Nissen
Administrative Law Judge

6/ As previously pointed out, it is unlikely that the SIP revision is under active consideration over four years after its submittal and a troubling aspect of this case is the prospect that EPA will negate any possibility of Cyanamid ever recovering the penalty by continuing inaction in that respect (Order Denying Stay at 5).

7/ As specified in Rule 22.20 (40 CFR Part 22), this decision constitutes an initial decision, which unless appealed in accordance with Rule 22.30, or unless the Administrator elects to review the same, sua sponte, as therein provided, will become the final order of the Administrator in accordance with Rule 22.27(c).