UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	:	
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	:	Dkt. No. CAA-R6-P-9-LA-92002
Phibro Energy USA, Inc.	:	Judge Greene
	:	
	:	
Respondent	:	

Clean Air Act, Sections 113(d) and 111, 42 U.S.C. §§ 7413(d) and 7411; 40 C.F.R. § 60.13(c).

Respondent is not liable for failure to conduct performance evaluations of its H_2S continuous emission monitoring systems by the date the continuous emission monitoring systems were installed and operational, inasmuch as the regulation at 40 C.F.R. Part 60 do not require that performance evaluations were to be conducted by that date.

Appearances:

Robert Brager, Esquire, Beveridge & Diamond, 1350 I Street, N.W., Suite 700, Washington, D.C. 20005, and John Manard, Jr., Esquire, Phelps Dunbar, Texaco Center, 400 Poydras Street, New Orleans, LA 70130-3245

Richard Bartley, Esquire, Office of Regional Counsel, Region VI, U.S. Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, TX 75202-2733.

Before: J. F. Greene, Administrative Law Judge

Decided October 5, 1994

ORDER
GRANTING RESPONDENT'S CROSS-MOTION FOR ACCELERATED DECISION ON THE MERITS AND INITIAL DECISION[1]

This matter arises under Section 113(d) of the Clean Air Act (the Act), 42 U.S.C. § 7413(d), Section 111 of the Act, 42 U.S.C. § 7411, and 40 C.F.R. Part 60. The complaint charges that Respondent Phibro Energy USA, Inc. failed to conduct timely performance evaluations as required by 40 C.F.R. § 60.13(c) on continuous emission monitoring systems installed by Respondent on fuel gas combustion devices at its Krotz Springs, Louisiana, petroleum refinery. Complainant contends that the performance evaluations were due by October 2, 1991, the date by which the continuous emission monitoring devices were required to be installed and operational. Complainant proposes a total civil penalty of $34,000.[2]

In its answer to the complaint, Respondent denied that the performance evaluations were not conducted in a timely manner.

The parties were unable to settle, owing to differing views of the applicable regulatory requirements. Complainant moved for accelerated decision on the issue of liability, and to strike certain defenses raised by Respondent in its answer. Shortly thereafter Respondent filed a cross-motion for accelerated decision on the merits. For reasons set forth below, it is held

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[1]40 C.F.R. § 22.20(b) provides that "[i]f an accelerated decision . . . is issued as to all the issues and claims in the proceeding, the decision constitutes an initial decision. . . ."

[2]Complaint at 6 (May 19, 1992).

that the regulations do not require performance evaluations to have been conducted by the date that the equipment became operational.

In a motion for summary determination, the question is whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and is entitled to judgment as to liability as a matter of law. The question is "whether the evidence presents a sufficient disagreement to require submission to [a trier of fact] or whether it is so one-sided that one party must prevail as a matter of law."[3]

Here there is no disagreement as to the facts. Rather, the dispute is over the correct interpretation of the applicable requirements, i.e., whether Respondent was required by EPA's implementing regulations to have performed evaluations of the monitoring systems no later than the same date upon which the equipment was put into operation.

The regulation which governs this matter provides as follows:

> (c) If the owner or operator of an affected facility elects to submit continuous opacity monitoring system (COMS) data for compliance with the opacity standard as provided under § 60.11(e)(5), he shall conduct a performance evaluation of the COMS as specified in Performance Specification 1, appendix B, of this part before the performance test required under § 60.8 is conducted. Otherwise, the owner or operator of an affected facility shall conduct a performance evaluation of COMS or continuous emission monitoring

[3]See Anderson v. Liberty Lobby, 477 U.S. 242, 251-252 (1986).

> system (CEMS) during any performance test required under § 60.8 or within 30 days thereafter in accordance with the applicable performance specification in appendix B of this part, [sic] The owner or operator of an affected facility shall conduct COMS or CEMS performance evaluations at such other times as may be required by the Administrator under section 114 of the Act.[4]

In its motion, Respondent asserts that: (1) neither the Act nor the implementing regulations specify an exact date by which such evaluations were to have been performed; (2) at most 40 C.F.R. § 60.13(c) requires that such an evaluation be conducted within 210 days after "initial start-up" of the "affected facility." Respondent states that the evaluations were in fact conducted within 210 days of initial start-up of the affected facility. Respondent further urges that any award of damages would violate the due process clause of the Fifth Amendment.

This case stems from a letter, dated February 13, 1992, in which EPA requested that Respondent submit information relating to the installation, operation, and certification of continuous emission monitoring systems associated with its fuel gas combustion devices. In its response of March 17, 1992, Respondent informed EPA that two continuous emission monitoring devices had been installed in order to meet the requirement of 40 C.F.R. § 60.105(a)(4) that monitors be installed by October 2, 1991. Respondent included in its response a copy of the performance evaluation for one of its continuous emission monitoring systems. The performance evaluation for its second

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[4]40 C.F.R. § 60.13(c) (emphasis added).

system was received by EPA on April 30, 1992.

As a result of the information received from Respondent, the complaint herein was filed.

The issue for determination is whether 40 C.F.R. § 60.13(a) requires that performance evaluations be conducted no later than the date on which the continuous emission monitoring systems were required to be installed and operational. If it does not, the question becomes whether § 60.13(c) as amplified by other portions of the Part 60 regulations or as interpreted by precedent or EPA policy,[5] so requires.

In Respondent's view,

> 40 C.F.R. § 60.13(c) does not impose any specific deadline for conducting the required performance evaluations. Rather, 40 C.F.R. § 60.13(c) requires that performance evaluations be 'conducted during any performance test required under § 60.8 or within 30 days thereafter in accordance with the applicable performance specification.'[6]

Respondent maintains that in the absence of a clear deadline in the text of 40 C.F.R. § 60.13(c), reference should logically be made to 40 C.F.R. § 60.8 (which is referred to in § 60.13(c)) for the deadline. 40 C.F.R. § 60.8(a) requires that performance tests be conducted "[w]ithin 60 days after achieving the maximum

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[5]Not to be confused with mere statements of EPA officials or positions asserted by counsel, which have not the requisite formality to constitute "policy" that is binding at the trial level.

[6]Memorandum in Support of Phibro Energy USA, Inc.'s Cross-Motion for Accelerated Decision on the Merits [hereinafter Respondent's Memorandum] at 5.

production rate at which the affected facility will be operated, but not later than 180 days after initial start-up."[7] Thus, Respondent asserts, the only requirement to perform a performance evaluation in 40 C.F.R. § 60.13(c) is that such an evaluation be conducted within 210 days after the initial start-up of the affected facility.[8]

Respondent asserts that here, the "initial start-up" was the deadline for installation and operation of the continuous emission monitoring systems, and that the continuous emission monitoring systems were "affected facilities."[9] Respondent conducted the performance evaluation within 210 days of the installation and operation of the continuous emission monitoring systems. Thus, Respondent argues, it fully complied with the deadline of § 60.8, and, consequently, with § 60.13(c).[10]

Complainant maintains that Respondent's reliance upon 40

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[7]40 C.F.R. § 60.8(a).

[8]Respondent's Memorandum at 5-6.

[9]Respondent's Memorandum at 6. Respondent points out that the definition of "affected facility" in 40 C.F.R. § 60.2 is very broad, including "any apparatus to which a standard is applicable." Id. In the instant case, the "apparatus to which the standard is applicable" is the continuous emission monitoring system, and the applicable standard is Performance Specification 7 (PS 7) a performance standard for hydrogen sulfide continuous emission monitoring systems, promulgated on October 2, 1990. See 55 Fed. Reg. 40171 (1990).

[10]See Respondent's Memorandum at 6.

C.F.R. § 60.8 is "totally misplaced."[11] Specifically, Complainant takes the position that only the fuel gas combustion devices (and not the continuous emission monitoring systems) are "affected facilities"[12] and that as a result, the provision of § 60.8 and its 180-day grace period is inapplicable because the "initial start-up" of the fuel gas combustion devices occurred over 10 years ago:

> In Respondent's case, startup of the fourteen (14) affected facilities (FGCDs) occurred between February 1979 and June 1982. Thus, Respondent should have conducted the required performance tests using appropriated test methods in 40 C.F.R. Part 60, Appendix A, during that same time frame.[13]

Respondent counters that if 40 C.F.R. § 60.8 is inapplicable, and the 180-day performance test period is not triggered, then the performance evaluation requirement in § 60.13(c) is also not triggered. For support, Respondent points out that 40 C.F.R. § 60.13(c) requires performance evaluations to be conducted only "during any performance test required under § 60.8 or within 30 days thereafter. . . ."[14] As a result,

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[11]Memorandum in Support of Complainant's Motion for Accelerated Decision on Liability and Motion to Strike Defenses [hereinafter Complainant's Memorandum] at 14.

[12]Response to Respondent's Cross-Motion for Accelerated Decision on the Merits [hereinafter Complainant's Response] at 6-7. Complainant maintains that because 40 C.F.R. § 60.2 includes a separate definition of "monitoring devise," the term "affected facility" cannot include continuous emission monitoring systems. Id.

[13]Complainant's Response at 4 (citations omitted).

[14]40 C.F.R. § 60.13(c).

Respondent argues, "if there has been no initial start-up triggering 40 C.F.R. § 60.8, then by its very terms 40 C.F.R. § 60.13(c) does not require facilities to conduct performance evaluations for continuous emission monitoring systems.[15]

Moreover, Respondent maintains that the plain language of Performance Specification 7 supports its reading of 40 C.F.R. § 60.13(c). Section 1.1.1 states that "[t]his specification is to be used for evaluating the acceptability of [continuous emission monitoring systems] at the time of or soon after installation and whenever specified in an applicable subpart of the regulations." This language, in addition to the other arguments put forth by Respondent, supports its assertion that its interpretation of the regulations was reasonable.

Complainant's argument that "the one year compliance extension, during which the H_2S CEMS were to be installed and certified, includes or incorporates this 'or soon thereafter' language in PS 7" is not persuasive.[16] The undisputed deadline for the installation of the continuous emission monitoring systems was October 2, 1991. The language "or soon after installation" plainly indicates that the regulated community would be afforded a period of time after the installation deadline in which to conduct or complete their performance

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[15]Respondent's Memorandum at 8.

[16]Complainant's Response at 7. See also Complainant's Memorandum at 9-10.

evaluations.

Also unpersuasive is Complainant's argument that the requirement to "operate" the continuous emission monitoring systems by October 2, 1991 "must include the requirement that such operation be conducted in the one manner that will create valid and precise information."[17] If the data were unreliable and inaccurate, Complainant maintains, then the monitoring itself would be a "virtual nullity." However, as Respondent points out, this interpretation:

> not only ignores the real world difficulties inherent during start-up of new technology, it also ignores the Agency's regulations. 40 C.F.R. § 60.13(b) requires that CEMS 'be installed and operational prior to conducting performance tests under 40 C.F.R. § 60.8.' (Emphasis added). As noted above, 40 C.F.R. § 60.8 provides 180 days within which to conduct performance tests, and 40 C.F.R. § 60.13(c) requires that the CEMS performance evaluations at issue here be conducted 'during any performance test required under § 60.8 or within 30 days thereafter.'[18]

These regulations recognize that technological difficulties may be encountered during the start-up of new technology by providing a grace period between the installation and operation of the monitors, and the deadline for performance tests and performance evaluations.

In conclusion, the regulations simply do not say what Complainant contends that they say, although EPA's desire to interpret them in this manner is understandable. Moreover, no

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[17]Complainant's Memorandum at 11.

[18]Respondent's Memorandum at 9.

formal policy statement of which Respondent should have been aware -- such as a preamble in a Federal Register publication of the rules -- has been pointed to as a contrary indication to the language of the rules. Accordingly, the regulations at issue here did not give fair notice of what EPA expected the regulated community to do by way of compliance.

In Gates & Fox Co., Inc. v. OSHRC, 790 F.2d 154, 156 (D.C. Cir. 1986), the District of Columbia Circuit concluded that: "[w]here the imposition of penal sanctions is at issue . . . the due process clause prevents . . . validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires."[19] The court speaks in terms of deference to an agency's interpretation of a regulation, and declines to defer to OSHA's view of the matter. The "deference" standard is an appellate review standard, and is not applicable at the trial level. At the trial level, the question is whether the interpretation contended for by the agency is reasonably supported by the language of the regulations and formal interpretative policy statements by the agency. Such statements do not include mere letters or statements of staff personnel.

The Fifth Circuit has also addressed the issue of fair notice. In reviewing an OSHRC decision, the court stated that:

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[19]Gates & Fox Co., Inc. v. OSHRC, 790 F.2d 154, 156 (D.C. Cir. 1986) (citing Phelps Dodge Corp. v. FMSHRC, 681 F.2d 1189, 1193 (9th Cir. 1982); Kropp Forge Co. v. Secretary of Labor, 657 F.2d 119, 122-24 (7th Cir. 1981); Diebold, Inc. v. Marshall, 585 F.2d 1327, 1335-39 (6th Cir. 1978)).

> An employer . . . is entitled to fair notice in dealing with his government. Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires. . . . If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express. . . .[20]

Where, as here, a penalty is sought for an alleged violation of an at best ambiguous regulation, and the regulation fails to give fair warning of the conduct it requires, a penalty cannot be assessed against Respondent consistent with the due process clause of the Fifth Amendment.

Moreover, Respondent cannot be held liable, as "the due process clause prevents . . . validating the application of [the] regulation. . . ."[21] Stated differently, there is no violation if Respondent did not have fair warning of what the agency intended.[22] In the interest of fairness there can be no other

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[20]Diamond Roofing v. OSHRC, 528 F.2d 645, 649 (5th Cir. 1976) (citations omitted). See also In the Matter of K.O. Manufacturing, Inc., Docket No. EPCRA-VII-89-T-611 at 16 n. 25 (February 28, 1993) (respondent not liable for failure to file a reporting form for 2-Butyoxyethanol, inasmuch as the regulation in question did not give adequate notice that the use of such chemical had to be reported).

[21]Gates & Fox Co., 790 F.2d at 156. A violation found without a monetary penalty is still a significant penalty. Under EPA penalty policies, previous violations are taken into account in proposing penalties in subsequent actions. See, e.g., Clean Air Act Stationary Source Civil Penalty Policy at 17 (October 21, 1991).

[22]See id. An exception is Rollins Environmental Services (NJ) Inc., v. EPA, 937 F.2d 649, 652 n. 2 (D.C. Cir. 1991), where the court found that while no penalty could be imposed due to the ambiguous regulation, liability could be imposed, because

result. In order to continue to enjoy the confidence of the regulated community, the public, and the courts in the conduct of its enforcement activities, the government must "occasionally bear the consequences of unclear wording in the extensive and detailed implementing regulations for its statutory responsibilities. This should be regarded as a small price to pay for the maintenance of credibility and public trust, and for a reputation of fairness in dealing with the regulated community."[23]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is a corporation doing business in the State of Louisiana and is a "person as that term is defined in Section 302(e) of the Act, 42 U.S.C. § 7602(e), and within the meaning of Section 113(d) of the Act, 42 U.S.C. § 7413(d).

2. At all times relevant to the complaint, Respondent has been the "owner" and "operator" of a petroleum refinery known as the Krotz Springs LA Refinery, ("the facility") located at Krotz

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"Rollins did not invoke due process as a ground for avoiding liability. . . . At no point did either of Rollins' briefs mention the due process clause or Gates & Fox or any other comparable decision such as Diamond Roofing. . . ." Id. In the instant case, while Respondent does not expressly invoke due process as a ground for avoiding liability, Respondent "mentions" the due process clause, and cites Gates & Fox, and Diamond Roofing. In any case, the violation in Diamond Roofing was overturned even though there was no mention of the due process clause. Diamond Roofing, 528 F.2d at 649.

[23]In the Matter of K.O. Manufacturing, Inc., Docket No. EPCRA-VII-89-T-611 at 17 (February 28, 1993)(Greene, J.).

Springs, Louisiana, within the meaning of Section 113 of the Act, 42 U.S.C. § 7413, and 40 C.F.R. Part 60.

3. The facility is a "stationary source" as that term is defined at Section 302(z) of the Act, 42 U.S.C. § 7602(z).

4. The facility is a "petroleum refinery" as that term is defined in 40 C.F.R. § 60.101(a).

5. Respondent's continuous emission monitoring systems were due to be installed and operational by October 2, 1991.

6. Respondent's continuous emission monitoring systems were installed and operational by September, 1991.

7. Respondent did not conduct a performance evaluation of the continuous emission monitoring systems by October 2, 1991 (the date by which the continuous emission monitoring systems were required to be installed and operational).

8. 40 C.F.R. § 60.13(c) failed to give fair notice that performance evaluations were due by the date the continuous emission monitoring systems were required to be installed and operational.

9. Where, as here, the assessment of a civil penalty is involved, a regulation must give fair notice of the conduct it requires.

10. There can be no liability where, as here, Respondent's actions were reasonable, in view of the language of the regulations, and where Respondent did not have fair notice of the conduct which EPA believed was required by the regulations.

ORDER

Accordingly, Respondent's Motion for Accelerated Decision on the Merits is hereby granted. And it is FURTHER ORDERED that Complainant's Motion for Accelerated Decision on Liability be, and it is hereby, denied.

And it is FURTHER ORDERED that this matter be, and it is hereby, dismissed.[24]

J.F. Greene
Administrative Law Judge

Washington, D.C.
October 5, 1994

[24] Any petition for reconsideration shall be filed no later than fifteen (21) days from the date of service of this Order.