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8/22/88

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
UNIVERSAL CIRCUITS, INC.,	)	Docket No. CWA-IV-88-001
	)	
Respondent	)	

ORDER

On February 4, 1988,[1/] the United States Environmental Protection Agency, Region IV (sometimes EPA or complainant) issued a complaint against respondent pursuant to Section 309(g) of the Federal Water Pollution Control Act, as amended (sometimes Clean Water Act or CWA), 33 U.S.C. § 1319(g). Respondent was charged with violating Sections 307 and 308 of the CWA by failing to comply with the General Pretreatment and the Electroplating Point Source Category Regulations set forth in 40 C.F.R. Parts 403 and 413. Specifically, respondent has allegedly: (1) failed to submit periodic reports under 40 C.F.R. § 403.12(e) from June 1984 to the date of the complaint's issuance, and (2) failed to comply with certain effluent limitations as required at 40 C.F.R. §§ 413.01 and

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[1/] Unless otherwise indicated, all dates hereinafter are for the year 1988.

413.84 at times from August 1985 and continuing to December 1987. EPA proposed to assess a penalty in the amount of $100,000.

Respondent served an answer, affirmative defenses, and request for hearing on February 23. On July 8 respondent also served a motion to dismiss with supporting brief (motion). Complainant submitted its answer to the motion, with supporting memorandum, on July 29.[2/]

The respective arguments of the parties are well-known and they will not be repeated here except to the extent deemed necessary by this order. Respondent argues essentially that complainant applied improperly administrative civil penalties created by the CWA[3/] to alleged violations occurring prior to February 4, 1987, the statute's effective date. Respondent claims that such action constitutes an improper retroactive application of the law. To support this, respondent maintains generally that Congress did not intend specifically that the new administrative penalties be applied retroactively, that the administrative penalty provision changed substantively

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2/In accordance with the order dated July 27, 1988, complainant also served a motion for accelerated decision with accompanying affidavits and documents. The issues raised in the motion for accelerated decision shall be addressed in a later order.

3/P.L. 100-4, Title III, Section 314(a), enacted February 4, 1987. CWA Section 309(g).

prior law, and that such penalties were designed to achieve punitive rather than procedural or remedial results.

Complainant responds that the 1987 amendments to the CWA did not change the nature of violations of the general and categorical pretreatment standards, and that the mechanism provided by Section 309(g) (hereinafter Section) merely constitutes a procedural change which can be applied retroactively. Complainant also asserts that inclusion of the pre-February 4, 1987 violations in the administrative penalty assessment would neither alter any matured or unconditional rights of respondent nor impose any unforeseen obligations on respondent for the reason that the law concerning Pretreatment and Electroplaters existed prior to February 4, 1987 and respondent was well aware of same.

Stated broadly, statutes are construed to operate prospectively unless the legislative intent that they be given retrospective or retroactive operation clearly appears from the expressed language of the acts, or by necessary or unavoidable implication.4/ As respondent observes, the language of the Section does not explicitly refer to either an effective date or the extent, if any, of this provision's retroactivity.

4/82 C.J.S. Statutes §§ 414 (1969). Union Pacific Railroad Company v. Laramie Stock Yards Company, 231 U.S. 190 (1913); Greene v. United States, 376 U.S. 149 (1964); Jackson v. People's Republic of China, 794 F.2d 1490 (11th Cir. 1986).

However, an examination of the legislative history of the CWA finds support for retroactive application. The Senate's Committee on Environment and Public Works stated:

> The Administrator is not expected to use this new [administrative civil penalty] authority for cases that would otherwise have been tried in court. Three provisions, in particular, reflect the Committee's intent on this score. First, this new authority is designed to address past, rather than continuing, violations of the Act." (Emphasis added).5/

Further, a fundamental strand running through the decisions cited by respondent for prospective application is that the relevant actions, conduct, or transactions preceded newly introduced original, substantive legislation.6/

5/S. Rep. No. 99-50, 99th Cong., 1st Sess. 26 (1985).

6/See, e.g., Union Pacific Railroad Company v. Laramie Stock Yards Company, supra note 4, (Defendant and its immediate grantors allegedly satisfied requirements for adverse possession prior to statute passed by Congress on June 24, 1912); Greene v. United States, supra note 4, (Government employee's right to restitution had "matured" under a 1955 regulation and such right could not be defeated by a subsequent regulation); Fordham v. Belcher Towing Company, 710 F.2d 709 (11th Cir. 1983) (Statute limiting period for commencing personal injury suits with respect to maritime torts did not bar claims which had accrued before statute was enacted); Jackson v. People's Republic of China, supra note 4, (Foreign Sovereign Immunities Act of 1976 not applied retroactively with respect to actions by the Chinese government relating to bonds issued by the Chinese government in 1911); Griffon v. United States Department of Health and Human Services, 802 F.2d 146 (5th Cir. 1986) (Civil Monetary Penalties Law could not be applied retroactively to acts of medicaid fraud committed before Act's effective date).

In contrast to those decisons, the CWA, as it is generally construed today, was established in 1972 by P.L. 92-500 and can trace its roots back to 1948. Respondent's alleged violations took place during the period June 1984 to the date of the administrative complaint's issuance.

Like the petitioner in Griffon, respondent argues erroneously that retroactive application of a statute, the Section, defeats substantive rights because it creates liability where none existed before. The Fifth Circuit's response is appropriate here as well:

> The alleged difficulty with petitioner's argument is that the basis for petitioner's liability and the burdens of proof in this case existed prior to the passage of the CMPL, so that the petitioner was on notice that his acts were unlawful at the time he committed them. Application of the CMPL under these circumstances can produce no manifest unfairness because advance notice of the applied provisions would not have changed Griffon's conduct nor substantive rights.7/

Statutory changes that are procedural or remedial in nature generally apply retroactively.8/ Remedial statutes are those

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7/Griffon, supra, at 153-154 n. 14.

8/United States v. Vanella, 619 F.2d 384 (5th Cir. 1980); United States v. Blue Sea Line, 553 F.2d 445 (5th Cir. 1977). Sutherland, Stat. Const. §§ 41.04, 41.09 (4th Edition 1986); 82 C.J.S. Statutes §§ 416, 421 (1969).

which provide a remedy, or improve or facilitate remedies already existing for the enforcement of rights and the redress of injuries.9/ Thus, the term "remedial" is usually used in the context of either legislation which is not penal10/ or criminal in nature, or legislation which is procedural in nature; that is, does not affect substantive rights. Further, the inclusion of a penalty provision, without more, does not by a flash of legal legerdemain make a statute penal in nature.

Respondent maintains that retroactive application of the Section is not warranted in the instant case because what may be construed as a procedural change has been accompanied by such substantive changes as a new adjudicative forum, burden of proof, standard of evidence, and source of liability. This thesis is not persuasive. Statutory changes have been held to be procedural and remedial in nature where the congressional purpose is "shoring up the enforcement mechanisms" of the relevant statute,11/ or the forum is completely shifted

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9/2 Sutherland, supra at § 60.02.

10/Where the primary purpose of a statute is expressly enforceable by fine, imprisonment, or similar punishment the statute is always construed as penal. The prime object of every law that is strictly penal is to enforce obedience to the law's mandates by punishing those who disregard them. Id. at §§ 59.01.

11/Griffon v. United States Department of Health and Human Services, supra note 6, at 151; United States v. Blue Sea Line, supra note 8.

for adjudicating a particular type of claim.[12] The legislative history of the Section[13] details the enforcement role envisioned for administrative civil penalties under the Clean Water Act:

> This authority to issue administrative penalty orders is intended to complement and not to replace a vigorous civil judicial enforcement program. Civil judicial enforcement is a keystone of successful enforcement of the Act and necessary for cases involving novel issues of law or contested penalty assessments, cases requiring injunctive relief, serious violations of the Act, or large penalty actions, and cases where remedies are sought requiring significant construction or capital investment. The addition of this enforcement tool is based in part on the Agency's assurance that it does not intend to retreat from vigorous judicial enforcement of Clean Water Act violations.
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> The addition of administrative civil penalties should, therefore, increase the total number of enforcement actions without any corresponding decline in the number

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12/ Hallowell v. Commons, 239 U.S. 506 (1916); United States v. Blue Sea Line, supra note 8; Bell v. New Jersey, 461 U.S. 773 (1983).

13/ H.R. Rep. No. 99-189, 99th Cong., 1st Sess. (1985) at 31; H.R. Rep. No. 99-1004, 99th Cong., 2d Sess. at 138 (1986).

> of judicial enforcement actions taken by the Administrator. The Administrator is not expected to use this new authority for cases that would otherwise have been tried in court.
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> Administrative penalties could provide greater deterrent value than an administrative order for a violation that does not warrant the more resource intensive aspects of judicial enforcement. Many Clean Water Act violations are straightforward, self-reported and likely uncontested by the violator. The administrative penalty authority is expected to be exercised where violations are clearly documented and easily corrected and will likely be uncontested by the violator.
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> To serve its intended function, this administrative enforcement tool should be tailored to the less complex cases for which it is intended. Administrative enforcement should be as flexible and unencumbered by procedural complexities as possible, consistent with due process considerations while providing for effective input by citizens who may be affected by the violations. Administrative cases should be resolved promptly.[14]/

The fact that respondent is a party to an administrative, rather than a federal district court, proceeding does not bar retroactive application of the Section. For similar reasons,

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[14]/ Supra note 5, at 26-27.

ancillary features of an administrative civil penalty proceeding shall not preclude its retroactive operation with regard to such matters as the government's reduced burden of proof or new standards of evidence.15/ Nor do the size of the administrative civil penalties imposed by the Section condemn the statute's retrospective application. Respondent relies mistakenly upon United States v. Bekhrad 16/ to argue that a change in the size of applicable penalties must be given prospective operation. In Bekhrad, retroactive application was denied to an otherwise procedural remedy because the amendment created a new liability in connection with a past transaction,17/ unlike the situation here.

Respondent claims that the Section authorizes the imposition of penalties which had not been previously available, specifically Section 309(g)(1)(B). However, violations of any condition or limitation in a permit issued under Section 404 of CWA are already subject to civil and criminal sanctions pursuant to Sections 309(a), 309(c), and 309(d) of the CWA.

15/United States v. Blue Sea Line, supra note 8.

16/672 F. Supp. 1529 (S.D. Iowa 1987).

17/The Civil Fraud Claims Act incorporates by reference a criminal statute. Moreover, the legislative history suggests that the amendment was intended to be applied only prospectively.

IT IS ORDERED that respondent's motion to dismiss be DENIED.

Frank W. Vanderheyden
Administrative Law Judge

Dated: August 22, 1988

IN THE MATTER OF UNIVERSAL CIRCUITS, INC., Respondent,
Docket No. CWA-IV-88-001

Certificate of Service

I certify that the foregoing Order dated August 22, 1988 was sent this day in the following manner to the below addressees:

Original by Regular Mail to:

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Regional Hearing Clerk
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Copy by Regular Mail to:

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Doris M. Thompson
Secretary

Dated: August 22, 1988