UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

Grassland Dairy Products, Inc.:
Greenwood, Wisconsin

Docket No. CWA-A-O-016-94
Judge Greene

Respondent

ORDER
DENYING RESPONDENT'S MOTION
FOR SUMMARY JUDGMENT

This matter arises under Section 309(g) of the "Clean Water" Act, 33 U.S.C. § 1319(g). The complaint charges Respondent herein with violations of National Pollutant Discharge Elimination System (NPDES) permit issued to it in 1983 (amended in 1987) [1] pursuant to Section 402 of the Act, 33

U.S.C. § 1342. Respondent moved for summary judgment on the grounds, inter alia, that a Wisconsin court's dismissal of an action brought by the State of Wisconsin pursuant to the state's Pollution Discharge Elimination Law, and based upon the same or similar claims as is the matter here, bars this federal Clean Water Act proceeding on its merits under the doctrine of res judicata. [2] The state matter was dismissed because the complaint had not been filed within the particular thirty-day period following the Wisconsin Department of Natural Resources' request for enforcement, as providdd by the Pollution Discharge Elimination Law. [3] , [4]

In general, whether or not a state court judgment has a preclusive effect upon a subsequent federal action is governed by 28 U.S.C. § 1738, sometimes referred to as the "Full Faith and Credit Act," which provides that:

> [t]he records and judicial proceedings of any court [of] any State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of [the] State . . . from which they are taken. [5]

The United States Supreme Court, in interpreting this language, has ruled that a federal court must give any prior state court judgment the same preclusive

effect as that judgment would have in the state in which it was issued in cases where the subsequent federal action has been instituted pursuant to a statute which confers exclusive jurisdiction upon federal courts. Matsushita Electric Industrial Co. v. Elpstein, 516 U.S.__ 134 L. Ed. 2d 6, 17 (1996); Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985). In such cases, 28 U.S.C. § 1738 requires that a federal court look first to the appropriate state preclusion law to determine the effect of a state court judgment upon a federal proceeding. [6] Only when state law indicates that a particular claim or issue would be barred will it be necessary to determine whether an exception to 28 U.S.C. § 1738 was created in the federal legislation in question. The same issues cannot be relitigated unless the federal court finds that an exception or an implied exception to (or "implied repeal," [8] of) § 1738 has been created. The same claim may be brought if the relevant federal statute creates an expressed or implied exception. Matshushita, 134 L. Ed. 2d 6 at 18; Marrese, 470 U.S. at 381, 386, citing Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982). The primary consideration in determining whether an exception has been created must be the intent of Congress. [9]

Were it not abundantly clear that exceptions to the Full Faith and Credit Act were created with the passage of the Clean Water Act, it would be appropriate at this point to determine whether the dismissal based upon the state Pollution Discharge Elimination Law's thirty-day limitation bars a similar federal government action on its merits under the Clean Water Act, which confers concurrent enforcement authority upon the EPA Administrator and to which 28 U.S.C. § 2462 presumably applies. [10] Accordingly, it is deemed unnecessary to inquire first into the details of Wisconsin preclusion law as they relate to dismissals based upon a period of limitations and other "procedural devices", Reinke v. Boden, 45 F. 3d 166, 170 (7th Cir. 1995). [11]

Creation of Exception to 28 U.S.C. § 1738.

The Supreme Court in Matsushita remarked that:

As an historical matter we have seldom, if ever, held that a federal statute impliedly repealed § 1738..... The rarity with which we have discovered implied repeals is due to the relatively stringent standard for such findings, namely that there by an "'irreconcilable conflict'" between the two federal statutes at issue". [12]

Section 402 of the Clean Water Act creates just such an "irreconcilable conflict" with 28 U.S.C. § 1738. The Act does not specifically state that an

exception to or repeal of 28 U.S.C. § 1738 was created. However, the language of § 402(i) of the Act [33 U.S.C. § 1342] goes as close to a specifically expressed exception as it is possible to go without using the precise words "an exception to 28 U.S.C. § 1738 is being created for this purpose." In connection with provisions which set forth procedures by which approval may be gained from EPA for state governments to operate and enforce their own water pollution control acts, § 402 states at subsection (i), *Federal Enforcement Not Limited,* that "nothing in this section shall be construed to limit the authority of the [EPA] Administrator to take action pursuant to section 1319 [§ 309*, Enforcement*, of the Act] of this title. [13]" Such a provision is strikingly at odds, i. e. irreconcilably in conflict, with the notion that the failure of a state justice department to file a complaint within thirty days of receipt of a request from the state department of natural resources bars federal action on the merits based upon the same or similar facts.

In addition, statements that appear in the Clean Water Act's legislative history create a strongly implied exception and further underline the irreconcilability of § 402 of the act with 28 U.S.C. § 1738. This history reveals a clear intent not only that the federal government shall not be precluded from enforcing the Act when the state in question has been insufficiently prompt in enforcing its own water pollution statutes pursuant to approval from the federal government -- the very situation here -- but that the EPA Administrator should be vigilant in doing so. The Senate Report which accompanies the Act states inter alia that:

The [Senate Public Works] Committee does not intend this jurisdiction of the Federal government to supplant state enforcement. Rather the *Committee intends that the enforcement power of the Federal government be available in cases where States and other appropriate enforcement agencies are not acting expeditiously and vigorously to enforce control requirements.* Under the Refuse Act [of 1899] *the Federal government is not constrained in any way from acting against violators.* The Committee continues that authority in this Act. [14] , [15]

The Senate Committee made clear throughout the report that, based upon "record documentation of the poor enforcement performance under the 1965 Act," not only were there "weaknesses in the procedures established on enforcement, but more importantly, there were weaknesses in the overall design of enforceable requirements." [16] The intent to strengthen enforcement in order to attain the

goal of eliminating the discharge of pollutants by 1985, and to restore "the natural chemical, physical, and biological integrity of the Nation's waters," is expressly stated. [17] The Committee's intention that "the enforcement power of the Federal government be available in cases where States and other appropriate enforcement agencies are not acting expeditiously and vigorously to enforce control requirements" is expressly set forth. Id. These expressions are more than sufficient to create an exception to 28 U.S.C. § 1738, even apart from the nearly identical exception created by § 402 of the Act. In setting parameters of the states' authority, in authorizing the Administrator to oversee the states' implementation of the program, and in authorizing significantly enhanced penalties against water polluters in order to encourage compliance with the Act, Congress plainly did not intend those penalties and related encouraging effects to be, in effect, annulled by those same inadequate (here, untimely) enforcement and other problems of which it had just specifically complained in the report accompanying the proposed new Act. See United States v. SCM Corporation, 615 F. Supp. 411, 419 (D. Md. 1985). Recognizing this, the majority of cases have held, on the question of whether state court decisions on the Clean Water Act preclude federal court litigation, that "the Administrator of the Environmental Protection Agency is the chief enforcer of the nation's clean water laws and . . . Federal courts should not abrogate their responsibility to accept jurisdiction, state court proceedings notwithstand- ing." United States v. Rayle Coal Co., 129 F.R.D. 135, 136 (N.D.W.Va. 1989); [18] see also City of Park

Rapids, Docket No. CWA-AO-V-004-92 (April 19, 1994) at 10.

Accordingly, it is found, and held, that (1) exceptions to 28 U.S.C. § 1738 were created by the Clean Water Act and its unmistakably clear legislative history; that these exceptions were intended and expressly viewed as necessary in order to deal with what were perceived to be the significant inadequacies of clean water legislation and enforcement in their then-current forms; and that the exceptions created are consistent both with the dictates of the Act and with the strong expressions of the Senate Committee's intent; (2) this federal proceeding is not barred by the earlier state court dismissal of an action based upon the same or similar facts, for failure to file within the statutory period; (3) the state court action did not constitute a determination on the merits.

Respondent's motion must be denied.

ORDER

1. It is ORDERED that Respondent's motion for summary judgment shall be, and it is hereby, denied.

2. And it is FURTHER ORDERED that the parties shall resume their effort to settle this matter, and shall report again upon status during the week ending May 23, 1997.

J.F. Greene

Administrative Law Judge

April 30, 1997

Washington, D. C.

[1] Complaint at 3.

[2] *Res judicata* is usually offered as an affirmative defense; a dispositive motion based upon *res judicata* would ordinarily be treated as a motion to dismiss.

[3] § 147.29, *Enforcement,* of the Wisconsin Pollution Discharge Elimination Law, Wisconsin Statutes Annotated, Chapter 147, provides at subsection (1) that "whenever on the basis of any information available to it the department [Department of Natural Resources] finds that any person is violating this chapter, any rule adopted thereunder or any term or condition of any permit issued pursuant to this chapter, the department ***shall refer the matter to the department of justice for enforcement..."*** Subsection (2) provides that the department of justice ***"shall initiate the legal action requested by the department*** [of Natural Resources]***...within 30 days of receipt of the written request."*** [Emphasis supplied]

[4] Complainant's Memorandum in Opposition to Respondent's Motion for Summary Judgment, at 3; Complainant's Supplemental Memorandum in Opposition to Respondent's Motion for Summary Judgment, August 25, 1995, at 1-3.

[5] This administrative action may be thought by some not to have been brought in a "court within the United States," 28 U.S. C. § 1738. There is no need to consider this, in view of the conclusions reached. However, the reasoning behind the "full faith and credit" statute pertains equally to federal

administrative judicial actions for civil sanctions as to actions in federal district court. Moreover, the holding of 3M v. Browner, 17 Fed. 3d 1453 (D. C. Cir. 1994) which involved 28 U.S.C. § 2462, makes clear that the fact that the "full faith and credit" Act is a part of Title 28, *Judicial Administration,* of the United States Code is not inconsistent with its application to federal administrative judicial proceedings.

[6] Marrese at 383-386.

[7] **Marrese,** at 386.

[8] Matsushita, at 134 L. Ed. 2nd, 21.

[9] · Marrese at 386, citing Kremer at 470-476.

[10] See 3M Co. (Minnesota Min. and Mfg.) v. Browner, 17 F. 3d 1453 (D. C. Cir., 1994). It is noted that the complaint herein was filed on September 2, 1994; the pleadings indicate that most, if not all, of the alleged violations took place within the five year period preceding the filing of the complaint.

[11] The parties briefed the issue of whether Wisconsin law would preclude an action in a Wisconsin court when a state court has dismissed an action for failure to file within a given period. Because it has been determined that exceptions to 28 U.S.C. § 1738 were created by the Act, a determination as to any preclusive effect of Wisconsin procedural law upon the merits of a subsequent state action need not be made.

[12] At 134 L. Ed 2nd 6, 21.

[13] "Nothing" presumably includes a state's effort to limit the period within which state enforcement proceedings must be initiated to a period of thirty days after the formal recommendation of enforcement. While there is no limitation period in the Clean Water Act, it is assumed, based upon 3M Co. v. Browner, supra n. 10, that the five year period set forth in the "general" statute of limitations at 28 U.S.C. § 2462 applies to this action.

[14] Emphasis supplied.

[15] S. Rep. No. 414, 92d Cong., 2d Sess. (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3730.

[16] Id. at 3729.

[17] Id. at 3678.

[18] The cases cited in Rayle for this proposition do not involve state determinations based upon limitations periods.

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order, was filed with the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on April 30, 1997.

Shirley Smith

Legal Staff Assistant

For Judge J.F. Greene

NAME OF RESPONDENT: Grassland Dairy Products, Inc.

DOCKET NUMBER: CWA-A-O-016-94

Sonja Brooks

Regional Hearing Clerk

Region V - EPA

77 West Jackson Blvd

Chicago, IL 60604-3590

Timothy J. Chapman, Esq.

Office of Regional Counsel (C-29A)

Region V - EPA

77 West Jackson Blvd

Chicago, IL 60604-3590

Philip A. Munroe, Esq.

Di Renzo and Bomier

231 E. Wisconsin Avenue

P. O. Box 788

Neenah, Wisconsin 54957-0788