8/23/96

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Standard Materials, Inc.	)	[CWA] Docket No. VI-92-1603
	)	
Respondent	)	

ORDERS

The Region 6 office of the United States Environmental Protection Agency (the "Complainant", "EPA," or the "Region") served the Complaint in this matter on January 29, 1992 on the Respondent, Standard Materials, Inc.. of Slidell, Louisiana. The Complaint alleges that Respondent violated Section 301 of the Clean Water Act, ("CWA"), 33 U.S.C. §1311, by discharging washout water into a navigable water of the United States, without a permit or meaningful treatment for the five years preceding the Complaint, from Respondent's concrete facility in Slidell, Louisiana. The Complaint seeks the assessment of a civil penalty of $125,000, the maximum for an administrative class II civil penalty pursuant to the CWA §309(g)(2)(A), 33 U.S.C. §1319(g)(2)(A).

Respondent initially filed two Answers *pro se*, by its President, V.J. Scogin, Sr., addressed to the Regional Hearing Clerk on February 13, 1992. The Answers were both handwritten on small pieces of stenographer's paper. One stated that Respondent "requests a fair hearing of the proposed civil penalty assessment." Neither Answer addressed the particulars of the allegations of the Complaint.

Complainant, unaware of the filing of Respondent's Answers, filed a motion for a default judgment on August 17, 1994. Respondent responded with copies of the prior handwritten Answers. The Answers were then found in the Region's files. Complainant then, on August 29, 1994, withdrew its motion for a default order.

On June 23, 1995 the Region filed a Motion to Deem Allegations Admitted and for Accelerated Decision. The Respondent, by then represented by counsel, filed a "reply" to the motion on July 27, 1995. Pursuant to order of the former Administrative Law Judge ("ALJ") in this proceeding, the parties each submitted additional responses. The pleading cycle ended with the filing of Complainant's "sur-reply" on October 6, 1995. The undersigned was redesignated the presiding ALJ in this proceeding on March 6, 1996.

Rulings on Complainant's Motions

As indicated in its title, the Region's motion seeks an accelerated decision on Respondent's liability on two grounds. The

first is based on Respondent's failure to deny the allegations of the Complaint in its Answers. The second is based on a showing that there is no genuine issue of material fact concerning Respondent's liability. These rulings find that either ground will suffice to grant an accelerated decision finding Respondent liable for the alleged violations, with one possible limitation on the period of the alleged violations. The motion and this decision do not address the appropriate amount of the civil penalty. A hearing will be scheduled on that issue.

- Motion to Deem Allegations Admitted

The EPA Rules of Practice, 40 CFR §22.15(b), set forth the requirements for an answer to an administrative complaint. "The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge." 40 CFR §22.15(d) then provides that "[f]ailure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation."

The only Answers filed by Respondent in this proceeding completely failed to admit, deny or explain the material allegations of the Complaint. The Complaint alleged that Respondent was a "person" within the meaning of the CWA; operates a facility in Slidell, Louisiana; and discharged pollutants without a permit into a drainage ditch, thence to Bayou Bonfouca, a navigable water of the United States, during a five-year period. Respondent's Answer left these allegations wholly unchallenged. Respondent only stated it desired a hearing on the civil penalty assessment. Thus, pursuant to 40 CFR §22.15(d), Respondent has admitted these allegations.

In its replies, Respondent asserts that it "intended" to place liability at issue in its Answers. Respondent submitted an affedavit by Mr. Scogin to that effect, with its response to Complainant's motion. While ordinarily some leeway in this regard might be granted a respondent who appears *pro se*, Respondent here has now been represented by counsel for over a year and has never moved to amend its Answer. The reason for this may be surmised from Respondent's replies in opposition to the instant motion. As discussed below, none of Respondent's claims amounts to a denial of any of the material allegations of the Complaint.

Respondent also attempts to make much of the "delay" of two years between the filing of the original Complaint and the filing of the default motion, followed by the withdrawal of the default motion and the filing of this motion almost another year later. However, Complainant has set forth a detailed chronology of its actions and contacts with Respondent, which also involve other litigation between EPA and Respondent relating to the Slidell facility (Complainant's Response, ¶18). This chronology

sufficiently explains the reasons for the delay, and demonstrates that the Region has proceeded to conclude this matter within a reasonable time, as required by the Administrative Procedure Act, 5 U.S.C. §555(b). The delay was justified, and Respondent has shown no prejudice. Complainant did not mislead Respondent in any way with regard to its position that the Answers failed to deny Respondent's liability (Withdrawal of Motion for Default Order, Attachment F to Complainant's Motion, ¶¶3-4).

For these reasons, Complainant's motion to deem allegations admitted is granted. This establishes Respondent's liability for the discharge of pollutants into the navigable waters of the United States, in violation of the CWA §301, 33 U.S.C. §1311.

- Motion for Acclerated Decision on Liability

The EPA Rules of Practice, 40 CFR §22.20(a) grant the ALJ the authority to issue an accelerated decision on all or part of a proceeding, without further hearing, "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." The motion for accelerated decision is analogous to the motion for summary judgment under Section 56 of the Federal Rules of Civil Procedure. In re CWM Chemical Services, Inc., TSCA Appeal 93-1 (EAB, Order on Interlocutory Appeal, May 15, 1995). Once a moving party has properly supported its motion for summary judgment, the burden shifts to the non-moving party, who may not rest on mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). In examining the record, any reasonable inferences must be construed in the light most favorable to the non-moving party. Cone v. Longmont United Hospital Assoc., 14 F.3d 526, 528 (10th Cir. 1994).

The facts establishing Respondent's liability are fully supported by the attachments to Complainant's motion. Respondent had a National Pollutant Discharge Elimination System ("NPDES") permit in effect for its facility from January 22, 1977 until it expired on January 22, 1982 (Attachment G). Respondent did not reapply for a renewed NPDES permit until April 16, 1991 (Attachment H). The EPA issued Respondent a renewed permit effective November 16, 1991 (Attachment I). Thus, Respondent did not have a permit in effect from January 1982 to November 1991. The allegations of the Complaint cover the last five years of that period, until the November 1991 effective date of the renewed permit.[1]

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[1] Presumably, the Complaint limits the period of the alleged violations to the five years preceding its filing in order to conform to the five-year statute of limitations applicable to administrative civil penalty proceedings. 28 U.S.C. §2462, 3M Company v. Browner, 17 F.3d 1453, 1457 (D.C. Cir. 1994). The actual period of alleged violations is therefore from January 29,

Respondent discharged pollutants without a permit during the period alleged, as shown by a series of monitoring reports and orders issued by the Louisiana Department of Environmental Quality ("LDEQ") (Attachments K, L, M, N, O, P, and Q). The Respondent was reminded on several occasions to cease discharging pollutants without a permit (Attachments M, P). In response to a Compliance Order issued by the LDEQ (Attachment N), the Respondent did obtain a Louisiana Water Discharge Permit System permit ("LWDS"), effective March 30, 1989 (Attachment Q, ¶1). The LDEQ repeatedly found Respondent exceeding its LWDS permit limits and conditions (Attachments 0, P, and Q) with respect to flow, turbidity, pH, using unauthorized outfalls, and bypassing settling ponds.

These attachments indicate Respondent "discharged" truck washout wastewater, an industrial waste or "pollutant" within the meaning of the Clean Water Act, §502(6,12). Respondent's discharges were subject to limits for total suspended solids (turbidity), oil and grease, and pH (acidity) (Attachments G, H, I and S). Respondent's application for its renewed NPDES permit states it discharges up to 999 gallons of truck wash wastewater per day. This discharge was both directly and indirectly into the receiving water Bayou Bonfouca (Attachments G, H, and I), a navigable water of the United States. The LDEQ reports are replete with descriptions of examples of the Respondent's unpermitted discharge of pollutants into Bayou Bonfouca (Attachments K through Q).

With one possible partial exception, Respondent's assertions and affidavits do not raise any genuine issue of fact or law, or lead to any inference, that could preclude an accelerated decision on liability. Respondent claims that any discharge was into an unnamed canal that was blocked off from Bayou Bonfouca. This is no defense. Complainant established that that canal itself is a "water of the United States" within the meaning of the CWA (Attachment I) and that any such blockage occurred in 1993 after the violations alleged in the Complaint. Similarly, no relevant connection is established with respect to cleanup operations on an adjacent property owned by American Creosote, since those operations took place after the violations alleged in the Complaint (Complainant's Sur-reply, ¶6). Intimations that Respondent's discharges did not cause any increase in pollution in the Bayou do not create a defense to discharging pollutnats without a permit. Such considerations may, however, be relevant in determining the appropriate amount of the civil penalty under the factors listed in CWA §309(g)(3), 33 U.S.C. §1319(g)(3).

The only possible issue concerning Respondent's liability relates to the effect of the LWDS permit held by Respondent effective on March 30, 1989 (See Attachment Q, ¶I). Neither party

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1987 until the effective date of Respondent's renewed NPDES permit, November 16, 1991.

addressed this matter directly in their submittals. It can be inferred from the LDEQ reports that Respondent did need a NPDES permit in addition to the LWDS permit in order to allow fully permitted discharges (See Attachment P). However there is nothing explicit in the record concerning the delegation of permitting authority under the CWA by EPA to the State of Louisiana, or the relationship or any overlap between the State and federal permits. Even if not a defense to Respondent's liability, the fact that Respondent held a LWDS permit for part of the period of the alleged violations could be relevant to the civil penalty factors. The effect of the Louisiana permit is a legal issue that is amenable to resolution before the hearing. The parties will be directed to address it with their prehearing exchanges as detailed below.

For the above reasons, Complainant's motion for accelerated decision is granted with respect to Respondent's liability, at least from January 29, 1987 until March 30, 1989. During that period, Respondent discharged pollutants to waters of the United States without a NPDES permit, in violation of the CWA §301, 33 U.S.C. §1311. Subject to a determination of the legal effect of Respondent's LWDS permit from March 30, 1989 until November 16, 1991, Respondent may also be found liable for the alleged violations during that period.

Order

1. Complainant's motion to deem the allegations of the Complaint admitted, for failure of Respondent to comply with 40 CFR §22.15(b,d), is granted.

2. Complainant's motion for an accelerated decision, pursuant to 40 CFR §22.20(a), is granted on the issue of Respondent's liability.

3. The two above orders are subject to a possible limitation of the period of the alleged violations, that will depend on the resolution of the issue concerning the effect of Respondent's Louisiana Water Discharge System permit, held during part of the period of the alleged violations.

Further Proceedings - Prehearing Exchanges

A hearing will be scheduled on the issue of the appropriate amount of the civil penalty to be assessed against Respondent, in accord with the factors listed in CWA §309(g)(3), 33 U.S.C. §1319(g)(3).

The schedule can now be set for the filing of prehearing exchanges, directed towards the civil penalty issue, under 40 CFR §22.19 in accord with the following procedure:

1. Each party shall submit a list of all expert and other

witnesses it intends to call with a brief narrative summary of their expected testimony; and copies of all documents and exhibits it intends to introduce into evidence. The exhibits should include a c.v. or resume for each proposed expert witness.

2. The Complainant shall submit a statement explaining in detail how the proposed penalty amount was determined, including a description of how the specific provisions of any EPA penalty or enforcement policies or guidelines were applied in calculating the penalty.

3. If the Respondent intends to take the position that it is unable to pay the proposed penalty, or that payment will have an adverse effect on Respondent's ability to continue in business, Respondent shall furnish supporting documentation such as financial statements or tax returns.

4. Complainant is directed to submit a short statement on the issue of the legal effect of Respondent's LWDS permit held during part of the period of the alleged violations, along with any appropriate motion, with its initial prehearing exchange. Respondent may file a reply to that statement and/or motion with its initial prehearing exchange.

5. Each party shall submit its views on the place for the hearing pursuant to §§22.21(d) and 22.19(d) of the Rules. Each party may also indicate when they would be available for the hearing, and give an estimate of the time needed to present its direct case.

The Complainant must make its initial prehearing exchange by October 4, 1996. The Respondent must make its initial prehearing exchange by October 24, 1996. If Respondent does not intend to present a direct case, but does wish to cross-examine Complainant's witnesses, it must submit a statment to that effect instead of a prehearing exchange. After the initial exchanges, the parties may file supplements to their prehearing exchanges (including any reply or rebuttal material), without motion, until 30 days before the date scheduled for the hearing. I will schedule the hearing after I receive the parties' initial exchanges.

The original of all filings, with attachments, shall be sent to the Regional Hearing Clerk, and copies sent to the opposing party and the Administrative Law Judge.

Andrew S. Pearlstein
Administrative Law Judge

Dated: August 23, 1996
Washington, D.C.

In the Matter of Standard Materials, Inc.
Docket No. [CWA] VI-92-1603

CERTIFICATE OF SERVICE

This will certify that the foregoing Orders, dated August 23, 1996, were sent by regular mail this day to the addressees listed below:

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Dated: August 23, 1996
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