9-11-92

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Nassau County Department of Public Works, National Seatrade, Inc. and McAllister Brothers, Inc.,	)	Docket No. MPRSA-II-92-02
	)	
Respondents	)	

ORDER GRANTING MOTION TO AMEND COMPLAINT

The complaint in this proceeding under section 105(a) of the Marine Protection Research and Sanctuaries Act (33 U.S.C. § 1415(a)) alleges that Respondents, Nassau County Department of Public Works as Permittee, National Seatrade, Incorporated (NSI) as owner of the barge Seatrader I, and McAllister Brothers, Incorporated as owner of the tug Captain Bill, which was towing the Seatrader I, violated section 101(a) of the Act and the permit by discharging an estimated 8,312,200 gallons of sewage sludge outside the confines of the Deepwater Municipal Sludge Dump Site (DMSDS) authorized by the permit. This unpermitted discharge was alleged to have occurred on or about August 19, 1991. The complaint alleged that Respondents were jointly and severally liable for the mentioned violation of the Act and permit and proposed to collectively assess Respondents a penalty of $50,000.

Respondents answered, admitting a discharge, but not the quantity, and alleging that on August 18, 1991, Respondents encountered a sudden storm and were forced to institute an

emergency dump in order to safeguard life at sea. Accordingly, Respondents contended that they were not subject to civil or criminal penalties by virtue of section 105(h) of the Act (33 U.S.C. § 1415(h)) and demanded that the complaint be dismissed.

Under date of June 26, 1992, counsel for Complainant filed a proposed amended complaint, a memorandum of law in support of its motion for leave to amend the complaint (Memorandum), a declaration of Complainant's counsel, Richard J. Weisberg (Weisberg Declaration), a copy of the original complaint and related documents. Although no formal motion to amend the complaint appears to have been filed, there can be no doubt as to Complainant's intention and this omission is considered not to be material.

The effect of the amendment is to allege that the unauthorized discharges or dumping occurred on two days, August 18 and 19, 1991, rather than one day August 19, and thus to increase the maximum proposed penalty to $100,000.[1/] Although Complainant acknowledges that he was aware, through an Ocean Dumping Notification Form submitted by NSI on August 22, 1991, that the unpermitted discharges commenced at 1630 hours on August 18, 1991, and

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[1/] MPRSA § 105(c) provides:

(c) Separate offenses

For the purpose of imposing civil penalties and criminal fines under this section, each day of a continuing violation shall constitute a separate offense as shall the dumping from each of several vessels, or other sources.

continued until 0815 hours on August 19, it is alleged that the failure to seek penalties for two days of violation was due to an oversight (Memorandum at 3; Weisberg Declaration at 5).

Complainant contends that Rule 15 of the Federal Rules of Civil Procedures provides the applicable standard for determining the motion, that the general rule is that motions to amend are freely allowed absent a showing of prejudice to opposing parties, that Respondents can not show prejudice within the meaning of the rule under the circumstances present here and that the motion to amend should be granted (Memorandum).

Opposing the motion, the County has filed an affidavit by its attorney, Jack L. Libert, dated July 16, 1992. Mr. Libert points out that the Agency was aware prior to filing of the complaint that the off-site dumping commenced at 5:40 p.m. on August 18, 1991, and ended at 8:15 a.m. on August 19, 1991, a total of 14 hours and 35 minutes. Thus, the County says the Agency was fully aware at the time the complaint was filed of facts sufficient to calculate the penalties it now claims should have been demanded in the complaint. The County argues that the fact the Agency sought a $50,000 penalty is recognition of the fact that the dumping continued for less than one day for penalty calculation purposes.

Mr. Libert states that on February 13, 1992, when he was representing all Respondents in this proceeding, he attended a [settlement] conference with Mr. Richard Weisberg, counsel for Complainant. He (Libert) says that as a price for settlement, Mr. Weisberg insisted on payment of the full amount of the proposed

penalty even though he was aware of Respondents' position that the off-site dumping was necessary to safeguard the lives of the tug and barge crews during the pendency of a hurricane. Mr. Libert further states that he (Weisberg) was aware of facts supporting Respondents' position, e.g., the tow line from the tug to the barge had parted, the barge floated free for a substantial period of time and it was necessary for the Coast Guard to remove the crew of the barge at sea. According to the County, the facts clearly justified the decision to discharge sludge off-site. Nevertheless, Mr. Libert says that Mr. Weisberg, in an effort to coerce a settlement, asserted that Complainant would seek to amend the complaint to increase the amount of the penalty, if Respondents did not agree to pay the proposed penalty of $50,000. It is alleged that the motion to amend is in retaliation for Respondents' refusal to settle on Complainant's terms. The County argues that a violation occurring during a 14 hour, 35 minute time span constitutes one day for penalty calculation purposes, not two. For these reasons, the County urges that the motion to amend the complaint be denied.

Under date of July 10, 1992, McAllister Brothers, Inc. (McAllister) filed a Memorandum of Law In Opposition To EPA's Motion For Leave To Amend The Complaint. The memorandum points out that, while there is no dispute that the discharge spanned [occurred in] two days, August 18 and 19, 1991, the actual time of the emergency dumping was less than 15 hours. McAllister emphasizes that Complainant was aware of the period of the dumping

for at least three months prior to filing the complaint,[2] not only through the NSI letter, dated August 22, 1991, referred to above, but also through a Shiprider Form, dated August 20, 1991, signed by EPA inspector Scott Coffin, a copy which is annexed to the memorandum. Because the facts upon which the proposed amendment is based have been available to Complainant for almost a year, McAllister argues that the proposed amendment is untimely. It cites cases to the effect that ". . . where a party seeking an untimely amendment knows or should have known of the facts upon which the proposed amendment is based, but fails to assert them in a timely fashion, the motion to amend is subject to denial," citing, among others, State Distributors, Inc. v. Glenmore Distilleries Co., 738 F.2d 405, 416 (10th Cir. 1984).

McAllister alleges that EPA counsel used the presently proposed amendment and increased penalty during settlement negotiations to attempt to force a settlement on the Agency's terms and that it was only after settlement negotiations failed, that the proposed amendment officially surfaced in a telephone conference call on March 27, 1992, with counsel and the ALJ.[3] McAllister

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[2] The complaint was filed on November 21, 1991.

[3] The subject of Complainant's contemplated motion for leave to amend the complaint was discussed in the mentioned telephone conference. Complainant was granted until May 17, 1992, to file such a motion, which grant was confirmed by an order, dated March 31, 1992. The time in which to file the motion was informally extended to June 26, 1992, because of Complainant's motion, subsequently withdrawn, to have the complaint dismissed without prejudice.

argues that Complainant's delay in moving to amend the complaint was blatant and that the Agency, in essence, was attempting to punish Respondents for failing to settle on the Agency's terms. McAllister contends that the proposed amendment should be denied.

On July 17, 1992, National Seatrade, Inc. served a Memorandum Of Law In Opposition to EPA's Motion For Leave To Amend The Complaint. NSI joined in the reasons for opposing the motion advanced by McAllister. NSI stated, however, that it wished to stress that the maximum penalty permitted under the statute for a single violation of 14 hours and 35 minutes was $50,000. It asserted that section 105(c) of the Act (note 1 supra) does not state that a separate penalty may be assessed for each day in which there is a continuing violation, which would be necessary for EPA's interpretation to be sustained. NSI contends that EPA's strained and broad construction of the Act should not be accepted, that statutes imposing penalties are to be strictly construed, that any doubt over interpretation of the statute should be decided in favor of Respondents and that Complainant's motion to amend the complaint should be denied.

Under date of July 29, 1992, counsel for Complainant filed a Reply Declaration and an accompanying Memorandum of Law. In the declaration, Mr. Weisberg acknowledges that the Agency was aware at the time the complaint was filed of facts indicating that the off-site dumping spanned two days. He asserts, however, that through an oversight, Complainant, including himself, failed to make the appropriate connection between these facts and the relevant

statutory provisions, so that at the time the complaint was filed, the Agency was unaware that it was entitled to assess a penalty for two offenses rather than one.

Mr. Weisberg states that he discovered the error in preparing for the February 13 settlement conference with Mr. Libert. He (Weisberg) points out that EPA was obligated to promptly bring the error to Respondents' attention and to notify Respondents of its intention to seek an amendment of the complaint, or risk prejudice to its right to amend because of delay. At the same time, he emphasizes that the Agency was obligated to make a serious, good faith effort to settle the matter. With these considerations in mind, Mr. Weisberg states that it was the Agency's judgment to give Respondents the benefit of the error by limiting its initial offer of settlement to the amount sought in the complaint. Recognizing, however, that a settlement might not be attainable, Respondents were promptly notified of the error and informed that, if a settlement could not be reached, the Agency would be obligated to correct its error and seek to amend the complaint. In effect, Mr. Weisberg confirms the facts alleged by Mr. Libert as to the substance of settlement discussions, but denies any bad faith.

In an accompanying memorandum of law, Complainant asserts that Respondents' contention the Agency has misinterpreted the penalty provisions of MPRSA is without merit. Complainant argues that in ordinary usage "day" means a "calendar day" and that Congress could not have intended "day" to mean any "free floating 24-hour period" as contended by Respondents. Complainant cites Okanogan, et al. v.

U.S., 279 U.S. 655 (1929) ("the word 'days' when not qualified in ordinary and common usage means calendar days") as supporting his position. In any event, Complainant says that the Agency's interpretation is reasonable and under well settled principles is entitled to deference. Because the Agency's interpretation is correct or at the very least reasonable, Complainant argues that no principle of strict construction is violated.[4/]

Denying any bad faith or implications thereof, Complainant reiterates the general rule that parties are permitted to amend their pleadings after acquiring facts necessary to support an amendment (Memorandum at 4-9). Cases cited by Respondents are allegedly distinguishable or inapposite. Complainant points out that an exception to this rule exists where a party's delay in seeking an amendment after acquiring the relevant facts is intentional and part of a deliberate design to gain some tactical advantage or to harass the adverse party. This, according to Complainant, falls under the heading of, or is equivalent to, bad faith (Id. at 10). Complainant says that the burden of demonstrating bad faith is on the party alleging it and argues that Respondents have failed to make any such showing. Indeed, apart from a few self-serving and conclusory statements in Mr. Libert's

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[4/] Reply Memorandum at 4, citing Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd., 611 F.Supp. 1542, 1553, aff'd, 791 F.2d 304, 314 (4th Cir. 1986), vac. & remanded on other grounds, 484 U.S. 49 (1987).

affidavit, Complainant says that Respondents have failed to address this critical issue.[5]

Complainant says that in considering motions to amend, the first question must be whether there is a legitimate basis for the motion. If there is, the opponent must be held to its burden and required to demonstrate bad faith by more than conjecture for, according to Complainant, to do otherwise would substantially undercut the rule requiring liberality in the granting of amendments. Complainant argues that its motion to amend is indisputably legitimate, because upon discovery of its error, the Agency had little choice, but to inform Respondents that absent a settlement, the Agency would seek to amend the complaint to increase its demand (Reply Memorandum at 11, 12). According to Complainant, Respondents, in order to show bad faith, must do more than demonstrate the Agency was aware at the time the complaint was filed of the two day duration of the off-site dumping. Rather, Complainant says that Respondents must demonstrate not only that the Agency was aware of its right to assess penalties for two days of violation, but that the Agency purposefully failed to claim

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[5] In a letter, dated August 3, 1992, described as a supplemental answer, the County expressly alleged that Complainant's conduct, acknowledged in the Weisberg Declaration, evidences bad faith. The County also referred to Rule 22.07(a) of the Consolidated Rules of Practice, which concerns the computation of time for the purpose of these rules and which provides that in computing time, the day of the event from which the designated period begins to run shall not be included. The County argues that this rule should control here and makes practical sense as well inasmuch as an event which begins on Monday and continues until Tuesday is in common usage a one day event.

penalties for two days in order to gain an advantage in future settlement negotiations or for some other ulterior purpose. The reality, according to Complainant, is that the Agency gained nothing by failing to assess a two-offense penalty, but prejudice to its right to assess such a penalty and the burden of unwanted motion practice (Id. at 13). Because Respondents have utterly failed to meet their burden of proof, Complainant argues that Respondents' allegations of bad faith must be rejected.

Because Respondents have failed to allege or demonstrate prejudice and have failed to show bad faith, Complainant maintains that there is no basis to deny the motion to amend and that the motion should be granted forthwith.

D I S C U S S I O N

The general rule is that the word "day" when used in a statute or contract in the absence of qualification means a calendar day. See Okanogan Indians v. United States, 279 U.S. 672 (1929) ("pocket veto" case concerning meaning of word "days" in constitution). See also Words and Phrases, Day. Nothing in the legislative history indicates any intention to amend or qualify in any way the accepted meaning of the word.[6/] Accordingly, Respondents' contention that section 105(c) of MPRSA does not permit the assessment of separate

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[6/] See Senate Report No. 92-451, 92nd Congress and Conference Report No. 92-1546, reprinted U.S. Code, Congressional and Administrative News (1972) at 4234-4280, which, at 4257 & 4275, merely repeat the language of section 105(c) as to penalties for continuing violations.

penalties under the circumstances present here, i.e., off-site dumping commencing on August 18 and continuing into August 19, is rejected.

The County's argument (supra note 5) that Rule 22.07(a) (40 CFR Part 22), providing that in computing any period of time the day of the event from which the designated period begins shall be excluded, controls, while resourceful, is not accepted, because the mentioned rule is applicable only to computing times prescribed or allowed by the Rules of Practice.

The general rule is that amendments to pleadings will be liberally granted where the interests of justice will be thereby served and no prejudice to the opposing party results. While this statement is fully supportable under Rule 15 of the FRCP,[7] it is especially true in administrative proceedings. See Port of Oakland and Great Lakes Dredge and Dock Company, MPRSA Appeal No. 91-1 (EAB, August 5, 1992). Moreover, delay in seeking an amendment is seldom, if ever, a sufficient reason in and of itself for denial of a motion to amend. See 3 Moore's Federal Practice ¶ 15.08 and Spang & Company, Inc., Docket Nos. EPCRA-III-037 & 048 (Order Granting Motion to Amend Complaint, April 7, 1992).

Respondents have neither alleged nor demonstrated prejudice such as would permit or require denial of the motion to amend. This being so and the motion being based on a proper or, at the

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[7] Federal Court decisions interpreting the FRCP have been held to be useful guides in applying the Consolidated Rules of Practice. Rockwell International Corp., TSCA Appeal No. 87-5 (Order On Interlocutory Appeal, October 23, 1987).

very least, a permissible interpretation of the Act, denial of the motion would require a finding that it was being sought to secure some ulterior or unfair tactical advantage or to abuse or harass Respondents and thus, could be considered a "bad faith" amendment. While amendments designed to force a settlement or to punish the adverse party for failing to settle are "bad faith" amendments or indicia thereof in the absence of a satisfactory explanation, the cases relied upon by Respondents are readily distinguishable.

For example, in State Distributors, Inc. v. Glenmore Distilleries Co., 738 F.2d 405, 416 (10th Cir. 1984), the court's decision to sustain denial of a motion to amend to include additional defendants, reviewed under an abuse of discretion standard, was influenced by considerations of permissive joinder. Likewise, in GSS Properties, Inc. v. Kendale Shopping Center, 119 F.R.D. 379 (M.D. N.C. 1988), the court characterized a three-month delay as "blatant" where it found that plaintiff's claim it did not know the facts upon which the proposed amendment was based prior to instituting the action was false.

In the instant case, there is no dispute that Complainant was in possession of facts which would enable the calculation of the proposed penalty on the basis of an offense continuing for or into two days prior to filing the complaint.[8] Because the legal basis of the proposed amendment is sound and because it is unlikely that

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[8] It should be noted that Complainant's apparent position that he must always seek the maximum penalty permitted by the Act is erroneous. The Board rejected a similar argument by the Agency in Port of Oakland supra.

Complainant would have purposefully refrained from proposing a penalty based on two days of violation in order to coerce a settlement of $50,000, which he could have insisted upon anyway, it is concluded that the proposed amendment is not a "bad faith" amendment. In any event, the contrary has not been shown and the motion will be granted.[9]

O R D E R

Complainant's motion to amend the complaint is granted. If a signed copy of the amended complaint has not been served on Respondents, it shall be so served forthwith. Respondents are deemed to have denied the increased demand and are not required to file additional answers.[10]

Dated this 17th day of September 1992.

Spencer T. Nissen
Administrative Law Judge

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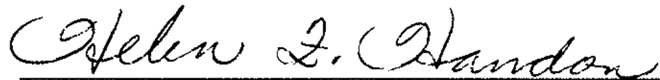
[9] Respondents are, of course, free to renew their objections to the amended complaint after the evidence has been heard.

[10] In the near future, I contemplate contacting counsel for the purpose of setting a mutually agreeable date for the hearing which will be held in New York City.

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER GRANTING MOTION TO AMEND COMPLAINT**, dated September 11, 1992, in re: Nassau County Department of Public Works, National Seatrade, Inc. and McAllister Brothers, Inc., Dkt. No. MPRSA-II-92-02, was mailed to the Regional Hearing Clerk, Reg. II, and a copy was mailed to Respondents and Complainant (see list of addressees).



Helen F. Handon
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DATE: September 11, 1992

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