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FEB 18 2000
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CATALINA YACHTS, INC.,)

CV 99-07357 GHK (VAPx)

Appellant,)

MEMORANDUM AND ORDER

vs.)

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)

Appellee.)

ENTERED
CLERK, U.S. DISTRICT COURT
FEB 23 2000
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

This matter comes before the court on appeal from the United States Environmental Protection Agency's ("EPA") Environmental Appeals Board ("EAB") decision of In re Catalina Yachts, Inc., 29 Env'tl. L. Rep. 41093 (EPCRA Appeal, March 24, 1999). The court has fully considered the briefs and papers pertaining to this matter. This motion is appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7.11. We rule as follows:

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1 I. BACKGROUND

2 Appellant Catalina Yachts, Inc. ("Catalina") is a California
3 corporation which manufactures recreational sail boats. On June 20,
4 1994, the EPA, Region 9, filed an administrative complaint against
5 Catalina seeking \$175,000 in civil penalties for Catalina's failure to
6 timely file seven "Form Rs" with the EPA for its use of styrene and
7 acetone. Section 313 of the Emergency Planning and Community Right-
8 to-Know Act ("EPCRA"), 42 U.S.C. § 11023, requires facilities that
9 manufacture, process, or otherwise use certain chemicals in quantities
10 exceeding the established thresholds to submit a Toxic Chemical
11 Release Inventory Form ("Form R") to the EPA. Catalina concedes that
12 it did not file the required forms within the required time period.

13 On January 27, 1997, an EPA Administrative Law Judge ("ALJ")
14 assessed a penalty of \$39,792 against Catalina. This penalty was
15 assessed by taking the EPA's requested amount and reducing it by
16 various factors.

17 The EPA and Catalina appealed the ALJ's decision to the EAB. The
18 EAB reviewed the ALJ's determination and concluded, on March 24, 1999,
19 that a \$69,000 adjustment, as a factor of Catalina's environmentally
20 beneficial measures, was improper, and assessed a final penalty of
21 \$108,792 against Catalina (the ALJ's decision was affirmed in every
22 other regard). Catalina, following dismissal of its motion for
23 reconsideration, appeals from the EAB's final decision. We have
24 jurisdiction pursuant to 42 U.S.C. § 11045(f)(1).

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1 II. STANDARD OF REVIEW

2 EPCRA provides that, "[a]ny person against whom a civil penalty
3 is assessed under this section may obtain review thereof in the
4 appropriate district court of the United States" 42 U.S.C.
5 § 11045(f)(1). However, EPCRA does not specify the appropriate
6 standard of review. Accordingly, we look to the Administrative
7 Procedure Act ("APA"), 5 U.S.C. § 551 et seq. See Hopi Tribe v.
8 Navajo Tribe, 46 F.3d 908, 914 (9th Cir. 1995). Under the APA, we
9 review the EAB's decision to determine whether it was, "arbitrary,
10 capricious, an abuse of discretion, or otherwise not in accordance
11 with law." 5 U.S.C. § 706(2)(A). This standard of review "is narrow
12 and a court is not to substitute its judgment for that of the agency."
13 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S.
14 29, 43 (1983).

15 Moreover, insofar as this matter concerns the EPA's authority to
16 establish sanctions, this determination is a "matter of agency policy
17 and discretion." Robinson v. United States, 718 F.2d 336, 339 (10th
18 Cir. 1983). Accordingly, we may not overturn the EPA's choice of
19 sanction unless it is unwarranted in law or unjustified in fact.
20 Spencer Livestock Comm'n v. Department of Agric., 841 F.2d 1451, 1456
21 (9th Cir. 1988) (citing Butz v. Glover Livestock Comm'n Co., Inc., 411
22 U.S. 182, 185-86 (1973); Blackfoot Livestock Comm'n v. Department of
23 Agric., 810 F.2d 916, 922 (9th Cir. 1987)).

1 **III. THE EPCRA FRAMEWORK**

2 The parties have limited this appeal to the propriety of the
3 EAB's penalty assessment under EPCRA with respect to Catalina's
4 claimed right to have its environmentally beneficial measures
5 considered as an offset of its assessed penalty. EPCRA section 325
6 provides that (for reporting violations), "[a]ny person (other than a
7 government entity) who violates any requirement of section 11022 or
8 11023 of this title shall be liable to the United States for a civil
9 penalty in an amount not to exceed \$25,000 for each such violation."
10 42 U.S.C. § 11045(c)(1). No more guidance is provided under this
11 subsection as to how to fashion an appropriate penalty.

12 Lacking statutory directives regarding the assessment of
13 EPCRA reporting violation penalties, the EPA has adopted, as guidance,
14 the penalty assessment factors set forth in 15 U.S.C. § 2615(a)(2)(B).
15 This statute provides:

16 In determining the amount of a civil penalty, the
17 Administrator shall take into account the nature,
18 circumstances, extent, and gravity of the violation or
19 violations and, with respect to the violator, ability to
pay, effect on ability to continue to do business, any
history of prior such violations, the degree of culpability,
and such other matters as justice may require.

20 Id. The EPA has also adopted its own penalty assessment methodology
21 under the Enforcement Response Policy ("ERP"), based on the penalty
22 factors applicable to other violations of EPCRA. The ERP establishes
23 a two-step process for calculating penalties: first, a gravity based
24 penalty is established reflecting the characteristics of the violation
25 (utilizing a penalty matrix); second, the gravity based penalty is
26 adjusted upwards or downwards, taking into account factors related to
27 the violator (e.g. voluntary disclosure of the violation, prior
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1 violation history, whether the chemical has been de-listed subsequent
2 to the violation, the violator's attitude, ability to pay, and other
3 matters as justice may require). With respect to the "other matters"
4 factor, the ERP states, "the Agency will consider other issues that
5 might arise, on a case-by-case basis, and at Regional discretion,
6 which should be considered in assessing penalties." ERP at 18.
7 However, "[u]se of this reduction is expected to be rare and the
8 circumstances justifying its use must be thoroughly documented in the
9 case file." Id.

10 Procedurally, EPA's assessment of an administrative penalty is
11 governed by the Agency's Consolidated Rules of Practice, 40 C.F.R.
12 Part 22. Under those rules, an action is initially assigned to an ALJ
13 to render an initial decision both on liability and penalty. This
14 initial decision may then be appealed by the parties, or may be
15 reviewed by the EAB sua sponte, within a fixed amount of time. The
16 EAB may assess a penalty that is higher or lower than the amount
17 recommended to be assessed by the ALJ. However, the EAB's rules of
18 decision have held, "[w]here a penalty assessment is within the range
19 of penalties approved by the applicable penalty policy, 'the Board
20 will not substitute its judgment for that of the Presiding Officer
21 absent a showing that the Presiding Officer has committed an abuse of
22 discretion or a clear error in assessing the penalty.'" In re Spang &
23 Co., 6 E.A.D. 226, 1995 WL 646518, *13 (EPCRA Appeal, Oct. 20, 1995)
24 (citing In re Pacific Refining Co., 5 E.A.D. EPCRA Appeal No. 94-1,
25 Slip Op. at 8 (E.A.B. 1994)).

1 IV. THE EAB'S PENALTY ASSESSMENT

2 In its complaint, the EPA requested a \$175,000 penalty against
3 Catalina (reflecting the maximum \$25,000 EPCRA penalty for Catalina's
4 seven reporting violations). The EAB ultimately imposed a \$108,792
5 penalty, less than the maximum allowable by law, after determining
6 that the ALJ's assessed penalty of \$39,792 was clear error.

7 Catalina argues, however, that the EAB's final penalty
8 determination was an abuse of discretion as it refused to consider
9 Catalina's environmentally beneficial measures under the "other
10 matters as justice may require" rubric.

11 The scope of our review is not to determine whether Catalina's
12 interpretation of the language in 15 U.S.C. § 2615, which the EAB has
13 adopted as "policy," is the better one, but rather to determine, at
14 most, whether EPA's reading is reasonable and consistent with the
15 statute. See e.g. Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 843
16 (1984) ("if the statute is silent or ambiguous with respect to the
17 specific issue, the question for the court is whether the agency's
18 answer is based on a permissible construction of the statute.")
19 (footnote omitted); United States v. Larionoff, 431 U.S. 864, 872
20 (1977) (court is to give controlling weight to an agency's
21 interpretation "'unless it is plainly erroneous or inconsistent with
22 the regulation.'" (citing Bowles v. Seminole Rock Co., 325 U.S. 410,
23 414 (1945)). See also National Ass'n of Regulatory Utility Comm'rs v.
24 E.C.C., 746 F.2d 1492, 1502 (D.C. Cir. 1984).

25 EPA interprets the "other matters as justice may require"
26 language of § 2615 to mean that other factors (or at least
27 environmentally beneficial projects) should not be considered unless
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1 the assessed penalty is otherwise manifestly unjust. We find this
2 interpretation to be reasonable and consistent with the statute's
3 overall purpose, especially in light of EPA's other penalty assessment
4 declarations which indicate EPA's desire to use this factor narrowly,
5 and only in rare circumstances.¹

6 V. DEPARTURE FROM PRECEDENT

7 A federal agency is "not absolutely bound by its prior
8 determinations, but rather may adjust its policies and rulings in
9 light of experience: '[c]umulative experience' begets understanding
10 and insight by which judgments . . . are validated or qualified or
11 invalidated." Montana Power Co. v. EPA, 608 F.2d 334, 347 (9th Cir.
12 1979) (citing NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 349
13 (1953)). But while an agency may announce new principles in an
14 adjudicatory proceeding, it "may not depart, sub silentio, from its
15 usual rules of decision to reach a different, unexplained result in a
16 single case." NLRB v. Silver Bay Local Union No. 962, 498 F.2d 26, 29
17 (9th Cir. 1974) (citations omitted).

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20 ¹ Catalina's argument that the EAB's interpretation has
21 wholly read the "justice" factor out of the "controlling
22 statutory language," (Appellant Br. at 11), is more a matter of
23 semantics than anything else. First, this language is not part
24 of the controlling statute, but rather is derived from another
25 environmental statute, not presently applicable, which the EPA
26 has adopted as guidance, and thus the EPA is entitled to greater
27 deference in its interpretation of this language. Second, the
28 EAB's framework still requires consideration of the "justice"
factor, however, it is simply not utilized if the assessed
penalty is not otherwise unjust. Finally, Catalina is not quite
correct when it asserts that the EAB failed to consider its
environmentally beneficial projects at all. Despite its ruling
in the case, the EAB did actually consider these projects, but
was not swayed by them. See In re Catalina Yachts, Inc., Slip.
Op. at 23 n. 23.

1 Catalina contends that the EAB abused its discretion by departing
2 from its prior decision of In re Spang & Co., 6 E.A.D. 226, 1995 WL
3 646518, *13 (EPA Oct. 20, 1995). However, our reading of Spang leads
4 us to the conclusion that, although Spang is subject to a certain
5 degree of ambiguity, the EAB's determination in the present case is
6 not an unexplained departure from Spang. In Spang, the EAB wrote:

7 As a matter of policy, the Agency obviously looks favorably
8 upon the undertaking of a project which benefits the
9 environment and which goes beyond the requirements of
10 environmental laws. By considering such behavior in a
11 penalty assessment proceeding the Agency can provide an
12 incentive for companies to engage in environmentally
13 beneficial activities. Nevertheless, sight must not be lost
14 of the fact that initial compliance with the law is the
15 primary objective of the Agency's enforcement efforts and
16 that penalties play an important deterrent role in those
17 efforts. Therefore, the amount of credit which is allowable
18 for environmentally beneficial projects must be tempered
19 with the knowledge that a violation has taken place. Thus,
20 to strike the proper balance between these conflicting
21 forces, we are of the view that the evidence of
22 environmental good deeds must be clear and unequivocal, and
23 the circumstances must be such that a reasonable person
24 would easily agree that not giving some form of credit would
25 be a manifest injustice. This formulation for giving due
26 credit for environmental good deeds holds faith to the
27 underlying principle of the justice factor, which is
28 essentially to operate as a safety mechanism when necessary
to prevent an injustice. It further suggests that use of the
justice factor should be far from routine, since application
of the other adjustment factors normally produces a penalty
that is fair and just.

Id. at *15. This language provides that the "justice" factor should
only be applied when not giving someone credit would be a manifest
injustice, and that application of this factor should be far from
routine because the application of the other adjustments normally
produces a penalty that is fair and just. Although the ultimate
decision in Spang was to remand the case to the ALJ for consideration
of the "justice" factor, we cannot say that the EAB's decision here

1 was unreasonable, unsubstantiated, or anything more than a
2 clarification, or refinement, of the standard set forth in Spang.²

3 Moreover, in light of the EAB's holding regarding the proper
4 application of the "justice" factor, it was not an abuse of
5 discretion, or contrary to law, for the EAB to have determined that
6 the ALJ's decision was clear error. The ALJ's decision failed to
7 consider EPA policy and the language in Spang discussing the
8 restrictive use of the "justice" factor.

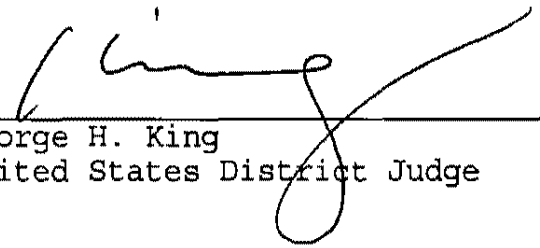
9 Finally, as the EPA's Consolidated Rules of Practice, 40 C.F.R.
10 Part 22, make it clear that the EAB may modify or increase penalties,
11 we find that it was not an abuse of discretion for the EAB to assess
12 Catalina's final penalty instead of remanding the case to the ALJ for
13 further consideration.

14 **VI. DISPOSITION**

15 The decision of the Environmental Appeals Board is **AFFIRMED**.

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17 IT IS SO ORDERED.

18 DATED: February 18, 2000

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George H. King
United States District Judge

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27 ² Nothing in In re Bollman Hat Co., 29 Env'tl. L. Rep. 41083
28 (EPCRA Appeal, Feb. 11, 1999), or In the Matter of E.C. Haab Co., Inc., 12 EPA Env'tl. L. Rep. 375 (ALJ June 30, 1998), leads us to alter our result.