UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Heating Oil Partners, L.P.) Docket No. CWA-III-199
)
Respondent)

ORDER GRANTING COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION

and

DENYING RESPONDENT'S CROSS-MOTION

The Region 3 Office of the United States Environmental Protection Agency, located in Philadelphia, Pennsylvania (the "Complainant" or "Region") filed a Complaint dated October 22, 1997 on Heating Oil Partners, L.P. (the "Respondent" or "HOP"). HOP is a distributor of heating oil throughout several northeastern states, with its headquarters in Darien, Connecticut. The Complaint alleges that the Respondent committed a series of violations of the oil pollution prevention regulations at its facility known as the Gill Bros. Terminal, located in Churchville, Pennsylvania (the "facility").

The Clean Water Act ("CWA") §311, 33 U.S.C. §1321, governs oil and hazardous substance liability. Violations of the oil pollution prevention regulations, found in 40 CFR Part 112, subject the owner or operator of the facility to the assessment of civil penalties, pursuant to the CWA §311(b)(6)(A)(ii). The Complaint charges HOP with committing the following specific violations:

(1) failing to provide adequate secondary containment in its loading and unloading area, in violation of 40 CFR §112.7(e)(4), [Count I];

(2) failing to provide adequate secondary containment for the entire contents of the largest single tank, in violation of 40 CFR §112.7(e)(2)(ii), [Count

I];

(3) failing to install a tank that is engineered to be fail-safe and to avoid spills, in violation of 40 CFR §112.7(e)(2)(viii), [Count II];

(4) failing to perform adequate integrity testing of its tanks, in violation of 40 CFR §112.7(e)(2)(vi), [Count III];

(5) failing to provide full security fencing around the facility, in violation of 40 CFR §112.7(e)(9)(i), [Count IV];

(6) failing to provide adequate lighting at the facility, in violation of 40 CFR §112.7(e)(9)(v), [Count IV]; and

(7) failing to prepare an adequate Spill Prevention Control and Countermeasure Plan ("SPCC Plan"), in violation of 40 CFR §112.3(b)(3), [Count V].

The Complaint was amended by permission of the undersigned Administrative Law Judge ("ALJ") to allow a minor clarification of the allegation concerning integrity testing of tanks. The Region, in the Complaint, seeks assessment of a Class II civil penalty of $125,000 against the Respondent for these violations, the maximum amount pursuant to the CWA §311(b)(6)(B)(ii).

The Respondent, in its Answer filed on November 14, 1997, disputed some factual matters, and denied liability for all violations alleged in the Complaint. In an amended Answer filed by permission of the ALJ, HOP also raised an affirmative defense in which it asserts that the EPA failed to provide adequate notice of the regulatory requirements for altering oil storage tanks. This defense relates to HOP's liability for the charges concerning the large oil tank, specified in Counts I, II, and V of the Complaint. HOP also contests the proposed amount of the civil penalty, if any is assessed.

Discussion

The EPA Rules of Practice, at 40 CFR §22.20(a), authorize the ALJ to render an accelerated decision in favor of either party "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding." The motion for accelerated decision is the functional equivalent of the motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

The parties' respective cross-motions for accelerated decision stem from the acquisition of the Gill Bros. facility by HOP from its former owner, Major Oil, Inc. ("Major Oil"). The Region inspected the facility on May 24, 1996, when it was still owned by Major Oil. The violations alleged in the Complaint are founded upon that inspection. On December 2, 1996, Major Oil entered into an "Asset Purchase Agreement" with HOP in which the Gill Bros. facility, along with other facilities, and, essentially Major Oil's entire business, was sold to HOP. The Region contends that the violations discovered in May 1996 continued after HOP's purchase of the facility until at least July 1997, the month when HOP responded to a CWA §308 information request sent by the Region.

The cross-motions for accelerated decision under consideration here focus on only one part, indeed a relatively small part, of this proceeding. The Region's motion seeks a determination that HOP's Major Oil Division was a "substantial continuation" of Major Oil's business at the Gill Bros. facility, and that HOP is therefore liable for the violations committed by Major Oil, Inc., under the theory of successor liability. Respondent opposes this motion, contending it is not a corporate successor to Major Oil, and is therefore not liable for any violations committed by Major Oil, before HOP acquired the facility on December 2, 1996.

The Complaint alleges, however, that the violations continued at the facility after the transfer of ownership. The Respondent does not dispute that the facility conditions that gave rise to the Complaint remained essentially unchanged for at

least some months after the acquisition. HOP's denials of liability and defenses challenge other factual and legal bases of the allegations. Hence, it is undisputed that, if violations are found, they did continue during the period of the Respondent's ownership of the facility.

The continuation of the violations renders the significance of deciding these motions quite limited. This is seen by a footnote at the very end of Complainant's brief in support of its motion. (Note 11, p. 26). The Region calculated its proposed civil penalties by following the method in the Draft Civil Penalty Policy for Violations of Section 311(b)(3) and Section 311(j) of the Clean Water Act, dated April 3, 1997. The Region calculated a total civil penalty of $234,572 for all violations for the entire period of ownership of the facility by both Major Oil and HOP. The recalculated penalty for the period of only HOP's ownership was $205,772. Since the maximum penalty for an administrative proceeding brought under the CWA is $125,000, that is the amount sought by the Region in this case, regardless of which period is applied. Hence, deciding these motions would actually have no effect on the requested civil penalty, if the Region's calculation method is adopted.

In the same footnote, the Region states that resolution of the issue of successor liability "is important because it may affect the knowledge and culpability attributable to Respondent." However, if this alone is a valid reason for deciding the motions, at least Complainant's motion would be denied. It is precisely on the issue of Respondent's knowledge and culpability that there are material facts in dispute.

Nevertheless, it is possible that resolution of the motions, based on the substantial continuity theory, could ultimately have an impact on the consideration of the penalty amount, depending on the facts and circumstances adduced at hearing. Hence that theory is addressed in the following discussion.

- Substantial Continuity of Business

The Clean Water Act §311(b)(6)(A) provides that "any owner, operator, or person in charge of any . . . onshore facility" who fails to comply with any applicable oil pollution prevention regulation shall be liable for an administrative civil penalty. The Act does not address or define "owner or operator" in terms of corporate forms or successors. Hence if it is determined that a corporate successor did not comply with the regulations because it is a substantial continuation of the seller of the facility, that successor corporation may be held liable for any violations committed by the seller. This would appropriately effectuate the purpose of the Act, since the successor would be responsible for those violations under the "substantial continuity" doctrine.

Generally an asset purchaser does not acquire liabilities of the company that sold the assets. However, an asset purchaser may acquire the seller's liability if: (1) the parties agree to that effect; (2) the transaction amounts to a de facto merger; (3) the transaction is fraudulently entered into to escape liability, or (4) the purchasing company is merely a continuation of the business enterprise of the seller. *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 308 (3d Cir. 1985). The exceptions for a de facto merger and "mere continuation" of the seller's business have traditionally required a showing of continuity in stock ownership between the selling and purchasing companies. *United States v. Mexico Feed and Seed Co., Inc.*, 980 F.2d 478, 487 (8th Cir. 1992).

However, the federal courts have broadened the "mere continuation" exception in public policy contexts. The most common such context has been under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), to prevent successor corporations from avoiding responsibility to pay for the cleanup of hazardous waste sites. As articulated in *Gould, Inc. v. A & M Battery and Tire Service*, 950 F.Supp. 653, 657 (M.D. Pa. 1997), courts take into consideration the following factors in determining whether a corporate successor should be held potentially liable under the "substantial continuity" theory:

(1) retention of the same employees;
(2) retention of the same supervisory personnel;
(3) retention of the same production facilities in the same location;
(4) retention of the same name;
(5) production of the same product;
(6) continuity of assets;
(7) continuity of general business operations; and
(8) whether the successor holds itself out as the continuation of the previous enterprise.

Another factor that is often discussed is whether the purchasing company had knowledge or should have known of potential CERCLA liability. In *Gould*, the court held that, since CERCLA was a strict liability remedial statute, actual knowledge may be considered, but was not necessary to hold the successor liable. 953 F. Supp. 659.

The federal courts have also found that the EPA may extend liability to successor corporations for the purpose of enforcing statutes to assess civil penalties. *Oner II, Inc. v. U.S. EPA*, 597 F.2d 184, 185 (9th Cir. 1979).[(1)] The court stated that "the EPA's authority to extend liability to successor corporations stems from the purpose of the statute it administers, which is to regulate pesticides to protect the national environment." In that case, the actual notice of the successor corporation of the seller's liability to EPA under the Federal Insecticide, Fungicide, and Rodenticide Act, was considered a significant factor in the decision. 597 F.2d 186. Successor corporations have also been held liable for violations by their predecessors in EPA administrative enforcement proceedings. See *In re Microft Systems International Holdings, S.A.*, Docket No. FIFRA-93-H-03 (ALJ, July 15, 1994); and *In re Gary Busboom*, Docket No. FIFRA-09-06-41-C-89-06 (ALJ, Oct. 17, 1991).

In this case, the undisputed facts with respect to all of the relevant factors indicate that HOP was substantial continuation of Major Oil's business enterprise at the Gill Bros. facility. Following the terms of the Asset Purchase Agreement, HOP retained the great majority of Major Oil's employees at the facility, including the plant manager and other key supervisory personnel. The business of distributing heating oil from the facility continued uninterruptedly, and under the same name. HOP acquired all business assets from Major Oil, including real property, customer selling rights, motor vehicles, oil inventory, office equipment, and intangible assets such as goodwill. Respondent essentially held itself out as the continuation of the business of Major Oil. The only factor that would prevent the transaction from being considered a de facto merger, is the stock purchase by HOP from Major Oil's sole shareholder, John Killion.

Thus, for whatever limited purpose it may ultimately have in this proceeding, HOP is found to be a substantial continuation of Major Oil's business at the facility. It is liable for any violations that were committed by Major Oil before the facility was acquired by HOP. This is especially appropriate since any such violations continued after HOP's acquisition of the facility in any event. This finding supersedes the provision in the Asset Purchase Agreement that seeks to limit such successor liability. As noted above, this finding will have limited impact since the penalty calculation may not be affected at all by extending the period of HOP's noncompliance to include the time the facility was owned by Major Oil.[(2)]

In addition, there is a material factual dispute over whether HOP was aware or should have been aware of the potential violations at the facility. Major Oil's plant manager, Gerald Frey, was present at the EPA's May 1996 inspection and signed a form acknowledging the inspection which noted at least the problem with the hole in the large tank. When HOP was preparing to purchase the facility, it engaged a consulting firm that found no outstanding environmental liabilities. The consultant's employee, Matthew Gallo, interviewed Mr. Frey, who continued as HOP's plant manager at the facility. According to Mr. Gallo's affidavit, Mr. Frey stated that an agency had inspected the facility, but he was not sure which one. Mr. Frey is listed as a witness in Complainant's prehearing exchange. His testimony, as well as that of other employees of both Major Oil and HOP, could likely clarify the extent of HOP's knowledge of potential environmental liabilities stemming from the EPA's May 1996 inspection.

The facts concerning HOP's knowledge of violations could bear on the Respondent's degree of culpability, one of the factors that must be considered in assessing a civil penalty in this case pursuant to the CWA §311(b)(8). This determination could well supersede any incremental increase in the penalty that could result from adding the period of Major Oil's ownership of the facility, under the substantial continuity finding.

Summary of Rulings

1. The Respondent is found to be a substantial continuation of the business of Major Oil, and is therefore liable for any violations alleged in the Complaint, for the period that the facility was owned by Major Oil.

2. The impact of this ruling on the determination of the amount of the civil penalty is likely to minor, if any, since the violations continued after HOP's acquisition of the facility. The additional time the violations continued under Major Oil's prior ownership is not likely to have a significant impact on the ultimate penalty calculations.

3. There is a disputed material issue of fact concerning whether HOP knew or should have known of Major Oil's potential liability for any violations at the time of the acquisition. This issue could significantly affect the determination of HOP's culpability and the amount of the penalty.

Order

Complainant's motion for partial accelerated decision concerning successor liability is granted. Respondent's cross motion is denied.

Further Proceedings

Despite this ruling, all substantial issues concerning Respondent's liability for the alleged violations, and the amount of the civil penalty, remain in dispute. An order scheduling the hearing will be issued under separate cover.

Andrew S. Pearlstein
Administrative Law Judge

Dated: September 21, 1998
Washington, D.C.

1. The holding in *Oner II* was limited by a subsequent decision by the Ninth Circuit Court of Appeals, *Atchison, Topeka and Santa Fe Railway Company v. Brown & Bryant, Inc.*, 132 F.3d 1295, where the court held it would not apply the substantial continuity doctrine in that circuit. The court also held that state, rather than federal common law, should apply to successor liability. Most other circuits, however, have found to the contrary on both counts, including the Third Circuit, which includes Pennsylvania, where the Respondent's facility is located. See *United States v. Keystone Sanitation Co.*, 1996 U.S. Dist. LEXIS 13651, 10 (M.D. Pa., 1996). This decision will follow the law of the Third Circuit. The Clean Water Act is a federal statute that is best construed by the federal courts in the interest of promoting the uniform national purpose of preventing pollution of the nation's waters.

2. The effect may be even more limited that indicated above, since the Region, in its penalty calculations submitted with its prehearing exchange, has considered Major Oil violations extending back to June 1993, although the inspection of the facility took place in May 1996. The period of the violations may be in dispute, and may be found to have even a smaller effect on the penalty than in the Region's

calculations cited above.