UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

Frontier Stone, Inc. CAA Docket No. II-95-0105

Respondent

ORDER DISMISSING COMPLAINT
and
INITIAL DECISION

The Region 2 Office of the United States Environmental Protection Agency (the "Complainant" or "Region") f iled a Complaint dated May 18, 1995, against Frontier Stone, Inc. ("Frontier" or the "Respondent"). The Complaint charges Respondent with failing to conduct timely performance tests of five new pieces of equipment at its rock crushing plant in Lockport, New York, in violation of the Clean Air Act ("CAA") §§ 111 and 114, 42 U.S.C. §§7411 and 7414, and 40 CFR §60. 8 (a). The Complaint proposes assessment of a civil penalty of $40,000 against Respondent for these violations, pursuant to the CAA §113(d), 42 U.S.C. §7413(d). The Respondent filed an Answer in which it denied the material allegations of the Complaint and raised a series of affirmative defenses.

The Region filed a motion for partial accelerated decision on liability, dated January 15, 1997. Respondent filed a response in opposition to the motion, which included a motion to dismiss the Complaint.

This ruling dismisses the Complaint on one of the grounds urged by Respondent -- that this action for the assessment of a civil penalty is barred by the applicable statute of limitations.

Factual Background

Between December 1986 and May 1989, Frontier received and installed five new pieces of rock crushing or conveying equipment: a CR6 Barmac crusher, an H5 Peerless conveyor, a BFC Cross Bros. conveyor, a C2B Cross Bros. conveyor, and an HCR Hazemag crusher. The last of these five pieces of equipment, the HCR Hazemag crusher, was in full operation by October 18, 1989.[1]

On August 5, 1994, the Region sent Frontier a formal information request pursuant to the CAA §114. Frontler's responses stated that it had not conducted initial performance tests on these five pieces of equipment. [2] On January 30, 1995, the Region issued a Compliance Order directing Respondent to complete performance tests of these pieces of equipment according to an approved plan and schedule. [3] Frontier conducted the performance tests on three of these apparatus in December, 1994, and completed the tests on the last two on June 21, 1995. [4]

Throughout this period, Frontier was operating under a permit issued by the New York State Department of Environmental Conservation ("NYSDEC").[5] On May 26, 1987, EPA delegated authority to the NYSDEC to administer and enforce the Clean Air Act's New Source Performance Standards, includingthat for non-metallic mineral processing plants, under 40 CFR Part 60, Subpart 000. (52 FR 19511). The NYSDEC and its delegatee, the Niagara County Health Department, inspected Respondent's plant on several occasions and conducted opacity observations on the emissions from Respondent's equipment. Those inspections did not disclose any compliance problems or emission violations. [6]

Discussion

The EPA Rules of Practice, at 40 CFR §22.20(a), empower the Presiding Officer to render an accelerated decision "without further hearing or upon such limited additional evidence, such as affidavits, as he may require, 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 regulation further provides that the ALJ "upon motion by the respondent, may at any time dismiss an action without further hearing, or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant."

This ruling will join the chorus of decisions that address whether a violation of an environmental statute or regulation is a "continuing" violation for the purpose of applying the statute of limitations bar to commencing proceedings for the enforcement of a civil penalty. The violation at issue in this proceeding concerns a regulation promulgated as part of the New Source Performance Standards under the authority of the CAA §111(b). The Frontier rock crushing plant is regulated under the General Provisions found in 40 CFR Part 60, Subpart A, and the specific Subpart 000, which provides the standards for performance for nonmetallic mineral processing plants. Under the General Provisions, 40 CFR §60.8(a) states:

Performance Tests. (a) Within 60 days after achieving the maximum production rate at which the affected facility [7] will be operated, but not later than 180 days after initial startup of such facility and at such other times as may be required by the Administrator under section 114 of the Act, the owner or operator of such facility shall conduct performance test(s) and furnish the Administrator a written report of the results of such test(s).

Subsection (b) provides that the performance tests must be conducted in accordance with methods and procedures specified in the applicable subpart. For Respondent's rock crushing plant, that is Subpart 000, which includes the applicable substantive emission standards for particulate matter (40 CFR §60.672), performance test methods (40 CFR §60.675), as well as additional definitions, and monitoring and reporting requirements.

The case of *3M Co. v. Browner,* 17 F. 3d 1453 (D.C. Cir. , 1994) has settled the issue of whether administrative proceedings brought by federal agencies for the assessment of civil penalties are subject to the federal statute of limitations. They are. The applicable statute of limitations is 28 U.S.C. §2462, which reads:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . .

Since Congress has not provided otherwise by including another statute of limitations in the Clean Air Act, this proceeding is subject to the five-year limitation in §2462.

The underlying purpose of statutes of limitations is to promote security and stability in human affairs by creating an expectation of finality in litigation. The primary purpose is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend. 51 Am.Jur. 2d, Limitation of Actions, 602-603. Congress has determined that a reasonable time for the commencement of a proceeding to enforce civil penalties is within five years from the date of the violation.

The court in *3M* held that the limitations period begins on the date when the violation occurred, or "first accrued," and not when the violation was discovered by the EPA. 17 F.3d 1462. The issue in this case also involves the meaning of the phrase "first accrued" in 28 U.S.C. §2462, although from a different perspective. EPA contends that the violation here continued each day

until Respondent conducted the performance tests. Thus, the violations would continue to "accrue," tolling the application of the statute of limitations, beyond the deadline for conducting the initial performance tests. Respondent argues that the violation was complete 181 days after the initial startup of each piece of equipment, and that the statute of limitations should begin to run from that date only.

The facts are not in dispute concerning the relevant dates. Frontier's newest subject apparatus, the HCR Hazemag crusher, was in full operation by October 18, 1989. Under 40 CFR §60.8(a), Respondent was required to conduct the initial performance test for the crusher no later than April 18, 1990. The other four machines were installed and operating earlier, and their performance tests were to have been done earlier. The tests were not done until December 1994 and June 1995. The Complaint in this proceeding was dated May 18, 1995, served on July 12, 1995, and filed with the Regional Hearing Clerk on July 13, 1995.[8] Thus, using the earliest date, this proceeding for a civil penalty was commenced more than five years after the deadline for conducting initial performance tests for new equipment subject to the CAA. This proceeding was commenced, however, well under five years after the Respondent actually conducted the performance tests.

The decision whether a violation is a continuing one for the purpose of applying the statute of limitations must depend primarily on the nature of the violation itself. Although there have been a number of decisions addressing the issue of continuing violations by Administrative Law Judges, the Environmental Appeals Board, and the federal courts, none has involved the violation at issue here, and none is controlling as a precedent.

The plain language of the regulation at issue here, and the language of 28 U.S.C. §2462, indicate that the failure to conduct timely performance tests is not a continuing violation, at least for the purpose of applying the statute of limitations. The time element is integral to this regulatory requirement. The whole intent of 40 CFR §60.8(a) is for facilities to conduct performance tests at or soon after the "*initial startup*" of new equipment. The test must be done "not later than 180 days after initial startup." The violation is complete if a facility has not conducted the tests on day 181 after startup. All the legal and factual prerequisites for filing a complaint are then in place. (See *3M,* 17 F.3d at 1460). If the facility conducted a performance test on day 181, it would be in violation of §60.8 (a) , and subject to a civil penalty. The regulation requires a test to be done by a certain deadline. The nature of such a violation is not continuing after the deadline has passed. Applying the plain

meaning of §2462, the violation "first accrues" on the 181st day after initial startup.

During the ensuing five years, if a facility does not conduct the performance tests, it remains in violation and subject to a civil penalty. But it would be a fallacy to construe each day the test is not done as a new violation. The regulation, by its own terms, requires the test to be done within 180 days after initial startup. All the elements of the violation are in place on the 181st day after startup if the performance test has not been done. The passage of time from initial startup renders any late testing even later, and could increase the gravity of the violation, but does not create any new violations or toll the statute of limitations.

The facility remains in violation after 180 days whether it conducts late performance tests or never conducts the tests. Technically, the party would remain a violator indefinitely. The statute of limitations simply requires that a proceeding to enforce a civil penalty be commenced within five years of the date of violation. Complainant misunderstands the nature of this violation in its statement that a party that does not conduct the testing within 180 days "remains in violation until such time as the performance testing is done."[9] Even after the tests are done late, the party is still a violator. The late testing is contrary to the explicit requirement and intent of the regulation to have the tests done on new equipment soon after initial startup. This demonstrates why it is also fallacious to tie the running of the statute of limitations to the time when the tests are finally conducted. The late conduct of the performance tests does not change the party's status as a violator.

Once the tests are not done within 180 days after startup, there is then a continuing failure to conduct the tests, until they are done. That does not mean the violation is continuing, however. The violation was complete and first accrued on the expiration of 180 days after startup. It is but an exercise in semantics to debate whether that also means the violation itself is "continuing." Regardless of that debate, a straightforward application of the statute of limitations in 28 U.S.C. §2462 to a violation of 40 CFR §60.8 (a) compels the conclusion that the statute begins to run 181 days after initial startup of the facility.

This interpretation does not mean, as Complainant contends, that a facility is relieved of its obligation to conduct performance testing after 180 days.[10] On the contrary, the maxim "better late than never" would likely apply, particularly if late tests would still at least partially fulfill the purposes

of §60.8 (a) . The EPA always retains the power to compel the facility to conduct performance tests, even after five years have passed since initial startup. Injunctive relief is not subject to 28 U.S.C. §2462. The Respondent here did indeed conduct the tests late, in response to the Region's Compliance Order. It is plain that tests conducted years after initial startup will never fully substitute for true initial performance tests done within 180 days of startup. Late performance tests can never provide information on facility performance at initial startup. They can, however, provide current performance information. At least within five years after 180 days from startup, it will generally still be in the facility's and the EPA's interest to conduct the tests as soon as possible to provide this information, as well as to reduce the gravity of the violation and the party's exposure to civil penalty liability.[11]

Although none of the precedents that have considered the issue of continuing violations is controlling, I will address several of the cases cited by the parties. Complainant cites the Initial Decision in *In re Harmon Electronics Inc.,* Docket No. RCRA-VII-91-H-0037 (December 12, 1994). [12] In that decision the ALJ stated that the violations at issue were inherently distinguishable from those in the cases of *Toussie v. U.S.,* 397 U.S. 112 (1970), and *United States v. McGoff,* 831 F.2d 1071 (D.C. Cir. 1987). The violations in *Harmon* all stemmed from the ongoing operation of the respondent's landfill without a permit. The ALJ described them as follows: "The offense here was not simply an act of failing to file for a permit but a *state* of continued noncompliance with RCRA by *treating, storing and disposing* of hazardous waste without a permit." (Emphasis in original, Initial Decision, p. 24).

Respondent's violation here is more akin to that in *Toussie*-- the failure to register for the military draft within the prescribed time period, five days from the person's eighteenth birthday. Frontier failed to conduct performance tests and file the report of the tests within the prescribed time period, 180 days from initial startup.[13] After conducting the tests and filing the report, nothing further is required of the facility. This is a far cry from the ongoing operation of a facility without a permit. Here it is undisputed that Frontier operated throughout this period under a permit issued by the EPA's delegates, the NYSDEC, and was inspected regularly by NYSDEC. True, Frontier operated without having done the initial performance tests, but it was not thereby engaging in a new violation each day of its operation. Respondent contends the NYSDEC inspections were functionally and legally equivalent to the initial performance tests. Although that proposition is highly questionable, those facts at least demonstrate that Respondent was not engaging in continuing unauthorized operation, as was the respondent in *Harmon.*

Respondent's failure to conduct the tests is also similar to the failure to provide EPA with a Premanufacture Notice at least 90 days before importing a new chemical. That was the underlying violation (of TSCA) at issue in *3M.* [14] In the proceeding *In re Lazarus, Inc.,* Docket No. TSCA-V-C-32-93 (Initial Decision, May 25, 1995),[15] the ALJ found certain violations continuing so as to toll the statute of limitations, and others barred by the statute. The requirements to register PCB transformers with the fire department, and to properly store combustible materials at least five meters away from the PCB transformers, were held to constitute continuing duties. The ALJ reasoned that the respondent was operating in a state of noncompliance with those requirements on the date of the inspection. *(Lazarus,* 1995 TSCA LEXIS 11, pp. 19-21). On the other hand, the requirement to conduct quarterly inspections was held to be not continuing beyond the quarterly time periods when the inspection reports were due. The ALJ found that the failure to inspect in any quarterly time period is not the kind of violation that is by nature continuing but is complete upon termination of the quarterly period." (*Id.*, p. 29).

Respondent's violation here of failing to conduct initial performance tests is similarly not by nature continuing, but is complete on expiration of the facility's 180-day initial startup period. Just as late quarterly inspection reports will not serve the purpose of providing a timely report of conditions during that quarter, a late "initial" performance test will not serve the purpose of timely testing emissions during initial startup. Those late reports could still be compelled, and could still provide useful information, but the violations are by their nature not continuing. For these reasons, the statute of limitations for a violation of 40 CFR §60.8(a) begins running 181 days after initial startup of the facility. Since the Complaint here was not filed until over five years from that date, this proceeding seeking a civil penalty must be dismissed pursuant to 24 U.S.C. §2462.

Other Defenses

The Respondent also raised a series of additional affirmative defenses which were addressed by the parties in their respective motions for accelerated decision. These will not be analyzed in this decision. This decision dismissing the Complaint as barred by the statute of limitations renders those issues moot. For the purpose of guidance to the parties, I will note, however, that, with one possible exception, none of those defenses would bar Respondent's liability for the violation of 40 CFR §60.8(a). [16] Some of Respondent's other defenses and arguments could however be relevant to the determination of the appropriate amount of any civil penalty.

Order

The Complaint in this matter is ordered dismissed with prejudice. Pursuant to 40 CFR §22.20 (b) (1), this decision constitutes the initial decision of the ALJ in this matter. [17]

Andrew S. Pearlstein
Administrative Law Judge

Dated: March 10, 1997
Washington, D.C.

[1] Supplemental Affidavit of David J. Mahar, Ex. A.

[2] Complainant's Prehearing Exchange , Ex. 5 ("CX 5") ; Respondent's Prehearing Exchange, Ex. 5 ("RX 5)

[3] Complainant's Motion, Ex. A.

[4] CX 7,8; RX 7,8.

[5] Mahar Affidavit, ¶16, Ex. K.

[6] Mahar Affidavit, ¶¶ 5, 6, 8, 15, 17, 19; Exs. B, D, J, L.

[7] *Affected facility* means, with reference to a stationary source, any apparatus to which a standard is applicable. 40 CFR §60.2.

[8] This period of almost two months between the date on the Complaint and that on its certificate of service is not explained, but is immaterial since the earlier date is still more than five years after the deadline for conducting initial performance tests.

[9] Complainant's Reply Brief, p. 13, 17.

[10] Complainant's Reply Brief, p. 13-14.

[11] The Clean Air Act Stationary Source Civil Penalty Policy (CX 9, p. 10, 11-12) recognizes this principle by increasing its assessment of the gravity of the violation, and increasing the penalty, based on the length of time the violation continues. The CAA Penalty Policy speaks in terms of "length of

violation" rather than considering "continuing" violations as new or separate violations. The same violation may be considered continuing for the purposes of applying multi-day penalties, while it is not continuing for the purposes of applying the statute of limitations.

[12] The *Harmon* proceeding is pending on appeal to the Environmental Appeals Board. (EAB Appeal No. RCRA-94-4).

[13] Although Respondent is only charged with failing to conduct the tests, §60.8(a) also requires reports of such tests to be furnished to EPA. The conduct of the tests and filing of reports are part and parcel of the same violation.

[14] The Court in *3M* expressed "considerable doubt" over the f inding of the ALJ that each day that 3M failed to submit the Notice constituted a separate violation, tolling the statute of limitations. However, the Court elected to "pass over it" since this issue was not relied on or pressed by EPA in its defense to the appeal. 17 F.3d at 1455, note 2.

[15] The Lazarus proceeding is pending on appeal to the Environmental Appeals Board. (EAB Appeal No. TSCA-95-2).

[16] The possible exception is Respondent's defense that this Complaint is barred by application of CAA §113(d)(1), which limits the EPA's authority to bring administrative civil penalty proceedings "to matters where . . . the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action . . ." This regulation as applied in this case appears superseded by the statute of limitations in 28 U.S.C. §2462. However, this decision does not address whether, under the language and additional contingencies in §113(d)(1), a proceeding brought more than one year, but less than five years, after the violation of §60.8(a) first accrued, could be maintained.

[17] Pursuant to 40 CFR §22.27(c) this Initial Decision shall become the final order of the Agency, unless an appeal is taken pursuant to 40 CFR §22.30 or the Environmental Appeals Board elects, *sua sponte,* to review this decision.