UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
	)	
Phibro Energy USA, Inc.	)	**Dkt. No. CAA-R6-P-9-LA-92002**
	)	
	)	
	)	**Judge Greene**
	)	
Respondent	)	
	)	
	)	

ORDER UPON MOTION FOR RECONSIDERATION

Complainant seeks reconsideration of the *Order Granting Respondent's Cross-Motion for Accelerated Decision on the Merits and Initial Decision*, which granted summary determination to Respondent Phibro Energy USA, Inc.

The matter arises under section 111(b) of the Clean Air Act [42 U. S. C. § 7411(b)] ("the Act"). The principal issue is whether Respondent conducted, in a timely manner, performance evaluations of two hydrogen sulfide continuous emissions monitors on its fuel gas combustion devices in order to certify that the performance specifications set forth at 40 C.F.R. Part 60 (Appendix B) for such monitors were being met.

Also at issue is whether Respondent reported the results of such evaluations in writing to the Administrator of the U. S. Environmental Protection Agency (EPA) in a timely manner.

The complaint charged that Respondent had:

. . . . failed to conduct a timely perform-

ance evaluation, using Performance Specifi-

cation 7, of the two (2) H_2S CEMS [continu-

ous emission monitoring systems] . . . and

failed to furnish the Administrator a written

report of the results of such performance

evaluations in a timely manner, as required

by 40 C.F.R. § 60.13(c).

The *Order Granting Respondent's Cross Motion* determined that (1) Respondent was not liable for failure to conduct performance evaluations in a timely manner, i. e. within the period subsequently contended for by Complainant in its motion for partial "accelerated" decision, on the ground that the regulations at issue do not require such evaluations to be performed within that period; and (2) Respondent had conducted the evaluations in a timely fashion, i. e. within the time allowed by a reasonable, fair reading of the controlling regulations, which was at the same time the most logical meaning of the regulations in the circumstances here.[(1)]

The difficulties in this matter begin with two of the pertinent regulations, which do not fit together and cannot be read together convincingly to support the charge when applied to Respondent's situation. This difficulty was compounded by the complaint, which did not state precisely why Complainant believed the evaluations in question [40 C.F.R. § 60.13(c)][(2)] had not been timely as performed by Respondent, thereby leaving this crucial detail to the reader's ability to devine what period of time Complainant had in mind. A particular period for performing the evaluations cannot be inferred with confidence from section 60.13(c) even when read with the regulation to which it refers (section 60.8), or from the four corners of various regulations set forth in Subpart A of 40 C.F.R. Part 60 (which are generally applicable to certain stationary sources of air pollution) and those at Subpart J (issued March 8, 1974) which relate to performance standards for petroleum refineries. Moreover, the two ultimate charging paragraphs of the complaint [that 40 C.F.R. § 60.13(c) had been violated] were preceded by an allegation to the effect that Respondent had installed -- timely, it appears, -- two continuous hydrogen sulfide (H_2S) emission monitoring systems on its fuel gas combustion devices.[(3)]

With the filing of Complainant's motion for decision as to liability, however, the theory of this prosecution became clear: Complainant asserts that Respondent's failure to perform and report the results of evaluations of the H_2S monitoring systems within the one-year period following promulgation of performance specifications for those monitoring systems constitutes a violation of 40 C.F.R. § 60.13(c). What did not become clear, and has not subsequent-ly become clear, is why Complainant believed section 60.13(c) supported the view that Respondent's evaluations were required to be performed and reported to the Administrator within that one year period[4] inasmuch as Section 60.13(c), even when read with section 60.8 and the performance specification publica-tion notice, simply does not require the evaluations of the monitoring systems to have been performed--and reported upon -- by the date the monitors were to be installed and in oper-ation. The performance specification itself, moreover, pro-vides that the evaluations are to be conducted "at the time of *or soon after*" [emphasis added] installation of the monitors.[5]

40 C.F.R. §§ 60.13(c) and 60.8; "Affected Facility".

40 C.F.R. § 60.13(c), the regulation Respondent is charged with having violated, appears in Subpart A of 40 C.F.R. Part 60 and has general applicability to stationary sources of pollution. It provides in pertinent part that:

. . . .the owner or operator of an

affected

facility shall conduct a performance evalua-

tion of the . . . continuous emission monitor-

ing system (CEMS) during any performance test

required under § 60.8 or within 30 days there-

after in accordance with the applicable per-

formance specification in appendix B to this

part and, if the continuous monitoring system

is used to demonstrate compliance with emission

limits on a continuous basis, appendix F to

this part, unless otherwise specified . . . .

[Emphasis added] [(6)]

40 C.F.R. § 60.8, which also appears in Subpart A, provides in pertinent part, that

(a) Within 60 days after achieving the

maximum production rate at which the *affected*

facility will be operated, but not later than

180 days after initial startup of such *facil-*

ity and at such other times as may be required

. . . the owner or operator of *such facility*

shall conduct *performance test(s)* and furnish

the Administrator [of the U. S. Environmental

Protection Agency] a written report of the re-

sults of such *performance test(s)*. [Emhasis

supplied].

The parties disagree as to what is and is not included in the term `affected facility.'[(7)] While this is an interesting point, the answer does not assist in determining liability here. In the interest of clarity of the present discussion, however, it is noted that: (1) the complaint states that `affected facility' refers to the fuel gas combustion devices at Respondent's refinery[(8)], thereby indicating that, at least in Complainant's view, the term does not include, or refer to, the continuous emissions monitoring systems. This view is supported by the definitions of "affected facility" and "standard" (utilized in the definition of "affected facility"), at 40 C.F.R. § 60.2 of Part A, *General Provisions*, as follows:

Affected facility means, with reference to

a stationary source, any apparatus to which

a standard is applicable.

. . .

Standard means a standard of performance

proposed or promulgated under this part.[(9)]

(2) As Complainant points out, the regulations define the terms "continuous monitoring system" and "monitoring device" separately from "affected facility," and do so in such a way as to imply that they are not "affected facilities" and therefore would not be included in the term. In any case, no emissions limitation, or *standard* as such, is applicable to continuous emissions monitoring systems alone. (3) Section 60.100 (Subpart J) speaks in terms that cannot be reconciled easily with the proposition that "affected facility" includes emissions monitoring systems as well as the combustion devices to which the emissions standards at Part 60 Subpart J are applicable. [(10)] (4) It is clear from the definition of the term "fuel gas combustion device" at section 60.100 (Subpart J) that emissions monitors are not included; hence "affected facility" cannot refer both to combustion devices and to emissions monitors[(11)]. Accordingly, section 60.8 refers not to emissions monitors, but to fuel gas combustion devices. As a result, section 60.8 does not apply to the situation at hand, since it provides only for "performance tests" to be conducted on combustion devices. Because no section 60.8 "test" was required here, section 60.13(c) -- which speaks in terms of performance evaluations in connection with tests required to be performed on fuel gas combustion devices -- does not require performance evaluations to be conducted within any given period of time in connection with Respondent's then-newly installed monitors. Section 60.8 [and 60.13(b)] tests apparently refer to performance tests required after initial start-up of fuel gas combustion devices.[(12)] Accordingly, the only time limitation that clearly can be brought to bear upon the situation here is that referred to in Specification 7.

The Meaning of "Operate".

A principal point of Complainant's argument is that the performance specifications for emissions monitoring systems (published on October 2, 1990), which allowed one year for installation and operation of the monitors, ought to have been understood by Respondent to mean that it was also necessary to conduct performance evaluations and report upon them in writing

to the Administrator within the same year provided for installation and operation. In other words Complainant asserts that "operate" means, in this instance: (1) acquire monitors; (2) install them; (3) make them operational; (4) conduct performance evaluations; and (5) report upon the evaluations in writing to the Administrator.

Complainant expresses understandable concern that:

> Without conducting the required performance evaluation, the data from the H_2S CEMS would be unreliable and possibly inaccurate, rendering the monitoring itself a virtual nullity. The only EPA-recognized procedure to ensure the reliability and accuracy of the H_2S CEMS data is to conduct the performance evaluation required by 40 C.F.R. § 60.13(c) using Performance Specification 7. Thus, the requirement to operate the H_2S CEMS by October 2, 1991, must include the requirement that such operation by conducted in the one manner that will create valid and precise information.[(13)]

However, what the regulations do not say cannot fairly be required of Respondent, especially where, as here, the language of the performance specification itself provides that the evaluations may be conducted "soon after" installation, with no reference at all to operation.[(14)] This provision is entirely consistent with the one year period granted by the publication notice for installation and operation of the H_2S monitors. The word "operate" has not been defined in the Act or regulations, and is not, so far as can be discovered, a term of art. In consequence, "operate" has the meaning of ordinary usage, or ordinary usage in the context in which it is found. Neither ordinary usage nor ordinary usage with context provides a basis

for finding that "operate" includes all the activities urged by Complainant. Further, in the absence of provisions in Subparts A and J of Part 60 regard- ing the timing of performance evaluations and reports for emissions monitors connected to combustion devices that had been in operation long before the monitors were installed, the "soon after" provision of Specification 7 stands out as both reasonable and controlling.

In sum, it is held that section 60.13(a) does not require evaluations of H_2S continuous emissions monitors to be per-formed no later than the date upon which they are required to be installed and in operation by 15 ***Fed. Reg.*** No. 191 at 40171. Neither does section 60.13(c), when read together with 60.13(b) and/or section 60.8, make the requirement contended for by Complainant. Moreover, it is held that the language of 15 ***Fed. Reg.*** No. 191 at 40171 requires only that the regulated community install, and operate, H_2S continuous emissions moni-toring systems no later than one year from the date of prom-ulgation of the performance specifications for such monitoring systems. This Respondent did, or did substantially. The word "operate" is not adequate to notify members of the regulated community that they were expected to acquire, install, and bring monitors into operation as well as perform evaluations and report the results in writing to the Administrator, all within that same one year period. This is true particularly when Performance Specification 7 provides that the evaluations may be conducted "soon after" installation.

Last, it is held that the requirements of Specification 7 of Appendix B were met, or were substantially met, by Respondent's having concluded performance evaluations on (1) the emissions monitor attached to the catalytic cracking unit by March 9, 1992, and (2) the crude unit emissions monitor by March 26, 1992. It is held that these dates substantially comply with the broadly worded requirement ("at the time of installation or soon after") of Specification 7 in the cir-cumstances shown, which include the resolution of initial technical difficulties.[(15)]

The Matter of "Deference".

It is important to address an argument incompletely made and responded to by the parties, to the effect that EPA's statutory and regulatory interpretations are "entitled to deference."[(16)] Complainant is correct insofar as the objective is to point out that EPA's interpretations of the statutes and applicable regulations it enforces are generally *accorded* deference if they are reasonable. However, Complain-ant failed to add that this is

a *standard of review*; it is upon federal district court or court of appeals review that deference is frequently accorded reasonable agency interpre-tations that have become final,[(17)] not at the trial level in any tribunal. There has been considerable discussion in the cases, particularly in the Court of Appeals for the District of Columbia Circuit, as to when and just how much deference is to be accorded. It is noted further that some decisions in other circuits speak of "entitlement" to deference, but the thrust of such decisions has been that federal appellate courts *will not disturb* reasonable agency interpretations. This is closer to according deference than to recognizing entitlement.

Arguments made for agency interpretations at the trial level cannot, obviously, be accorded deference.[(18)] Otherwise, little purpose would be served by Congressional mandates in many statutes, including the Clean Air Act[(19)], that persons against whom certain kinds of agency charges have been lodged are entitled to adjudicate those charges before an independent administrative law judge qualified and appointed pursuant to 5 U.S.C. § 3105.

Summary; Additional Findings and Conclusions.

The arguments of the parties have been reconsidered at length, owing to the fact that the principal issue is a matter of initial impression.

It is determined that the previous order adequately and correctly expressed the opinion of this tribunal. Respondent's reasoning as set forth in its *Cross-Motion for Acceler-ated Decision on the Merits* is correct in most respects,[(20)] expressly excluding its tentatively held view that the term "affected facility" may be construed broadly to include continuous emissions monitoring systems. Upon renewed and careful reconsideration of the record, therefore, including the motion for reconsideration and the response, it is determined that the previous decision should stand as issued and corrected, and as amplified by the contents of this Order.

In view of the discussion above, it is further found that:

1. The term "affected facility" refers, in connection with this matter, to fuel gas combustion devices (as defined) to which emission standards are applicable, and not to continuous emissions monitoring systems either alone or as connected to combustion devices.

2. Respondent was bound by Performance Specification 7 and was required to conduct evaluations of its H_2S monitoring devices in accordance with such specification.

3. There is no evidence that Respondent did not, and accordingly it is held that Respondent did in fact, conduct the required performance evaluations in accordance with Performance Specification 7 of 40 C.F.R. Part 60, Appendix B.

4. Respondent's performance evaluations of the H_2S monitoring systems were conducted soon after installation of such systems, as provided by Performance Specification 7. Accordingly, given the applicable regulations and the facts here, including technical difficulties attending initial operation, the evaluations were conducted and reported in a timely, or substantially timely, manner.

5. Neither the word "operate" nor the words "install and operate" are adequate to notify the regulated community that conducting and reporting of performance evaluations were included or were intended by EPA to be included within the one year period allowed for installation and operation of emissions monitors.

6. Respondent was charged with failure to report the results of the performance evaluations to the Administrator in a timely manner. However, 40 C.F.R. § 60.13(c) does not require that performance evaluations of emissions monitoring systems be reported to the Administrator.

7. "Deference" to Complainant's or EPA's interpretation is not given at the trial level; otherwise, there would be little need for hearings, and statutory grants of the right to hearing on the record before an administrative law judge qualified and appointed pursuant to 5 U.S.C. § 3105 would be rendered a nullity. The standard referred to by Complainant in its brief is a standard of review frequently utilized by federal district or appellate courts in connection with review of final agency interpretations of agency authority and regulations.

ORDER UPON RECONSIDERATION

Complainant's motion for reconsideration is denied.

And it is further ordered that such other aspects of Complainant's motion for "accelerated" decision as have not been

specifically addressed were considered unnecessary to the decision here, and are denied.

J. F. Greene

Administrative Law Judge

July 31, 1997

Washington, D. C

It cannot mean that. Perf. Spec. 7 itself says "or soon thereafter." Complainant's view renders these words a nullity, thereby violating a basic principle of statutory construction (interpret in such a way that nothing is superfluous)

In connection with the foregoing, 40 C.F.R. § 60.13(b) provides that "all continuous monitoring devices shall be installed and operational prior to conducting *performance tests* under § 60.8." (Emphasis supplied). Accordingly, it will become important to inquire what *performance tests*, as opposed to performance evaluations of the emissions monitors required by section 60.13(c), must be conducted pursuant to section 60.8, and what period of time is provided for such tests.

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order, was filed with the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on July 31, 1997.

NAME OF RESPONDENT: Phibro Energy USA, Inc.

DOCKET NUMBER: CAA-R6-P-9-LA-92002

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1. [1] That decision is appended hereto, made a part hereof, and reissued to reflect the correction of typographical errors.

2. [2] All references herein to the ***Code of Federal Regulations*** are to 40 C.F.R. Part 60 of the July l, 1991, edition, unless otherwise specified.

3. [3] Complaint at 5-6, ¶¶ 22, 23, and 24.

4. [4] "All fuel gas combustion devices . . . in petroleum refineries, subject to subpart J of 40 CFR part 60, will be required to *install and operate* CEMS's within l year of the promulgation date." (October 2, 1990) 55 ***Fed. Reg***. 40171.

5. [5] 40 C.F.R. Part 60, Appendix B, Specification 7: 1. *Applicability and Principle*, at section 1.1, *Applicability*.

6. [6] Section 60.13 became applicable on October 2, 1990, the date of promulgation by EPA of performance specifications for H_2S continuous emissions monitoring systems. The monitors were re-quired to be *installed and operating* within one year of that date, i. e. by October 2, 1991. ***Fed. Reg.*** Vol. 55, No. 191, at 40171. Complainant has not contended that Respondent's continuous emis-sions monitoring systems were not installed by October 2, 1991.

7. [7] Even bearing in mind that these terms mean what the Administrator says they mean (through the Environmental Appeals Board or an official policy pronouncement) until such time as a

reviewing court holds otherwise, the Administrator has not yet spoken directly to this point.

8.

[8] The complaint at § 12 alleges that "Phibro's facility utilizes and includes fuel gas combustion devices . . . each of which is an `affected facility' within the meaning of 40 C.F.R. § 60.2."

9.

[9] See, for instance, the heading to 40 C.F.R. Part 60, *Standards of Performance for New Stationary Sources;* the standards refer to emission limitations set by EPA in that Part for various pollutants from stationary sources.

10.

[10] 40 C.F.R. § 60.100 "*Applicability, designation of affected facility* . . . (a) the provisions of this subpart are applicable to the following affected facilities in petroleum refineries: . . . fuel gas combustion devices . . . ."

11. [11] "*Fuel gas combustion device* means any equipment, such as process heaters, boilers and flares used to combust fuel gas, except facilities in which gases are combusted to produce sulfur or sulfuric acid." [Emhasis original] The equipment at Respondent's refinery where monitors were installed are (1) the fluidized catalytic cracker, and (2) the crude area. Respondent's answer to the complaint at 7; Complainant's memorandum in support of motion for partial judgment, at 5.

12. [12] The start-up of Respondent's combustion devices is said to have occurred around 1982, many years before H_2S continuous emissions monitoring systems were required to be installed. Respondent's *Cross-Motion for Accelerated Decision on the Merits* at 6-7.

13. [13] Complainant's motion for partial "accelerated" decision, Memorandum at 11.

14. [14] That the specification does not refer to operation could be a further indication that "operate" does not include the conduct of performance evaluations and submissison of written reports.

15. [15] See generally Exhibit A of Respondent's Cross-Motion, Affidavit of Mr. Kenneth Brummett.

16. [16] Complainant's memorandum in support of motion for partial decision as to liability, at 13-14; Respondent's cross-motion for "accelerated" decision on the merits, at 11.

17. [17]But, see various District of Columbia Circuit decisions where Judge (now Justice) Scalia seemed to say that even where such in-terpretations are reasonable, if another interpretation seems more reasonable the court may or will substitute it for the Agency's judgment. At one time Justice Scalia was Chair of the Administra-tive Conference of the United States, and made a something of a specialty of administrative law.

Cf. ***General Electric Company v. U. S. EPA***, 53 F. 3d 1324, 1326-1330 (D. C. Cir. 1995).

18. [18] If an agency interpretation has been the subject of a formal (published) policy pronouncement from the agency head, it is binding in much the same way as an agency regulation is binding. That, however, is not a matter of deference.

19. [19] 42 U.S.C. § 7413(d)(2)(A), section l13 of the Act.

20. [20] See particularly pp. 6-10.