UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
City of Sioux Falls, SD,	)	Docket No. CWA-VIII-93-03-P-II
	)	
	)	
Respondent	)	

ORDER ON MOTIONS

By an administrative complaint issued on November 19, 1992, under section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g), Respondent, the City of Sioux Falls, South Dakota (City), was charged with violating its National Pollutant Discharge Elimination System (NPDES) permit and the General Pretreatment Regulations found at 40 C.F.R. Part 403. The penalty proposed for the alleged violations is $125,000.

The City owns and operates a publicly owned treatment works (POTW) which is authorized, pursuant to its NPDES permit, to discharge treated waste waters into the Big Sioux River, which is one of the "waters of the United States" as defined in 40 C.F.R. § 122.2. In 1985, EPA approved Respondent's Industrial Pretreatment Program, which required Respondent, the POTW, to apply and enforce National Pretreatment Standards. These standards, which apply to Industrial Users ("IUs"), non-domestic sources that discharge wastewaters into a POTW, control pollutants that are determined not to be susceptible to

treatment by a POTW or which would interfere with the operation of a POTW.

On April 30 and May 1, 1992, EPA conducted an audit of the City's Industrial Pretreatment Program. On the basis of the audit, twenty findings of violation of the General Pretreatment Regulations and of the City's NPDES permit were alleged in the complaint.

The City answered the complaint on December 11, 1992, denying the alleged violations, asserting affirmative defenses, requesting summary judgment on some findings of violation[1/] and requesting a hearing on those remaining and on the proposed penalty.

A flurry of motions and responses were filed by the parties. Under date of May 13, 1993, the City submitted motions to strike and to dismiss certain alleged violations, and a motion for production of documents. Complainant opposed those motions by submittals, dated June 14, 1993, including therewith a motion for leave to file first amended complaint ("motion to amend") and proposed amended complaint. On July 2, 1993, the City filed a document entitled "Response to Complainant's Motion

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[1/] The motion requested summary judgment on findings of violation numbered 3, 4, 5, 8-13, and 15-18, and in the alternative, a dismissal of the complaint with prejudice on its merits, on grounds that the allegations in the complaint are duplicative, erroneous, misleading, or complied with pursuant to a compliance order, dated September 4, 1992. The motion was not followed up by either party, but is considered to have been superseded by the motions to dismiss and to strike allegations in the complaint described below, so it is not addressed herein.

to Dismiss," which replies to Complainant's opposition to the motion to dismiss. Complainant filed a motion for a more definite pre-hearing exchange on July 7, 1993. A letter, dated July 12, 1993, from the City to the undersigned Administrative Law Judge (ALJ) was objected to by Complainant in a motion to strike, dated July 14, 1993. Under dates of July 19, August 3, and August 13, 1993, the parties submitted supplemental memoranda supporting their positions on the motions to strike and to dismiss and on the motion to amend the complaint. Complainant opposed the latter such submission of the City as untimely. Subsequently, Complainant filed a supplemental memorandum in support of its motion to amend the complaint, to which the City replied on October 28, 1993. The City moved for discovery on October 21, 1993, to depose two EPA employees with respect to penalty calculations. All of these motions are discussed below.

D I S C U S S I O N

I. Complainant's Motions to Strike

As indicated in the introduction of this order, the City submitted motions to strike duplicated violations, to dismiss violations not referenced in specific terms and conditions of its NPDES permit and for the production of documents under date of May 13, 1993. Complainant's opposition to these motions was filed on the due date, as extended (June 14, 1993). The opposition included a motion for leave to file an amended

complaint. Considering the five days additional time for filing responses to motions where service is by mail (Rule 22.07(c)), the City's response to the motion to amend was to be filed not later than June 29, 1993.[2/] Under date of July 2, 1993, the City filed a document entitled "Response To Complainant's Motion To Dismiss." This document and the cover letter stated the City's position that the proceeding should be handled on the basis of the present pleadings and that a further response to the motion to amend the complaint would be forthcoming.

On July 7, 1993, Complainant filed a document entitled "Complainant's Motion To Strike Response To Complainant's Motion To Dismiss and To Bar Response To EPA's Motion To Amend Its

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[2/] 40 C.F.R. § 22.16(b) provides, in part:

> Response to motions. A party's response to any written motion must be filed within ten (10) days after service of such motion, unless additional time is allowed for such response. If no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion.

Under 40 C.F.R. § 22.07(c), five days are added to the time allowed for responses to pleadings and documents where they are served by mail. 40 C.F.R. § 22.07(b) provides, in pertinent part:

> (b) Extensions of time. The . . . Presiding Officer . . . may grant an extension of time for the filing of any pleading, document, or motion (1) upon timely motion of a party to the proceeding, for good cause shown . . . . The motion shall be filed in advance of the date on which the pleading, document, or motion is due to be filed . . . .

Complaint."[3/] The motion pointed out that the City's response was untimely and that the City had not moved for additional time in which to serve a response brief. Accordingly, Complainant argued that the City's response to the motion to amend should be stricken as untimely and that any further response to the motion should be barred.

In a letter to the ALJ, dated July 12, 1993, counsel for the City stated that she had been absent from the office from June 14 through June 19, 1993, and from July 6 through July 10, 1993.[4/] The letter further stated that the City was currently preparing a memorandum with supporting affidavits in response to Complainant's motion to amend the complaint and that the City intended to have these documents ready for filing in no more than 30 days. Additionally, the letter stated that the City was strongly opposed to Complainant's motion to amend [being treated] as a routine matter after Complainant ignored the City and State's earlier requests to reevaluate the case.

[3/] Complainant selected this title for the motion, notwithstanding its contention that it had not filed a motion to dismiss any portion of the complaint and that the City was responding to a motion that did not exist.

[4/] In a cover letter, dated July 19, 1993, forwarding its "Supplemental Memorandum In Support Of City's Motions To Strike And To Dismiss And In Opposition To EPA's Motion To File An Amended Complaint" ("Supplemental Memorandum"), counsel corrected the June days of absence from the office as being from June 19 through June 28, 1993. No claim of excusable neglect has been made and no reason for the absences has been advanced.

On July 14, 1993, Complainant filed a reply to the City's letter, dated July 12, 1993, and a motion to strike the letter upon the ground that it was an ex parte communication. The motion purports to quote from Rule 22.08 entitled "Ex parte discussion of proceeding," but conveniently omits the word "ex parte" from the language of the rule providing in part that "(a)ny ex parte memorandum or other communication addressed to the Administrator. . or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding. . . ." The City's July 12 letter refects that a copy was mailed to counsel for Complainant and counsel has acknowledged receipt of a copy thereof. Accordingly, the July 12 letter was not an improper ex parte communication and Rule 22.08 is not applicable.

Complainant avers that counsel for the City has known since April that Complainant intended to file a motion to amend the complaint and that the statement in the City's July 12 letter that Complainant filed the motion to amend "after ignoring the City and State's earlier requests to reevaluate the case" is "unequivocally false." In fact, Complainant says that its reevaluation of the case, led to the filing of the motion to amend the complaint. It is apparent, however, that "reevaluating the case" during the public notice and comment period required by CWA § 309(g)(4) is a far different matter than any reevaluation after the complaint has been issued. This

is true even if Complainant's assertion that it acknowledged deficiencies in the complaint in the April phone conversations with counsel for the City is credited. The City is apparently referring, inter alia, to a letter from the State, dated November 6, 1992, submitted during the public comment period and to a second letter, dated December 16, 1992, submitted by the State after the complaint was issued. These circumstances indicate that there is no warrant for Complainant's extravagant claim that the quoted statement in the City's letter is "unequivocally false."

In its Supplemental Memorandum, served on July 19, 1993 (supra note 4), the City, inter alia, reiterated the charge that the Agency abruptly and without notice changed its procedures and that, although EPA officials were aware of the errors in the complaint, Complainant ignored State and City comments (Id. 8). Additionally, the City argued that under § 309(g)(2) of the Act, EPA was authorized to issue a compliance order or to bring a civil action, but was not authorized to do both as it was attempting here. Opposing the motion to amend, the City contends that this is a case where sanctions should be imposed on the Agency pursuant to FRCP Rule 11.[5/]

[5/] Supplemental Memorandum at 9, 10. FRCP Rule 11 provides in part that the signature of an attorney or party "constitutes a certificate by the signer that the signer has read the pleading, motion or other paper [and] that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and warranted by existing law. . . ." The rule provides for sanctions for infractions of the rule.

Despite Complainant's acknowledgment that the Rules of Practice do not provide for response briefs (Motion to Strike, dated July 7, 1993), Complainant filed a memorandum in opposition to the City's Supplemental Memorandum on August 3, 1993 ("C's Opposition"). Complainant argues, inter alia, that the City's opposition to its motion to amend is untimely and should be stricken, that FRCP Rule 11 is not applicable, that the Agency has not acted in bad faith, but has been responsive to the City's concerns and that there is no basis for the City's motions to strike and to dismiss.

If sanctions were available in this forum, Complainant says that they should be imposed on the City (C's Opposition at 2, 3). Complainant accuses the City of waging a campaign aimed at misleading the court and confusing the administrative process from the inception of this litigation. As examples, Complainant cites the City's "relentless contravention of the Part 22 procedural rules" and the alleged fact that its supplemental memorandum is replete with "misrepresentations and lies." (Id. 3). The City's statement that it informed EPA's current counsel of the complaint's deficiencies on November 6, 1992, December 2, 1992, December 10, 1992, and December 16, 1992, allegedly "are lies" (sic) (C's Opposition at 4).

Such abusive allegations are not in keeping with the code of professional responsibility;[6/] hinder, rather than assist, in the resolution of the underlying controversy, and are especially inappropriate for lawyers who represent the government and who, accordingly, have an additional obligation to the public for proper behavior. Vituperative language such as accusing opposing counsel of lying is not acceptable practice before this ALJ. This is especially so here, because the City appears to have a reasonable explanation for the statements which are alleged to be false.

The City responded mildly to Complainant's vituperative memorandum, pointing out that in view of the unfortunate deteriorating nature of [EPA's] comments, it appeared that different conclusions have been drawn from meetings held and presentations made prior to the issuance of the complaint.[7/] The City denied waging a campaign to mislead the court, averring that City officials were not aware of the physical condition of earlier counsel for the Agency. City officials were assertedly aware that EPA legal counsel was in attendance at early meetings

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[6/] See, e.g., EC-37, EC-38 and DR 7-101, Model Code of Professional Responsibility and Code of Judicial Conduct (ABA 1980), which specify, inter alia, that a lawyer should not make unfair or derogatory references to opposing counsel, that a lawyer should be courteous to opposing counsel and should avoid offensive tactics.

[7/] Second Supplemental Memorandum In Support Of City's Motions To Strike And To Dismiss And In Opposition To EPA's Motion To File An Amended Complaint ("Second Supplemental Memorandum"), dated August 13, 1993.

where statements which the City believed were not correct were identified for EPA officials. The City summarized its position that errors, omissions and inaccuracies were called to the attention of EPA officials both orally and in writing prior to the issuance of the complaint and says that the fact present counsel was not aware of these statements does not excuse EPA from having issued the complaint without correcting the errors. Moreover, the City asserts that, because current EPA counsel attended a meeting with representatives of the City and EPA [in early December 1992] it was not unreasonable to assume that she was aware of information previously supplied by the City concerning inaccuracies in the complaint proposed to be issued by the Agency.

Complainant responded to the Second Supplemental Memorandum by filing a motion to strike on August 25, 1993.

Complainant's motions to strike will be denied. Firstly, the mere fact that a pleading, motion for an extension of time, or response to a motion is filed or served out of time, does not mean that the pleading or response should be struck or that the relief sought by the opposing party must be granted. Instead, the law favors resolution of cases on their merits and I am permitted, but not required, to accept or excuse filings which are out of time. See, e.g., E. I. du Pont de Nemours & Co.,

Docket No. TSCA-III-540 (Order Granting Motion To Dismiss, June 25, 1992) (even though complainant was 49 days late in responding to a motion to dismiss, the motion was granted only after a careful review wherein it was concluded that complainant was unlikely to prevail on the facts alleged). See also Asbestos Specialists, Inc., TSCA Appeal No. 92-3 (EAB, October 6, 1993) (it was error to rely upon Rule 22.16(b), supra note 2, as a basis for dismissing the complaint where it was clear that complainant opposed the motion). Here, the City served a response memorandum on July 2, 1993, which, although curiously titled, made it clear that the City opposed the motion to amend. This opposition was reiterated in the City's letter of July 12. Under these circumstances, it flies in the face of reality to proceed as if the motion were unopposed. Moreover, as will be seen, consideration of the City's Supplemental Memorandum does not alter the ruling on the motion.

In Hardin County, Ohio, RCRA (3008) Appeal No. 92-1, Order Denying Reconsideration (EAB, February 4, 1993), a reply to a response to a motion, which had been filed without moving in advance for leave therefor, was struck upon the ground that the Rules of Practice made no provision for filing such documents. Although this rule could be applied here, neither party has

scrupulously adhered to the Rules of Practice and I decline to do so.[8/]

II. The City's Motions To Strike and To Dismiss and Complainant's Motion to Amend the Complaint

The City has moved to strike alleged violations that are duplicated in the complaint. In support, an affidavit of Robert Kappel, the City's Environmental Compliance Manager, provides factual information and legal argument for the motion. The complaint contains twenty findings of violation, but does not include references to any provisions of the City's NPDES permit, the Clean Water Act or implementing regulations which were allegedly violated, as required by 40 C.F.R. § 22.14(a).[9/] Mr. Kappel asserts that two of the alleged violations could not be referenced to federal law, and that the rest are duplicated, being based on only five different sections of the Code of Federal Regulations. He argues that a single audit that reveals

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[8/] The charge that the City has relentlessly contravened the Part 22 procedural rules (C's opposition) is hypocritical in view of Complainant's attempt to make an ex parte communication out of the City's letter, dated July 12, 1993, which was in no sense ex parte. Moreover, Complainant, although admittedly aware that the Rules of Practice made no provision therefor, nevertheless, proceeded to file an opposition to the City's Supplemental Memorandum on August 3, 1993, a supplemental memorandum in support of its motion to amend on October 21, 1993, and reply memoranda (motions to strike) on July 7, July 14, and August 25, 1993.

[9/] Rule 22.14(a)(2) provides "Each complaint for the assessment of a civil penalty shall include: . . . (2) Specific reference to each provision of the Act and implementing regulations which respondent is alleged to have violated . . . ."

several violations of the same regulations should be treated as a single violation.[10/] He alleges that the complaint was not subject to prior analysis or review, and that not all relevant factors were taken into account. As an example, he states that following an EPA inspection in 1991, the City submitted a schedule to correct the deficiencies, but received no response from EPA. According to Mr. Kappel, the City received the Audit Findings, which listed 22 required corrective actions, on August 10, 1992, and had completed 18 of the required actions by September 4, 1992. The City claims that it did not receive adequate support and guidance from EPA, and that without prior notice or opportunity to consult or comply with EPA's requests for changes, EPA issued a compliance order, received by the City on September 4, 1992, and then issued the complaint in November 1992. Moreover, Mr. Kappel states that the City has continued to improve its pretreatment procedures, and that it has received awards for excellence in operation and maintenance.

The City has moved to dismiss findings of violation numbered 1, 2, 9, 10, 12, 13, 14, 16, 17, 18, 19 and 20 as relating to conditions not contained or referenced in the specific terms and conditions of its NPDES permit. Another affidavit of Robert Kappel is provided in support, containing factual and legal argument. Mr. Kappel alleges that EPA is

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[10/] Mr. Kappel cites section 309(g)(3) of the CWA which requires treating as a single violation a single operational upset which leads to simultaneous violations of more than one pollutant parameter.

attempting to unilaterally modify the City's pretreatment program requirements and NPDES permit, which does not have a provision allowing EPA to unilaterally amend POTW pretreatment programs. While the City's proposed 1994 NPDES permit does contain such a provision, he argues that it cannot form the basis for a penalty assessment until the current permit is modified. He avers that the City submitted schedules and programs to address audit deficiencies, but did not receive timely or adequate formal guidance or approvals from EPA.

The City's arguments set forth in its memorandum in support of the motion to dismiss expand further the arguments set forth in the Kappel affidavit. The City alleges that penalties are sought for violations of pretreatment standards which are not included as conditions of its NPDES permit, and points out that EPA has not followed prescribed methods of modifying or incorporating new conditions into an NPDES permit or pretreatment program. A new pretreatment policy in the 1994 NPDES permit has been proposed, but is not an enforceable part of the current (1989) permit. Assuming that EPA must adhere to the same procedures (in 40 C.F.R. § 403.18(b)) applicable to a permittee for a substantial modification of an industrial pretreatment program, the City argues that EPA did not follow these procedures. Cases are cited in support of the principle that an NPDES permittee can only be held liable for violations

of specific conditions contained in the permit.[11/] This is known as the "permit-as-a-shield defense," and is based upon section 402(k) of the CWA.[12/]

In opposition to the motion to strike, Complainant acknowledges its failure to identify some of the violations with citations to regulatory and permit provisions, concurrently filing a motion to amend the complaint to correct those errors, to consolidate duplicated claims and to add appropriate citations to regulations and permit conditions. Distinguishing the EPA compliance order, dated August 31, 1992, from the present enforcement action, Complainant explains that they are parallel proceedings, and the present action does not allege violations of the compliance order. Complainant points out that there is no duty for it to notify a violator prior to taking enforcement action under the CWA.[13/] The amended complaint charges the City with violations of several requirements set forth in subsections of the federal regulations. It does not add any new violations, and consolidates allegations of

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[11/] See, e.g., Inland Steel Co. v. EPA, 574 F.2d 367, 369-73 (7th Cir. 1978).

[12/] Section 402(k) of the CWA provides, in pertinent part, "Compliance with a permit issued pursuant to this section shall be deemed compliance for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317 and 1343 of this title . . . ."

[13/] The Agency is, however, required by § 309(g)(1) of the Act to consult with the State prior to assessing an administrative penalty and § 309(g)(4) provides for public notice and opportunity to comment.

violation that were duplicated in the initial complaint, resulting in fourteen findings alleging violations of 40 C.F.R. Part 403 and conditions in the City's NPDES permit. Complainant urges that it is appropriate for EPA to seek penalties for each separate instance of violation of the same regulation or permit condition as well as to seek penalties for violations of each subsection of those regulations or the permit (Complainant's Memorandum in Opposition, dated June 14, 1993, at 5).

In opposition to the motion to dismiss, Complainant asserts that the proposed 1994 NPDES permit is not at issue; rather, the City is charged with violations of the General Pretreatment Regulations of 40 C.F.R. Part 403 and with violations of its 1989 NPDES permit. Complainant says that the City's defense of inadequate oversight of its pretreatment program by EPA is not affirmative misconduct, which is the only viable ground of estoppel against the government.

The City counters these arguments in its July 2, 1993, submittal, explaining that it is not asserting an estoppel defense, but rather that it seeks to dismiss those allegations which fail to state a permit violation. Emphasizing that Complainant knew its allegations were questionable yet only much later moved to amend the complaint, the City contends that the case should be handled on the basis of the present pleadings.

In its Supplemental Memorandum, dated July 19, 1993, the City avers that it had corrected many of the alleged deficiencies following the June 19, 1991, inspection and

April 30, 1992, audits. A report of inspection on June 30, 1992, by the South Dakota Department of Environment and Natural Resources (SDDENR) is cited in support, which noted that "(n)o deficiencies were observed," and gave a satisfactory overall rating, including consideration of the pretreatment program (Supplemental Memorandum at 3; Affidavit of Robert Kappel In Support of Motion to Strike, at unnumbered page 2). According to the City the compliance order issued on August 30, 1992, repeated most of the requirements identified by the City in its previously submitted schedule to correct the deficiencies found in the April 30, 1992 audit. See Affidavit of Lyle Johnson at 4. The City refers to the unnecessary expense it incurred in responding to EPA's errors and omissions in the initial complaint, and emphasizes EPA's abandonment of its long-standing prior practice of consultation concerning pretreatment program deficiencies and improvements, as well as EPA's failure to respond to the City's proposed compliance schedules, ordinances and other submittals. Without citing any authority, the City asserts that it was entitled to be informed of "abrupt procedural changes."[14/]

[14/] Supplemental Memorandum at 8 - 9. This argument seemingly is more appropriately considered in mitigation of the proposed penalty.

The City argues that under section 309(a)(2) of the CWA, EPA may issue a compliance order or bring a civil action, but not both, and that this applies to administrative actions under § 309(g), referring specifically to § 309(g)(11).[15/]

The City claims that the amended complaint is a "total rewrite having very little similarity to the original complaint," containing new issues and including a new method of computing the penalty, and is prejudicial, because it will require another complete review and re-analysis (Supplemental Memorandum at 11 - 12).

[15/] The authority to assess civil penalties under the CWA was added to the Act by the Water Quality Act of 1987 (P.L.100-4, February 4, 1987). Section 309(g)(11) provides:

> (11) Protection of existing procedures
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> Nothing in this subsection shall change the procedures existing on the day before February 4, 1987, under other subsections of this section for issuance and enforcement of orders by the Administrator.

It appears that this section was merely to make clear that the addition of administrative penalty authority was not intended to affect the Administrator's authority to issue and enforce compliance orders. Upon a finding of violation, § 309(g) establishes only three conditions for the assessment of a penalty, i.e., consultation with the State, notice and opportunity for a hearing in accordance with § 554 of Title 5 and notice and opportunity for public comment.

Finding of violation number 4 of the proposed amended complaint alleges that the City's ordinance did not authorize a penalty amount of $1,000 per day of violation by an IU. The City explains that the South Dakota state law did not authorize it to impose $1,000 penalty provisions until July 1, 1992, and alleges that EPA failed to review and approve the City's proposed ordinance expeditiously, causing delay in adopting the new penalty provisions (Supplemental Memorandum at 4; Affidavit of Lyle Johnson at 4).

In its opposition, Complainant points out that the standard for filing administrative complaints is set forth in 40 C.F.R. § 22.13, which authorizes the issuance of a complaint if EPA "has reason to believe" that a violation has occurred. As to the assertion that it knew of the complaint's deficiencies, Complainant explains that current counsel for EPA was not assigned to this case until early 1993, although she did attend, but not conduct, a settlement conference on December 2, 1992 (C's Opposition at 3, 4).

Disagreeing with the claim that prior inspections resulted in satisfactory ratings by SDDENR, Complainant alleges a continued history of deficiencies, i.e., failure for several years to implement key pretreatment program requirements.

Complainant also disagrees with the claim that it did not provide adequate supervision and guidance. EPA states that it held annual regional workshops for pretreatment programs. Complainant provides a description of the content, significance and effect of the different types of inspections performed, emphasizing that the SDDENR does not have authority or expertise to fully evaluate a pretreatment program. Complainant also alleges that it did not make a decision to take any enforcement action until the City demonstrated a consistent and repeated pattern of non-compliance. Complainant characterizes as false the City's allegation that the deficiencies from the 1991 inspection were presented as routine or minor.

With regard to finding of violation number 4 of the proposed amended complaint, Complainant alleges that the federal regulation concerning the pretreatment penalty authority required the City to adopt it by November 16, 1990, and that the City "did not exhibit a willingness to pursue the required authority from the South Dakota legislature" (C's Opposition at 13).

Subsequent to the City's July 19, 1993, memorandum, Complainant submitted a supplemental memorandum, citing In re Asbestos Specialists, Inc, supra, for the proposition that

administrative pleadings are "liberally construed" and "easily amended." ("It is only where the defect in the complaint is not curable by amendment that leave to amend should be denied.")

The City distinguishes Asbestos Specialists by alleging that it was prejudiced by Complainant's actions. The City repeats assertions that EPA ignored conversations initiated by the City and information submitted by the City demonstrating the erroneous nature of the original complaint, both before and after it was filed, and that it was forced to incur a substantial expenditure of funds in order to respond to the initial erroneous Complaint (Response, dated October 28, 1993). The City argues that EPA violated its statutory obligation to take into account the nature, circumstances, extent and gravity of the violation by failing to properly investigate the allegations. The City concludes that the complaint should not be amended without compensating the City for its expenses to date, and requests that the motion to amend be denied and the motion to dismiss be granted.

A plethora of paper has been filed concerning the three motions, including several affidavits. The first question to address is whether to grant the motion to amend. If it is granted, the next question is whether the motions to dismiss and to strike certain allegations are still viable with respect to the amended complaint.

The parties agree that the original complaint was defective. For example, findings of violation numbered three,

four and six in the original complaint appear to allege the same violation:

> 3) City personnel lack knowledge of the current base of industrial users (IUs) discharging to the wastewater treatment plant (WWTP). The City indicated that updates of its Industrial Waste Survey (IWS) are performed on an ongoing basis through review of new commercial building permits and water billing records for current users. However, a cursory review of the telephone directory and the City's IWS collected sufficient information to **suspect that more SIUs are present** within the WWTP service area. Walk-through inspections at seven IUs which were not identified as SIUs were completed as part of the audit. More facilities were identified as **needing additional information to correctly determine the facility status.** Two of the facilities that were inspected were determined to be categorical industrial users (emphasis added).
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> 4) The City recently compiled a listing of all major water users . . . within the WWTP service area. Several facilities identified in the list **require further follow-up by the City to adequately determine whether the facilities should be classified as SIUs** (emphasis added).
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> . . . .
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> 6) The Audit identified one known CIU (Dakota Plating), another CIU yet to discharge (Schwartz Mfg.), and many other potential SIUs identified by the City which have not been issued IU permits. **The City has little or no information on the nature of wastewater discharges from these facilities.** Dakota Plating claims to be a "no discharge" facility. However, during the site visit, the operational status of the wastewater pretreatment-recycle system was determined to be questionable and discolored standing water was observed in a floor drain next to the plating room. . . . (emphasis added).

The proposed amended complaint more clearly alleges in findings of violation numbers 5 and 6:

> 5) 40 C.F.R. § 403.8(f)(2)(i) requires that a POTW develop and implement procedures to ensure compliance with the requirements of a Pretreatment Program, which at a minimum, enable the POTW to, "[i]dentify and locate all possible Industrial Users which might be subject to the POTW Pretreatment Program. Any compilation, index or inventory of Industrial Users made under this paragraph shall be made available to the Regional administrator . . . upon request. . . . The Audit revealed that Respondent failed develop [sic] and implement procedures to ensure compliance with the requirements of a Pretreatment Program, enabling Respondent to identify and locate all possible [IUs] that might be subject to its Pretreatment Program when Respondent failed to obtain additional information necessary to correctly determine the facility status of at least two [CIUs], Schwartz Manufacturing and Dakota Plating. Therefore, Respondent violated 40 C.F.R. § 403.8(f)(2)(i).
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> 6) 40 C.F.R. § 403.8(f)(2)(ii) requires that a POTW develop and implement procedures to ensure compliance with the requirements of a Pretreatment Program, which at a minimum, enable the POTW to, "[i]dentify the character and volume of pollutants contributed to the POTW by the Industrial Users . . . . " Section I(2)(d) of Part III of Respondent's NPDES permit further requires that Respondent "[m]aintain and update, as necessary, records identifying the nature and character of industrial user inputs." Respondent's procedures and records failed to adequately indicate whether some facilities should be classified as [SIUs] . . . . Therefore, Respondent violated 40 C.F.R. § 403.8(f)(2)(ii) and Section I(2)(d) of Part III of its permit.

While the proposed amended complaint contains fewer findings of violation and is not worded exactly the same as the original complaint, the allegations of violations are essentially the same.[16/] Each of the findings of violation alleged in the proposed amended complaint is a restatement of one or more findings of violation in the original complaint. The original complaint provided the City with adequate notice of the factual allegations of all of the violations charged, albeit citations to the NPDES permit conditions and to federal regulations were lacking for most allegations.

The City's arguments do not counterbalance in this case the generally accepted principle that "administrative pleadings are liberally construed and easily amended," and that permission to amend a complaint will ordinarily be freely granted. In re Port of Oakland and Great Lakes Dredge and Dock Company, MPRSA Appeal No. 91-1, Final Decision and Order (EAB, August 5, 1992); In re Wego Chemical & Mineral Corp., TSCA Appeal No. 92-4, Final Decision at 15, n. 11 (EAB, February 24, 1993); Yaffe Iron & Metal Company, Inc. v. U.S. EPA, 774 F.2d 1008, 1012 (10th Cir. 1985). The general rule is that amendments to pleadings will be liberally granted where the ends of justice will thereby be served and no prejudice to the opposing party results. Foman v. Davis, 371 U.S. 178 (1962). "It is only where the defect in the

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[16/] Some of the findings of violation alleged in the original complaint do not appear to have a counterpart in the proposed amended complaint.

complaint is not curable by amendment that leave to amend should be denied." In re Asbestos Specialists, Inc., supra, citing 3 Moore's Federal Practice ¶ 12.14 and cases cited therein.

The City has not shown that it would be prejudiced by the amended complaint. To justify denial of a motion to amend, a respondent must show "serious disadvantage," meaning it would be "seriously prejudiced in [its] defense on the merits." In re AZS Corporation, Docket No. TSCA-90-H-23, Order Denying in Part Motion to Amend Complaint (March 18, 1993), citing Port of Oakland, supra, and Hodgson v. Collonades, Inc., 472 F.2d 42 (5th Cir. 1973).

The extent of time which elapsed between the filing of the original complaint and the motion to amend, approximately seven months, does not amount to prejudice to the City. Mere delay is seldom, if ever, a sufficient reason for denying a motion to amend a complaint. AZS Corporation, slip op. at 21; Port of Oakland, supra. "Leave to amend a complaint is generally available even where the plaintiff did not ask for it at an earlier stage in the proceeding." Asbestos Specialists, slip op. at 11, citing Bank v. Pitt, 928 F.2d 1108, 1112 (11th Cir. 1991) (where a more carefully drafted complaint might state a claim upon which relief may be granted, the plaintiff should be given an opportunity to amend its complaint, even where the plaintiff does not seek leave until after the district court renders final judgment).

Motions to amend a complaint have been denied on the basis of undue delay where the amendments are sought on the eve of trial and they would substantially expand the scope of trial. In re Everwood Treatment Company, Inc. and Cary W. Thigpen, Docket No. RCRA-IV-92-15-R, Order Denying Motion to Amend Complaint at 9-10 (July 28, 1993). In this case, the motion to amend was not filed on the eve of a hearing, and the amendments do not essentially change the nature of the violations being charged.

The expenses incurred in responding to a defective complaint, even where the complainant was aware of or could have avoided the defects, do not constitute prejudice within the meaning of the rule concerning amendments. A motion to amend a complaint has been granted where it was opposed on grounds that it would be grossly unfair to allege a new claim after considerable time had elapsed, requiring a different factual defense, when complainant should have been alerted to deficiencies in its proof. In re Spang and Company, Inc., Docket Nos. EPCRA-III-037 and 048, Order Granting Motion to Amend the Complaint (April 9, 1992). ("Prejudice . . . means more than mere inconvenience or added expense.") In a situation similar to the present matter, prejudice was not demonstrated where complainant allegedly refused to meet with the respondent to clarify facts prior to filing the complaint, which could have avoided inaccuracies therein. In re Reynolds Metals Company,

Docket No. RCRA-1092-05-30-3008(a), Order Granting Motion to Amend Complaint (February 5, 1993).

For these reasons, the Complainant's motion to amend the complaint will be granted, and the proposed first amended complaint will be accepted into the record as the amended complaint in this proceeding.[17/]

The City's motions to dismiss and to strike address the original complaint. The City does not address the question of the extent to which the motions are still viable if the motion to amend is granted.

In federal courts, motions to strike are not favored, and "matter will not be stricken from a pleading unless it is clear that it can have no possible bearing upon the subject matter of the litigation." 2A Moore's Federal Practice ¶ 12.21[2] (2d ed.). Even if allegations are redundant or immaterial, they should be stricken only if they are prejudicial to the moving party. Id.; Fink v. DeClassis, 745 F.Supp. 509 (N.D. Ill. 1990). The arguments in support of the City's motion to strike, including its alleged substantial compliance with EPA's required actions in EPA's 1992 Audit Findings, SDDENR's inspection reports, and that the state law did not authorize a $1,000 per day penalty until July 1992, are relevant to the amount of any penalty, but do not meet the standards for granting motions to

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[17/] Hereinafter, "complaint" and "amended complaint" will refer to the First Amended Administrative Complaint, Findings of Fact and Violation, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Request a Hearing Thereon, dated June 14, 1993.

strike. In the amended complaint, federal regulation and permit provisions are cited for each of the fourteen findings of violation, some findings of violation which were duplicative have been consolidated, and prejudice has not been demonstrated.

The City's argument that it improved or corrected its pretreatment procedures and received awards for excellence have no bearing on liability. The fact that the City may have substantially complied with the compliance order, dated August 31, 1992, is not relevant to the City's liability in the proceeding at issue, which is not based on that order. At issue here is a civil penalty assessment for past violations, which is distinct from the issue of bringing a facility which is in violation into compliance, to which a compliance order is directed.[18/] The City's arguments are matters to be considered in mitigation of the proposed penalty, but do not warrant striking any of the allegations of violation in the amended complaint.

[18/] The penalty calculations "are based on a period of liability beginning June, 1991 until September, 1992." (Complainant's Pre-hearing Exchange, Exhibit 3.) Compare the language of section 309(a), "[w]henever . . . the Administrator finds that any person is in violation . . . ," addressing compliance orders and civil actions, with section 309(g), "[w]henever . . . the Administrator finds that any person has violated . . . ," addressing administrative penalty assessments (emphasis added).

As to the motion to dismiss, findings of violation numbered 1 through 5, 7, 8, 11 and 13 of the amended complaint allege only violations of 40 C.F.R. Part 403, and not violations of conditions in the permit. The City questions whether EPA may enforce requirements of federal regulatory provisions which are not included in its NPDES permit. However, these findings of violation may not necessarily constitute separate or continuing violations upon which separate or increased penalties may be imposed.[19/] The complaint alleges violations of certain conditions of the permit, so if it is proven that the City violated a permit condition as alleged in the amended complaint, a civil penalty may be assessed in accordance with CWA section

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[19/] Findings of violation numbered 9 and 10, both allege violation of the same regulatory provision, 40 C.F.R. § 403.8.(f)(2)(iv) and of section I(2)(e) of the NPDES permit. Findings of violation numbered 11 and 12 both allege violations of 40 C.F.R. § 403.8(f)(2)(v). Complainant's pre-hearing exchange Exhibit 3, the penalty calculation worksheet, states that "each reportable noncompliance criterion that is met is counted as a single violation for the month," and the gravity component of the penalty includes consideration of the number of violations.

309(g), 33 U.S.C. § 1319(g).[20] The extent to which the findings of violation in the amended complaint constitute separate violations has not been fully briefed and is not clear from the record at this point in the proceeding.[21]

Under the Consolidated Rules of Practice, upon motion of respondent, an action may be dismissed "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" (Rule 22.20(a)). It has not been demonstrated that, considering all allegations

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[20] Section 309(g) of the CWA provides, in pertinent part:

> (1) Whenever on the basis of any information available -- (A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit . . . the Administrator . . . may . . . assess . . . a class II civil penalty under this subsection.
> * * *
> (2) * * *
> (B) The amount of a class II civil penalty under paragraph (1) may not exceed $10,000 per day during which the violation continues; except that the maximum amount of any class II civil penalty under this paragraph shall not exceed $125,000.
> (3) In determining the amount of any civil penalty assessed under this subsection, the Administrator . . . shall take into account the nature, circumstances, extent and gravity of the violation, or violations . . . .

[21] As indicated below, depositions are expected to be taken of two individuals who were involved with calculating the penalty; the issue of separate violations, and the calculation of the penalty in accordance with the amended complaint, may be further illuminated thereby.

of violation, Complainant has no right to relief or has failed to establish a claim. As noted above, there is a question as to the number of violations at issue in this proceeding. For these reasons, the motion to dismiss will be denied.

III. Motions Regarding Discovery

In its submission, dated May 14, 1993, the City included a motion for production of documents. It requested copies of all documents and exhibits which Complainant intends to introduce into evidence at the hearing, including penalty calculation documents. In opposition, Complainant asserts that the motion was filed prematurely, prior to the date of June 28, 1993, when the pre-hearing exchange documents are due to be filed, and not in conformance with 40 C.F.R. § 22.19(b), which provides for discovery by means of the pre-hearing exchange. Under dates of June 28, 1993, and October 29, 1993, Complainant filed pre-hearing exchange documents which included the penalty calculation worksheet. The motion for production of documents will be denied at this time. The City may, of course, renew the motion, if it appears that Complainant possesses additional documents relevant to the penalty calculation.

On October 21, the City moved to take the depositions of two individuals who were involved with calculating the penalty proposed in the complaint. One individual, Mr. Bruce Kent, is

a consultant retained by EPA to assist in performing the penalty calculations, and the other individual, Mr. John Lara, performed the penalty calculation in the original complaint, and is no longer with EPA's Region VIII enforcement office. The City asserts that the information received from Complainant, which is allegedly all of the penalty information in Complainant's possession, does not contain sufficient detail including its relationship to the alleged violations and whether it should be changed if based on erroneous information contained in EPA's original pleadings. The City alleges that the information sought cannot be obtained by alternate methods and is necessary to preserve the evidence for hearing.

Complainant having no objection, the City's motion to take the depositions of Mr. Lara and Mr. Kent will be granted.[22/]

Complainant filed a motion on July 7, 1993, for a more definite pre-hearing exchange. It requests the City to provide a brief narrative summary of expected testimony as required by 40 C.F.R. § 22.19(b). Pointing out that the City has not exchanged nor indicated when it will exchange documents and exhibits it intends to introduce into evidence, Complainant requests at least an index of, and identification of, each document the City intends to introduce into evidence. Also noted is the City's failure to include a certificate of service

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[22/] The parties are directed to inform me when the depositions are completed. I will then telephonically contact counsel for the purpose of setting a mutually agreeable date for the hearing, which will be held in Sioux Falls, South Dakota.

with its pre-hearing exchange statement, as required by 40 C.F.R. § 22.05(b).

In its pre-hearing exchange statement, dated June 22, 1993 (at 2, ¶ 4), the City states that all of the exhibits and affidavits presently intended to be offered at the hearing have been filed. It requests that the file documents to be received in evidence, including the answer, motions to strike and to dismiss and for production of documents, and supporting affidavits.

Responding to the motion for a more definite pre-hearing exchange, the City states by letter, dated July 19, 1993, that it believes it has complied with the pre-hearing exchange rules, by providing documents, including two appendices of documentation attached to its answer, which fully disclose its response to this action. The City has enclosed supplemental affidavits, intended to serve as further response to the request for a narrative summary of expected testimony. The City identified its exhibits by stating that it "intends to offer all of the documents, memoranda and exhibits it has previously given the EPA as evidence at the hearing."

The record currently includes affidavits of Mr. Johnson, Mr. Kappel, and Gary Hanson, Utilities Commissioner for the City of Sioux Falls. The record also includes letters to EPA Region VIII from Mr. Robert E. Roberts, Secretary of SDDENR, dated December 16, 1992, and from Mr. Pirner, Director of SDDENR, dated November 6, 1992 (attached to Motion for Production of

Documents). The only proposed witness listed by the City who does not appear to have provided supporting documentation is Mr. Larry Mutchler, City Pretreatment Coordinator. However, the pre-hearing exchange letter, dated March 9, 1993, does not require a narrative of expected testimony, but provides that the parties "[f]urnish the names of expected witnesses and copies of any documents or exhibits proposed to be offered at the hearing . . . ." There is no basis for requiring the City to provide narratives of expected testimony in this case.

The pre-hearing letter also does not require the exhibits to be listed and identified. The listing and numbering of exhibits enables orderly presentation at the evidentiary hearing, and if this case proceeds to hearing, the documents are expected to be identified at that time.

The City does not address its failure to include a certificate of service. However, because its pre-hearing exchange documents were due on June 28, 1993, and were received in the Office of Administrative Law Judges on June 24 and July 1, 1993, and Complainant does not allege that they were untimely filed, it is harmless error on the part of the City. Complainant's motion for more definite pre-hearing exchange will be denied.

O R D E R

1. Complainant's motions to strike the City's response, dated July 2, 1993, the letter, dated July 12, 1993, and the memoranda, dated July 19 and August 13, 1993, are DENIED.
2. The City's motion to dismiss certain allegations in the complaint is DENIED.
3. The City's motion to strike certain allegations in the complaint is DENIED.
4. Complainant's motion to amend the complaint is GRANTED.
5. The City's motion for production of documents is DENIED.
6. The City's motion to take the depositions of Messrs. Lara and Kent is GRANTED.
7. Complainant's motion for more definite pre-hearing exchange is DENIED.

Dated this 13th day of July 1994.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER ON MOTIONS**, dated July 13, 1994, in re: City of Sioux Falls, SD, Dkt. No. CWA-VIII-93-03-P-II, was mailed to the Regional Hearing Clerk, Reg. VIII, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: July 13, 1994

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