

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Allen Family Foods, Inc.,) Docket No. CWA-3-2001-0002
)
Respondent)

ORDER DENYING RESPONDENT'S
MOTION TO DISMISS

In this enforcement proceeding, the United States Environmental Protection Agency ("EPA") alleges that Allen Family Foods, Inc. ("Allen"), committed multiple violations of Sections 301, 307, and 308 of the Clean Water Act (the "Act"). 33 U.S.C. §§ 1311, 1317 & 1318. These alleged violations stem from respondent's discharge of wastewater from the operation of its poultry processing facility to a Publicly Owned Treatment Works ("POTW"). Allen has filed a motion to dismiss EPA's amended complaint in this case, arguing that EPA lacks jurisdiction to prosecute this action. For the reasons set forth below, respondent's motion to dismiss is *denied*.

For purposes of ruling upon respondent's motion to dismiss, the facts of this case are as follows.¹ Allen owns and operates a poultry processing facility located in Hurlock, Maryland. From at least 1994, it has discharged wastewater from this facility to the Town of Hurlock POTW. Ans. ¶¶ 4 & 13. Allen has discharged this wastewater pursuant to a Wastewater Discharge Permit issued by the POTW. The Wastewater Discharge Permit placed limits on the biochemical oxygen demand ("BOD₅"), total flow, total suspended solids ("TSS"), oil and grease ("O&G"), and pH of respondent's wastewater.

In its amended complaint, EPA identifies three kinds, or groups, of violations. The first group involves effluent limitation violations. Here, EPA alleges that since September of 1996, Allen has exceeded its Wastewater Discharge Permit for BOD₅ on at least 84 occasions, for total flow on at least 147 occasions, for TSS on at least 2 occasions, and at least once each for O&G and pH. The second group of violations involves respondent's alleged failure to report to the Town of Hurlock POTW the monitoring results of its wastewater discharges. The third group involves Allen's alleged failure to inform the Town of Hurlock POTW that it exceeded the effluent limitations of its Wastewater Discharge Permit.

In seeking the dismissal of this action, Allen raises two arguments. First, Allen asserts that the Clean Water Act does not provide EPA with enforcement authority over the provisions

¹ These are the facts as set forth in the January 9, 2002, order denying EPA's motion for accelerated decision.

of its Wastewater Discharge Permit, and hence, over any perceived violations of that permit. As its second argument, Allen submits that the United States Department of Agriculture has exclusive regulatory authority over the operations of its Hurlock poultry processing facility.

The Statutory Argument

Citing Section 307(b) of the Act and 40 C.F.R. Part 403 (“General Pretreatment Regulations For Existing And New Sources Of Pollution”), respondent submits that industrial dischargers (such as Allen) that do not directly discharge into the waters of the United States, but instead discharge into a public sanitary sewer system (such as the Hurlock POTW), are regulated by the Clean Water Act’s pretreatment program. Respondent further submits that under this pretreatment program, limitations are imposed on Industrial Users by the owner of an EPA and State-approved publicly owned treatments works. Resp. Mem. at 5-6.

According to respondent, EPA’s only enforcement authority as it relates to “interference” or “pass through” is contained in Section 309(f) of the Clean Water Act. 33 U.S.C. § 1319(f).² In that instance, respondent argues that EPA is to bring the action in Federal district court against both the POTW and the industrial discharger. Respondent submits that here, contrary to the Clean Water Act’s enforcement scheme, EPA improperly

² 40 C.F.R. 403.3 contains the following definitions:

(i) The term *Interference* means a Discharge which, alone or in conjunction with a discharge or discharges from other sources, both:

(1) Inhibits or disrupts the POTW, its treatment processes or operations, or its sludge processes, use or disposal; and

(2) Therefore is a cause of a violation of any requirement of the POTW’s NPDES [National pollutant discharge elimination system] permit

* * * * *

(n) The term *Pass Through* means a Discharge which exits the POTW into waters of the United States, in quantities or concentrations which, alone or in conjunction with a discharge or discharges from other sources, is a cause of a violation of any requirement of the POTW’s NPDES permit

(Emphasis in original).

seeks to enforce a local pretreatment permit and local ordinance through a Federal administrative enforcement action pursuant to Section 309(g). 33 U.S.C. § 1319(g). Resp. Mem. at 6-7.

Allen's view of the Clean Water Act's enforcement scheme as it relates to pretreatment standards is rejected as being too narrow. Respondent's interpretation of the Act's enforcement scheme is inconsistent with a fair reading of the Act. Rather, as asserted by the EPA, Section 309(f) is but one of two ways for the Agency to enforce a POTW's pretreatment standards. The other way is for EPA to proceed under Section 309(g) and, as it has done in this case, file an administrative complaint.

The fact that Sections 309(f) and (g) offer EPA alternative enforcement choices is clear from the plain language of these statutory provisions. Section 309(f) provides EPA with access to Federal district court and to obtain there what it is unable to obtain in an administrative enforcement action, *i.e.*, a permanent or a temporary injunction. In addition, Section 309(f) provides: "Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this chapter."

As EPA points out, there is another enforcement route available to the Administrator which is set forth in Section 309(g), titled, "Administrative penalties." Pursuant to Section 309(g), the Administrator may assess a Class I or a Class II civil penalty for a violation of Sections 307 ("Toxic and pretreatment effluent standards") and 308 ("Records and reports; inspections) of the Act. The plain language of Section 309(g) offers EPA an administrative enforcement route when it believes that an Industrial User has failed to comply with pretreatment standards.

Despite this clear language of Section 309(g), Allen raises what it believes is another bar to EPA's prosecution of this case. Allen begins this argument with Section 307(d) of the Clean Water Act. Section 307(d) provides:

After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

33 U.S.C. § 1317(d).

Allen submits that EPA lacks jurisdiction in this case because the pretreatment standards allegedly violated are the product of the Town of Hurlock's ordinance and not the product of notice and comment rulemaking under Section 307(d). Respondent further submits that because only EPA can promulgate standards under the Clean Water Act, complainant is powerless to enforce a Pretreatment Permit issued pursuant to local ordinance. Resp. Mem. at 9-10.

Acceptance of Allen's argument would lead to an absurd result in this case. According to respondent's reading of the statute, EPA would be precluded from enforcing the pretreatment standards allegedly violated in this case not only under either Section 309(g), but also under Section 309(f) as well. This result would obtain because both of these statutory sections relate back to the pretreatment provisions of Section 307(d). If EPA cannot enforce the Town of Hurlock POTW's pretreatment standards under Section 309(g), as Allen submits, it stands to reason that it cannot enforce the same provisions under Section 309(f), even though Allen believes that EPA must proceed pursuant to Section 309(f) in the first place. Thus, under Allen's reading of the Act, the only party left for EPA to proceed against would be the Town of Hurlock. Presumably, the cause of action would not at all relate to the Town's operation of its POTW, but rather to Allen's failure to comply with a Water Discharge Permit issued by the POTW.³ Such an enforcement scheme would make no sense.

Fortunately, a plain reading of the involved Clean Water Act provisions and EPA's implementing regulations produces a different result. We begin with Section 301(a) of the Act, 33 U.S.C. § 1311(a). This section addresses effluent limitations. Section 301(a) states that, except as otherwise provided in the Act, it is unlawful to discharge any pollutant. One of the statutory provisions which provides an exception to this discharge prohibition is Section 307, 33 U.S.C. § 1317.

Section 307 addresses toxic and pretreatment effluent standards. As noted above, Section 307(d) in part provides that it is unlawful to violate any pretreatment standard "promulgated under this section." The crux of the disagreement between EPA and Allen is whether Section 307(d) encompasses the Town of Hurlock POTW's pretreatment standards. Based upon the regulations promulgated by EPA at 40 C.F.R. Part 403, this issue is resolved in EPA's favor.

In its argument, EPA effectively points out that the provisions of 40 C.F.R. 403.8, 403.9, and 403.11 establish a formal process for a POTW to establish a Pretreatment Program and, more importantly, for the POTW to establish local limits applicable to an Industrial User. *See* EPA Resp. at 7. EPA essentially argues that through 40 C.F.R. Part 403, it has promulgated regulations allowing POTW's, such as the Town of Hurlock POTW, to enact specific local limits that fall within the coverage of Section 307(d) of the Clean Water Act. EPA is correct. A review of Part 403 shows that EPA has created a regulatory scheme that allows a particular POTW to adopt local limits. This is not a case of "bootstrapping" regulatory authority as Allen, citing to the provisions of 40 C.F.R. 403.5(d), argues is the case. Rather, all that Section 403.5(d) states is that a POTW's local limits "shall be deemed Pretreatment Standards for the purposes of section 307(d) of the Act," if developed in accordance with Section 403.5(c). Section 403.5(c), in turn, ties into the requirement that each POTW develop a Pretreatment Program pursuant to Section 403.8, including the requirement

³ There has been no assertion by Allen that this Wastewater Discharge Permit was not properly issued.

that “[s]pecific effluent limits shall not be developed and enforced without individual notice to persons or groups who have requested such notice and an opportunity to respond.” Section 403.5(c)(3).

Thus, EPA has established that it has the legal authority under Section 307(d) of the Clean Water Act to enforce local limits adopted by POTW’s pursuant to 40 C.F.R. Part 403.

The Preemption Argument

Allen also argues that EPA cannot maintain the present action because the United States Department of Agriculture (“USDA”) “has primary jurisdiction and authority over poultry and poultry processing operations.” Allen Mem. at 12. In that regard, respondent states that the USDA promulgated its “HACCP” program at 9 C.F.R. 381.65, 417.1, and 304, and that the “USDA’s scheme is so complete over food safety its regulation allows for zero tolerance in poultry.” *Id.* In essence, Allen argues that the USDA has jurisdiction over its poultry processing facility in this case, and not the EPA.

In response, EPA essentially states that this is a Clean Water Act case involving the respondent’s alleged failure to comply with Federal environmental regulations. EPA further states that there has been no showing by Allen that Congress intended for USDA regulations to exclusively occupy the field here. Indeed, EPA argues that there has been no showing whatsoever that Allen couldn’t comply with both the Clean Water Act provisions at issue in this case, as well as with the USDA’s HACCP regulations.

EPA’s point is well-taken. Allen has failed to show that the HACCP regulations to which it cites preclude the enforcement of the Clean Water Act provisions and the 40 C.F.R. Part 403 regulations relied upon by EPA. Moreover, at this preliminary stage, just what the HACCP regulations require of Allen and how they affect the respondent’s Hurlock processing facility are unknown.

Accordingly, for the foregoing reasons, respondent's motion to dismiss is *denied*.

Carl C. Charneski
Administrative Law Judge

Issued: March 18, 2002
Washington, D.C.