UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
CITY OF SALISBURY, MARYLAND,	)	Docket No. CWA-III-219
	)	
Respondent	)	

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION

By Order issued July 31, 1999, Complainant's Motion for Accelerated Decision as to Liability was granted for counts one and three of the Complaint and Respondent's Motion to Dismiss was denied. Respondent, by Motion filed August 4, 1999 seeks reconsideration of that Order. Complainant's response opposing Respondent's Motion was filed August 19, 1999. For the reasons discussed below, Respondent's Reconsideration Motion will be **DENIED**.

Respondent seeks reconsideration of the Court's Order on three grounds. Respondent challenges the decision to deny Respondent's Motion to Dismiss as to counts one, two and three, and to grant Complainant's Motion for Accelerated Decision as to counts one and three on grounds that the monitoring and reporting requirements which Respondent is charged with violating were not made applicable to Respondent until May 1997, after the dates of the alleged violations. Respondent also separately challenges the Court's decision to grant Complainant accelerated decision on liability as to count three. The decision as to count three, Respondent maintains, was incorrectly based, in part, on the applicability of 40 C.F.R. § 122.41(l)(4)(ii) to Respondent and, further, embraces two inconsistent interpretations of the reporting requirement.

STANDARD OF REVIEW

The Rules of Practice governing this proceeding make no specific provision for a motion for reconsideration of an accelerated decision. The Environmental Appeals Board ("EAB"), which does have a provision in the Consolidated Rules of Practice for reconsideration of its decisions at 40 C.F.R. § 22.32 has stated that:

> A motion for reconsideration should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of this office clearly erroneous factual or legal conclusions. Reconsideration is normally appropriate only when this office has obviously overlooked or misapprehended the law or facts or the position of one of the parties.

Southern Timber Prods., Inc., RCRA (3008) Appeal No. 89-2, 3 E.A.D. 880, 889 (Order on Motion for Reconsideration,1992)(quoting *City of Detroit*, TSCA Appeal No. 89-5 (Order, CJO Feb. 20, 1991)).

Administrative Law Judges addressing this issue have employed different standards than that enunciated by the EAB for reconsideration of its decisions. In a recent case where the respondent sought reconsideration of an order granting accelerated decision on liability the presiding officer, after finding that "a partial accelerated decision is an interlocutory order that may be modified or vacated prior to final judgment," held that a somewhat lower standard for reconsideration than that employed by the EAB ought to apply to a motion for reconsideration of a partial accelerated decision. *Pepperell Assocs*. Docket No. CWA-2-I-97-1088, 1999 EPA ALJ Lexis 16, at *15, 16 (Initial Decision, Feb. 26, 1999)(citing 40 C.F.R. § 22.20(b)(2)). In another case in which a respondent sought reconsideration of an order grating accelerated decision as to liability, the presiding officer held that, in the absence of a specific rule providing for reconsideration, the proponent of the motion must "demonstrate that a variance from the rules will further the public interest." *Oklahoma Metal Processing Co., Inc.*, TSCA Docket No. VI-659C, 1997 EPA ALJ LEXIS 16 at *2 (Order Denying Motion for Reconsideration, June 4, 1997).

For the reasons discussed below, it is hereby found that Respondent has not presented legal or factual issues sufficient to warrant, under any of the standards discussed above, reconsideration of the Order granting Complainant's Motion for Accelerated Decision as to counts one and three, and denying Respondent's Motion to Dismiss.

DISCUSSION

Respondent asserts that the rules codified at 40 C.F.R. § 503 were not made applicable to it until May of 1997, when its provisions were incorporated into Respondent's NPDES permit. Respondent's original permit, which was issued in 1985, had an expiration date of 1990.[(1)] Because the permit predates the promulgation of the Part 503 rules in 1993, Respondent maintains it does not impose those regulations on Respondent.

Respondent argues further that the Part 503 regulations are not, as Complainant has asserted, self-implementing or directly enforceable pursuant to CWA § 405(e) as to generators of sludge. Rather, Respondent asserts that pursuant to section 405(e), the Part 503 rules are directly enforceable only against users and disposers of

sludge, whereas pursuant to section 405(f), which applies to generators of sludge, the Part 503 rules are to be imposed exclusively through NPDES permits. According to Respondent, this parsing of section 405 is logical because generators could be regulated all along through their NPDES permits; section 405, which was amended in 1987 to bring users and disposers within reach of the statute, was designed to be self-implementing to provide EPA a way to regulate users and disposers without requiring them to obtain permits. For these reasons, Respondent requests reconsideration of the Order denying its Motion to Dismiss all three counts of the Complaint, or, in the alternative, reconsideration of the decision to grant Complainant's Motion for Accelerated Decision as to liability for counts one and three of the complaint.

While Respondent is correct that CWA § 405(e) was amended in order to bring users and disposers within the reach statute, Respondent's reading of section 405(f) as presenting permits as the *only* means by which the sludge rules may be imposed on POTWs is refuted by a reading of section 405, the sludge rules at 40 C.F.R. § 503, and the preamble to the final part 503 rules.

CWA § 405(f) directs that permits shall include requirements for use and disposal of sludge; it does not preclude imposition of sludge requirement directly through the Part 503 rules. That the sludge rules were to be directly enforceable against POTWs was made clear in the preamble to the final rule revising the Part 122 rules where the Agency states that "the statute compels compliance with the Part 503 standards by set deadlines without exception. At the same time, the statute requires that the Part 503 standards be included in permits." 54 Fed. Reg. 18,716, 18,740 (1989).[(2)]

Further, the Part 503 regulations explicitly place generators like Respondent within their scope. Section 503.1(b)(1), 40 C.F.R. states that the rules apply, *inter alia*, "to any person who prepares sewage sludge." A preparer of sewage sludge, in turn, is defined at 503.9(r) as "either the person who *generates* sewage sludge during the treatment of domestic sewage in a treatment works or the person who derives a material from sewage sludge" (emphasis added). Finally, §503.3(b), "Direct Enforceability," provides that "[n]o person shall use or dispose of sewage sludge through any practice for which requirements are established in this part except in accordance with such requirements." 40 C.F.R. § 503.3(b).

EPA emphasizes throughout the preamble[(3)] to the final Part 503 rules that the rules are directly enforceable and that it will rely heavily on the self-implementing nature of the Part 503 standards in the early period of implementation. 58 Fed. Reg. 9248, 9364, 9366. The Agency explains that "the standards are directly enforceable against any user or disposer of sewage sludge. POTWs and other generators of sewage sludge are users and disposers of sewage even if final use or disposal is provided by some other party." *Id*. at 9359. The Agency elaborates further on this point, stating that:

> EPA has determined that, when Congress amended section 405(e) to extend the obligation to comply with the sludge standards to each person using or disposing of sewage sludge, Congress did not intend to limit or transfer the responsibility of the generating POTW for ensuring compliance with the standards except insofar as the generating POTW sends the sewage sludge to another treatment works treating domestic sewage.

Id. at 9361.[(4)]

Respondent's arguments that the statute and regulations at issue have been misapplied are unpersuasive. Accordingly, Respondent's Motion for Reconsideration

of the Order denying its Motion to Dismiss the Complaint for failure to state a claim upon which relief can be granted, and granting Complainant's Motion for Accelerated Decision as to counts one and three on this basis is DENIED.

Respondent also seeks reconsideration of the decision to grant Complainant's Motion for Accelerated Decision as to count three on grounds that 40 C.F.R. § 122.41(l)(4)(ii), which was not incorporated into Respondent's NPDES permit until 1997, was improperly applied to the facts of this case. Respondent misconstrues the reference to this rule in the prior Order. It was not "applied" to the facts of the case as Respondent asserts, but rather was referenced to emphasize that as a POTW Respondent should have been aware that the requirements at issue applied to it and to illustrate the point that reporting all the information developed regarding pollutant concentrations was in keeping with the overall scheme of the CWA and its regulations concerning POTWs. In that this regulation was not applied to Respondent, the fact that this provision was not included in Respondent's permit until 1997 is irrelevant.

Finally, Respondent's argument that the Accelerated Decision Order incorporates two inconsistent interpretations of the reporting requirements is difficult to understand. In that Order it was found that Part 503.18 requires a POTW to submit all data developed about pollutant concentrations in its sludge; it was found further that Region III had issued a letter to the effect that the Region would be satisfied if regulated entities reported certain specified data. Region III's letter did not represent a second, inconsistent, interpretation of the rule, but rather served effectively to limit the Region's capacity to seek enforcement to those entities that supplied information that did not satisfy the minimum standards set out in the letter. Moreover, as Complainant points out, Respondent's submissions did not satisfy even the lower requirements set out in Region III's letter and Complainant has asserted violations only where Respondent did not satisfy these minimum data reporting requirements.

Accordingly, Respondent's Motion for Reconsideration of the Order granting Complainant's Motion for Accelerated Decision as to Liability for count three of the Complaint is DENIED.

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Susan L. Biro
Chief Administrative Law Judge

Dated: August 23, 1999
Washington, D.C.

1. This permit was administratively continued pursuant to condition 5 on page 17 of the permit. *See*, Complainant's Prehearing Exchange Exh. 7.

2. This point is reiterated later in the same section where it is noted that while the part 503 standards must be incorporated into new and reissued permits, "permittees would still be liable for compliance with Part 503 regulations by the statutory deadline" whether or not their existing permits have been modified to

incorporate those regulations. 54 Fed. Reg. 18716, 18740.

3. Courts frequently look to the preamble to a final rule when construing the meaning of a rule. *See, Nat'l Mining Assoc., et al. v. United States E.P.A*, 59 F.3d 1351, 1355 n.7 (D.C. Cir. 1995) ("We consider EPA's preamble to the final rule in construing its definition of 'major source.'"); *Wiggins Bros. v. Dep't of Energy*, 667 F.2d 77, 88 (Temp. Emer. Ct. App. 1981), *cert. denied*, 456 U.S. 905 (1982) ("It is well settled by decisions of this Court that the preamble to a regulation of DOE . . . should be considered in construing the regulation and determining the meaning of the regulation.").

4. *See also id*. at 9360: "Subpart B of today's regulation applies to a person who applies sewage sludge to the land, [and] to a person who prepares sewage sludge for application to the land . . . [Further,] as the generator of sewage sludge, the treatment works cannot limit its responsibility for the use and disposal of the sewage sludge in compliance with the standards merely by transferring the sludge to a commercial applier."