UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Florida Fence Post Company,	)	Docket No. 90-09-R
	)	
Respondent	)	

RULING ON MOTION TO DISMISS

This Ruling addresses a motion, filed by Respondent Florida Fence Post Company, to dismiss a complaint issued against it by Complainant Region IV of the United States Environmental Protection Agency ("EPA"). The complaint was issued under the Resource Conservation and Recovery Act, as amended, 42 U.S.C. §§ 6901 et seq. ("RCRA"). The basis for the motion to dismiss was that the complaint failed to comply with 40 C.F.R. § 22.14(a)(5), which requires that the complaint "include ... [a] statement explaining the reasoning behind the proposed penalty."

Arguments of the Parties

The complaint in this case proposed a civil penalty of $58,748 that, it stated, was "based upon the facts alleged in this Complaint and, to the extent known, upon the following factors: ...."[1] The complaint then listed fourteen factors, which began with "the potential for harm to human health or environment," and ended with "the effect of the penalty on FFPC's ability to continue to do business."[2]

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[1] Complaint and Compliance Order (April 26, 1990) at 12.

[2] The fourteen listed factors in their entirety were:
"a. the potential for harm to human health or environment,
b. the extent to which the conduct of FFPC has deviated from regulatory requirements,
c. the maximum monetary amount that can be assessed under RCRA,
d. the presence or absence of multiple violations,
e. the number of days over which the violations occurred,
f. any actual damage to human health or the environment,
g. the economic benefits accruing to FFPC resulting from noncompliance,
h. any extraordinary efforts on the part of FFPC to

Respondent's motion to dismiss argued that this enumeration of factors was insufficient under the above quoted C.F.R. section. The complaint, according to Respondent, "merely lists a number of factors that may apply in the abstract to the calculation of a penalty ... [but] completely fails ... to explain how these factors apply to the factual situation described in the Complaint."[3]

Complainant defended its complaint by citing Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), and EPA's RCRA Penalty Policy (1984).[4] That statutory section mandates that assessment of a RCRA civil penalty "take into account the seriousness of the violation and any good faith efforts to comply." The RCRA Penalty Policy, according to Complainant, incorporates this statutory mandate and adds other factors to be considered in assessing a RCRA civil penalty.

A review of the fourteen factors listed in the complaint reveals that they reflect various subheads in the Penalty Policy. Complainant asserted that "[t]hese factors constitute the reasons behind the proposed penalty."[5] "Therefore," concluded Complainant, it "complied with the requirement ... that EPA's complaint include a statement explaining the reasoning behind the proposed penalty."[6]

Complainant raised also the issue of worksheets that it uses

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comply,

i. any voluntary efforts on the part of FFPC to rectify damage to human health or the environment, resulting from the noncompliance,
j. the absence or presence of circumstances outside the control of FFPC that resulted in the noncompliance,
k. the absence or presence of recalcitrance on the part of FFPC,
l. the history of noncompliance on the part of FFPC,
m. the absence or presence of willful noncompliance, and
n. the effect of the penalty on FFPC's ability to continue to do business." (Id. 13.)

[3] Motion to Dismiss, Answer and Request for Hearing (June 11, 1990) at 2.

[4] Response to Respondent's Motion to Dismiss (June 22, 1990) at 1.

[5] Id. at 2.

[6] Id.

to calculate a civil penalty "based on the factors."[7] "[I]t is EPA policy not to attach these worksheets to the complaint," stated Complainant, as they "are privileged and exempt from disclosure under Section 7(A) of the Freedom of Information Act, 5 U.S.C. § 552, because they are enforcement sensitive, and could reasonably be expected to interfere with enforcement proceedings."[8] Complainant added that during settlement negotiations, it does release the worksheets upon request of the respondent "in appropriate cases."[9]

Respondent replied that a "mere listing of factors simply cannot be construed to constitute an explanation of the reasoning behind a proposed penalty ... particularly ... where ... [R]espondent ... disputes a number of EPA's allegations of rule violations."[10] Respondent focused also on the purpose of the required explanation. "Surely a major purpose," contended Respondent, "is to allow a respondent to determine whether it wishes to request a hearing to contest material facts that may lead to a reduction of the penalty and to assess the viability of negotiating a settlement with the Agency."[11] Complainant's offer of the worksheets "only after FFPC enters into ... negotiations," according to Respondent, "undercut[s] FFPC's ability to make an informed decision about its options."[12]

Discussion

The complaint's simply listing fourteen factors upon which the proposed penalty was based does indeed fall short of the required explanation of "the reasoning behind the proposed penalty." The listing of these fourteen factors is certainly a part of the explanation; it is important that the penalty be based on the correct factors or criteria. But the dispute between the parties lies usually not in the identification of the factors that will determine the penalty; these factors are normally identified adequately by the appropriate statute and EPA penalty policy. Usually the key issue lies rather in how these factors are to be applied to the case at hand.

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7 Id.

8 Id.

9 Id.

10 Response to Complainant's Response to Respondent's Motion to Dismiss (August 1, 1990) at 2.

11 Id. 3.

12 Id.

What is crucial in the typical case is the value, if any, to be accorded to each of the factors, and how these individual values are then combined to produce a single proposed penalty. It is in determining these individual values and then combining them that the crucial judgments are generally made. Without an explanation of these valuations and their combination, the very essence of the usual penalty calculation is withheld from the respondent.

That 40 C.F.R. § 22.14(a)(5) therefore requires just such an explanation is supported by the logic of the procedural situation created by the service upon Respondent of the complaint. It is supported further by the recent EPA decision in In the Matter of Environmental Protection Corporation (East Side Disposal Facility).[13]

Logic of the Procedural Situation

Service of the complaint on Respondent forced upon it a choice among several procedural options to resolve this case: Respondent could accept the proposed penalty or instead contest it, and could also try to negotiate a settlement. Only with a knowledge of how the fourteen listed factors were actually used to calculate the proposed penalty could Respondent, as it contended, make an informed choice among these options.

Thus the complaint told Respondent that, instead of answering or negotiating, it could resolve the penalty matter simply by paying the proposed amount;[14] or, if Respondent chose to do nothing, the complaint said that it could be found in default and the proposed penalty assessed without further proceedings.[15] Respondent, in deciding whether to expend some of its finite resources in contesting or negotiating the proposed penalty rather than accepting it, needs to estimate the chances of reducing the proposed penalty through litigation or negotiation. Such an estimate can reasonably be made only if Respondent knows the calculations used by Complainant to support the proposed amount.

If Respondent, after estimating its chances of success through litigation, decides to answer the complaint, its answer, under 40 C.F.R. § 22.15(a), may raise three types of issues. Thus the answer may contest any material fact, may demand judgment as a

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13 In the Matter of Environmental Protection Corporation (East Side Disposal Facility), RCRA (3008) Appeal No. 90-1, Docket No. 09-86-0001, Order Adopting the Presiding Officer's Decision on Remand as Final Agency Action (September 12, 1990).

14 Complaint, supra note 1, at 16-17.

15 Id. 14-15.

matter of law, or may challenge the amount of the proposed penalty. Again Respondent needs to know Complainant's calculation of the penalty in order to decide intelligently whether to place in issue its proposed amount and, if so, how most effectively to place it in issue.

If Respondent chooses to answer the complaint, Respondent is afforded the additional option of requesting a hearing.[16] In deciding whether to request a hearing, the preparation for and participation in which would expend further resources, Respondent has to consider its entitlement to a hearing and the advantageousness to it of a hearing. Once more, such a consideration may turn partly on what, if any, challenges Respondent can make to the proposed penalty, and that determination will depend on Complainant's asserted justification for the penalty amount.

In conjunction with litigating, Respondent has the option also of trying to negotiate a settlement.[17] In deciding whether negotiations would constitute a useful strategy and a sensible expenditure of resources, Respondent again would reasonably want to know the manner by which the proposed penalty had been calculated.

In sum, the logic of the procedural situation is that Complainant, by serving Respondent with a complaint, forced upon it certain choices. For Respondent to make an informed choice, it needs the explanation prescribed by 40 C.F.R. § 22.14(a)(5) of the reasoning behind the proposed penalty. And that explanation must include not only an identification of the factors used to calculate the penalty, but also a statement of how they were used in the calculation.

Environmental Protection Corporation

Summary of the Case

This case turned on 40 C.F.R. § 22.14(a)(5). On an appeal from an EPA proceeding, a U.S. district court affirmed the decision of that proceeding that the respondent had violated RCRA, but remanded the case for further consideration of the penalty "in view of the Agency's default in pleading the penalty assessment."[18] The complaint had stated that "[t]he penalty proposed herein is based on the seriousness of the violation, the threat of harm to public health or the environment and the efforts of the Respondent to

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16 Id. 14.

17 Id. 15-16.

18 Environmental Protection Corporation v. Thomas, CV F-87-447 EDP (E.D. Cal. 1988).

comply with the applicable requirements."[19] In another submission by the complainant, "EPA stated that the penalty was assessed in accordance with the Final RCRA Civil Penalty Policy which EPC acknowledged it possessed and understood."[20]

In a memorandum decision, the U.S. district court held that the respondent had been insufficiently informed as to the basis of the penalty, and accordingly directed the remand. The memorandum decision cited, and quoted, all of 40 C.F.R. § 22.14(a),[21] not just 40 C.F.R. § 22.14(a)(5). But the dispute on this question in the EPA proceeding that was before the court on appeal had centered specifically on 40 C.F.R. § 22.14(a)(5);[22] and the decision of the U.S. district court focused on the issue represented by 40 C.F.R. § 22.14(a)(5).

The court's decision first affirmed that the respondent had violated RCRA. Then, after citing 40 C.F.R. § 22.14(a) and quoting it in its entirety, the court stated: these "provisions ... have

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19 Order, supra note 13, at 4.

20 Order, supra note 13, at 5 n.7.

21 The entire 40 C.F.R. § 22.14(a) provides as follows.

> "(a) Complaint for the assessment of a civil penalty. Each complaint for the assessment of a civil penalty shall include:
> (1) A statement reciting the section(s) of the Act authorizing the issuance of the complaint;
> (2) Specific reference to each provision of the Act and implementing regulations which respondent is alleged to have violated;
> (3) A concise statement of the factual basis for alleging the violation;
> (4) The amount of the civil penalty which is proposed to be assessed;
> (5) A statement explaining the reasoning behind the proposed penalty;
> (6) Notice of respondent's right to request a hearing on any material fact contained in the complaint, or on the appropriateness of the amount of the proposed penalty.
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> A copy of these rules of practice shall accompany each complaint served." (emphasis in original)

22 In the Matter of Environmental Protection Corporation (East Side Disposal Facility), Docket No. RCRA-09-86-0001, Accelerated Decision and Order (April 8, 1987) at 15.

the purpose of providing defendant with a factual basis for the Agency's penalty determination, and to allow the person being penalized to mount a defense in the matter." Finally, as noted, the remand was to consider the penalty "in view of the Agency's default in pleading the basis of the penalty assessment."

In the EPA proceeding upon remand, the Administrative Law Judge accorded the respondent an evidentiary hearing on the penalty question with posthearing briefs,[23] and imposed a penalty anew.[24] On appeal to EPA's Chief Judicial Officer, the decision of the Administrative Law Judge was affirmed.[25] Both the Administrative Law Judge and EPA's Chief Judicial Officer treated the case as turning on 40 C.F.R. § 22.14(a)(5).[26]

As Applied to the Instant Case

What does Environmental Protection Corporation mean for the instant case? On first blush, it might seem that it would control, since the instant case turns on 40 C.F.R. § 22.14(a)(5), the very section (along with § 22.14(a)) cited as the basis for the district court and EPA decisions in Environmental Protection Corporation.

But in fact, the two cases focus on two different points in the proceeding. Environmental Protection Corporation focuses really on the imposition of the penalty; its specific holding is that, prior to such imposition, the respondent has to be "provide[d] ... with a factual basis for the Agency's penalty determination ... to allow the ... [respondent] to mount a defense in the matter."[27] It would seem that this rationale could be satisfied if the needed information were provided to the respondent

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23 In the Matter of Environmental Protection Corporation (East Side Disposal Facility), Docket No. RCRA-09-86-0001, Decision and Order (October 24, 1989) at 8.

24 Decision and Order, supra note 23, at 21.

25 The Order of EPA's Chief Judicial Officer "affirmed and incorporated" the decision of the Administrative Law Judge, calling it "a well reasoned opinion." Order, supra note 13, at 7.

26 Decision and Order, supra note 23, at 3-5, 7-8; Order, supra note 13, at 2-8. The decisions of both the Administrative Law Judge and EPA's Chief Judicial Officer additionally reaffirmed that the respondent had violated RCRA. The decision of the former also calculated in detail the amount of the penalty, a calculation that was affirmed by the decision of the latter.

27 Environmental Protection Corporation, supra note 18.

at any point before imposition of the penalty, as long as it was in time for the respondent reasonably to challenge the penalty calculation, if he so chose.

Nothing about enabling the respondent "to mount a defense" would appear to require that the information be provided only in the complaint. Including it in the prehearing exchange, for example, should enable the respondent fairly "to mount a defense."

In Environmental Protection Corporation, the decision apparently spoke of 40 C.F.R. § 22.14(a)(5) (and § 22.14(a)) because the respondent advanced this section as the ground for his procedural appeal. The respondent's reliance on this section is natural, since it is the section that requires the complainant to explain the penalty. But the rationale of the decisions in this case, as noted, would seemingly permit the required explanation to be provided after service of the complaint, as long as it was in time to make possible a defense against the proposed penalty.

The instant case, on the other hand, presents squarely the question of whether the required explanation must be included in the complaint, rather than in some subsequent submission. This Ruling answers that question in the affirmative, for the reasons set forth above under the subheading Logic of the Procedural Situation.

An affirmative answer is solidly supported also by the language of Environmental Protection Corporation. Although the precise holding of that case does not compel an affirmative answer, it is certainly consistent with and generally supportive of such an answer. If, before a penalty can be imposed, Respondent is entitled to the required explanation so that he can "mount a defense," the sooner he receives the explanation, the more fully he will be afforded that chance. Furthermore, 40 C.F.R. § 22.14(a)(5) (and § 22.14(a)), cited as the basis for the decisions in that case, stipulate expressly that it is the "complaint" that shall "include" the required explanation of the penalty.

The above discussion of Environmental Protection Corporation centered on the timing of the explanation of the penalty. A further question is what constitutes a sufficient explanation. In that case, the explanation in the complaint, which was quoted above, was just a slight elaboration of the statutorily mandated factors. This explanation was supplemented, as noted above, by a submission from the complainant stating "that the penalty was assessed in accordance with the Final RCRA Civil Penalty Policy which EPC acknowledged it possessed and understood."[28] The U.S. district court, without even mentioning this explanation and supplement, remanded the case, so evidently the court concluded

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[28] Order, supra note 13, at 5 n.7.

that they were an insufficient explanation of the penalty calculation.

In the instant case, the complaint's listing of fourteen factors probably provided Respondent with more of the reasoning behind the proposed penalty than was given the respondent in Environmental Protection Corporation. But, per the court's formulation in that case, listing these factors still failed to "provid[e] ... a factual basis for the Agency's penalty determination ... to allow ... [Respondent] to mount a defense." Consequently, the court's memorandum decision supports the ruling that the complaint in the instant case lacks a sufficient explanation of the reasoning behind the proposed penalty.

Further Submission by Complainant

The complaint in this case, as discussed above, has been determined to fall short of the requirements of 40 C.F.R. § 22.14(a)(5). But before Respondent's motion to dismiss is ruled upon finally, Complainant may have until December 31, 1990 to make a submission that further explains the reasoning behind its proposed penalty.

That additional time for Complainant will not unduly disadvantage Respondent, since any dismissal granted now would be without prejudice, thus enabling Complainant to initiate the case again with a more detailed complaint. Moreover, prior to Environmental Protection Corporation, the cases have lacked a clear definition of the exact requirements of 40 C.F.R. § 22.14(a)(5) to guide Complainant; and the EPA Chief Judicial Officer's decision in that case was issued after the last filing in the instant matter.

Since Complainant will now be required to explain further the reasoning behind its proposed penalty, the question arises as to whether that requirement can be satisfied through a submission other than Complainant's worksheets. According to Complainant, as noted above, its worksheets are privileged and exempt from disclosure under the Freedom of Information Act.

The EPA Chief Judicial Officer's decision in Environmental Protection Corporation mentioned that complainant's worksheet. The decision noted that the respondent had been given, prior to the remand hearing, a "worksheet ... with a detailed basis for the proposed penalty;"[29] but the decision stated that, apparently independently of that worksheet, the complaint combined with other unspecified "submissions" given the respondent was not "legally insufficient" under 40 C.F.R. § 22.14(a)(5).[30] Therefore the

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[29] Id. 6-7.

[30] Id. 8 and 8 n.10.

indication is that this section may be satisfied by some documentation other than Complainant's worksheets.

In any event, the precise documentation needed to satisfy 40 C.F.R. § 22.14(a)(5) is not presented for decision at this time. Complainant may have to December 31, 1990 to submit information, in whatever form Complainant chooses, to allow the mounting of a defense by Respondent to the proposed penalty. If Respondent, upon receipt of Complainant's information, contends that it is insufficient according to that formulation, that contention can be addressed when raised.

Order

Complainant may have to December 31, 1990 to amend the complaint so that it complies with 40 C.F.R. § 22.14(a)(5). A final ruling on Respondent's motion to dismiss the complaint will be deferred until after December 31, 1990.

Thomas W. Hoya
Administrative Law Judge

Dated: November 30, 1990

IN THE MATTER OF FLORIDA FENCE POST COMPANY, INC., Respondent
Docket No. 90-09-R

Certificate of Service

I certify that the foregoing Ruling on Motion to Dismiss, dated Nov. 30, 1990, was sent this day in the following manner to the addressees listed below.

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