UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Delatte Metals, Inc.,	)	Docket No. CWA-VI-92-1623
	)	
	)	
RESPONDENT	)	

ORDER GRANTING MOTION TO DEEM ALLEGATIONS ADMITTED, FOR ACCELERATED DECISION AS TO LIABILITY AND RESCINDING SUSPENSION ORDER

This proceeding under section 309(g) of the Clean Water Act (33 U.S.C. § 1319(g)) was commenced on June 17, 1992, by the issuance of an "Administrative Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Request A Hearing Thereon", charging Respondent, Delatte Metals, Inc. (DeLatte), with violations of the Act. Based upon discharge monitoring reports (DMRs) submitted by Delatte, the complaint alleged that Delatte had discharged lead in excess of NPDES daily average permit limits in 13 months of an 18-month period commencing in March 1990 and ending August 1991. For these alleged violations, it was proposed to assess DeLatte a penalty totaling $125,000.

By a letter, dated July 8, 1992, signed by its President, DeLatte requested a formal hearing concerning the allegations in the complaint.

For some unexplained reason, the matter was not forwarded to the Chief Judge for assignment of an ALJ until July 20, 1994. The undersigned was designated to preside by an order, dated August 10, 1994. In a Status Report, dated November 25, 1994, counsel for Complainant stated that no progress had been made toward settlement of this action and requested that prehearing procedures be scheduled.

Under date of December 28, 1994, Complainant filed a Motion to Deem Allegations Admitted and for Accelerated Decision. The motion pointed out that paragraph (b) of Rule 15 of the Consolidated Rules of Practice (40 CFR Part 22) required that an answer clearly and directly admit, deny or explain each of the factual allegations in the complaint of which respondent has any knowledge and that paragraph (d) provides that failure of respondent to admit, deny, or explain any material factual allegations contained in the complaint constitutes an admission of the allegation.* Complainant further pointed out that the answer

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* Rule 22.15, entitled "Answer to the complaint", provides in pertinent part:

> (a) General. Where respondent (1) Contests any material fact upon which the complaint is based; (2) contends that the amount of the penalty proposed in the complaint or the proposed revocation or suspension, as the case may be, is inappropriate; or (3) contends that he is entitled to judgment as a matter of law, he shall file a written answer to the complaint with the Regional Hearing Clerk. Any such answer to the complaint must be filed with the Regional Hearing Clerk within twenty (20) days after service of the complaint.
>
> (b) Contents of the answer. The answer shall clearly and directly admit, deny or explain each of the

(continued...)

merely requested a hearing and that DeLatte has made no response to the specific factual allegations of the complaint. Complainant alleged that despite a letter, dated June 2, 1994, which informed DeLatte of the deficiencies in its answer, and numerous telephonic attempts to discuss the matter, DeLatte has not sought to supplement or amend its answer, nor to fulfill its obligations or to assert its rights with respect to this matter. Complainant moved that the ALJ enter an order deeming the factual allegations of the complaint to have been admitted and for an accelerated decision in Complainant's favor as to liability. DeLatte made no response to this motion.

By a letter, dated January 20, 1995, the ALJ directed that, absent settlement, the parties were to furnish specified prehearing information on or before March 31, 1995. Documents

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* (...continued)
factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state (1) the circumstances or arguments which are alleged to constitute the grounds of defense, (2) the facts which respondent intends to place at issue, and (3) whether a hearing is requested.

(c) Request for hearing. A hearing upon the issues raised by the complaint and answer shall be held upon request of respondent in the answer. In addition, a hearing may be held at the discretion of the Presiding Officer, sua sponte, if issues appropriate for adjudication are raised in the answer.

(d) Failure to admit, deny, or explain. Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.

Complainant was directed to submit included a copy of the NPDES permit issued to DeLatte and a copy of DMRs upon which violations alleged in the complaint were based. DeLatte was directed to furnish a statement of the causes, if known, of exceedances alleged in the complaint and actions taken, if any, to correct the exceedances. If DeLatte was contending that the proposed penalty exceeded its ability to pay, it was directed to furnish financial data to support such contention. In a footnote to the mentioned letter, Complainant's motion that certain allegations in the complaint be deemed admitted and for an accelerated decision was denied. It was pointed out, however, that the motion could be renewed or Complainant could move for a default order, if DeLatte failed to cooperate in furnishing information directed by the letter.

Complainant, on March 10, 1995, filed an Expedited Request to Reassert Complainant's Motion to Deem Allegations Admitted. Among other things, the motion recited DeLatte's failure to respond to the prior motion, argued that, under the circumstances, Complainant was legitimately entitled to have its motion to deem allegations admitted granted, and complained of the unnecessary expenditure of resources, if Complainant were required to file its prehearing exchange, Complainant anticipated that, because of DeLatte's prior nonresponse, Respondent would make no response to the ALJ's prehearing order. The motion requested clarification of the footnote in the January 20 letter to the extent that it precluded Complainant from taking further action

[e.g. moving for default] unless it expended the resources to file a prehearing exchange, which, Complainant worried, would likely be a unilateral submission; moved that its December 28 motion to deem allegations admitted be regarded as reasserted, considered and ruled upon; and for a suspension of the requirement that prehearing exchanges be filed pending a ruling on its motion. DeLatte did not respond to this motion.

By an order, dated March 27, 1995, further proceedings in this matter were suspended pending further order of the ALJ. On January 31, 1996, Complainant filed a motion for expedited consideration of its prior motion.

Discussion

Consolidated Rule 22.15(d), supra, may be considered analogous to FRCP Rule 8(d), entitled "Effect of Failure To Deny", which provides in pertinent part: "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." There is no doubt that federal courts, with exceptions not relevant here, generally enforce Rule 8(d) as written. See, e.g., Ismail v. Cohen, 706 F.Supp. 243, 249 (S.D.N.Y. 1989), aff'd 899 F.2d. 183 (2nd Cir. 1990) (admission of sufficiency of notice); Hall v. Aetna Casualty & Surety Co., 617 F.2d. 1108, 1111 (5th Cir. 1980) (admission of insurance coverage); and Matter of Borba, 736 F.2d. 1317 (9th Cir. 1984) (admission that a building was personal property for purpose of bulk-sale statute); Cf. Trotter v. Jack

Anderson Enterprises, Inc., 818 F.2d. 431 (5th Cir. 1987) (failure to deny allegation of malice held not to be an admission where motion for summary judgment placed plaintiff on notice issue was to be litigated).

Although the FRCP are not applicable to Agency proceedings under the Consolidated Rules of Practice, court decisions interpreting the FRCP have been held to be useful guides to applying analogous Part 22 rules. See, e.g., In re Asbestos Specialists, Inc., TSCA Appeal No. 92-3, 4 EAD 819 (EAB, 1993). In view thereof, Complainant's motion that the exceedances of NPDES permit discharge limits for lead alleged in the complaint be deemed to have been admitted will be granted. It follows that the violations alleged in the complaint have been established and that DeLatte is liable for a civil penalty therefor. Complainant's motion for an accelerated decision as to liability will be granted.

The amount of the penalty remains at issue and will be determined after further proceedings, including a hearing if necessary. Delatte will be given a further opportunity to submit the prehearing information directed to be furnished by the ALJ's letter, dated January 20, 1995. If Delatte fails to submit the information and persists in its apparent refusal to cooperate in the resolution of this matter, Complainant will be free to move for the entry of a default order in accordance with Rule 22.17.

ORDER

Complainant's motions that the exceedances of NPDES permit discharge limits for lead alleged in the complaint be deemed to be admitted and for an accelerated decision as to liability are granted. The suspension of proceedings entered on March 27, 1995, is rescinded. DeLatte is directed to submit the information specified in the ALJ's letter, dated January 20, 1995, on or before July 19, 1996.

Dated this 6th day of June 1996.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that the original of this **ORDER GRANTING MOTION TO DEEM ALLEGATIONS ADMITTED, FOR ACCELERATED DECISION AS TO LIABILITY AND RESCINDING SUSPENSION ORDER**, dated June 6, 1996, in re: **Delatte Metals, Inc.**, **Dkt. No. CWA-VI-92-1623**, was mailed to the Regional Hearing Clerk, Reg. VI, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Helen F. Handon
Legal Staff Assistant

Date: June 6, 1996

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