5/16/89

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
EASCO ALUMINUM CORPORATION,	)	Docket No. CWA-AO-V-13-89
	)	
Respondent.	)	

Order Granting Partial Accelerated Decision

The Environmental Protection Agency ("EPA") brings this proceeding under the Clean Water Act ("CWA"), Section 309(g)(2)(B), 33 U.S.C. 1319(g)(2)(B), charging Respondent Easco Aluminum Corporation ("Easco") with discharging pollutants into the Mahoning River in Ohio, in excess of the effluent limitations established by an NPDES (National Pollutant Discharge Elimination System) Permit issued to Easco and with failing to comply with the discharge monitoring requirements set by the permit.[1] A penalty of $125,000, is requested. The EPA has moved for an accelerated decision pursuant to 40 CFR 22.20. The motion is opposed by Easco.[2]

There are two principal issues to be decided on this motion:

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[1] The original permit was effective July 23, 1985, and a modified permit, effective February 10, 1988, was issued on December 21, 1987. Attachments A & B to the complaint. The violations charged are of effluent limits and monitoring requirements set by the modified permit.

[2] Since the EPA is the moving party, its motion to file a reply brief is granted. Easco's motion for leave to reply to that brief is denied. Nothing stated in Easco's motion indicates that further briefing is necessary.

(1) whether the EPA has established as a matter of law that Easco has violated its permit as charged; (2) whether, under the facts as established, the penalty proposed is an appropriate one taking into account the statutory factors.[3]

I The Issue of Liability

The discharges of the pollutants pH, TSS (total suspended nonfilterable solids) and O&G (oil and grease) in excess of the permit's daily and monthly effluent limitations during the period August 1985 through February 1988, and the failure to comply with the effluent monitoring violations during this same period are shown by Easco's discharge monitoring reports ("DMRs"). The data is summarized in Attachments E and F to the Complaint. Attachment E shows discharges of TSS in excess of daily permit limits on 7 different days and in excess of average monthly limitations on 5 separate months, discharges of O&G in excess of daily permit limitations on 28 different days and in excess of average monthly limitations on 18 separate months and discharges of pH in excess of daily permit limits on 14 different days. Attachment F shows 1234 separate violations of the monitoring requirements.

It is not disputed that the DMRs were technically correct in

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[3] CWA Section 309(g)(3), 33 U.S.C. 1319(g)(3), provides that in determining the amount of the penalty, the Administrator "shall take into account the nature, circumstances, extent and gravity of the violations, and with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require."

what was reported.[4] The significance of the data, on the other hand, is disputed both with respect to liability and with respect to the appropriate penalty to be assessed.

The EPA contends that in calculating the number of days of violation, a violation of a monthly average requirement constitutes 30 separate violations.[5] Easco contends that a violation of a monthly average should only count as one violation. The argument is important because the statute provides that a penalty, not to exceed $10,000 per day, may be assessed for each day during which the violation continues.[6]

I find that the EPA's position of counting a monthly violation as 30 separate violations is the correct one. Atlantic States Legal Foundation v. Tyson Foods, 897 F2d 1128, 1139-40 (11th Cir. 1990). Counting a violation of a monthly average as a single violation does not adequately take account of the nature of the violation and its potential gravity. The maximum daily limitations in the permit for TSS and O&G are much higher than the 30 day average concentration limits. Under Easco's interpretation, Easco could stay within the maximum daily limits and still do harm in the

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[4] See Easco's Memorandum in Opposition, Mook Affidavit, Paragraph 5.

[5] The monthly rate is described in the permit as a "30 day" limitation, and is apparently determined from the single weekly samples. See Attachments A & B to the Complaint.

[6] CWA Section 309(g)(2)(B).

aggregate over a 30 day period.[7]

Easco also raises several objections to the permit limitations themselves, which it claims should be considered in determining whether the permit has been violated.

First, Easco argues that the permit effluent limitations are too low, since they are based upon a presumed rate of flow which was greater than the volume actually discharged because Easco had installed a cooling tower that decreased the volume of Easco's discharges into the river by approximately 75%, and also because the volume discharged was affected by the fact that Easco was an intermittent discharger.

Second, Easco argues that the limitations speak in terms of mg/l or ug/l, which are measures of concentration in the pollutant stream, while the regulatory standards establish a load limit, measuring the quantity of pollutant discharged as a proportion of the quantity of product produced (mg/kg). The modified permit here contains no load limits for TSS and O&G.[8] Easco has submitted calculations, however, to show that taken as a proportion of metal cast per day, the O&G and TSS discharged would have been within the regulatory standards even though they may have exceeded the concentration levels in the permit.

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[7] The reasons why the monthly average was violated in a particular month, e.g., whether because of one excessive discharge in the month or because of consistent discharges near the maximum, however, may be considered in assessing the penalty.

[8] The original permit did contain a load limit for these pollutants, but the violations have been determined by the modified permit's limits. Supra, n. 1.

Third, Easco argues that the excess pH discharges were caused by the water received from the City of Niles, which often exceeded the permit limitations.

I find that these arguments are unpersuasive in determining whether the permit has been violated. The effluent limitations are fixed in the permit proceedings. If they are based on erroneous assumptions, or are inconsistent with regulatory standards or fail to take account of factors that Easco thinks should be considered, Easco had and has an adequate remedy for correcting these mistakes in the permitting procedures themselves. This is not a proceeding to decide what terms, conditions and requirements should be established in Easco's permit to carry out the purposes of the NPDES program. It is a proceeding to enforce the permit as written.[9] If there are good reasons why Easco did not raise, or could not raise in the permit proceedings the objections to the effluent limitations that it makes here, those reasons can be

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[9] See Public Interest Research Group of N. J. v. Powell Duffryn Terminals, Inc., 913 F 2d 64, 77-78 (3d Cir 1990), cert. denied, 59 U.S.L.W. 3565 (U.S Feb. 19, 1991). I find this case in point even though it was a citizen's suit for enforcement in the district court, brought under CWA Section 505(a), 33 U.S.C. 1365(a), review of which is governed by CWA Section 509(b)(2), 33 U.S.C. 1369(b)(2), which expressly prohibits judicial review in any civil enforcement proceeding of any action of the Administrator for which review could have been obtained in an NPDES permit proceeding. This, of course, is an administrative enforcement proceeding under Section 309(g)(2), and reviewable under Section 309(g)(8) which does not contain a similar prohibition. Nevertheless, administrative enforcement proceedings are similar in nature to judicial enforcement proceedings (though narrower in scope in the relief that can be granted) and serve essentially the same purpose. It is reasonable, therefore, to apply the same restrictions as to reviewing matters that could have been raised in the permit proceedings.

considered in determining the appropriate penalty. The permit, however, must be taken as written in determining whether there has been a violation.

I find, accordingly, that there is no genuine factual dispute over whether Easco has violated the terms of its permit as charged in the complaint. The evidence in the form of the DMRs clearly establishes that it did. Thus, the EPA is entitled to an accelerated decision in its favor on the issue of Easco's liability.

II The issue of the Appropriate Penalty

Although the violations are established by the DMRs, Easco has raised several factual issues with respect to the appropriateness of the EPA's proposed penalty.

First, Easco takes issue with the EPA's claim that the violations, as disclosed by the DMRs, were serious violations. Easco claims that the permit limitations are based on an assumed rate of flow which was much greater than the actual discharge into the Mahoning River and also that the discharges were within the regulatory standards for loading limits which were established for the industry. The EPA disputes each of these claims. I find that there are genuine issues of fact raised with respect to these claims.[10]

[10] The factual support is contained in Mr. Mook's affidavit, which, contrary to what the EPA seems to argue, does contain sufficient information to show that there are genuine issues of fact with respect to these claims. The EPA in its Reply Memorandum has submitted affidavits disputing Easco's claims. A response to

The EPA argues that Easco's arguments directed to showing that its discharges were not as polluting as indicated on the DMRs must be disregarded because Easco is prohibited as a matter of law from impeaching its DMR data. None of the cases cited by the EPA in support of this argument would preclude consideration of Easco's arguments in determining the appropriate penalty.[11]

Also relevant in determining the seriousness of the violation is how indicative are the monthly data of the average discharges for the months in which monthly exceedances were reported.[12] The answer would appear to turn on the interpretation of the data reported in the DMRs. The parties, however, did not directly speak to this issue in their papers, and it does not appear from the papers that the point can or should be decided at this time. Instead, the parties should be allowed to introduce any evidence they may have on this point.

Easco also disputes the EPA's claim that Easco procrastinated in hooking up to the City of Niles' publicly owned treatment works ("POTW"). The documents cited by the EPA are inconclusive on

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these affidavits is not necessary since a motion for summary judgement should not be turned into a trial by affidavits over issues which are disputed.

[11] The EPA in its Reply Memorandum at p. 11, miscites Natural Resources Defense Council, Inc. v. Outboard Marine Corp., 692 F. Supp. 801,819 (N.D. Ill. 1988) by leaving out the word "Normally" before the quotation from the court's opinion. The court in that case did recognize an exception to the normal rule and found that the defendant had properly raised a factual issue as to whether the reported exceeded permit concentration limit of 1.0 ppb PCBs was reliable.

[12] Supra, n. 7.

whether or not they support the EPA's position.[13] For its part, Easco offers the affidavit of Mr. Mook. The EPA argues that Mr. Mook's statements regarding Easco's efforts to tie into Niles' POTW, being made on information and belief, cannot be taken as factual assertions. This may be true, but the documents relied upon are also known to Easco and it is clear that Easco would interpret its conduct as reflected in these documents differently than the EPA seeks to do. I find, accordingly, that there is a genuine factual dispute over whether Easco was diligent or procrastinated in seeking to tie into Niles' POTW. The issue is relevant on the degree of Easco's culpability in determining the appropriate penalty.

Also having a bearing on Easco's culpability is the extent to which Easco reasonably relied on the Ohio EPA's ("OEPA") advice in its efforts to bring itself into compliance. Again, the parties would draw different conclusions from the relevant documents, thus raising a factual issue on which the parties should be given the opportunity to introduce other evidence, if they so desire, with respect to the merits of their respective positions.[14]

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[13] See Complainant's memorandum in support of its motion at 31-33; Complainant's reply memorandum at 14.

[14] Mr. Moore's assertions in his affidavit, Paragraphs 9 & 10 are not based on information and belief. The EPA argues they must still be disregarded because Mr. Moore has not shown the he is competent to speak to the matter. Mr. Moore has stated in his affidavit that he has personal knowledge of all facts in his affidavit except as to matters sworn to on information and belief. His affidavit is sufficient to show the existence of a disputed issue of fact. His competency and credibity can be tested on cross-examination.

Easco also raises other factual issues in its papers relevant to the proposed penalty.[15] It is not necessary to discuss them in detail, except with respect to the assertion made in Mr. Moore's affidavit that the proposed penalty would work an undue economic hardship upon Easco and interfere with its ability to continue in business.[16] Though stated as a fact, it is really opinion and while sufficient to show the existence of a factual issue on Easco's ability to pay a $125,000 penalty, would be plainly insufficient as it stands to permit a ruling in Easco's favor.

Finally, Easco argues that its discharges had no effect on the quality of the Mahoning River because the river was already heavily polluted. The extent of the actual pollution of the Mahoning River by others as disclosed in the EPA's submissions, is really not disputed. While it may well be a relevant factor in considering the seriousness of the violation by showing the importance of stopping all possible causes of pollution, it is not relevant as a grounds for mitigating a penalty. Chesapeake Bay Foundation v. Gwaltney of Smithfield, 611 F. Supp. 1542, 1560 (D.C. Va. 1985).

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[15] See Mook affidavit, Paragraphs 12, 13, 22, 23 and 24.

[16] Moore affidavit, Paragraph 16.

Conclusion

For the reasons stated, the EPA's motion for an accelerated decision on the issue of liability is granted and its motion for an accelerated decision on the penalty is denied.

Gerald Harwood

Gerald Harwood
Senior Administrative Law Judge

Dated: AUG 16 1991

IN THE MATTER OF EASCO ALUMINUM CORPORATION, Respondent
Docket No. CWA-AO-V-13-89

Certificate of Service

I hereby certify that this Order Granting Partial Accelerated Decision, dated August 16, 1991, was mailed this day in the following manner to the below addressees:

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Dated: August 16, 1991