UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION FOR ACCELERATED DECISION

By Motion filed May 21, 1999, Complainant moved for accelerated decision on the issue of liability only, for each of the three types of violations described in the Complaint. For the reasons discussed below Complainant's motion will be granted in part and denied in part.(1)

I. Background

On July 15, 1998, Complainant initiated this administrative proceeding pursuant to Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g).(2) Respondent, the City of Salisbury, Maryland, owns and operates a publicly owned treatment works ("POTW") in Salisbury that treats domestic sewage. The Complaint charges Respondent, in one undesignated Count, with 24 violations of the sludge regulating provisions of CWA § 405, 33 U.S.C. § 1345, and implementing regulations codified at 40 C.F.R. § 503. Complainant seeks assessment of an aggregated penalty in the amount of $16,000.

Section 405(d)(1) of the CWA directs the Administrator to issue "regulations

providing guidelines for the disposal of sludge and the utilization of sludge for various purposes." 33 U.S.C. § 1345(d)(1). The regulations governing the use or disposal of sewage sludge are found at 40 C.F.R. § 503 and impose upon persons engaging in use or disposal of sewage sludge specific requirements. The Complaint charges Respondent with violating the regulatory requirements governing: (a) monitoring under 40 C.F.R. § 503.16; (b) pollutant concentration ceilings under 40 C.F.R. 503.13; and (c) data reporting for the land application of sludge under 40 C.F.R. § 503.18.

Complainant asserts that, based on admissions in the form of Respondent's own records and reports, there is no genuine issue as to any material fact in this proceeding and that it is entitled to judgment as a matter of law pursuant to 40 C.F.R. § 22.20(a). Respondent opposes Complainant's Motion as to its alleged violations of pollutant concentration ceilings and reporting requirements; Respondent urges that material issues of fact are in dispute, that Complainant is not entitled to judgment as a matter of law, and that an evidentiary hearing is necessary to resolve disputed factual issues. As to the remaining violation charged, Respondent admits that it failed to monitor for arsenic and selenium in the first quarter of 1996 as required by 40 C.F.R. § 503.16, and does not contest the granting of an accelerated decision on liability for that violation.

II. Undisputed Facts[(3)]

1. Respondent, in its capacity as owner and operator of a POTW, generates sewage sludge during treatment of domestic sewage.

2. Respondent's POTW has a design flow capacity of one million gallons per day and is required to maintain an approved pretreatment program.

3. Respondent land applied 335.84 metric tons of sewage sludge during 1996 and 490.02 metric tons during 1997.

4. Respondent did not monitor its sewage sludge for arsenic and selenium during the first quarter of 1996.

5. Respondent sampled its sludge on April 19, 1996 and analysis showed it to contain 97 milligrams per kilogram (mg/kg) of arsenic. Respondent reported that value on its Discharge Monitoring Report ("DMR") for the second quarter of 1996. Respondent applied this sludge to agricultural land on April 19, May 2, and May 15, 1996.

6. Respondent sampled its sludge on June 25, 1996 and analysis showed that it contained 2100 mg/kg of nickel. Respondent did not report this value on its DMR for the second quarter of 1996. Respondent applied this sludge to agricultural land on June 26, and 27 and July 2, 8-11, 18 and 22 , 1996.

7. Respondent sampled its sludge on August 26, 1996 and analysis showed it to contain 150 mg/kg of molybdenum. Respondent did not report this value on its DMR for the third quarter of 1996, reporting instead that the concentration was nondetectible. Respondent applied this sludge to agricultural land on August 26, September 20, 23 and 24, 1996.

8. Respondent sampled its sludge on March 18, 1997 and analysis showed it to contain 370 mg/kg of cadmium and 1100 mg/kg of nickel. Respondent reported these results on its DMR for the first quarter of 1997. Respondent applied this sludge to agricultural land on March 18 and 24 and April 7-9, 1997.

9. During the first quarter of 1996, Respondent sampled its sludge twice - on February 21, 1996 and on March 18, 1996. Analysis of these samples showed them to contain 660 mg/kg and 590 mg/kg of copper; 78 mg/kg and nondetectable amounts of nickel; and 330 mg/kg and nondetectable amounts of lead respectively. On its DMR for the first quarter of 1996 Respondent reported that its sludge contained 590 mg/kg of copper, nondetectable amounts of nickel and nondetectable amounts of lead.

10. During the second quarter of 1996, Respondent sampled its sludge three times - on April 19, 1996, on May 29,1996, and again on June 25, 1996. Analysis of these samples showed them to contain 490 mg/kg, 560 mg/kg and 500 mg/kg of copper; 220 mg/kg, nondetectable amounts and 2100 mg/kg of nickel; nondetectable, 320 mg/kg and nondetectable amounts of lead; and nondetectable, 2.9 kg/mg, and 3.8 kg/mg of mercury, respectively. On its DMR for the second quarter of 1996, Respondent reported that its sludge contained 490 mg/kg of copper, 220 mg/kg of nickel, nondetectable amounts of lead, and nondetectable amounts of mercury.

11. During the third quarter of 1996, Respondent sampled its sludge twice - on July 24, 1996 and on August 26, 1996. Analysis of these samples showed them to contain 350 mg/kg and 1200 mg/kg of zinc respectively. On its DMR for the third quarter of 1996 Respondent reported that its sludge contained 350 mg/kg of zinc.

12. During the fourth quarter of 1996, Respondent sampled its sludge three times - on October 22, 1996, on November 29, 1996, and on December 3, 1996. Analysis of these samples showed them to contain nondetectable, nondetectable and 35 mg/kg of nickel; and nondetectable, nondetectable and 94 mg/kg of lead respectively. On its DMR for the fourth quarter of 1996 Respondent reported that its sludge contained nondetectable amounts of zinc and lead.

III. Discussion

Consolidated Rule of Practice 22.20(a) provides for entry of an accelerated decision "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding." 40 C.F.R. § 22.20(a). The Environmental Appeals Board has held that the standard for accelerated decision is "comparable to a summary judgment under Federal Rule of Civil Procedure 56, which by analogy provides guidance." *ICC Industries.*, TSCA Appeal No. 91-4, 1991 EPA App. Lexis 13, at * 16 (EAB, Dec. 2, 1991); *see also*, *CWM Chemical Services*, TSCA Appeal No. 93-1, 6 E.A.D. 1 (EAB, May 15, 1995). Interpreting the standard of Rule 56, the Supreme Court has stated that the proper inquiry is "whether the evidence presents a sufficient disagreement to require submission to a [fact finder] or whether it is so one sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 251 (1986).

The moving party bears the burden of showing that no genuine issue of material fact is in dispute. *Adickes v. Kress*, 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the factual record and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Cone v. Longmont United Hospital Assoc.*, 14 F. 3rd 526, 528 (10th Cir. 1994). The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 256. I now turn to the two remaining charges in dispute.

A. Exceedances of Pollutant Concentration Limits

Regulations implementing the Clean Water Act provide at 40 C.F.R. Section 503.13(a)(1) that sewage sludge "shall not be applied to the land if the concentration of any pollutant in the sewage sludge exceeds the ceiling concentration for the pollutant in Table 1 of § 503.13."(4)

The undisputed facts establish that on April 19, 1996, June 25, 1996, August 26, 1996, and March 18, 1997, Respondent sampled its sludge. The facts further establish that testing of those samples evidenced that they contained concentrations of arsenic, nickel, molybdenum, and cadmium and nickel respectively, that exceeded the regulatory ceiling established under 40 C.F.R. § 503.13, and, that this sludge was applied to land. These facts were drawn from Respondent's DMRs (Complainant's Prehearing Exhibits ("CX") 5 and 6) and information produced by Respondent in reply to an information request sent to Respondent by EPA pursuant to CWA § 308, 33 U.S.C. § 1318.(5) CX 4.

Complainant asserts that the data and records generated by Respondent constitute admissions and are conclusive evidence on the issue of liability for exceeding pollutant concentration ceilings. In support of its position, Complainant represents that a majority of cases addressing this question have adopted this approach. *See, e.g., Sierra Club v. Union Oil*, 813 F.2d 1480 (9th Cir. 1987); *Connecticut Fund for the Environment v. Upjohn Co.*, 660 F. Supp. 1937 (D. Conn. 1987); *United States v. Municipal Authority of Union Township and Dean Dairy Products Inc.*, C.A. No. 1:CV-94-0621 (M.D. Pa. December 14, 1995). Moreover, Complainant avers that the legislative history of the CWA supports its position.(6) To allow Respondent to impeach its own data as it seeks to do here, Complainant maintains, would open the door to just the sort of exhaustive fact finding and expert scientific testimony that Congress sought to avoid.

Respondent contends in opposition that its DMRs, while constituting evidence of exceedances, are not conclusive evidence where a Respondent can show by direct evidence that such concentration levels were the result of laboratory error. Further, Respondent maintains that the majority of cases addressing this issue do not stand for the proposition that a respondent may never dispute information recorded on its DMRs, but rather that they erect a high barrier to such challenges which respondents have generally been unable to surmount. *See, e.g., Friends of the Earth v. Facet Ent., Inc.*, 681 F. Supp. 532 (W.D.N.Y. 1984); *PIRG of New Jersey v. Yates Inds., Inc.*, 757 F. Supp. 438, 446-47 (D.N.J. 1991); *PIRG of New Jersey v. Magnesium Elektron, Inc.*, 34 E.R.C. 2077, 1992 WL 16314, 16317 (D.N.J. 1992).

In particular, Respondent relies on the case *PIRG of New Jersey v. Elf Atochem North America, Inc.*, 817 F. Supp. 1164 (D.N.J. 1993). In that case the judge found that Elf Atochem had submitted sufficient evidence, directly disputing certain of the allegations and circumstantially disputing many others, to resist plaintiff's summary judgment motion for a significant number of the violations alleged. Respondent submits that, as in *Elf Atochem*, it has direct evidence, as well as strong indirect evidence, that each of the five reported results indicating exceedances of pollutant concentration ceilings was in error.

Respondent's direct evidence is in the form of follow-up samples of the lagoons from which the original samples were taken. These follow-up samples, Respondent avers, show concentrations far below the regulatory limit. Respondent acknowledges that quantities of sludge were removed(7) from the lagoons in the time between the original and the follow-up samples, but maintains that the amount of material removed in each instance was insufficient to significantly alter the concentration level of the pollutants at issue.(8) Respondent's Prehearing Exhibit ("RX") 1. Moreover, Respondent argues that the instant case is distinguishable from the NPDES cases cited in one significant respect; sludge is often stored in lagoons that do

not change significantly in composition thus making it amenable to retesting, whereas the effluent that is the subject of the cited cases is sampled and discharged and consequently not available for retesting.

Respondent presents a multitude of other arguments focusing on circumstantial evidence of erroneous test results. For example, Respondent points to a report of the Maryland Department of the Environment which reported problems with the reliability of the metals work done by the lab to which it sent its samples for analysis.(9) RX 5. Respondent also represents that the five results in question are far in excess of past and subsequent sample results, and that the lab had produced a result for copper in February of 1997 which was found to be erroneous upon retesting. Respondent concedes that, as pointed out by the court in *Elf Atochem*,(10) even if it is subsequently found not liable for exceeding pollutant concentration ceilings, its reporting of erroneous results may constitute monitoring violations.

I find that Respondent has raised material issues of fact as to its exceedances of pollutant concentration ceilings which must be examined in greater depth at an oral evidentiary hearing. Accordingly, Complainant's motion for accelerated decision as to violations of the pollutant concentration ceilings in 40 C.F.R. § 503.13 will be denied.

B. Failure to Report Data on Concentration of Pollutants in Sludge

The regulations at Section 503.18(a)(1) require Class I sludge management facilities and POTWs with a design flow rate of one million gallons or more to submit to the permitting authority, which in this instance is EPA, "[t]he information in 503.17(a) [with exceptions not relevant here], for the appropriate requirements on February 19 of each year." Section 503.17(a)(4)(i), in turn, requires a person who land applies sludge meeting certain pollutant levels and pathogen requirements to develop information about "[t]he concentration of each pollutant listed in Table 3 of Section 503.13 in the bulk sewage sludge."

The undisputed facts establish that although Respondent sampled and analyzed its sludge on ten occasions in 1996, it reported results from only four of those sampling events on its sludge DMRs. Complainant maintains that Section 503.18 clearly requires Respondent to report all information developed pursuant to Section 503.17 concerning the concentration of pollutants listed under Section 503.13 and, therefore, that Respondent's omissions constitute violations of Section 503.18(a).

Respondent replies that there are several issues of material fact in dispute. Moreover, Respondent submits that Complainant is not entitled to judgment as a matter of law because Section 503.18 does not, as promulgated, obligate Respondent to submit to EPA all of the sludge data which it collected and reported to the State of Maryland. Case law establishes, Respondent asserts, that dischargers must be provided fair notice of a rule's requirements before it can be enforced against them. *See, e.g., U.S. v. Hoechst Celanese Corp.*, 128 F.3d 216 (4th Cir.1997) *cert. denied*, 118 S. Ct. 2367 (1998); *General Electric v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995). In the instant case, Respondent argues, EPA documents show that EPA itself did not know what the reporting requirements were under Section 503.18; therefore EPA cannot enforce against Respondent the interpretation embodied in its Complaint and Motion.

Respondent submits that in the preamble to the proposed rules codified at 40 C.F.R. Part 503, EPA's discussion of monitoring and reporting issues supports Respondent's position. According to Respondent, EPA acknowledged in the preamble to the proposed

Part 503 regulations that proposed monitoring and reporting requirements were minimum requirements and that states may require more frequent monitoring, record keeping and reporting requirements. *See,* 54 Fed. Reg. 5746, 5872. Because EPA did not explicitly require in the final rule that all sludge data reported to the states must be reported to EPA, it is clear that EPA did not want this data, Respondent maintains. Respondent argues further that although the proposed rule refers to the possible imposition of more stringent requirements, Respondent has never been subject to such requirements. *Id*. at 5894. To subject Respondent now to more stringent requirements without specifying them in a permit is contrary to EPA guidance, Respondent argues, pointing to a passage from EPA's Part 503 Implementation Guidance. RX 9 at 4-66.

Respondent next points to a passage in the draft rule under the heading "Frequency of monitoring and reporting" where the Agency states that "owners and operators of treatment works shall monitor and report the parameters specified in this subpart in accordance with the following [frequency of monitoring]." 54 Fed. Reg. 5894-95. Respondent maintains that this passage shows that a city required to monitor quarterly would only be required to report one monitoring result per quarter. Because it was required to monitor quarterly, as required by Section 503.16, Respondent believes that it was required to report only one monitoring result for each quarter.

Respondent then turns to EPA guidance on the issue of monitoring and reporting. According to Respondent, EPA's national guidance document, "Preparing Sewage Sludge for Land Application or Surface Disposal" (RX 10), establishes that reporting of additional sludge data is permissive. This conclusion is based on Respondent's reading of the following passage: "[Annual] Reports should include the results of all analyses performed during the reporting period using the prescribed analytical method(s)." RX 10 at 36-37 (emphasis added). Respondent argues that use of the word "should" amidst other statements containing the words "must," "shall," and "are required to" demonstrates that "should" as used in the quoted passage is intended to be read as permissive, not mandatory.

Finally, Respondent argues that a letter sent by EPA Region III to dischargers in the Region shows that the Agency recognized that the reporting requirements in Section 503.18 were unclear. According to Respondent, the letter's direction to report the highest monthly average concentration during the monitoring period is contrary to the position taken by Complainant in this proceeding, and is further evidence that Section 503.18's reporting requirements lack the required clarity.[(11)] Moreover, Respondent maintains that this letter applies only to data collected in 1994.

Respondent's arguments are unavailing. I do not find the regulations to be as unclear as Respondent maintains they are. Section 503.18(a) requires Respondent to submit "[t]he information in § 503.17(a)" and Section 503.17(a) requires Respondent to "develop the following information . . .[t]he concentration of each pollutant listed in Table 3 . . . ." The plain meaning of these provisions is *the* information, not just *some* information, that Respondent develops on such pollutant concentrations must be submitted in accordance with Section 503.18(a). Respondent is correct that regulations must give regulated parties fair notice of their requirements. It also true, however, that absolute specificity is not required. While perhaps not crystal clear, Section 503.18 is "sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require." *Freeman United Coal Mining Co. v. Federal Mine Safety and Health Review Comm'n*, 103 F.3d 358, 362 (D.C. Cir. 1997). As a POTW, Respondent should be aware that the purpose of the sludge regulations is to ensure that land applied sludge does not contain pollutants in excess of what the regulations allow, and that to achieve this purpose all data collected must be reported.

This conclusion is reinforced by 40 C.F.R. § 122.41(l)(4)(ii), a provision of the NPDES rules addressing sludge monitoring. This regulation provides that:

> If the permittee monitors any pollutant more frequently than required by the permit . . . in the case of sludge use or disposal, approved under 40 CFR part 503, . . . the results of this monitoring shall be included in the calculation and reporting of the data submitted in the . . . sludge reporting form specified by the Director.

The discussion of this provision in the preamble to the final rule is instructive. Responding to an objection to the requirement that persons report results of additional sludge monitoring, the Agency states:

> The requirement to submit all monitoring has been an established requirement of the NPDES program for over ten years. It assures that self-monitoring reports are representative of the monitored activity *and do not represent selected results*. . . . Since self-monitoring of sludge and related activities fulfills the same function as self-monitoring under NPDES, there is no apparent reason for the requirement to be different for sludge monitoring. 54 Fed. Reg. 18,716, 18742 (1989) (italics added).

In addition to finding that Section 503.18 put Respondent on notice that it was required to report all information developed about pollutant concentrations in its sludge, I find that the evidence offered by Respondent fails to show that EPA itself did not understand what the rule required or that EPA offered conflicting interpretations of those requirements. The passages from the proposed rule cited by Respondent do not establish that the meaning of Section 503.18, as finally promulgated, is ambiguous. The fact that the final rule does not state explicitly that all sludge data must be reported on sludge DMRs does not render it ambiguous. Similarly, Respondent's argument that it has never been subjected to more stringent requirements must fail. The requirements Respondent did not fulfill are not a set of "more stringent requirements," but rather are simply the requirements of 503.18. Finally, it is true that the draft rule contained language directly linking monitoring frequency with reporting obligations. Section 503.18(a)(1) as promulgated, however, nowhere refers to monitoring frequency, referring instead only to 503.17.[(12)]

Respondent's argument that the use of the word "should" in EPA's sludge guidance document, as opposed to "must" or "shall," demonstrates that reporting of all information is permissive is also unpersuasive. As Complainant argues, the guidance document is written in a style intended to convey information in a more readable fashion than the regulations themselves, and applying interpretive methods used for statutes and regulations is not appropriate. Moreover, the definition of "should" cited by Respondent does not offer unqualified support for Respondent's interpretation. The term "should" is defined as "ordinarily implying a duty or obligation; although usually no more than an obligation of propriety or expediency, a moral obligation . . . ." Black's Law Dictionary 1237 (5^{th} ed. 1979). This definition does not compel Respondent's interpretation of the quoted passage from the guidance, but rather offers it as a possibility. That such an interpretation of a guidance document is possible does not provide reason to reinterpret a regulation that has been found to provide sufficient notice of its requirements.

Finally, the letter sent by EPA Region III to Respondent likewise does not support Respondent's contention that EPA offered ambiguous and contradictory interpretations of the reporting requirements of Section 503.18. This letter and attached guidance did not present a new interpretation of Section 503.18, or indicate that the Agency was unsure of what needed to be reported thereunder. Rather, it specified what would constitute adequate reporting under the rule, potentially reducing the reporting requirements of regulated parties.

Accordingly, Complainant is entitled to judgment as a matter of law as to Respondent's liability for violating 40 C.F.R. § 503.18.

Conclusion

Complainant's Motion for Accelerated Decision is granted in part, as to Respondent's liability for violating the monitoring requirements of 40 C.F.R. § 503.16 and the data reporting requirements of 40 C.F.R. § 503.18 as alleged in the Complaint, and denied in part, as to the alleged violations of the pollutant concentration limits set forth in 40 C.F.R. 503.13. The hearing will proceed on issues as to liability for alleged violations of the pollutant concentration limits, and issues as to penalty assessment for the violations alleged in the Complaint.

ORDER

1. Complainant's Motion for Accelerated Decision as to Respondent's liability for violating 40 C.F.R. § 503.16 and 40 C.F.R. § 503.18 is hereby **GRANTED**;

2. Complainant's Motion for Accelerated Decision as to Respondent's liability for violating 40 C.F.R. § 503.18 is hereby **DENIED**; and

3. **A hearing on the remaining issues in this proceeding will be held as previously scheduled in this case beginning on September 7, 1999 in Washington, D.C.**

Susan L. Biro
Chief Administrative Law Judge

Dated: July 30, 1999
Washington, D.C.

1. [1] On August 14, 1998, in response to the Complaint, Respondent filed a pleading

entitled "Motion to Dismiss and in the Alternative Response to Administrative Complaint, Findings of Violations, Notice of Proposed Assessment and Request for Hearing." While alternatively titled as a Motion to Dismiss, the pleading did not contain a recitation of the standards for granting such a Motion, nor did it argue that the facts of this case warranted dismissal. To the contrary, in the pleading Respondent admitted one violation and raised a factual dispute as to the validity of the other violations alleged. The Complaint never responded to this "Motion." For the reasons stated herein, Respondent's "Motion to Dismiss" is hereby DENIED.

2. [2] The Complaint proposes a Class I penalty, which, under Section 309(g)((2)(A) of the Act, is limited to $10,000 per violation, up to a maximum of $25,000 in total. Section 309(g)(2)(A) provides that hearings on Class I penalties "shall not be subject to section 554 or 556 of Title 5." Class II penalties under Section 309(g)(2)(B) are limited to $10,000 per day that a violation continues, up to a maximum of $125,000. Section 309(g)(2)(B) requires that hearings be conducted in accordance with Section 554 of the Administrative Procedure Act (APA). Class II penalty assessment hearings are governed by procedures set forth in the Rules of Practice at 40 C.F.R. Part 22, and are conducted by administrative law judges, pursuant to delegated the authority to "hold hearings and perform related duties which the Administrator is required by law to perform in proceedings subject to 5 U.S.C. 556 and 557." EPA Delegations Manual 1-37. For Class I penalty assessments, the authority to perform presiding officer functions was delegated to General Counsel and Regional Administrators, who have authorized Class I penalty proceedings under the Act to be conducted by Regional Judicial Officers (RJOs), who conduct hearings under procedures set forth in a proposed rule, 56 Fed. Reg. 29996 (July 1, 1991), which was never finalized. EPA Delegations Manual 2-51.

Under the Rules of Practice, the Regional Hearing Clerk has the responsibility to forward complaints governed by 40 C.F.R. Part 22 to the Chief Administrative Law Judge. 40 C.F.R. §22.21(a). At the time the Complaint and Answer were filed, there was no binding authority requiring the Regional Hearing Clerk to forward Clean Water Act Class I penalty assessment complaints and answers to a Regional Judicial Officer. However, effective August 23, 1999, this problem is rectified by the Final Rule amending the Rules of Practice at 40 C.F.R. Part 22, which adds procedures at Subpart I for non-APA proceedings presided over by RJOs, specifies that Subpart I applies to Class I Clean Water Act penalty cases, and requires all complaints intended to be presided over by RJOs under non-APA procedures to include a statement that Subpart I procedures apply. 64 Fed. Reg. 40138 (July 23, 1999)

Before this problem was rectified, the Regional Hearing Clerk sent the Complaint and Answer in this proceeding to the Chief Administrative Law Judge, and to date has not notified the undersigned that she sent it in error. In the year since this matter has been pending, neither party objected to the assignment of an Administrative Law Judge, nor made any indication to the undersigned that it wished to exercise its right to a hearing before a Regional Judicial Officer, so the parties have waived that right. Having an Administrative Law Judge preside over this proceeding does not render the proceeding or its outcome invalid nor does it violate the requirement of Section 309(g)(1)(A) that the hearing shall not be subject to Section 554 or 556 of the APA. Affording the parties *greater* due process than that required by statute is not a violation of the statute, particularly where the parties do not object or assert prejudice. Moreover, EPA Administrative Law Judges, as well as Administrative Law Judges at other Federal agencies, frequently are required to, and do, conduct proceedings which are not subject to APA procedures.

3. [3] This recitation of the undisputed facts is drawn from the Stipulated Facts, Exhibits and Testimony signed and submitted jointly by the parties.

4. [4] Table 1 of 40 C.F.R. § 503.13 establishes the following pollutant ceiling concentrations measured in milligrams per kilogram:

Arsenic	75
Cadmium	85
Copper	4300
Lead	840
Mercury	57
Molybdenum	75
Nickel	420
Selenium	100
Zinc	7500

5. [5] CWA § 308 authorizes the Administrator, *inter alia*, to request of owners or operators of point sources information necessary to carry out the purposes of CWA § 405.

6. [6] *See* S. Rep. No. 414, 92nd Cong., 1st Sess. 64, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730 (stating in part that "One purpose of these requirements is to avoid the necessity of lengthy fact finding [and] investigations . . . at the time of enforcement.").

7. [7] Respondent makes the following representations as to follow-up sample results and changes in the sampled lagoons between the original sample date and the follow-up sample date:

1) The lagoon that showed an arsenic exceedance on April 19, 1996 was resampled on June 24, 1996 and showed a nondetectible amount of arsenic. Between April 19 and June 24, 130,000 gallons, or 7% of the total volume, was removed.

2) The lagoon that showed a nickel exceedance on June 25, 1996 was resampled on October 22, 1996 and showed a nondetectible amount of nickel. Between June 25 and October 22, 365,000 gallons, approximately 17% of the total volume, was removed.

3) The lagoon that showed a molybdenum exceedance on August 26, 1996 was resampled on May 18, 1998 and showed a concentration of 5.84 mg/kg of molybdenum. Between August 26, 1996 and May 18 1998, 115,000 gallons, approximately 6% of the total volume, was removed.

4) The lagoon that showed cadmium and nickel exceedances on March 18, 1997 was resampled on April 9, 1997, and showed nondetectible amounts of those pollutants. Between March 18 and April 9, 80,000 gallons, approximately 4% of the total volume, was removed.

8. [8] Respondent maintains that it has a quantity of sludge from the lagoon which produced the August 26, 1996 molybdenum result which is unchanged from that time and which shows a molybdenum concentration below the allowable ceiling. RX 2.

9. [9] Respondent terminated its contract with this lab in April 1997 upon learning that MDE had initiated a certification action against the lab.

10. [10] 817 F. Supp. at 1179.

11. [11] Respondent also claims that EPA representatives provided conflicting verbal guidance on the requirements of Section 503.18. These claims, however, are unsubstantiated and thus will not be addressed here.

12. [12] Respondent's proffered interpretation of the rule, that the reporting requirements of Section 503.18 are governed by the quarterly monitoring requirement of Section 503.16, fails for the same reason.