UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

Labarge,.Inc.

Respondent

Docket No. CWA-VII-91-W-0078
Judge Greene

DECISION AND ORDER AS TO PENALTY [1]

This matter arises under Sections 301(a), 307(d), and 309(g)(1), (2)(B) of the Clean Water Act (the Act), 33 U.S.C. §§ 1311(a), 1317(d), and 1319(g)(1), (2)(B). The complaint herein alleges that Respondent violated Sections 301(a) and 307(d) of the Act, 33 U.S.C. §§ 1311(a) and 1317(d), by the discharge of waste water which contained copper in excess of the amount allowed by law into a navigable water of the United States on various dates from January, 1988 through at least November, 1990. The complaint proposed a civil monetary penalty of $125,000.

Complainant's motion for summary decision as to liability was granted on February 5, 1996;[2] Respondent was found liable for the violations alleged in the complaint. Remaining to be determined, therefore, is the appropriateness of the amount of the penalty sought by Complainant. The parties agreed to submit the penalty issue for decision upon the record, augmented by briefs.

At the outset, Respondent maintains that the assessment of a penalty in this proceeding is barred by Section 309(g)(6)(A)(ii), as read together with Section 309(d) of the Act. Section 309(g)(6)(A)(ii) provides as follows, in pertinent part:

Limitation on Actions Under Other Sections.

Action taken by the Administrator..... under this subsection shall not affect or limit the Administrator's..... authority to enforce any provision of this chapter; except that any violation --

. . .

(ii) with respect to which a state has commenced and is diligently prosecuting an action under State law comparable to this subsection,

. . .

shall not be the subject of a *civil penalty action under subsection (d)* [3] of this section or section 1321(b) of this title or section 1365 of this title . . . .

Subsection (d) of Section 309, however, refers only to factors to be considered in arriving at penalty amounts in civil court actions brought to enforce various sections of the Act or permit or other requirements imposed upon members of the regulated community. It resembles closely subsection (g)(3), Administrative Penalties, Determining Amount[4], pursuant to which the issue of the penalty here is being considered. The language of subsection (d) clearly does not refer to administrative actions which result in the imposition of civil penalties, for, among other reasons, the civil administrative penalty authority and factors to be considered in setting those penalties appear in subsection (g) (1) and (3).

The effect of subsection (g)(6)(A) is, *inter alia*, to bar civil court actions [subsection (a)] and concomitantly the assessment of civil penalties under subsection (d), against members of the regulated community when "a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection" [i. e. subsection (g)]. Accordingly, Respondent could not be proceeded against in civil court for civil penalties if a State were diligently prosecuting an action under a State law comparable to subsection (g), Administrative Penalties, against Respondent. Respondent's argument as to subsection (d) overlooks the structure of section 309 of the Act [5], which provides for State enforcement of various sections of the Act and of certain permit conditions [6]; civil actions by the EPA Administrator in district courts of the United States;[7] criminal actions and penalties; [8] and administrative actions and penalties.[9] Subsection (d), Civil Penalties; Factors Considered in Determining Amount, sets forth factors to be considered in determining the amount of civil penalty to be imposed in civil actions, most obviously those brought pursuant to subsection (a), Civil Actions. Accordingly, subsection (d) does not speak to, and does not bar, the assessment of a civil penalty pursuant to subsection (g)(1) in a subsection (g) action such as this one.

***Res Judicata* and Collateral Estoppel.**

Respondent also argues that the instant action is barred under principles of collateral estoppel and *res judicata*. As Complainant urges, however, neither collateral estoppel nor *res judicata* can be considered at a stage of the proceedings where, as here, liability has already been determined. The issues at this stage of the proceedings are limited to whether the amount of the penalty proposed in the complaint has been justified by Complainant and should be assessed. It is noted that Respondent did raise, but failed to support in response to the motion for summary determination as to liability, various affirmative defenses. [10]

The Issue of the Penalty.

The factors governing a penalty assessment under the Act, as set forth in Section 309(g)(3), are:

In determining the amount of any penalty assessment under this subsection, the Administrator . . . shall take into account the nature, circumstances, extent and gravity of the violation, or 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.

1. The Nature, Circumstances, Extent, and Gravity of the Violations

Respondent is the owner and operator of a facility that manufactures electronic cable and wiring harnesses, printed circuit boards and other electronic systems and devices. The facility discharges industrial waste water into the water system of the City of Joplin, Missouri, from which it would enter Turkey Creek, a navigable water of the United States as defined by Section 502(7) of the Act, 33 U.S.C. § 1362(7).

At the request of EPA, and pursuant to the authority of the Act, Respondent submitted the results of sampling analyses performed on its wastewater discharges from 1988 through 1990. These results showed copper discharges into the city sewer system on numerous occasions at levels that exceeded the amount permitted by either federal or local standards. In fact, Respondent exceeded the monthly average standard for copper eleven (11) times from January 1988 to November 1990. Of the eleven (11) monthly average violations, six (6) exceeded the standard by more than 1000%. One monthly average violation was nearly 5000% over the legal limit.

Respondent exceeded the daily maximum standard for copper on eighteen (18) occasions from January, 1988 through November, 1990. Of the eighteen (18) daily maximum violations, six (6) exceeded the standard by more than 100%, and three (3) exceeded the standard by more than 1000%. The highest daily average violation was nearly 3000% over the prescribed limit.

Complainant has described in detail the severe damage to aquatic life that can be caused by the introduction of even small amounts of copper. Complainant's Exhibit 13 at 2. See also Complainant's Exhibits 22 and 23. In light of this evidence, it was reasonable on Complainant's part to conclude that the potential for environmental harm from Respondent's discharges was high.[11] Moreover, evidence of measurable environmental harm in connection with a violation is not required in order to support the assessment of a substantial penalty under the Act. Public Interest Research Group of New Jersey (PIRG), Inc. v. Powell Duffryn Terminals, Inc., 720 F. Supp. 1158, 1167 (D.N.J. 1989), rev'd on other grounds, 913 F.2d 64 (3d Cir. 1990); N.R.D.C., Inc. v. Texaco, 800 F. Supp. 1, 24 (D. Del. 1992), rev'd on other grounds, 2 F.3d 493 (3d Cir. 1993). Accordingly, it must be found that the nature, circumstances, extent and gravity of the violations established here support the imposition of a substantial penalty.

2. Ability to Pay, Prior Violations, Degree of Culpability, Economic Benefit, and Such Other Factors as Justice May Require.

The remaining statutory factors, "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" are addressed below.

Ability to pay cannot be considered because Respondent declined to provide current information on its ability to pay the penalty. Complainant's Exhibit 15. Accordingly, it will be assumed that Respondent can afford the amount proposed.

Since the record does not show that Respondent has any prior history of the violations found, this statutory factor will not be considered.

Degree of culpability on Respondent's part, however, requires comment. The record reveals that Respondent discharged copper in violation of federal and local limits despite repeated notices from the City of Joplin. See Complainant's Exhibits 1-11. Rather than alter its production practices to

eliminate the discharge problem, Respondent chose to continue to operate at a rate it must have known or suspected would result in additional violations.[12] The record is silent as to why Respondent's operation was allowed to continue at length in such a way as to permit additional violations, in the face of warnings. Accordingly, no reduction can be made in Complainant's penalty proposal on the ground that Respondent lacked culpability, or lacked some degree of culpability, for the violations found.

With respect to the statutory factor of "such matters as justice may require," Respondent has not given, and the record does not disclose, any reason to reduce the proposal based upon other matters which justice may require.

3. Deterrence.

It is noted that amounts sufficiently large to deter future violations have been held to be appropriate. Hawaii's Thousand Friends v. Honolulu, 821 F. Supp. 1368, 1394 (D. Hawaii 1993) (penalty must be high enough to ensure that the discharger cannot absorb penalty as cost of doing business); PIRG, 720 F. Supp. at 1166 (same); Atlantic States Legal Foundation v. Universal Tool, 786 F. Supp. 743, 753 (N.D. Ind. 1992) (same); Tull v. United States, 481 U.S. 412, 422 (1987) (the need for deterrence should be considered in imposing penalties under the Act).

4. Summary.

Accordingly, it is found that Complainant's penalty proposal of $125,000 is supported by the record, and is reasonable and fair based upon (1) the nature, circumstances, extent, and gravity of the violations; and (2) the consideration of various statutory factors which must be taken into account where appropriate.

ORDER

It is ORDERED that:

1. Respondent LaBarge, Inc. shall be, and is hereby, assessed a civil monetary penalty of $125,000 for the violations previously found.

2. Payment shall be made within sixty (60) days of the service date of the final order herein by submitting a certified check or cashier's check payable to the Treasurer of the United States of America, to:

Mellon Bank
U. S. Environmental Protection Agency
Region 7
Regional Hearing Clerk
Post Office Box 360748M
Pittsburgh, PA 15251[13]

3. Failure by Respondent to pay the penalty within the prescribed time frame after entry of the final order will result in the assessment of interest and penalty charges on the debt pursuant to 31 U.S.C. § 3717; 4 C.F.R. §102.13. [14]

J.F. Greene

Administrative Law Judge

Washington, D. C.

March 26, 1997

[1] 40 C.F.R. § 22.20(b) provides that "[i]f an accelerated decision..... is issued as to all the issues and claims in the proceeding, the decision constitutes an initial decision . . . "

[2] **Order Granting Motion for Determination as to Liability for Violations Alleged in the Complaint,** February 5, 1996, attached hereto and made a part hereof.

[3] Emphasis added. Of course, the action here was brought pursuant to the authority of subsection (g), Administrative Penalties, not subsection (d).

[4] See text of section 309, subsection (g)(3), infra, at 5.

[5] While not instantly apparent, the structure of section 309 yields to understanding upon more careful examination. Subsection (d), despite the reference in subsection (g) to "civil penalty action under subsection (d) . . . .," speaks only to what the (civil) court must take into account when imposing a civil penalty in connection with a civil action. The civil action itself is provided for in subsection (a) of section 309, 33 U.S. C. 1319 (a) .

[6] Subsection (a), State enforcement; compliance orders.

[7] Subsection (b), Civil actions.

[8] Subsection (c), Criminal penalties.

[9] Subsection (g), Administrative penalties.

[10] Six affirmative defenses were raised in Respondent's Answer to the Complaint, and one was raised in response to Complainant's motion . See attached **Order Granting Motion for Determination as to Liability for Violations Alleged in the Complaint,** at 2-3, 5-6.2

[11] Respondent submitted as Exhibit 1 to its Response Brief several pages from Complainant's gravity calculation worksheet under what appears to be the Agency's "Clean Water Act Penalty Policy for Civil Settlement Negotiations," of February 11, 1986. Respondent maintains that Exhibit 1 proves that Complainant has acknowledged that the violations in this case constitute minimal harm. The above-referenced penalty policy, however, is used for settlement purposes; it is designed solely to provide Complainant with a compromise settlement figure. Policy at 2. Moreover, Respondent acknowledges that Exhibit 1 was provided to Respondent "pursuant to ongoing settlement negotiations." Affidavit of Ellen S. Goldman, Esq. (September 6, 1996). Consequently, Exhibit 1 should not be used as evidence of the ultimate fact here, i. e. the appropriate amount of penalty. See 40 C.F.R. §22.22(a); Fed. R. Evid. 408.

[12] Indeed, Respondent appears to have benefitted economically from its delayed compliance. However, the subject of economic benefit need not be reached, as the proposed penalty is justified on the basis of the nature, circumstances, extent and gravity of the violations, and the degree of culpability of Respondent.

[13] A letter which identifies this matter, and which includes (1) the EPA docket number and (2) Respondent's name and address, must accompany the check.

[14] Pursuant to Section 22.27(c) of EPA's Consolidated Rules of Practice, 40 C.F.R. § 22.27(c), this Initial Decision "shall become the final order of the Environmental Appeals Board within forty-five (45) days after service upon the parties and without further proceedings unless" it is appealed by a party to the Board or the Board elects, sua sponte, to review it. Under Section 22.30(a) of the Consolidated Rules, the parties have twenty (20) days after service upon them of this Initial Decision to appeal it. The address for filing an appeal is as follows:

Environmental Appeals Board

U.S. EPA

Weststory Building (WSB)

607 14th Street, N.W., 5th Floor

Washington, D.C. 20005

Attachment

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF

LaBarge, Incorporated

Defendant

Docket Number: CWA-VII-91-W-0078
Judge Greene

ORDER GRANTING MOTION FOR DETERMINATION
AS TO LIABILITY FOR VIOLATIONS
ALLEGED IN THE COMPLAINT

This matter arises under Sections 30 (a) , 307(d) , and 309(g) of the Clean Water Act, 33 U. S.C. §§ 1311(a) , 1317(d) , and 1319(g) , ("the Act").

The complaint herein alleges that Respondent LaBarge, Incorporated, which owns and operates an electronic cable and harness manufacturing facility in Joplin, Missouri, violated Sections 301(a) and 307(d) of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1317(d) by the discharge of waste water which contained copper in excess of both federal and local limits to the city-owned Lone Elm and Turkey Creek treatment facility, from which it would enter Turkey Creek, a navigable water of the United States as defined by Section 502(7) of the Act, 33 U.S.C. § 1362(7). The dates of the alleged violations and the amount of copper alleged to have been found in the samples for those dates are set forth in the complaint, where they are juxtaposed with the federal standard [1] and the local copper waste-water limits. [2]

In its answer to the complaint, Respondent did not deny any of the allegations of violations. Neither did it dispute the accuracy of the monitoring reports regarding the amounts of copper detected in the samples taken ("sample values"). Instead, Respondent's responses to the charging paragraphs [3] were that "The statements in this paragraph are conclusions of law and require no answer."[4],[5] In addition, six affirmative defenses were interposed in the answer.

Three of these defenses assert that, for various reasons, the federal government is without authority to proceed in this matter. A fourth states that such action should "be held in abeyance pending the exercise of the City's authority." [6] The others assert "laches, waiver, estoppel, and all other legal and equitable defenses not secifically set forth above."

Complainant moved for summary judgment. [7] In its response to the motion, Respondent denied -- without more -- for the first time that the alleged violations had occurred. And still, the sample values of copper were not disputed. However, the response did raise another affirmative defense to the effect that as a federal defense contractor engaged in the production of harness for missles, Respondent cannot be held liable for any waste water copper violations that occurred in connection with harness-for-missles production.

Summary Judgment.

It is well settled in every federal judicial circuit that neither mere pleadings, nor mere conclusionary assertions, are sufficient to defeat a motion for summary judgment. See, for instance, *First National Bank of Arizona v. Cities Service Co., Inc.,* 391 U.S. 253, 289 (1968). The "evidence manifesting the dispute must be 'substantial,"' and must go "beyond the allegations of the complaint." *Fireman's Mut. Ins. Co. v. Aponaug Mfg. Co.,* 149 F. 2d 359, 362 (Sth Cir. 1945) ; *Beal V. Lindsay,* 468 F. 2d 287, 291 (2d Cir. 1972) ; *Securities and Exchange Commission v. Research Automation Corp.,* 585 F. 2d 31, 33 (2d Cir. 1978). In responding to such a motion, a party may not rest upon mere allegations or denials. The responding party must set forth specific facts to show the existence of a genuine issue for trial. No such showing has been made. Indeed, Respondent did not even dispute the government's findings until called upon to respond to a motion for judgment. When it did (barely) raise this issue, Respondent put forward not a single fact, by affidavit or otherwise, upon which a finding could reasonably be made that a material factual issue remains to be determined. While Respondent is correct in pointing out that the record must be examined in the light most favorable to the defendant, F. R. Civ. Proc. 56, 28 U. S. C. A., such examination occurs only after the opposing party has responded to the motion with something more than denials. This process cannot be used to convert mere denials into something more. Accordingly, it is held that nothing shown here even begins to counter the government's well supported motion.

Affirmative Defenses.

The rules of procedure specify that Respondent must identify in its Answer to the complaint "circumstances or arguments which are alleged to constitute grounds of defense," and "facts which [are to be placed] at issue. . . . "[8] Here, Respondent raised an affirmative defense, by way of a mere assertion, in its response to the summary judgment motion, rather than in the answer. Although Complainant urges that this defense should not be considered, it is determined that the arguments upon which Complainant relies to defeat the "government contractor" defense are persuasive. [9] These arguments are hereby adopted.

With respect to the affirmative defenses raised, the general rule is that defendant has the burden of supporting any such defenses with a showing sufficient to survive summary determination. [10] Here, as Complainant points out in its motion for partial summary judgment and in its Motion to Strike Affirmative Defenses, Respondent has failed to support any of the defenses with anything more than bare assertions. For the reasons stated in those motions, it is held that none of the affirmative defenses are sufficient to defeat the motion at hand.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is a Delaware corporation doing business in St. Louis, Missouri, and a "person," within the meaning of Section 502(5) of the Act, 33 U. S. C. S 1362(5). Respondent owns and operates an electronic cable and harness manufacturing facility at 1505 Maiden Lane, Joplin, Missouri, which is'a point source within the meaning of Section 502(14) of the Act, and discharges pollutants as defined in Section 502(12) of the Act to the Lone Elm and Turkey Creek wastewater treatment facilities, owned and operated by the City of Joplin, Missouri, and thence to Turkey Creek, a navigable water of the United States as defined by Section 502(7) of the Act. Respondent is therefore subject to the requirements of the Act.

2. No material factual issue remains to be determined. No affirmative defense raised here constitutes a defense to the violations charged. Complainant is entitled to judgment as a matter of law as to the issue of liability for the violations charged. Accordingly, only the issue of the amount of penalty to be assessed for such violations remains to be determined.

3. Defendant violated Sections 301(a) and 307(d) of the Act, 33 U. S. C. §§ 1311(a) and 1317(d), by the discharge of copper in excess of local limits thereon and in excess of the federal categorical pretreatment standards

therefor, on the dates, or for the periods, and to the extent indicated in paragraph II. H. of the Complaint.

ORDER

It is ORDERED that Complainant's motion for summary judgment shall be, and it is hereby, granted as to Respondent's liability for the violations stated in the complaint.

And it is *FURTHER ORDERED* that the parties shall confer for the purpose of attempting to settle the issue of the amount of penalty to be assessed for the violations found, and shall report upon the status of their settlement effort during the week ending March 15, 1996. It shall be the responsibility of counsel for Complainant to initiate the settlement process.

J. F. Greene

Administrative Law Judge

February 5, 1996

Washington, D. C.

[1] See 40 C.F.R. §§ 413.80, 413.81, 413.84 (a) , (c) , (g) , and (h).

[2] Page 3 of the complaint, paragraph 2, "Copper Violations".

[3] Paragraph II.I at page 4 of the complaint, states as follows:

On the basis of the above Findings, Respondent has violated the provisions of Sections 301(a) and 307(d) of the Act..... by discharging copper in excess of its local limits and the categorical pretreatment standards on the dates, or for the periods, and to the extent indicated in Paragraph II.H, above.

Paragraph II.H of the complaint states that

The sampling and analysis results submitted . . . show that Respondent has discharged copper in excess of the copper limitations of its industrial discharge permits..... on numerous occasions since at least January, 1988.

[4] Answer to the complaint, paragraphs II.H and II.I, at 3.

[5] Plaintiff urges that since defendant did not admit, deny, explain, or state that it is without knowledge, as to the factual allegations contained in the complaint with regard to which respondent has any knowledge, the charges have been admitted by defendant.

See 40 C. F.R. § 22.15(b) , which provides that "The answer shall clearly and directly admit, deny, or explain each of the 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 . . . . "

[6]

Paragraph IV, Affirmative Defenses, at 3-4 of the Answer.

[7] The motion will be treated as a motion for partial judgment, since it goes only to liability for the violations charged.

[8] 40 C.F.R. § 22.15(b)

[9] Complainant's Reply to Respondent's Response to Complainant's Motion for Accelerated Decision, at 2-5.

[10] See *In the Matter of Standard Scrap Metal Company,* Appeal.No. 87-4, August 6, 1990.

CERTIFICATE OF SERVICE

I hereby certify that the original of this ORDER was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on February 5, 1996.

Shirley Smith

Legal Staff Assistant

for Judge J. F. Greene

NAME OF CASE: LaBarge Incorporated

DOCKET NUMBER: CWA-VII-91-W-0078

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