UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
LUVERNE FIRE APPARATUS CO., Ltd.	)	Docket No. CWA-VIII-94-19-PII
	)	
Respondent.	)	

Order Denying Respondent's Motion to Dismiss

This is a Class II civil penalty proceeding under the Clean Water Act ("CWA"), section 309(g), 33 U.S.C. §1319(g). Prior to the hearing in this matter, held in September 1995, Respondent Luverne Fire Apparatus Co., Ltd., had moved to dismiss on the grounds that a compliance order that preceded this action had been improperly served and that Respondent had never been notified of the violations until service of the instant complaint. Judge Vanderheyden, then presiding, on August 29, 1995, had denied the motion. Following the hearing, Respondent moved for reconsideration of its motion.[1] Judge Vanderheyden retired on December 31, 1995, leaving this case and Respondent's motion undecided. On April 3, 1996, the case was reassigned to me by Chief Administrative Law Judge Lotis, for further proceedings.

In considering the motion, I have relied not only on the actual motion papers and exhibits thereto, but have also reviewed

[1] Judge Vanderheyden at the hearing indicated that Respondent could move for reconsideration of his order denying the motion. Transcript of proceedings at 414. The motion was filed on October 3, 1995, prior to Judge Vanderheyden's retirement.

the record for relevant information. For the purpose of this motion the following facts are considered to have been established:

Respondent manufactures fire trucks at a facility located in Brandon, South Dakota, and discharges its wastewater to the Brandon publicly owned treatment works ("POTW"). As such, it was required to file a report giving specified information about its wastewater discharges at least 90 days prior to commencing discharge (a "BMR" report), a report of compliance with the pretreatment standard within 90 days after commencing discharge to the POTW, and periodic reports of compliance thereafter.[2]

On April 22, 1993, inspectors from EPA Region VIII conducted an inspection of Respondent's facility and advised the production manager, Mr. Copely, that the facility was subject to pretreatment standards for new sources and to the reporting requirements for its wastewater discharges.[3] Up to that time no reports had been submitted by Respondent. On June 3, 1993, the reports still having not been received from Respondent, the EPA issued and served upon the production manager a Compliance Order directing Respondent to comply. The production manager was not a corporate officer, and not a proper person upon whom a compliance order should be served.[4]

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[2] 40 C.F.R. §§403.12(b), 12(d) and 12(e).

[3] Specifically, the pretreatment standards for the metal finishing subcategory. 40 C.F.R. Part 433.

[4] See, CWA, section 309(a)(4), 33 U.S.C. §1319(a)(4). The employee is actually described in the inspection report as the "plant manager." The EPA, however, admits that he was not a "corporate officer" upon whom the order should be served.

No response to the order was received despite its being followed-up by telephone calls and letters to the production manager.

No reports having been received, the EPA on May 5, 1994, issued the administrative complaint that is the subject of this proceeding. Respondent's officers heard about the EPA's action over the local television station, and, according to them, this was the first time they learned that Respondent had a compliance problem under the CWA. The production manager had never told Respondent's officers about the EPA's inspection, the compliance order, and the communications between him and the EPA about Respondent being delinquent in not filing reports.[5]

Respondent then proceeded to bring itself into compliance with the reporting requirements and by July, 1994, had achieved full compliance.[6]

Respondent's argument simply stated is that the EPA's improper service of its compliance order is the cause of Respondent's failure to file the proper reports on time. Once Respondent learned that these reports were required, it promptly brought itself into compliance. Respondent, accordingly, should not be penalized when the violations are attributable to the EPA's misconduct.

This argument is not grounds for dismissal of the complaint, though it may be considered in determining the appropriate penalty.

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[5] Respondent's Exhibit 10.

[6] Affidavit of Rhenda Iris Stock, Exhibit F to Respondent's motion. Ms. Stock considers Respondent as having achieved compliance by August 31, 1994, but the EPA calculated its proposed penalty on the basis that Respondent had achieved full compliance by July 1994. Transcript of proceedings at 89.

First, the improper service of the compliance order by the EPA cannot fairly be characterized as "government misconduct." The Act requires that service be made upon "any appropriate corporate officer."[7] Neither the statute nor the regulations specifically state who qualifies as a "corporate officer." Mr. Copely upon whom service of the order was made was not a mere employee, but the plant manager who undertook to deal with the EPA and who Respondent admits was "a high level employee."[8] The EPA could understandably believe that he qualified as a "corporate officer" upon whom service of the order was made.

Further, Respondent's defense is not really the defect in service of the compliance order, but a broader one relating to Respondent's lack of knowledge that it had to report its discharges into the POTW. Its claim is that it promptly brought itself into compliance as soon as it learned that there was a problem. It was Mr. Copely's decision to not inform the corporate officers of his dealings with the EPA. Respondent indicates that this was sufficient misconduct on Copely's part to justify firing him.[9] The EPA cannot be held responsible insofar as Respondent's ignorance about the violations came about through Mr. Copely's conduct.

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[7] CWA, section 309(a)(4), 33 U.S.C. §1319(a)(4).

[8] Respondent's reply brief to Complainant's opposition to the motion, p. 1. Respondent describes Mr. Copely as a "production manager... a shop foreman that sees that the truck assembly gets done." Transcript of proceedings at 312.

[9] Respondent's motion to dismiss at 2. Mr. Copely actually resigned, but he did so to avoid being fired. See transcript of proceedings at 383.

The cases cited by Respondent dealing with the consequences that should follow from government misconduct, accordingly, are not in point.

Second, the EPA is not charging or seeking penalties for violations of the compliance order but of the Act and the regulations.[10] The compliance order under CWA, section 309(a)(3), 33 U.S.C. §1319(a)(3), is one remedy that the EPA has available to achieve compliance under the Act, but it is not the sole remedy. Under section 309(g), 33 U.S.C. §1319(g), administrative penalties may also be assessed for violations. Compliance orders and the assessment of civil penalties are not mutually exclusive alternatives. The compliance order is directed to stopping the violation. Civil penalties are assessed for violations already committed.[11]

The regulations, authorized by statute and properly issued, impose the obligation to report, not the compliance order. Due notice of their contents is given by their publication in the Federal Register and in the Code of Federal Regulations.[12] Nothing in the statute or regulations indicates that any further notice to Respondent for the assessment of a penalty under §309(g) is

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[10] Transcript of proceedings at 109-110.

[11] See United States v. Earth Sciences, Inc., 599 F. 2d. 368, 375-376 (10th Cir. 1979). The compliance order, itself, expressly states that it does not preclude the institution of a further action under §309(g), for the violations cited therein. Compliance order dated June 3, 1994, p. 11 (Complainant's Exhibit 3).

[12] 44 U.S.C. §§1507, 1510.

required beyond the notice provided by the instant administrative complaint.[13]

Accordingly, Respondent's motion to dismiss is denied. This does not mean that Respondent has not raised serious questions about the appropriateness of the penalty proposed by Complainant. But they are matters properly considered in determining the appropriate penalty and not grounds for dismissing this proceeding.

As alternative relief in its motion, Respondent requests that all references in the Administrative Complaint to prior communications and to the nature, circumstances, extent and gravity of the alleged violations be stricken, that the EPA refile the Administrative Complaint under class I and that the EPA be prohibited in such action from referring to the prior communications. This relief is also denied. The nature, circumstances, extent and gravity of the alleged violations are required by statute to be considered in determing the appropriate penalty.[14] The improper service of the compliance order and Mr. Copely's conduct are relevant as extenuating circumstances that should be taken into account in determining the appropriate penalty and it would be unwarranted to exclude them. No grounds exist for refiling as a class I action. Although larger penalties are obtainable in a class II action than in a class I action, nothing in the statute precludes the assessment in a class II action of a

[13] 40 C.F.R. §22.43.

[14] CWA, section 309(g)(3), 33 U.S.C. §1319(g)(3).

penalty in such amount as is appropriate under the facts, and the standards for determining the amount of the penalty and the defenses available are the same for both classes of penalties.[15]

Gerald Harwood
Gerald Harwood
Senior Administrative Law Judge

Dated: April 24, 1996

[15] See CWA, section 309(g)(3), 33 U.S.C. 1319(g)(3).

In the Matter of LUVERNE FIRE APPARATUS CO., LTD., Respondent
Docket No. CWA-VIII-94-19-PI

Certificate of Service

I certify that the foregoing Letter to the Parties and Order Denying Respondent's Motion to Dismiss, dated April 24, 1996, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

Ms. Tina Artemis
Regional Hearing Clerk
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Copy by Regular Mail to:

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Marion Walzel
Legal Staff Assistant

Dated: April 24, 1996