UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
City of Traverse City	)	Docket No. 5-CWA-97-041
Wastewater Treatment Plant	)	
	)	
Respondent	)	
	)	

ORDER DENYING CROSS-MOTIONS FOR ACCELERATED DECISION

The Region 5 Office of the United States Environmental Protection Agency (the "Complainant" or "Region") filed an Administrative Complaint on October 1, 1997 against the City of Traverse City, Michigan (the "Respondent" or the "City"). The Complaint alleged that the City committed two violations at the City's wastewater treatment plant, which holds a National Pollutant Discharge Elimination System ("NPDES") permit, No. MIL 0027481. The Complaint alleged that the City failed to use the specified methods for conducting its analysis of inorganic pollutants in its wastewater treatment plant sludge on two occasions, as required by 40 CFR §503.8(b). Pursuant to the Clean Water Act §309(g)(2), 33 U.S.C. §1319(g)(2), the Complaint seeks assessment of a civil penalty of $1500 against the City. In an Answer filed on October 22, 1997, the Respondent denied this allegation.

The parties have filed their prehearing exchanges, listing proposed witnesses and evidence to be presented at the hearing, which has not yet been scheduled. The City filed a motion for accelerated decision on May 18, 1998. The Region then filed a response in opposition and cross-motion for accelerated decision on May 29, 1998. This decision relies on the Complaint and Answer, the affidavits and attachments submitted with the motions, and the parties' prehearing exchanges.

The EPA Rules of Practice, at 40 CFR §22.20(a), authorize the Administrative Law Judge to grant an accelerated decision "if no genuine issue of fact exists and a party is entitled to judgment as a matter of law." The motion for accelerated decision is analogous to the motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

The City owns and operates a wastewater treatment plant (the "plant"), or publicly owned treatment works ("POTW"), in Traverse City, Michigan. The plant treats domestic sewage with a design flow rate of over one million gallons per day. The

plant also generates sewage sludge. Under the plant's NPDES permit, the City is authorized to apply the sewage sludge to land, pursuant to the standards in 40 CFR Part 503. The CWA §405(e), 33 U.S.C. §1345(e), renders it unlawful for any person to dispose of sludge from a POTW except in accordance with the Part 503 regulations promulgated under the authority of §1345(d).[(1)]

The City is required, pursuant to 40 CFR §503.8 and §503.16, to sample and analyze its sewage sludge, on a quarterly basis. Pursuant to §503.18, the City is required to submit an annual report of the results to EPA. The methods prescribed for analyzing samples of sewage sludge are given in §503.8(b). The City in this proceeding is charged with not following the prescribed method for analyzing inorganic pollutants required by §503.8(b)(4): "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication SW-846, Second Edition (1982), with updates, known as "SW-846."

In the City's annual sludge report for 1995, the City indicated it followed a different named method for analyzing inorganic pollutants, in its samples analyzed on October 3 and December 27, 1995. The City's contract laboratory, SOS Analytical, cited the "200 series" method, which is specified in 40 CFR §136.3 for analyzing the constituents in wastewater discharged from a POTW under the NPDES permit program.

The City contends that the 200 series method is virtually identical to SW-846, and that in fact it complied with all sampling and analysis requirements in SW-846. The City argues that the difference is one of nomenclature only. Method 200 is used for wastewater, while SW-846 is used for solid waste, including sewage sludge. The Region makes several legal and factual arguments that run counter to the Respondent's position. The parties' contentions will be addressed in the context of the discussion below.

A review of the parties' motions, with accompanying affidavits and documents, indicates that genuine issues of fact remain. Therefore, neither party's motion for accelerated decision can be granted, and a hearing will be necessary.

The Region first contends that the admitted citation of the incorrect analysis method in the sludge monitoring reports is enough to find the City liable. The Complaint (¶17), however, charges that the City "violated 40 CFR §503.8(b) for 1995 by failing to use the methods specified in U.S. EPA publication SW-846 for analysis of inorganic pollutants." The gravamen of the charge is that the City actually used the wrong method - not that it cited the wrong method in its report. The application of strict liability to violations of the Clean Water Act does not extend to finding violations for errors not charged in the Complaint. Therefore, the Respondent did not violate 40 CFR §503.8(b) as a matter of law, by citing Method 200 instead of SW-846.

The cases cited by Complainant are distinguishable or do not lend support to the Region's position. In *Connecticut Fund for the Environment, Inc. v. Upjohn Company*, 660 F.2d 1397 (D. Conn. 1987), the defendant was held strictly liable under the Clean Water Act for discharge violations despite its claim that the discharge monitoring reports ("DMRs") were erroneous. The court held that "if an entity reports a pollution level in excess of Permit limits, it is strictly liable, as Congress has manifested an intention that the courts not reconsider the effluent discharge levels reported." 660 F.2d at 1417. In this proceeding, the charge does not concern pollution levels reported, but rather the method of sampling and analysis.

In addition, the broad nature of this ruling in *Upjohn* has been limited or contradicted in other and subsequent cases. Although the defendant bears a "heavy burden to establish faulty analysis," it may "present direct evidence of reporting inaccuracies" and "may not rely on unsupported speculation of measurement error." *SPIRG v. Georgia-Pacific Corp.,* 615 F. Supp. 1419, 1429 (D. N.J. 1985). Another court has held that a convincing argument that the DMRs contained typographical errors was sufficient to defeat summary judgment. *Friends of the Earth v. Facet Enterprises*, 618 F.Supp. 532, 536 (W.D.N.Y. 1984). In the other case cited by the

Region, *Public Interest Research Group of New Jersey, Inc. v. Elf Atochem North America, Inc.*, 817 F.Supp. 1164 (D. N.J. 1993), the court denied the plaintiff's motion for summary judgment for discharge violations on the defendant's factual showing of potential errors in its DMRs due to faulty laboratory practices. The court held that, if the DMRs are proven erroneous, the violations would constitute monitoring, rather than discharge, violations. 817 F. Supp. 1180.

In this case, there is no allegation that the sludge exceeded any pollution limit, or that the laboratory committed any error in determining the levels of inorganic pollutants in the Respondent's sewage sludge. The Complaint only charges that the City did not use the correct methods to sample and analyze the sludge. The City asserts that it did use the proper methods but cited the wrong method name in its sludge report. The citation of the wrong name may (or may not) be a reporting violation. In light of the evidentiary materials submitted, the use of the wrong method name in the report does not by itself prove that the City actually failed to follow the proper sludge analysis methods.

The factual issue must focus on what the City's laboratory, SOS, actually did in sampling and analyzing the sludge for inorganic pollutants. The City has submitted two affidavits, by Mike Riebschleger, the chemist who performed the analyses, and Kirk Chase, the SOS lab director. Both affiants assert that the sludge samples were prepared or digested by following EPA Method 3050A, as required by SW-846. The Respondent's motion also relies on a letter sent by the Region's Chief of the Water Enforcement and Compliance Branch, Jose Cisneros, to the plant's Project Manager, Tim Truax, on February 10, 1998. The letter states that "the laboratory can be said to have followed SW-846 for the measurement [of inorganic pollutant levels], but not necessarily for the preparation [of the sludge samples]."[(2)]

One of the differences between Method 200 and SW-846 is in the requirements for sample preparation. Since Method 200 is intended for wastewater analysis, it does not include sample preparation and digestion standards that are required for semi-solid sludge. The Cisneros letter, among other things, points out that difference.

The Cisneros letter, as well as the affidavit of the Region's chemist, John V. Morris, Ph.D., also indicate some other possible discrepancies between the SOS laboratory's methods and those prescribed by SW-846. These concern the lab's Standard Operating Procedures ("SOP"); its identification of matrix modifiers for analysis of certain parameters; and its specification of type of background correction in the conduct of its graphite furnace atomic absorption analysis. These possible discrepancies however seem to be framed by Dr. Morris largely as lack of documentation, rather than necessarily problems in the actual methods followed. (Morris Affidavit, ¶7-8). The Respondent, in its submissions, maintains that it followed SW-846 in all respects, including having an adequate SOP for quality assurance and control. The affidavit of Kirk Chase, Lab Director for SOS (¶3), plausibly explains that the lab is set up to conform to the requirements of both the EPA Method 200 series and SW-846. Dr. Morris (Affidavit, ¶11) concludes by stating that it would be necessary to review the SOS lab's bench notes and binders in order to determine whether the lab actually followed all technical requirements of SW-846.

The City has not, however, in its motion, affidavits, and prehearing exchange, specifically addressed all the concerns raised by the Region and Dr. Morris, at the same level of detail. In these circumstances, the City's general assertions that it conducted the sampling and analyses of its sewage sludge in accord with SW-846, and that its SOP is consistent with SW-846, are not sufficient to grant its motion for accelerated decision. By the same token, the Region's unaddressed concerns are not sufficient to grant an accelerated decision for the Complainant. The parties' filings themselves indicate that additional evidence, in the form of the SOS laboratory's bench notes, as well as testimony and cross-examination of the lab's personnel, will be required in order to resolve the factual issues.

The evidence certainly indicates that the City's contract laboratory, SOS, substantially followed the SW-846 methods in its analysis of the plant's sewage sludge on the two occasions in question, despite its citation of the similar, if

not identical, Method 200 series in its annual report. A genuine issue of material fact remains, however, as to whether the lab deviated from SW-846, on the two occasions alleged, in any way that is sufficient to render it liable for violations of 40 CFR §503.8(b). Therefore, the parties' cross-motions for accelerated decision in this matter will be denied.

Order

Both the Respondent's and the Complainant's motions for accelerated decision in this proceeding are DENIED.

Further Proceedings

The record does not reflect whether the Complainant has requested production of the SOS lab's bench notes and binders for the sludge analyses in question. By this decision, the Respondent is ordered to disclose those documents.

In addition, the parties may freely supplement their prehearing exchanges, without motion, with additional documents or intended witnesses, until 10 days before the date scheduled for hearing. The hearing will be scheduled in a separate order enclosed with this decision.

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Andrew S. Pearlstein
Administrative Law Judge

Dated: July 24, 1998
Washington, D.C.

1. The Complaint in this proceeding failed to cite 33 U.S.C. §1345(e) as the statutory provision of the CWA alleged to be violated by the Respondent's alleged failure to comply with the sludge regulations. Such a citation is technically required to trigger the enforcement provisions of §1319(g). However, by citing the regulation allegedly violated, 40 CFR §503.8(b), and the authority of §1345 for the promulgation of such regulations (in ¶5), the Complaint gave sufficient notice of the alleged violation and sufficient reference to the statutory provisions and implementing regulations alleged to be violated, to comply with the requirements for a complaint in 40 CFR §22.14.

2. The Region argues that the Cisneros letter is evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence, and is therefore inadmissible in this proceeding under the EPA Rules of Practice, at 40 CFR §22.22(a). However, the letter, on its face, does not constitute, in the terms of Rule 408, "compromise negotiations." Rather, it concludes by suggesting that the parties engage in settlement discussion in the near future.