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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
DEPARTMENT OF DEFENSE,	)	Docket No. CAA-09-98-17
DAVIS-MONTHAN AIR FORCE BASE,	)	
	)	
RESPONDENT.	)	

ORDER DENYING MOTION TO DISMISS

Davis-Monthan Air Force Base ("Respondent") moves to dismiss the complaint in this case.
For the reasons that follow, Respondent's motion is DENIED.

I. BACKGROUND

This proceeding arises under Section 113 (d) of the Clean Air Act, 42 U.S.C. § 7413 (d), and is governed by the Consolidated Rules of Practice ("Consolidated Rules"), 40 C.F.R. §§ 22.01 et seq.[1] EPA filed a complaint on September 30, 1998, alleging violations of Sections 112 and 114 of the Clean Air Act, 42 U.S.C. §§ 7412, 7414, and the National Emissions Standards for Hazardous Air Pollutants ("NESHAP") for asbestos, 40 C.F.R. Part 61, subpart M. The violation occurred[2] on the Davis-Monthan Air Force Base, Arizona, during the renovation of Building 4210 in August, 1995. The renovation included the removal of carpet, which pulled up the floor tile underneath. Believing the floor tile may contain asbestos, the Respondent contacted the Pima County Department of Environmental Quality ("PDEQ"), sealed off the area, and hired a certified contractor to correct and abate the area. After a final walk through inspection on July 19, 1996, PDEQ determined Respondent completed all necessary corrective action, since there was no visible debris within the building,

and declared the condition abated.

PDEQ has jurisdiction to enforce NESHAP violations within Pima County, Arizona, however, as a condition of its grant, PDEQ must "initiate timely and appropriate enforcement actions against violators consistent with EPA's asbestos policy." Mr. Robert Trotter, EPA's Asbestos NESHAP Coordinator, after reviewing the case documentation PDEQ provided, suggested a draft minimum penalty to PDEQ. Although Respondent did take corrective action with respect to the violations, Respondent refused to pay a penalty or perform a supplemental environmental project based on the defense of sovereign immunity. On March 18, 1996, PDEQ referred the case to EPA and gave notice that it was closing all civil actions against the Respondent. EPA then filed the instant complaint against Respondent on September 30, 1998, seeking a civil penalty in the amount of $81,020.

II. DISCUSSION

Respondent's motion to dismiss challenges EPA's jurisdiction and authority to enforce a penalty and asserts that EPA's proposed penalty is excessive. Respondent advances three reasons for dismissal: (1) EPA failed to comply with the filing limitations period identified in 42 U.S.C. § 7413 (d)(1); (2) EPA improperly overfiled based on Harmon Industries, Inc. v. Browner, 19 F. Supp. 2d. 988 (W.D. Mo. 1998); and (3) EPA violated Respondent's general due process rights by proceeding in an action for which *res judicata* applies, filling after an unnecessary delay to the prejudice of the Respondent, constituting *laches,* and failing to give formal notice of federal involvement in the case.

Complainant, EPA, opposed the motion to dismiss, asserting that the allegations of the complaint, if taken as true, state several causes of action upon which relief can be granted and establish a prima facie case for violations of the asbestos NESHAP regulations.

The Consolidated Rules Section 22.20 states that the "Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding . . . on the basis of failure to establish a prima facie case[(3)] or other grounds which show no right to relief on the part of the complainant". 64 Fed. Reg. 40,184 (1999). Since the Consolidated Rules do not provide a specific standard by which to evaluate a motion to dismiss, guidance may be found in the Federal Rules of Civil Procedure ("FRCP") and related case law. See In the Matter of Asbestos Specialists, Inc., 4 E.A.D. 819, 827 (EAB Oct. 6, 1993); In the Matter of S & S Landfill, Inc., No. CAA-III-002, 1994 EPA ALJ LEXIS 65 (Sept. 22, 1994). Regarding Rule 12(b)(6), motions to dismiss for failure to state a claim upon which relief can be granted, the Supreme Court has stated that "[i]t is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 246 (1980) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In addition, for purposes of deciding motions to dismiss in civil actions, the allegations of the complaint are to be taken as true. See United States v. Gaubert, 499 U.S. 315, 327 (1991). In this case, the three affirmative defenses Respondent raises are insufficient to grant dismissal; therefore the motion to dismiss is denied.

1. Statute of Limitations[(4)]

The Respondent argues that EPA lacks jurisdiction to impose a penalty because it failed to file its administrative complaint within the required statutory period. Section 113 (d) of the Clean Air Act, 42 U.S.C. § 7413 (d), addresses the specific limitations period for filing an administrative action. Respondent argues EPA

exceeded this limitations period. The specific language of Section 113 (d)(1) in question is as follows:

> The Administrator's authority under this paragraph shall be limited to matters where the total penalty sought does not exceed $200,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action. Any such determination by the Administrator and the Attorney General shall not be subject to judicial review.

42 U.S.C. § 7413 (d)(1). Respondent analyzes Section 113 (d) by addressing the plain meaning of the language, the statutory scheme, and the intent of Congress.

As noted in the Court's November 17, 1999 Order on Respondent's Motion to Compel Discovery, these issues[(5)] have been resolved by recent decision of the Environmental Appeals Board. *see* In re: Lyon County Landfill, CAA Appeal No. 98-6, 1999 EPA App. LEXIS 26, August 26, 1999 ("Lyon County- EAB").

2. Overfiling[(6)]

Respondent, Davis-Monthan Air Force Base, also argues EPA abused its enforcement authority and improperly "overfiled" when it filed a civil complaint after the local, authorized Arizona agency, PDEQ, closed its case. To support this position, Respondent relies upon Harmon Industries v. Browner, 19 F. Supp. 2d 988 (W.D. Mo. 1998). As noted in the Court's November 17th Order on Respondent's Motion to Compel Discovery, the Eighth Circuit recently affirmed the district court's decision.

In Harmon, the company discovered illegal disposals of hazardous waste and self-reported the activities to the authorized state agency, the Missouri Department of Natural Resources ("MDNR"). While an EPA complaint was pending, Harmon and MDNR entered into a state-court consent decree in which MDNR acknowledged full satisfaction, released all RCRA claims and waived any claim for monetary penalties in recognition of Harmon's self-reporting and prompt action. The district court judge held EPA should not and does not have the authority to impose its own separate penalties after a regulated entity negotiates a settlement with the state agency authorized under RCRA and that settlement is approved by an appropriate state judicial authority.

Respondent argues EPA attempts to assert a penalty in a case that was already closed by the county, PDEQ and points to letters where PDEQ describes its satisfaction with Respondent's remedial efforts and the condition of Building 4210. Moreover, Respondent believes the present situation to be more compelling than Harmon for several reasons. First, the complaint was filed over two years after official closure by PDEQ; second, EPA does not assert any continuing danger to the public; third, the violations in Harmon were more egregious because they allegedly violated RCRA for 5 years, whereas Respondent's alleged violations lasted less than a few weeks; and fourth, EPA's action is an attempt to circumvent sovereign immunity and federal law. Respondent suggests that EPA "secretly started directing PDEQ to impose a penalty" in 1995.

In opposition to Respondent's position, EPA distinguishes Harmon from the present case. First, EPA focuses on the specific statutory language of RCRA which provides state programs substantially equivalent to federal programs shall be authorized "in lieu of the Federal program". See 42 U.S.C. § 6926 (e). Second, EPA argues this is not overfiling because PDEQ never entered into a consent order with Respondent, nor

initiated action with the appropriate state judicial authority; and third, EPA suggests the present action is not identical to PDEQ's because: (1) PDEQ's case contained violations of state requirements, (2) there is no requirement that EPA must conduct an independent inspection rather than use an authorized state's data, and (3) the referral from PDEQ to EPA does not render the present case a "local or state action" or a "joint enforcement action".

There was not a secret communication[(7)] between EPA and PDEQ, as Respondent suggests. EPA, through Mr. Trotter, considered PDEQ's actions to be inadequate and suggested a minimum penalty. In addition, Respondent admits in numerous documents presented to this Court, its awareness of PDEQ's referral to EPA.[(8)] Respondent knew EPA did not consider the proposed remedial actions alone a satisfactory remedy for the violations alleged.

3. Equitable Due Process[(9)]

Respondent also raises the defense of laches against EPA for alleged unnecessary delay and prejudice arguing that EPA was involved with the case in the early stages of PDEQ's enforcement action, yet did not bring its own enforcement action until three years after the alleged incident. Respondent considers this unexplained time passage coupled with the destruction of relevant samples[(10)], as adequate proof of unnecessary delay and prejudice to Respondent so as to warrant the defense of laches.

EPA responds the doctrine of laches is not applicable to the present action because the delay was not unnecessary and Respondent suffers no prejudice. EPA asserts that it brought the action as soon as it was confident EPA could seek administrative penalties from a federal facility under the Clean Air Act and it obtained the requisite waver mandated in Section 113 (d)(1). EPA maintains that Respondent experiences no prejudice severe enough to warrant the defense of laches. EPA also notes that Respondent had the opportunity itself to gather samples. Second, EPA's results are not tainted because of a lack of point testing all samples registering under 10%. Rather, EPA advocates that point counting is an option rather than a necessity when testing samples, the margin of error of 1-2% negates the need to retest the samples, and the destruction of samples is typical in the two authorized testing labs used by EPA (specifically, EPA provided a copy of a document from E-Labs of America that states testing samples are retained for a maximum of thirty (30) days before destroyed with its Response to the Motion to Amend/Dismiss Complaint). Third, Respondent took its own samples.[(11)]

The affirmative defense of laches generally does not apply to the federal government when the government is acting in its sovereign capacity to protect the public welfare or to enforce a public right, and therefore is rarely granted. *See* In the Matter of Century Aluminum of West Virginia, Inc., No. CAA-III-116, 1999 EPA ALJ LEXIS 26, at * 5-6 (June 25, 1999).

Here, Respondent's claim of unnecessary delay and prejudice are insufficient to support a laches defense. First, Respondent's argument that EPA unjustly delayed in filing the complaint is without merit. Given the conclusions in previous sections of this order, the delay in filing was not excessive. Second, Respondent's argument that evidence was destroyed is insufficient to apply the defense of laches. Given that Respondent collected its own samples, conducted independent testing, and has access to EPA's lab results, which came from two different accredited testing labs, it has not been prejudiced, although this aspect *may* warrant consideration in determining an appropriate penalty.

Respondent's final argument expresses its discontent with EPA's involvement, through Mr. Trotter, with PDEQ's substantive penalty decisions. Respondent argues that EPA exceeded its authority and took over the penalty decision process for PDEQ in 1995 without disclosing its involvement to Respondent. Since due process applies to administrative proceedings, Respondent asserts that it, as well as the entire regulated community, has the right to know what agency makes substantive decisions.

EPA responds that the notice advocated by Respondent here is not required under the Clean Air Act and that, in fact, it had notice of EPA involvement when PDEQ informed Respondent of its intention to refer its case to EPA.

Asbestos violations are governed by Section 113(d)(1)(B), where the "Administrator may issue an administrative order against any person . . . whenever, on the basis of any available information, the Administrator finds that such person . . . has violated or is violating any other requirement or prohibition". 42 U.S.C. § 7413 (d)(1)(B). On its face and pursuant to relevant case law, this section of the CAA imposes no duty on EPA to provide notice of violations of Section 112 before commencing an action for civil penalties. See Dow Chemical Co. v. U.S. Environmental Protection Agency, 635 F. Supp. 126, 130 (M.D. La. 1986) (stating that "no preliminary notice is required for the enforcement of regulations dealing with hazardous air pollutants under 42 U.S.C. § 7412"); see also United States v. Tzavah Urban Renewal Corp., 696 F. Supp. 1013, 1021 (D. N.J. 1988) (holding that in order to establish liability under the asbestos NESHAP, the government must prove "only ... (1) that defendants are owners or operators of a stationary source; (2) that asbestos-containing material was present in the facility being renovated; and (3) that specific requirements of the regulations have been violated").

As Respondent notes in its Motion, EPA did file its notice of intent to take administrative action 30 days prior to filing the complaint. Respondent's Motion at 19. Nor did EPA "covertly inject its penalty demands to PDEQ to impose a fine," as Respondent suggests. Rather, PDEQ receives grant funds from EPA for its asbestos NESHAP enforcement activities and, as a condition of its grant, PDEQ must demonstrate to EPA that it is taking "timely and appropriate" enforcement actions. This statutory mandate between the State of Arizona and EPA is not a secret, nor is it hidden from Respondent. The correspondence between EPA and PDEQ as to the "timely and appropriate" enforcement action against Respondent was foreseeable and does not violate due process.

Last, regardless of their lack of formal notice of EPA's involvement in 1995, and keeping in mind that the Court has already determined that this action was timely filed, it is also observed that Respondent had *actual* notice of EPA's intent to file a claim as early as 1996, not simply 30 days before September 30, 1998, as Respondent suggests.[(12)] For example, in PDEQ's letter to Respondent dated August 21, 1996, declaring Building 4210 adequately abated, it noted that the case had been referred to EPA on March 18, 1996: "[b]e advised that on March 18, 1996, PDEQ referred this case to the EPA for further action." Considering Respondent was already conducting compliance measures to abate Building 4210 and Respondent knew this referral occurred after the assertion of sovereign immunity, it is not difficult to state exactly why the case was referred to EPA: the PDEQ was blocked from complete enforcement.

Accordingly, for the foregoing reasons, Davis-Monthan Air Force Base's motion to dismiss is DENIED.

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William B. Moran
United States Administrative Law Judge

Dated: November 19, 1999

1. The revised Consolidated Rules which became effective August 23, 1999, apply to this proceeding. 64 Fed. Reg. 40,176 (1999) (to be codified at 40 C.F.R. §§ 22.01 et seq).

2. Respondent has admitted the substantive factual violations underlying EPA's Complaint. *see* Respondent's Motion to Compel Discovery, filed April 30, 1999 at 4.

3. In its motion to dismiss, the Respondent does not challenge EPA's ability to establish a prima facie case. Therefore, in the instant case, the allegations of the complaint, if taken as true, do state a cause of action and establish a prima facie case for several violations of the asbestos NESHAP regulations in 40 C.F.R. Part 61, subpart M by Respondent.

4. This issue was previously disposed of in the Court's November 17, 1999 Order on Respondent's Motion to Compel Discovery.

5. For the convenience of the reader, the Respondent's arguments and EPA's Response are briefly summarized here. Respondent asserts the plain language of Section 113 (d) requires EPA to file administrative actions within one year (or 12 months) of the first alleged date of violation. Specifically, Respondent points to the phrase that limits EPA's authority to "matters where the total penalty sought does not exceed $200,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action..." Id.

Respondent points to the reasoning used by the administrative law judge In the Matter of Lyon County Landfill, 5-CAA-96-011, 1998 EPA ALJ LEXIS 68 (Aug. 21, 1998). In Lyon County, the judge questioned whether the phrase "longer period of violation" refers to the period of time the violation existed or the remoteness in time between the filling of the complaint and the initial violation.

The Respondent also looks to the statutory scheme, arguing that since the first exception, a violation over the statutory maximum of $200,000, indicates a more serious violation, by analogy the second exception, a longer period of violation, does not target a longer lapse of time between the violations and the filing of the complaint, but rather focuses on violations that may last for an extended period of time and are therefore more serious.

Respondent also argues that the legislative history of the 1990 Clean Air Act Amendments supports its position and refers to legislation proposed in the House of Representatives on July 27, 1989 as H.R. 3030. See H.R. Rep. No. 101-490, at 405-06, *reprinted in* Legislative History of the Clean Air Act Amendments of 1990, at 3429-30 (1993). Respondent looks to segments of the proposed legislation to demonstrate the legislative intent behind the Section 113 (d)(1) exceptions and

waiver requirements was to not only enhance EPA's enforcement authority, but also to provide substantive procedural safeguards against potential EPA abuse.

Last, Respondent argues the general five-year statute of limitations stated in 28 U.S.C. § 2462 does not apply. According to Respondent, the Environmental Appeals Board has previously addressed the issue of the application of the 5-year statute of limitations in light of the 12-month limitations period in In re: Lazarus, Inc., TSCA Appeal No. 95-2, 1997 EPA App. LEXIS 27, (EAB Sept. 30, 1997). Moreover, the judge in Lyon County and Respondent here advocate the statutory one-year limitations period stated in Section 113 (d)(1) of the Clean Air Act carves out an exception to the holding in Lazaus.

In opposition to Respondent's assertion that EPA lacks jurisdiction to maintain a penalty action, EPA offers a different interpretation of Section 113 (d)(1) which allows them to fit into one of the two exceptions of the 12-month statute of limitations. Respondent critiques the ruling in Lyon County and suggests that the general 5-year statute of limitations found in 28 U.S.C. § 2462 applies in Clean Air Act enforcement actions.EPA disagrees with the ALJ's conclusion in Lyon County for several reasons: (1) the plain language of the statute does not equate the word "period" with "duration"; (2) the ALJ's interpretation is contrary to congressional intent; (3) practical application and policy considerations of the Clean Air act do not support the ALJ's decision; and (4) the signed waiver is not subject to judicial review.

In responding to Respondent's assertion that the general five-year statute of limitations does not apply in Clean Air Act violations, EPA points to the D.C. Court of Appeals statement in 3M Company v. Browner, 17 F.3d 1453, 1456-7 (D.C. Cir. 1994), that 28 U.S.C. § 2462 properly applies to administrative actions unless Congress specifically provides otherwise.

6. As with the statute of limitations issue, this matter was also disposed of in the Court's November 17th Order, wherein it was observed that the present case was distinguishable, at the very least, on the basis the State entity in Harmon I acknowledged full satisfaction, released all RCRA claims and waived any claim for monetary penalties, a situation very different from this matter, where the state's effort to seek a civil penalty was successfully stymied by Respondent. Order at 4..

7. Even if there were a "secret communication," this would have no impact on the issue of whether EPA has the statutory authority to pursue this action.

8. See Complainant's Prehearing Exchange exhibit Nos. 4 (July 22, 1996 letter from Respondent to PDEQ) and 5 (September 27, 1996 letter from Mr. Trotter to Respondent).

9. Under the mantel of equitable due process, Respondent reiterates its claim that *res judicata* operates as a bar to the present action. The previous discussion concerning overfiling addresses this repackaged argument.

10. Respondent's claim that EPA's failure to preserve the lab samples hindered its ability to prepare an effective defense is self described as the "subject of another motion to dismiss" Respondent's Motion at 18. Therefore this claim will be addressed in the Court's forthcoming Order addressing Respondent's Motion to Amend its Answer and/or Motion to Dismiss Complaint, filed on June 11, 1999.

11. It is not clear exactly what samples Respondent gathered during the period of violation, and the status of these samples. Inspection Reports by PDEQ inspectors and a memorandum to PDEQ from Respondent's Commander reveal that Respondent's Office of Special Investigations ("OSI") already conducted extensive analytical testing of Building 4210 for Regulated Asbestos Containing Material ("RACM"). Specifically, OSI has a Report of Investigations, File NR 95217D58-775999, relating to samples taken from Building 4210, that Respondent refused to allow PDEQ to

permanently incorporate in its file.

12. This observation should not be construed to imply that the Court considers the earlier *actual* notice to have been required.

In the Matter of Department of Defense, Davis-Monthan Air Force Base, Respondent
Docket No. CAA-09-98-17

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Motion To Dismiss**, dated November 19, 1999 was sent this day in the following manner to the addressees listed below:

Original by Regular Mail to:

Danielle E. Carr
Regional Hearing Clerk
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San Francisco, CA 94105

Copy by Regular Mail to:

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_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: November 19, 1999