3/12/96

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	:	
	:	
DONNELLY CORPORATION	:	Dkt. No. CWA-A-0-009-94
	:	Judge Greene
Respondent	:	
	:	
	:	

ORDER GRANTING MOTION FOR JUDGMENT AS TO LIABILITY

This matter arises under Section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g), which provides for the assessment of civil penalties for violations of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). The violations alleged in the complaint are set forth in two counts. Both counts charged Respondent Donnelly Corporation with effluent discharges into the Black River that exceeded the limits listed in its National Pollutant Discharge Elimination System (NPDES) permit in violation of Section 301(a) of the CWA. Count I charges 19 violations of the permit and Section 301(a) of the Act; and Count II charges 34 violations.

In answering the complaint, Respondent did not specifically

deny the allegations, but asserted several affirmative defenses and requested a hearing. Thereafter, Complainant moved for partial "accelerated" decision as to liability pursuant to 40 C.F.R. § 22.20(a).

Background.

Respondent's NPDES permit authorizes discharge of effluent containing several different pollutants through Outfalls 001B[1] and 001 at its facility. For many of the pollutants, the permit sets concentration as well as loading (mass or weight) limits on the discharges.[2] Concentration and loading limitations can be based upon a monthly average limitation, on a daily maximum limitation, or both. The concentration limit addresses the potency of the pollutant in the wastewater. The loading limit addresses the total mass of the pollutant in the wastewater.[3]

"Accelerated" Decision.

The standard for resolving a motion for "accelerated" decision is set out at 40 C.F.R. § 22.20(a). This section provides in pertinent part that an "accelerated" decision may be rendered on all or part of a proceeding if no genuine issue of material fact exists and if the moving party is entitled to

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[1] Prior to December 1, 1991, Outfall 001B was designated as Outfall 000A. Complaint ¶ 10.

[2] See Complainant's pretrial exhibits 1-4 submitted as part of its September 29, 1994, Prehearing Exchange.

[3] Complainant's Reply at 3.

judgment as a matter of law. The "accelerated" decision is for all practical purposes the equivalent of summary judgment. Under the summary judgment standard, an evidentiary hearing is generally reserved for the resolution of material facts in dispute. Where the only dispute between the parties involves questions of law which will resolved by the presiding judge, an "accelerated" or summary decision is appropriate.[4] For the reasons explained below, it is concluded that no genuine issue of material fact remains to be determined concerning Respondent's liability for the violations since April 29, 1989, alleged in Counts I and II, and that Complainant is entitled to judgment as to liability under the law for the violations alleged. The issue of appropriate penalty will be resolved in a separate proceeding, if the parties are unable to settle it.

Liability for Violations in Counts I and II

A. OUTFALL 001B

Count I of the complaint alleged that between January 1989[5] and November 1992, Respondent discharged effluent from Outfall

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[4] *In re CWM Chemical Services, Inc.*, 5 E.A.D. TSCA Appeal No. 93-1 slip op. at 14 (EAB, May 15, 1995).

[5] Complainant proposed penalties only for those violations which allegedly occurred after April 29, 1989, although the complaint alleges violations (i. e. occasions when permit limitations were exceeded) starting in January 1989. Attachment to Complaint, Ex. A, Table of Violations. September 1989, the earliest violation alleged for which a penalty is sought, is within five years of the filing of the complaint on April 29, 1994. Clearly, the five-year statute of limitations [28 U.S.C. § 2462] would apply to all violations alleged to have occurred before April 29, 1989.

001B into the Black River which exceeded the permit's loading and/or concentration limits for copper, zinc, and total suspended solids, as well as the pH limit. These instances of exceeding the permit limits were alleged to constitute 19 violations of the permit and Section 301(a) of the CWA.[6]

In support of its motion, Complainant pointed to Respondent's discharge monitoring reports (monitoring reports) for the facility's wastewater effluent.[7] Complainant argues that these monitoring reports document the discharges which exceeded the effluent limitations under Respondent's NPDES permit and establish that no genuine issue of material fact exists with respect to the 19 violations alleged in Count I. The motion was also supported by the affidavit of a U. S. Environmental Protection Agency (EPA) environmental engineer,[8] who stated that the violations became evident after permit limits were compared with the discharge levels recorded in Respondent's monitoring reports from Outfall 001B between January 1989, and November 1992.[9]

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[6] Complaint ¶¶ 12-13; Attachment, Ex. A, Table of Violations.

[7] Respondent's monitoring reports were submitted in Complainant's exhibit 6(a) of its September 29, 1994, pretrial exchange.

[8] Affidavit of Mr. Valdis Aistars, Attachment A to the motion ¶ 3. As an environmental engineer, his duties include the development, coordination, and tracking of enforcement actions under the CWA.

[9] *Id.* ¶¶ 8-9.

B. OUTFALL 001

Count II of the complaint alleged that between December 1991 and April 1992, Respondent discharged effluent from Outfall 001 which exceeded the permit's loading limits, concentration limits, or both, for copper. These instances were alleged to constitute 34 violations of the permit and Section 301(a) of the CWA.[10] In connection with this count also, Complainant contends that Respondent's monitoring reports for the above period document the alleged violations and establish that no genuine issue of material fact exists with respect to them.[11] Moreover, the affidavit of Complainant's affiant environmental engineer again stated that the violations had been established by a comparison of the level of pollutants listed in the monitoring reports and the effluent limitations in Respondent's permit for Outfall 001.[12]

Discussion.

In the face of a well-supported motion for summary decision, Respondent must come forward with evidence sufficient to establish that a genuine material factual controversy exists regarding the issues at hand. In this case, in order to counter the motion successfully, Responent would have to produce evidence to show that there are facts at issue as to whether the

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[10] Complaint ¶¶ 15-16; Attachment, Ex. A, Table of Violations.

[11] The monitoring reports covering December 1991 through April 1992 are part of Complainant's pretrial exhibit 6(a).

[12] Attachment A to the motion ¶¶ 8, 10.

discharges violated the permit limits on the dates in question. A review of Respondent's answer to the complaint and response to the motion demonstrates that no evidence has been produced to counter Complainant's evidence as to the factual allegations of the complaint.

In its answer, Respondent admitted with respect to both Counts I and II that its own monitoring reports appeared to indicate that certain permit parameters may have been exceeded for discharges covering the periods and outfalls in question.[13] Respondent's response to the motion did not dispute that its discharges exceeded permit parameters for the specific pollutants alleged in the complaint, motion and affidavit accompanying the motion. Respondent also did not dispute that its monitoring reports documented discharges which exceeded specific permit limits as alleged in Counts I and II.

In its answer to the complaint, Respondent asserted several affirmative defenses without explanation or rationale as to why such defenses might apply in this case. One of these, the statute of limitations question,[14] has been addressed nonetheless. The others have not been considered, since Respondent failed to comply with 40 C.F.R. § 22.15(b)(1). Accordingly, these assertions do not preclude a finding that no material issue of fact remains to be decided.

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[13] Answer ¶¶ 12, 15.

[14] *See* note 5, *supra*, at 3.

Number of Violations.

Respondent takes issue with the total number of violations alleged. Of the total of 53 violations charged (19 for Count I and 34 for Count II), Respondent asserts that five violations were improperly "double-counted." This contention does not constitute a material factual controversy. A dispute of fact is material "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). As a legal matter, therefore, liability here does not turn upon the exact number of violations involved. However, in the interests of economies on both sides of this dispute as well as judicial economy, this issue will be addressed.

Whether Respondent exceeded the permit limits 48 times or 53 times, and is therefore liable for 48 or 53 violations, does not preclude a finding of liability as a matter of law for the violations charged in Counts I and II.[15] Rather, Respondent's assertion as to the number of violations for each occasion where an effluent limitation is exceeded involves a question of law based upon an interpretation of Section 309(g) of the Act (the

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[15] *See NRDC v. Outboard Marine Corp.*, 692 F. Supp. 801, 820 n.34 (N.D. Ill. 1988): "At least on the current motions for summary judgment . . . OMC's stress placed on this issue is puzzling indeed. With the numerous violations that would remain even if OMC were right, this is clearly a classic illustration of a nonmaterial (that is, non-outcome determinative) factual dispute. Does it really matter," District Judge Shadur continued, no doubt in an effort to be humorous, "whether OMC is to be hanged for stealing a sheep or for stealing a lamb?"

penalty provisions) and case law which construes -- or assists in construing -- Section 309(g).

Section 309(g) governs the assessment of administrative penalties.[16] This section provides in relevant part:

> (1) Violations
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> Whenever on the basis of any information available-
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> (A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated <u>any permit condition or limitation</u> implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or
>
> . . . .
>
> the Administrator . . . may, after consultation with the State in which the violation occurs, assess . . . a class II civil penalty under this subsection. [Emphasis added].
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> (2) Classes of penalties
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> . . . .
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> (B) Class II
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> The amount of a class II civil penalty . . . may not exceed $10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty . . . shall not exceed $125,000.

Section 309(d) of the Act, 33 U.S.C. § 1319(d), contains nearly identical language as Section 309(g), and has been interpreted as authorizing the imposition of a separate penalty

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[16] 33 U.S.C. § 1319(g).

for each specific effluent limitation that is violated on a single day.[17] Consequently, Section 309(g) may be read as authorizing a separate penalty for each day each permit violation continues.

Respondent asserts that the violations for its copper discharges, which exceeded daily maximum and monthly average concentration limits, or exceeded daily maximum concentration and loading limits, were improperly double-counted in January 1990, January 1991, and January 1992.

In both January 1990 and 1991, Respondent had discharges on a single day that exceeded the daily maximum concentration as well as the loading limitation for copper from Outfall 001B. Complainant calculated a separate violation for each instance for a total of four violations. Respondent argues that these violations have been double-counted, and that only two violations should be said to have occurred in January 1990 and January 1991.

In support of its position, Respondent cites several cases for the proposition that separate violations may not be imposed if there is a violation of the monthly average limit and a violation of the daily maximum restriction in the same month in

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[17] *Atlantic States Legal Foundation v. Tyson Foods, Inc.*, 897 F.2d 1128, 1137-39 (11th Cir. 1990), *cited with approval in, Hawaii's Thousand Friends v. Honolulu*, 821 F. Supp. 1368, 1393-94 (D. Hawaii 1993).

connection with a single pollutant.[18] The rationale for this rule is that counting separate violations for exceeding the monthly average and the daily maximum limits could result in two penalties for the same illegal act if a single discharge happened to cause both violations.[19]

Respondent asserts that the rationale against double-counting the monthly average and daily maximum violations governs its violations here of the daily maximum loading and concentration limits for copper that occurred on the same day in both January 1990 and January 1991. Respondent's loading level for each pollutant is determined by multiplying the pollutant concentration level for that particular day times the flow.[20] As a consequence, in most cases no daily maximum loading exceedance would occur but for a contemporaneous daily maximum concentration exceedance.

Respondent's argument is not persuasive. The rule against double-counting applies to a monthly average violation and a daily maximum violation of the same effluent limitation during a

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[18] Motion at 2-4. This rule was expounded in *Tyson Foods* where the court was resolving violations of effluent limitations for several different pollutants, all of which occurred on the same day. The *Tyson* court did not address violations of different effluent limitations for a single pollutant. Nonetheless, it stated that, if a discharger violated the daily maximum limit for one pollutant and the average monthly limit for another pollutant, then each daily maximum violation would be added as a separate violation. *Tyson Foods, Inc.*, 897 F.2d at 1140. Such is not the case here.

[19] *Id.*

[20] Motion at 5 n.3

particular month (*e.g.*, a violation of a monthly average loading limitation and of a daily maximum loading limitation for a single pollutant). *Atlantic States Legal Foundation v. Universal Tool & Stamping Co.*, 786 F. Supp. 743, 746-47 (N.D. Ind. 1992)(emphasis added)(citing *Tyson Foods, Inc.*, 897 F.2d at 1140). However, where the violations pertain to different effluent limitations (such as concentration and loading limits) a separate violation is to be counted in accordance with Section 309(g) of the Act. This latter situation reflects the posture of Respondent's case here.

It is undisputed that Respondent had violations of its daily maximum concentration and daily maximum loading limits for copper. The definition of "effluent limitation" explicitly includes any restriction on quantities and concentrations of a pollutant.[21] Under Section 309(g), a separate violation and corresponding penalty is expressly contemplated for each effluent limitation that is exceeded on a single day. Respondent's permit clearly lists the loading and concentration limits as separate restrictions.[22] Thus, each exceedance of these express permit limitations constitutes a separate violation. This conclusion is supported by decisions that have viewed loading and concentration

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[21] The term "effluent limitation" is defined as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters . . . ." Section 502(11) of the CWA, 33 U.S.C. § 1362(11); *See also* 40 C.F.R. § 122.2.

[22] *Supra* note 2 .

restrictions as separate limitations which regulate distinct aspects of wastewater effluent, and for which separate violations may be assessed. *NRDC v. Texaco Refining and Marketing, Inc.*, 800 F. Supp. 1, 20 (D. Del. 1992), *modified on other grounds*, 2 F.3d 493 (3d Cir. 1993); *See also Hawaii's Thousand Friends,* 821 F. Supp. at 1394-95 (counting separate violations for exceeding loading, concentration and percent removal limits on a single pollutant).[23] Accordingly, Complainant properly calculated four separate violations for Respondent's excess discharges of copper in both January 1990 and January 1991.

For January 1992, Complainant calculated 34 violations for copper discharges in excess of permit limits. From Outfall 001, the violations consisted of one violation of the monthly average concentration limit for copper and one violation of the daily maximum loading limit for copper.[24] From Outfall 001B, the

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[23] Citing *Hawaii's Thousand Friends*, 821 F. Supp. at 1394 n.4, Respondent urges that the determination in *Texaco* should be viewed as analytically unsound because it was in part supported by *Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 78 (3d Cir. 1990) (holding, in direct opposition to *Tyson,* that violations of both the monthly average concentration limit and the daily maximum concentration limit could be counted as separate violations). This argument lacks merit. The court's holding in *Hawaii's Thousand Friends* is in accord with *Texaco,* whereby it explicitly held that violations of the loading and concentration limitations for a single pollutant can be counted as separate violations. The *Hawaii* court differed from *Powell* in that it did not count separately violations of the seven day average and the monthly average for the same effluent limitation on a single pollutant.

[24] Respondent also exceeded the daily maximum concentration limit for copper in January 1992. Complainant, presumably following the *Tyson* approach, considered these a single violation because in this instance the same effluent limitation was exceeded for both the monthly and daily limits.

violations were one violation each of the daily maximum concentration and daily maximum loading limit. Respondent contends that the violations should be reduced from 34 to 31. The rationale for this decrease is that all of the excess discharges appear to have occurred on the same day.[25] Therefore, under the prohibition against double-counting violations stemming from the same unlawful act, the maximum number of violations that can be claimed here for copper is 31 (one monthly average violation from Outfall 001 which counts as 30 violations plus one daily maximum violation from Outfall 001B).

Respondent's argument must be rejected. First, regarding the monthly average violation, in Respondent's opinion, violation of the permit's monthly average limitation is equal to 30 violations. However, a violation of the monthly average limitation counts as a violation for each day of that month. *Chesapeake Bay Foundation v. Gwaltney*, 791 F.2d 304, 314 (4th Cir. 1986), *vacated on other grounds*, 484 U.S. 49 (1987), *cited with approval in, Tyson Foods, Inc.*, 897 F.2d at 1139-40; *Universal Tool & Stamping Co.*, 786 F. Supp. at 747. Since January has 31 days, Complainant correctly calculated 31 violations of Respondent's monthly average limitation. Second, again for the rationale set out above, Respondent views the daily maximum loading violations, one from each of the outfalls, as improper because they each resulted from the daily maximum

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[25] It is noted that Respondent's monitoring report for January 1992 reflects that the violations occurred on two days, January 3 and 9. Complainant's pretrial exhibit 6(a).

concentration violation. As noted above, this argument is without merit. Concentration and loading restrictions are separate permit limitations, and thus may be counted as separate violations. Accordingly, under the Act and case law, the occasions when Respondent violated the permit limitations as alleged in Counts I and II may be counted as 53 violations. Of course, Respondent will have an opportunity to be heard regarding the reasons for the violations. All factors set out at Section 309(g)(3), 33 U.S.C. § 1319(g)(3), will be considered in determining the appropriate penalty, unless the parties are able to settle this issue.

It is noted that the permit limitations were exceeded on a number of days, and that fact may well take the violations out of the category of a "single operation upset which leads to simultaneous violations of more than one pollutant parameter" [emphasis added] which are to be treated as a single violation pursuant to Section 309(g)(3) of the Act, 33 U.S.C. § 1319 (g)(3).[26]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Donnelly Corporation, organized under the laws of the State of Michigan, is a "person" within the definition set forth at Section 502(5) of the CWA, 33 U.S.C. § 1362(5); it owns

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[26] 40 C.F.R. § 122.41(n) defines "upset" as "an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee . . . ."

and operates a manufacturing facility located at 49 West Third Street, Holland Michigan.

2. U.S. EPA consulted the State of Michigan about this matter by mailing a copy of the complaint to the appropriate State official, and offering the State an opportunity to be heard concerning the complaint and proposed penalty.

3. Beginning on July 18, 1986, pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, the Michigan Water Resources Commission (the Commission) issued Respondent NPDES permit number MI0000183. The permit authorized Respondent to discharge pollutants from its facility into the Black River through Outfalls 001B (known as 000A prior to December 1, 1991) and 001, subject to the terms and conditions of the permit. The permit became effective on the aforementioned date and expired on June 30, 1991.

4. Total suspended solids, copper, zinc, and pH are all "pollutants" as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6), and 40 C.F.R. § 122.2; Black River qualifies as a "water of the United States" and "navigable water" under Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and 40 C.F.R. § 122.2; and Outfalls 001B and 001 are "point sources" pursuant to Section 502(14) of the CWA, 33 U.S.C. § 1362(14), and 40 C.F.R. § 122.2.

5. On May 18, 1989, and April 26, 1990, pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, the Commission issued a first and second permit modification to Respondent's NPDES permit number MI0000183, authorizing the discharge of pollutants from

Outfalls 001B and 001. Neither the first nor the second permit modification changed the permit's loading or concentration limits for total suspended solids, copper, zinc, and pH, and the expiration date remained unchanged too.

6. On August 22, 1991, pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, the Commission reissued to Respondent NPDES permit number MI0000183. The reissued permit became effective by its terms on December 1, 1991, and authorized the discharge of pollutants from Outfalls 001B and 001. This permit changed the loading limits for zinc and copper. It expires on October 1, 1996.

7. Between January 1989 and November 1992, Respondent discharged effluent from Outfall 001B to the Black River that exceeded the permit's and reissued permit's concentration, loading limit, or both for zinc, copper, total suspended solids, and pH, for a total of 19 violations of the permit and Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

8. Between December 1991 and April 1992, Respondent discharged effluent from Outfall 001 to the Black River that exceeded the reissued permit's loading limit, concentration limit, or both for copper. These constitute 34 violations of the permit and Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

9. No material facts remain to be determined as to the issue of liability for the violations alleged in the complaint for the five-year period ending on April 29, 1994, with the filing of the complaint herein. Complainant is entitled to judgment as a

matter of law with respect to the violations alleged in Counts I and II of the complaint that are not outside the statute of limitations at 28 U.S.C. § 2462.

10. Respondent is liable for civil penalties pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g) for violations alleged in the complaint that are not outside the statute of limitations.

11. Remaining to be determined is the appropriate penalty to be assessed with respect to the violations found herein.

ORDER

Accordingly, it is ordered that Complainant's motion for partial accelerated decision shall be, and it is hereby, granted.

And it is FURTHER ORDERED that the parties shall have twenty one days from the date of this order in which to seek reconsideration of the findings relating to the number of violations.

And it is FURTHER ORDERED that the parties shall attempt to settle the remaining issue herein, and shall report upon the status of their effort during the week ending April 19, 1996.

J. F. Greene
Administrative Law Judge

Washington, DC
March 12, 1996

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 March 12 , 1996.

Shirley Smith
Legal Staff Assistant
for Judge J. F. Greene

NAME OF CASE: Donnelly Corporation
DOCKET NUMBER: CWA-A-O-009-94

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