9.28.92

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
B. J. CARNEY INDUSTRIES, INC.	)	[CWA] Docket No. 1090-09-13-309(g)
	)	
Respondent	)	

ORDER DISPOSING OF OUTSTANDING MOTIONS
AND SETTING FURTHER PROCEDURES

Currently pending is a Motion[1] made by the Complainant that seeks the following relief: (1) that accelerated decision be entered in its favor on the issue of liability; (2) that the seven affirmative defenses raised by the Respondent B. J. Carney Industries, Inc. (Respondent or Carney) in its Answer to the Amended Complaint (Answer) be stricken; and (3) that the Counterclaim made by the Respondent for expenses and attorneys fees, be dismissed. Carney filed an Opposition to the Motion, in which it supported all of its affirmative defenses with the exception of laches. The Respondent's Opposition also asserts there is no basis for the Amended Complaint (Complaint) and argues that it should recover its costs and attorneys' fees pursuant to the Equal Access to Justice Act, 5 U.S.C. §504. Complainant filed a Reply to the Respondent's Opposition, in which it specifically addressed certain of the points raised in the Opposition. Complainant also subsequently forwarded a recent case decided by the U.S. Environmental Protection Agency's (EPA

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[1] This pleading will hereinafter be referred to as the "Motion."

or Agency) Chief Judicial Officer relating to right to a jury trial and Constitutional arguments under the Clean Water Act (CWA or the Act), 33 U.S.C. §§1251 et seq., Dr. Marshall C. Sasser, CWA Appeal No. 91-1 (November 21, 1991).

The Complaint herein was filed against the Respondent pursuant to Section 309(g) of the CWA, 33 U.S.C. §1319(g), and it seeks an administrative penalty of $125,000 for allegedly unlawful discharges over a 5 year period of pentachlorophenol (PCP) from the Respondent's pole treating plant into the sewer system of the City of Sandpoint, Idaho, which sewer system is a Publicly Owned Treatment Works (POTW). Basically, the dispute between the parties focuses on whether the discharge by Carney violates the EPA Pretreatment Regulations, primarily those in 40 C.F.R. Part 429 (Timber Products Processing Point Source Category). This in turn hinges on whether the discharge by the Respondent for a five year period from 1985 to 1980 constitutes process wastewater, as defined in Section 401.11(q) of the EPA Regulations, 40 C.F.R. §401.11(q). Respondent argues that the discharges in question were not process wastewater and, therefore, not subject to applicable Pretreatment Regulations. On the other hand, the Complainant contends that the discharges are process wastewater subject to pretreatment requirements and the no discharge requirement of Section 429.75 of the EPA Regulations, 40 C.F.R. §429.75.

In support of its request for accelerated decision, Complainant takes the position that the facts set forth regarding

Carney's PCP discharges are substantially, if not entirely, undisputed since the Respondent in its Answer at 7 admits it discharged quantities of PCP into the Sandpoint sewer system from 1986 to 1990. However, the Complainant does admit, in its Reply to the Respondent's Opposition, p. 2, that, if the affirmative defenses relating to estoppel are properly raised, then triable issues of fact exist, particularly involving the relationship between Carney, the City of Sandpoint and EPA concerning the PCP discharges. Therefore, it is appropriate to consider the arguments relating to the affirmative defenses first, since the disposition with regard thereto has a direct effect on the viability of the Complainant's request for accelerated decision on liability. Accordingly, this Order will first deal with the affirmative defenses, then with the request for accelerated decision and lastly with the Counterclaim. In addition, further procedures will be set after the disposition of the above issues.

I. AFFIRMATIVE DEFENSES

While it is well established that motions to strike are not favored, it is correct that a motion to strike affirmative defenses can be entertained under EPA's Rules of Practice (Rules), 40 C.F.R. Part 22. Section 22.16 of the Rules refers to motions without restriction, leading to the conclusion that motions to strike are authorized under the EPA Rules. However, the standards to be applied to motions to strike are stringent and a matter will not be stricken from a pleading unless it is clear that it can have no possible bearing upon the subject

matter of the litigation, 2A Moore's Federal Practice, §12.21 at 175-76 (2nd ed. 1978). A second criteria for granting motions to strike is that permitting the defense to stand would prejudice the party bringing the action, Shell Oil Co. v U.S. Equal Employment Opportunity Comm., 523 F. Supp. 79, 83 (E.D. Mo. 1981); Oliner v. McBride's Industries, Inc., 106 F.R.D. 14, 17. (S.D. N.Y. 1985). And, a motion to strike will be denied unless the legal insufficiency of the defense is clearly apparent, with the rationale for this based on a concern that a court should restrain from evaluating the merits of a defense where the factual background of the action is largely undeveloped, Cipollone v. Liggett Group, Inc., 789 F.2d 181, 188 (3rd Cir. 1986), on remand, 644 F. Supp. 283, motion denied, 802 F.2d 658, on remand, 649 F. Supp. 664, cert. denied, 107 S.Ct. 907. See also 3M Company, Docket No. TSCA-88-H-06, Order issued August 7, 1989 at 6-7. If the sufficiency of the defense depends upon disputed questions of law or fact, then a motion to strike will be denied, Oliner v. McBride's Industries, Inc. supra at 17. In the present case, it is reasonable to conclude that the Complainant's Motion to Strike must be denied unless the Presiding Judge is convinced that there are no questions of fact, and that any questions of law are clear and not in dispute. See Lunsford v. United States, 418 F. Supp. 1045, 1051 (D.C.S.D. 1976), aff'd, 570 F.2d 221, 229 (8th Cir. 1977); 3M Company, supra at 7; and Eastman Chemicals Division, Eastman Kodak Company, Docket No. TSCA-88-H-07, Order issued September 14, 1989

at 18. With these principles in mind, an evaluation can be made regarding whether the affirmative defenses at issue should be stricken. These defenses will be reviewed seriatim.

The first affirmative defense is that the Respondent's discharges did not constitute a discharge of process wastewater pollutants. In this regard, Carney alleges that Section 429.75 of the EPA Regulations operates soley to preclude the discharge of process wastewater pollutants from nonpressure wood treating plants and that the wastewater discharged by it is not within the regulatory definition of process wastewater. The Respondent avers that the Agency considered adopting a regulation that would have banned discharge of all wastewater pollutants from such plants, but decided instead to adopt a regulation precluding the discharge only of process wastewater pollutants. As a result, Carney argues that Section 429.75 of the EPA Regulations is inapplicable to its facilities discharges. The Complainant does not directly address this defense in its pleadings but it appears to be subsumed in the arguments relating to accelerated decision. In any event, this defense raises a disputed question of law regarding the applicability of the Regulation to the discharges and, therefore, should not be stricken. As a result, the Complainant's request to strike the first affirmative defense is denied.

The second affirmative defense is that the Agency's unbridled discretion to interpret Section 429.75 of the EPA Regulations violates notions of due process. This defense relies

on the Fourteenth Amendment of the U.S. Constitution and comparable provisions of the Washington and Idaho State Constitutions that require a regulation be clear enough on its face to be understood by persons reading it, so they can know what conduct is prohibited. These constitutional amendments allegedly require such definitiveness to avoid the unbridled discretion of administrative officials to say what a statute or regulation means. Therefore, Carney argues that the Regulation at issue is constitutionally deficient.

However, this due process defense does not raise any factual issues nor does it raise a viable legal issue. Generally, the constitutionality of congressional enactments is beyond the jurisdiction of administrative agencies, Weinberger v. Salfi, 422 U.S. 749, 765 (1975); NPDES Permit Systems for 170 Alaska Placer Mines, More or Less, NPDES Appeal No. 79-1 (March 10, 1980); Davis, Administrative Law Treaties §22.04. Based on the same rationale, generally a challenge to validly adopted Federal regulation on constitutional grounds is not within the Agency's jurisdiction. See Dr. Marshall C. Sasser, CWA Appeal No. 91-1 at 13, where it was held that the argument that Section 309(g) of the CWA is unconstitutional may not be heard in an administrative proceeding before the Agency. Moreover, Complainant's well supported position on the merits of the constitutional vagueness issue is persuasive enough to sustain the pretreatment Regulations on due process grounds, even if there is jurisdiction to consider such a challenge as raised by the Respondent. See

Complainant's Memorandum in Support of the Motion, pp. 9-14. Accordingly, this second affirmative defense should be, and hereby is, stricken.

The third affirmative defense pleads collateral estoppel and acts of delegated privity. This defense relates to the allegation that the Agency delegated pretreatment authority to the City of Sandpoint (City or Sandpoint) and that EPA worked closely with Sandpoint in dealing with Carney and directed the City's efforts. As a result, the Respondent avers that the Agency was in privity with the Sandpoint in connection with the Carney discharges and that EPA directed the City not to terminate the discharges on certain occasions. The defense also alleges that the Sandpoint, in privity with EPA, issued an Industrial Waste Acceptance Permit (IWA Permit) allowing Carney to discharge up to 50 parts per million of PCP. The IWA Permit was allegedly issued based upon the City's determination that the Carney interpretation of Section 429.75 of the EPA Regulations was correct. Therefore, the Respondent argues that EPA is estopped by that decision. The argument is further made that the Agency is estopped since, at no time subsequent to the issuance of the aforementioned permit, did EPA direct that Carney's original permit be amended and that, in a 1988 audit of the Sandpoint POTW, the Agency found Carney's permit to be acceptable. Allegedly, EPA acquiesced in the City's policy of gradually eliminating the discharges and in 1990 communicated its acceptance of the Sandpoint's proposed program to eliminate the

discharges. The Respondent avers that the Agency knew it was relying on the City's proposal, and, therefore, Carney asserts that EPA is now estopped to bring the present action based on its conduct and reliance on that decision by EPA.

The collateral estoppel/privity affirmative defense raises factual matters involving the relationship between the Agency, Sandpoint and the Respondent. This the Complainant acknowledges in its Memorandum in Support of the Motion, p. 2, fn. 1, where the Complainant concedes that the relationship between EPA, Sandpoint and Carney involves a long series of complex facts and notes that it disputes Respondent's interpretation of this relationship and many of the Respondent's factual allegations concerning it.

Also, Complainant, in its Memorandum in Support of the Motion, pp. 14-15, relies on the argument that there was no prior adjudication, a necessary element for invoking the doctrine of collateral estoppel. However, in its Opposition to the Motion, pp. 39-40, the Respondent effectively contests this argument by asserting that the permit decision-making proceeding of the City constitutes an adjudication. This is sufficient to create a viable legal dispute, despite which way the matter is ultimately resolved after the facts relating to the issuance of the permit have been aired at hearing. Therefore, in addition to the factual disputes involving the relationship between the Agency, the City and Carney, a valid legal dispute on the applicability of collateral estoppel has been raised. As a result, the

Complainant's request to strike this collateral estoppel/privity affirmative defense must be, and hereby is, denied.

The fourth affirmative defense raises the issue of equitable estoppel. Respondent claims that the Agency's conduct is of sufficient character to constitute an equitable bar to the Complaint and proposed penalty. In this regard, Carney alleges that on two occasions in 1985 and 1987 EPA directed Sandpoint not to hold hearings regarding the proposed termination of Carney's discharge rights and, in 1987, did so when the Agency knew that the City had issued a discharge permit to Carney. The Respondent avers that at no time did EPA inform Sandpoint or Carney that the IWA Permit was invalid and in fact, on at least one occasion, indicated to the City that Carney's IWA Permit was acceptable. Further, the defense alleges that on numerous occasions the Agency indicated its accession to Sandpoint's policy of gradualism in dealing with the discharge and avers that EPA had delegated its authority to deal with Carney to Sandpoint. According to the Respondent, EPA knew that Carney was relying on its discharge permit and that the Agency agreed in 1990 with the City's plan to bring Carney into compliance and did not propose any penal sanctions at that time. The Respondent avers that EPA knew that its acceptance of the City's proposal relating to the discharge permit was communicated to Carney and that Carney relied on that statement by the Agency.

Complainant seeks to strike this defense first on the basis that equitable estoppel is not available against the government

when acting in its sovereign capacity. Also, Complainant contends that, even if available, equitable estoppel was not properly pleaded since Respondent did not assert the essential element of affirmative misconduct. Further, Complainant takes the position that Sandpoint is not EPA's agent and, therefore, argues that the equitable estoppel argument is not well taken.

The Respondent controverts the Complainant's position that equitable estoppel is not available against the government acting in its sovereign capacity and contends that the traditional elements of equitable estoppel have been met in this case. In this regard, the Respondent avers: that the Agency knew the facts relating to the IWA Permit allowing the discharges; that EPA intended that Carney rely on EPA's actions in delegating pretreatment authority to Sandpoint and deferring to the City on enforcement; that the Respondent was ignorant of the true facts; and that Carney relied upon the Agency's conduct to its injury. Moreover, in its Opposition to the Motion, pp.33-39, the Respondent alleges that the Agency's actions constitute affirmative misconduct[2] and specifically raises the question of whether Sandpoint was acting as EPA's agent.

On analysis, it is warranted to conclude that the equitable estoppel affirmative defense raises factual issues and a viable legal dispute regarding whether the doctrine of equitable

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[2] The Respondent's Answer, pp.12-13, does not use the term affirmative misconduct, but it is not unreasonable to infer from that pleading that Carney intended to aver affirmative misconduct by the Agency.

estoppel is applicable. Under the circumstances, the Complainant's request to strike this affirmative defense is not well taken and must be, and hereby is, denied.

The fifth affirmative defense raises the issue of whether EPA has a right to retroactive enforcement of its allegedly penal sanctions. In this regard, Respondent avers that Section 309(g) of the CWA was not enacted until February 4, 1987, and by that time Carney had already obtained its permit authorizing the discharges at issue. Since the Complaint seeks to impose penalties for conduct which occurred prior to the enactment of Section 309(g), which Respondent avers is penal in nature, Carney contends that this constitutes retroactive enforcement that is precluded by constitutional requirements of due process and by the prohibition of ex post facto punishments contained in the United States and comparable Washington and Idaho statutes.

Complainant asserts that the administrative remedies available under the 1987 Amendments to the CWA, including Section 309(g), apply retroactively and render Respondent's fifth affirmative defense invalid as a matter of law. Complainant cites Universal Circuits,Inc., Docket No. CWA-4-88-001, Order issued August 22, 1988, which specifically held that administrative remedies under the Amendments to the CWA apply retroactively as long as the penalty does not exceed the amount available under Act prior to the Amendments.

The Respondent in Opposition to the Motion, pp. 40-42, relies on its interpretation of Section 309(g) as a penal statute

and attempts to distinguish Universal Circuits, Inc. since it did not address the issue of a jury trial, a right which Carney allegedly would have had with regard to the pre-1987 violations since the Agency at that time would have had to bring the action in U.S. District Court. In this regard, the Respondent relies on Tull v. U.S., 48 U.S. 412, 422 as holding that the defendant was entitled to a jury trial to determine liability in a civil action brought in U.S. District Court to enforce a civil penalty under the CWA.

It is undisputed that, if the Agency had chosen to pursue this matter in a District Court suit under Section 319(c) of the Act as unamended, Respondent would have been liable for a higher penalty. Complainant correctly relies on Universal Circuits, Inc. as persuasive authority that administrative remedies of the 1987 CWA Amendments apply retroactively to actions that occurred prior to the date of the Amendments, as long as the penalty does not exceed what would have been available under the old statute. The Respondent's reliance on its alleged right to a jury trial for the pre-1987 discharges is not well taken. The Agency has the option to enforce the CWA in a civil administrative proceeding and there is no right to a jury trial in such a proceeding, as discussed more fully, infra. This affirmative defense, therefore, is not available since it does not raise any factual issues and because a viable legal issue has not been presented by the Respondent. Accordingly, the affirmative defense relating to the retroactive applicability of Section

309(g) of the CWA is stricken.

The sixth affirmative defense raises the issue of whether the Complaint is barred by laches. The Complainant, citing substantial authority, asserts that it is settled that the Fedral government is not subject to laches when asserting public rights. Apparently, the Respondent abandoned this affirmative defense since it was not covered in its Opposition to the Motion. In light of this, the affirmative defense that rests on the doctrine of laches will be, and hereby is, stricken.

The seventh affirmative defense rests on an argument by the Respondent that it is entitled to a jury trial in this administrative proceeding. This defense is actually not a defense, but an argument that there should be a right to a jury trial pursuant to the Sixth and Seventh Amendments of the U.S. Constitution or similar provisions of the Washington and Idaho Constitutions. Since no such jury trial is allowed in this administrative action, Respondent avers that this proceeding violates its due process rights and is unconstitutional.

Complainant argues that neither the Sixth or Seventh Amendments to the U.S. Constitution guarantee the Respondent the right to jury trial in an administrative action under Section 309(g) of the CWA. Complainant points out that the Respondent's argument under the Sixth Amendment rests on construing the CWA as a penal statute and points out that there is substantial authority distinguishing civil penalties from criminal penalties. Respondent alleges that, since Section 309(c) of the CWA raises

the possibility of criminal sanctions for the violations charged with under Section 309(g), it should have the right to a jury trial under the Sixth Amendment. In this regard, the Respondent relies on an Illinois Citizens Committee for Broadcast v. FCC, 515 F.2d 397 (D.C. Cir. 1975). However, that case is distinguishable because the right to a jury trial in an administrative proceeding was not at issue there. The mere fact that Respondent could have been criminally prosecuted under Section 309(c) of the CWA does not render the administrative portions of the statute penal in nature for purposes of the Sixth Amendment.

Regarding the Seventh Amendment argument, Complainant correctly points out that the Seventh Amendment right to a jury trial does not extend to administrative proceedings, Atlas Roofing Company v. Occupational Safety Health Review Commission, 430 U.S. 442, 460 (1977); Curtis v. Loether, 415 U.S. 189,194 (1974). Moreover, Respondent's reliance on Tull v. U.S. is not persuasive. The Chief Judicial Officer dealt specifically with this issue in Dr. Marshall C. Sasser, CWA Appeal No. 91-1, (November 21, 1991), at 13-14, where it was held:

> Moreover, respondent's reliance on Tull v. United States, 481 U.S. 412 (1987), to support his claimed right to a jury trial is misplaced. The Supreme Court held in Tull that the Seventh Amendment gives the defendant in a section 309(d) civil penalty action in federal district court the right to a jury trial on factual issues bearing on liability. The Court stated, however, that the Seventh Amendment right to a jury trial "is not applicable to administrative proceedings." 481 U.S. 412, 418 N.4, citing its own earlier decision in Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. 442 at 455 (1977). It stated in that case that:

> Congress is not * * * prevented [by the Seventh Amendment] from committing some new types of litigation to administrative agencies with special competence in the relevant field. This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of an administrative agency.

Thus, contrary to Respondent's contention, the Tull decision did not extend the right to a jury trial to administrative proceedings under section 309(g).

In light of the above, it is clear that the Atlas Roofing Co. case is a more persuasive authority and that the Respondent does not have the right to a jury trial under the Seventh Amendment in an administrative hearing like the instant proceeding. Moreover, the Respondent's reliance on state law is not well taken, and Carney did not pursue this argument in its Opposition to the Motion. State law cannot impose requirements in proceedings involving violations of federal statutes and, therefore, the request for a jury trial on these grounds must be rejected. Under the circumstances, the Complainant's position with regard to the right to a jury trial is well taken and the affirmative defense raised by the Respondent on this issue must be, and hereby is, stricken.

II. **ACCELERATED DECISION**

As noted above, Complainant has conceded in its Reply to Respondent's Opposition to the Motion, that allowance of the estoppel defenses raises disputed factual matters. Since these defenses have been permitted to stand, there are genuine issues of material fact that must be tried. Accordingly, under Section 22.20(a) of the Rules, the Motion for Accelerated Decision must

be, and hereby is, denied. Specifically, there are long standing and complex disputed factual issues that will have to be aired at hearing, regarding the relationship between the Agency, the City and the Respondent during the years of the alleged violations.

III. **COUNTERCLAIM**

The Respondent's counterclaim for attorneys fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. §504, is attacked in the Complainant's Motion for an alleged failure properly to assert a cause of action under the EAJA. Complainant avers that the law governing the present action, construed in a light most favorable to the Respondent, does not give rise to EAJA liability on the part of the government. Complainant argues that to make a successful EAJA claim, that statute requires that it be shown that the government's actions were not substantially justified. Complainant contends that Respondent has failed to allege lack of substantial justification in the counterclaim and has not pleaded the requisite elements of a the cause of action under EAJA. Complainant notes that Respondent merely claims that EPA's conduct in bringing the action has caused Carney to incur unnecessary attorneys fees and costs. Therefore, the Complainant asserts that the Respondent's counterclaim is legally deficient and unrecognizable under EAJA. Complainant asks that the counterclaim be dismissed pursuant to Section 22.20(a) of the Rules, which provides for dismissal of an action where no right to relief has been shown.

Respondent asserts in its Opposition to the Motion, p. 48,

that, for all the reasons stated in its brief and supporting documentation, EPA's Complaint is groundless. Therefore, Carney contends that the Complaint is not substantially justified, thereby giving rise to a valid claim under EAJA.

On analysis, it would appear that the Complainant's position with regard to the counterclaim is more persuasive. The substantial pleadings by both parties in connection with the Motion show that there are multiple and complex factual and legal issues to be tried in this proceeding. However these issues will ultimately be resolved on the merits, it is clear at this juncture that the Agency was substantially justified in bringing the Complaint. There is no question regarding the discharge into the Sandpoint POTW over an extended period of time and there appears to be substantial controversy over the relationship between the Agency, the City and the Respondent. As the Complainant correctly points out, substantial justification means justified in substance or in the main, and not justified to a high degree, Pierce v. Underwood 47 U.S. 552, 556 (1988). Further, the inquiry is whether the Agency's position has a reasonable basis in law and fact, Andrew v. Bowen 837 F. 2d 875, 878 (9th Cir. 1988). Additionally, even if the Agency does not prevail on the merits, this does not give rise to the presumption that it was not substantially justified in bringing the action. The Agency is not required to establish that the decision to litigate was based on the substantial probability of prevailing but the test is whether the Agency's position has a reasonable

basis in fact and law. See Westerman, Inc v. NLRB 749 F. 2d 14 (6th Cir. 1984).

Under the facts as pleaded to date by the parties, it must be concluded that the Complainant was substantially justified in bringing the Complaint, and that it has reasonable basis in law and fact for its position, even if the ultimate determination on the Complaint should establish that there is no liability on the part of the Respondent for the alleged violations. Accordingly, the Complainant's Motion with regard to the Counterclaim is well taken and the Counterclaim is hereby dismissed, pursuant to Section 22.20(a) of the Rules.

IV. FURTHER PROCEDURES

Agency policy encouraging settlement is set out in Section 22.18(a) of the Rules and the parties are urged to attempt to settle this matter. Counsel for Complainant is directed to file, on or before **October 28, 1992,** a statement with respect to whether a settlement has been reached or on the status of settlement negotiations.

If the case is not settled by that date, the requirements in this order will meet some of the purposes of a prehearing conference, as permitted by Section 22.19(e) of the Rules.

Accordingly, it is directed that the following prehearing exchange take place between the parties:

1. Pursuant to Section 22.19(b) of the Rules, each party shall submit the names of the expert and other witnesses intended to be called at the hearing with a brief narrative summary

of their expected testimony, and copies of all documents and exhibits intended to be introduced into evidence. The documents and exhibits shall be identified as "Complainant's" or "Respondent's" exhibit, as appropriate, and numbered with Arabic numerals (e.g., Complainant's Ex. 1).

2. The Complainant shall set out how the proposed penalty was determined, and shall state in detail how the specific provisions of any EPA penalty or enforcement policies and/or guidelines were used in calculating the penalty.

3. If Respondent intends to take the position that it is unable to pay the proposed penalty, or that payment will have an adverse effect on Respondent's ability to continue to do business, Respondent shall furnish certified copies of Respondent's statement of financial position (or in lieu thereof copies of Respondent's federal tax return) for the last fiscal year.

4. Each party shall submit its views as to the place of hearing. See the Sections 22.21(d) and 22.19(d) of the Rules.

5. If settlement is not reached, the parties, taking into account the deadlines set herein, shall submit either an agreed-upon hearing date or separate proposed hearing dates in the event the parties disagree on this date.

If the case is settled, the Consent Agreement and Final Order signed by the parties should be submitted no later than **November 30, 1992.** If a Consent Agreement and Final Order have

not been signed by that date, the prehearing exchange directed above should be made on **November 30, 1992.** The parties will be expected to make this prehearing exchange unless, prior to the due date an extension of time has been obtained pursuant to Section 22.07(b) of the Rules. The parties will then have until **December 21, 1992,** to reply to statements or allegations contained in the opposing party's prehearing exchange.

The original of all statements and pleadings (with any attachments) required or permitted to be filed by this order, shall be sent to the Regional Hearing Clerk and copies (with any attachments) shall be sent to the opposing party and to the Presiding Judge. If photographs are to be submitted in the prehearing exchange, the party submitting such photographs should provide the actual photograph to all parties concerned in the proceeding (copies reproduced on a duplicating machine will not be acceptable). Copies of statements and pleadings sent to the Presiding Judge shall be addressed as follows:

Judge Daniel M. Head
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code A-110
401 M Street, S.W.
Washington, D.C. 20460

SO ORDERED.

Daniel M. Head
Administrative Law Judge

Dated: September 25, 1992
Washington, DC

IN THE MATTER OF B. J. CARNEY INDUSTRIES, INC.
Respondent, Docket No. CWA 1090-09-13-309(g)

CERTIFICATE OF SERVICE

I certify that the foregoing Order Disposing of Outstanding Motions and Setting Further Procedures dated Sept. 28, 1992, was sent in the following manner to the addressees listed below:

Copy by Pouch Mail to:

Marian L. Atkinson
Regional Hearing Clerk
U.S. EPA, Region X
1200 Sixth Avenue
Seattle, WA 98101

Copy by Certified Mail,
Return Receipt Requested:

Counsel for Complainant:

Mark Ryan, Esquire
Office of Regional Counsel
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Counsel for Respondent:

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Witherspoon, Kelley, Davenport
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1111 Third Avenue, Suite 2600
Seattle, WA 98101-3204

Aurora M. Jennings

Aurora M. Jennings, Secretary
Office of Administrative
Law Judges

Dated: September 28, 1992
Washington, DC