UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	:	
	:	Dkt. No. CAA-020-92
Kalamazoo Regional Psychiatric Hospital	:	
Michigan Department of Mental Health	:	
	:	
Respondents	:	

OPINION ON RESPONDENTS' MOTION TO DISMISS

This matter arises under paragraph 113(d) of the Clean Air Act ("the Act"), 42 U.S.C. § 7413(d).[1] Respondents are the Kalamazoo Regional Psychiatric Hospital (Hospital), a state-owned facility, and the Michigan Department of Mental Health (Department), a department "and/or political subdivision of the State of Michigan"[2] charged with supervision of state-owned mental health facilities.

Respondents own and operate a coal-fired power plant at

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[1] Complaint at 1.

[2] Complaint at 2, ¶ 5.

their Kalamazoo, Michigan, facility. The complaint alleges that Respondents violated Rules 301 and 331 of the Michigan State Implementation Plan (SIP), i. e. the opacity limit (R. 336.1301) and the particulate matter emission limit (R. 336.1331),[3] based upon visible emission observations as summarized in the complaint. For these alleged violations, a total civil penalty of $176,760 has been proposed.

In answering the complaint, Respondents admitted certain allegations, denied or offered explanations for others, and raised certain of the issues now posed again by their motion to dismiss. These issues, as extracted from Respondents' lengthy briefs, are:

I) Whether the Act generally, and the complaint specifically, are constitutional, or whether they violate the Tenth Amendment to the United States Constitution[4];

II) Whether the complaint violates the Act, in that:

A. Civil penalties to recover the economic benefit of noncompliance must be sought in a proceeding brought pursuant to section 120 of the Act, whereas the complaint here was issued pursuant to section 113(d) of the Act;

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[3] **Complaint** at 3-4, ¶ 15-18. Issuance of the complaint was preceded by a "Notice of Violation" to Respondents on June 15, 1992, for violations of Michigan implementation plan Rules 301 and 331. **Complaint** at 2, ¶ 5.

[4] The Tenth Amendment provides that "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

B. Complainant failed to notify Respondents no later than thirty days after discovering Respondents' noncompliance, as provided by section 120 of the Act;

C. The requirements of section 113(a)(4) of the Act, 42 U.S.C. § 7413(a)(4), were not followed in that Respondents were not given a reasonable time in which to comply with applicable regulations before the complaint was issued;

III. Whether the complaint violates 40 C.F.R. § 22.14(a)(5) in that an explanation of the reasoning behind the calculation of the proposed penalty was not set forth in the complaint as required by 40 C.F.R. § 22.14(a)(5);

IV. Whether the current definition of "person" in the Michigan implementation plan is illegal;

V. Whether complainant is estopped from bringing this action

- by a consent order between the Hospital and the Michigan Department of Natural Resources (MDNR), or
- because Complainant colluded with MDNR to prevent Respondents from complying with the Act in operating the facility.

Respondents' motion to dismiss has been denied.[5] The reasons are set forth below, but at the outset it is noted that this tribunal does not have jurisdiction to decide constitutional questions. Accordingly, the Tenth Amendment argument has not

[5] See Order of April 28, 1995, attached hereto.

been addressed.[6]

Section 120 (42 U.S.C. § 7420) of the Act.

Section 120 of the Act sets forth an enforcement procedure which, among other things, authorizes the collection of "noncompliance penalties" for violations of the Act by owners and operators of certain stationary sources of pollution. The noncompliance aspects of this section are "designed to recover the economic advantage which might otherwise accrue to a source by reason of its failure to comply. . . ."[7] Specific procedures for an enforcement action instituted pursuant to section 120 are set forth.[8] Respondents assert that Complainant did not observe these requirements in the section 113(d) proceeding here.[9] Respondents take the position that because "economic benefit" to

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[6] Respondent urges that Congress may not order a state to regulate in a particular manner, as it did in the Act, much less impose penalties for the state's failure to do so; and that the Tenth Amendment bars Congress's attempt to impose the Clean Air Act upon the states, particularly when the states are engaged in performing their governmental functions.

[7] 40 C.F.R. § 66.1(a).

[8] See 42 U.S.C. § 7420.

[9] **Respondents' Motion to Dismiss Administrative Complaint** (April 7, 1993) at 39-43 [hereinafter Motion to Dismiss]. Among the procedural requirements of section 120(b)(3) are that a "brief but reasonably specific notice of noncompliance" must be given to violators not later than thirty days after discovery [by EPA or the state] of such noncompliance, 42 U.S.C. § 7420(b)(3).

Respondents was included in the proposed penalty,[10] Complainant was required to proceed under section 120.[11] Indeed, Respondents assert that "the use of section 120, relative to economic benefit is mandatory."[12]

Complainant responds to the effect that this proceeding was instituted pursuant to section 113(d) of the Act, that the requirements of section 120 do not apply, and that section 120 is an alternative procedure for the assessment of administrative penalties.[13]

Section 113(e) specifically requires that "economic benefit of noncompliance" be considered "by the Administrator or the court" in "determining the amount of any penalty to be assessed" when an administrative complaint is issued pursuant to section 113(d) of the Act.[14] Section 113(e) provides as follows:

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[10] See Attachment A to **Respondents' Reply Brief to Complainant's Memorandum in Response and Opposition to Respondent's Motion to Dismiss** (May 13, 1993) [hereinafter Respondents' Reply] (Attachment A, which is a copy of Complainant's penalty worksheet, demonstrates that the total civil penalty in the instant action included an assessment for economic benefit).

[11] **Respondents' Reply** at 2-5.

[12] **Respondents' Reply** at 4. Respondents cite Duquesne Light Company v. EPA, 698 F.2d 456 (D.C. Cir. 1983), as authority, but do not indicate what language from the opinion supports their position.

[13] **Complainant's Memorandum in Response and Opposition to Respondent's Motion to Dismiss** (April 26, 1993) at 11 [hereinafter Complainant's Response].

[14] It is noted that the amount of the civil penalty is in the form of a proposal or recommendation in the complaint. No "order" has yet been issued here regarding the penalty by the Administrator (i. e. this administrative tribunal). Before an

(e) Penalty assessment criteria

> (1) In determining the amount of any penalty to be assessed under this section . . . the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business . . . the economic benefit of noncompliance. . . .

42 U.S.C. § 7413(e)(1) (emphasis added).[15]

It is clear, therefore, that in bringing a section 113(d) complaint, "the Administrator . . . shall take into consideration

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order regarding the penalty is issued, Respondents have the opportunity for a hearing on the facts and the penalty issue.

[15] Respondents' position is further undermined by the very legislative history upon which they rely. A portion of Senate Report No. 101-228, with emphasis added by Respondents, reads as follows:

> All penalties authorized in section 113 and section 120 continue to be applied separately, and one will not substitue for the other.

Here, taken out of context, this statement appears to imply that the use of Section 120 relative to economic benefit is mandatory. However, when read in the context of the entire paragraph, an entirely different picture emerges:

> Like the civil judicial penalty provision contained in section 112(b), the penalty [sic] cap in section 113(d) would not limit the Administrator's authority pursuant to section 120 to recover the full economic benefit of noncompliance in cases where such benefit exceeds the maximum statutory penalty. All penalties authorized in section 113 and section 120 continue to be applied separately, and one will not substitute for the other.

The first sentence of this passage demonstrates Congressional intent that the Administrator have the option to use Section 120 in cases where the benefit exceeds the maximum statutory penalty under Section 113(d). In such cases, the amount of the penalty under 113(d) would not limit the Administrator's authority to recover the full economic benefit of noncompliance under 120. In this sense, the penalties authorized in Section 113 and Section 120 are applied separately, and one will not substitute for the other.

. . . the economic benefit of noncompliance." Regardless of whether an economic benefit component was included in the penalty proposal, the Administrator was not required to proceed under section 120. There is no reason why the requirements of section 120 would control a section 113(d) proceeding. Respondents cite no rule of statutory construction or other precept to support such a view.[16] Section 120 is a discrete portion of the Act, which, upon careful examination, appears to be nothing so much as an alternative [to sections 113(d) and 113(b)] enforcement procedure. Nowhere do the Act or regulations suggest a connection of the sort urged by Respondents between sections 120 and 113(d). On the contrary, section 120(f), 42 U.S.C. § 7420(f), contains the following language, which specifically envisions concurrent or alternative proceedings under other portions of the Act:

> **Other orders, payments, sanctions, or requirements.**
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> Any orders, payments, sanctions, or other requirements under this section [section 120] shall be in addition to any other . . . orders, payments, sanctions, or other requirements established under this chapter, and shall in no way affect any civil or criminal enforcement proceedings brought under any provision of this chapter or State or local law.

Respondents further argue that Complainant failed to give

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[16] A lengthy discussion of section 120 and its applications is contained in the opinion in Duquesne, supra n. 12, which was decided in 1983, seven years before the current section 113(d) was added to the Act. Duquesne provides no particular support for Respondents' view, in part because the enforcement procedure utilized here did not exist at that time.

notice of noncompliance no later than thirty days after such noncompliance was discovered, as provided in section 120(b)(3). Inasmsuch as the requirements of section 120 do not apply to this action, the argument is without merit.

Accordingly, the section 120 issues have been resolved in Complainant's favor.

Sections 113(a), 113(a)(1), 113(a)(4) and 113(d) of the Act, 42 U.S.C. §§ 7413(a), 7413(a)(1), 7413(a)(4), and 7413(d).

Respondents argue that the requirements of paragraph 113(a)(4) of the Act were not followed in issuing the complaint and in notifying Respondents pursuant to section 113(a)(1) of violations of the state implementation plan.[17] The short answers to this are that (1) the complaint was issued pursuant to section 113(d), not 113(a)(4)[18]; (2) notice of violation was sent pursuant to section 113(a)(1), not 113(a)(4)[19]; (3) notices of

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[17] **Motion to Dismiss** at 30, where the reference is to "42 U.S.C. 7413(a)(1)(4)," although clearly 42 U.S.C. § 7413(a)(4) was intended; and at 39-41.

[18] The choice of whether to proceed under section 113(d), 113(b) or 113(a)(4) is specifically within the Administrator's discretion. See section 113(a)(1)(A)-(C), 42 U.S.C. § 7413(a)(1)(A)-(C).

[19] It is undisputed that Complainant did follow the procedure set out at section 113(a)(1) with respect to the June 15, 1992, notice of violation. Section 113(a)(1) requires that, with respect to findings of violations of state implementation plans, (1) notice must be sent to the "person and the State," and (2) after a thirty day waiting period the Administrator may proceed with enforcement, whether by compliance order, by complaint ("administrative penalty") pursuant to section 113(d), or by civil judicial enforcement under section 113(b).

violation are not "orders"; (4) neither complaints nor notices of violations are governed by section 113(a)(4). There is no reason to suppose that the requirements of section 113(a)(4), a discrete portion of section 113 that relates chiefly to the issuance of compliance orders (rather than to complaints or notices of violation) apply to section 113(d). Without explaining why complaint procedure or the notice of violation would be governed by the provisions of section 113(a)(4), Respondents merely state that the procedural requirements of compliance order practice, including providing an opportunity for compliance within a given period, were not followed in connection with either the notice of violation or the complaint.[20] The only portions of Respondents' briefs that approach an argument for the applicability of section 113(a)(4) to the notice of violation are the several efforts to convert the notice into an "order" by repeatedly referring to it

[20] Respondents state their understanding that the words "this subsection" in the first line of paragraph 113(a)(4) refer only to 113(a), not to all of section 113: "With regard to section 7413(a)(4), it refers to 'requirements for orders issued [sic] under this subsection [113(a)].'" **Respondents' Reply** at 7. Consequently, it is implicitly acknowledged that an administrative penalty order issued pursuant to section 113(d) is not an "order issued under this subsection."

as an order.[21] If the notice of violation were an "order," an argument -- albeit a weak one -- might be made that it, at least, if not the complaint, is subject to the procedural requirements of paragraph 113(a)(4) as an "order issued under this subsection,"[22] including the provision for a reasonable time for compliance.[23] This argument, however, does not survive even a brief reading of paragraph 113(a)(4), wherein it is evident that a notice of violation was clearly distinguished from an "order" for purposes of "this subsection." It states, in part:

> In any case in which an order under this subsection (or notice to a violator under paragraph (1)) is

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[21] See **Motion to Dismiss** at 40, where reference is made by Respondents to "the 42 U.S.C. 7413(a)(1) order which preceded the issuance of the complaint"; "the 42 U.S.C. 7413(a)(1) order was issued on June 15, 1992"; "the 42 U.S.C. 7413(a)(1) order was not received within thirty days of petitioner's obtaining knowledge of the violation." "Thus the 42 U.S.C. 7413(a)(1) order and the complaint. . . ."; see also, at 42, "the 42 U.S.C. 7413(a)(1) order which proceeded [sic] it. . . ."

Respondents also point to the words "Order to comply with SIP" in the title of paragraph 113(a)(1) as an indication that the notice is really a compliance order. However, the presence of a minor paragraph labelling inconsistency does not convert the notice to an order, particularly as the words "notify" and "notice of violation" are used in the body of the paragraph. If "order" had been intended, presumably the notice would have been referred to as "order," and some content that would constitute a compliance order would have been described. Instead, the procedural requirements and content of compliance orders are described in paragraph 113(a)(4), Requirements for orders.

[22] See **Motion to Dismiss** at 39-43; **Respondents' Reply** at 7-10.

[23] Respondents state that neither the complaint nor the "section 113(a)(1) order" [i. e. the notice of violation] which preceded the complaint "indicates a time for compliance" [as provided by section 113(a)(4)]. **Motion to Dismiss** at 42.

> issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers.

42 U.S.C. § 7413(a)(4) (emphasis added).

Neither would a paragraph 113(a)(1) notice of violation contain any language which could reasonably be construed as an order to comply, or an order to pay a penalty, or an order to do any other thing. While no effort is warranted to prevent members of the regulated community from referring to a notice of violation as an "order," the notice was not, and is not, an "order" in the sense used in paragraph 113(a)(4).

Accordingly, a notice of violation is not an "order" under paragraphs 113(a)(1) and 113(a)(4), and is therefore not subject to the requirements of paragraph 113(a)(4).

It may well have been advantageous from Respondents' perspective to have had an opportunity to comply before suit was filed. In many circumstances, particularly in connection with the involvement of two state facilities, that would seem fair and reasonable. But it is not a requirement of the Act or the regulations that such an opportunity be given. The Administrator has several enforcement options in connection with perceived violations of state plans. One is the compliance order. Another is the administrative penalty order. There is no requirement to use one procedure as opposed to the others listed at section 113(a)(1). To impose a requirement that notices and complaints must comply with the provisions of paragraph 113(a)(4) would be to adopt strained readings of both that paragraph and paragraph

113(a)(1) that are inconsistent with the thrust of the entire "federal enforcement" portion of the Act. The obvious purpose of paragraph 113(a)(4) is to prescribe procedural requirements for compliance orders. The obvious purpose of 113(a)(1) is to provide notice of violations of state plans and to prescribe procedure for subsequent enforcement efforts. They must be interpreted and applied with those ends in view.

Last, Respondent points out that the notice of violation issued on June 15, 1992, contained "allegations" of violations of Rule 301 on July 16 and 17, 1991, which were not subsequently included in the complaint.[24] Nothing further is made of this interesting observation. Neither the statute nor the regulations require that everything listed as a violation in the notice be made part of a subsequent enforcement action.[25]

The arguments based upon section 113(a)(4) are rejected.

40 C.F.R. § 22.14(a)(5).

Section 22.14(a) of the Consolidated Rules sets forth the requirements for a "[c]omplaint for the assessment of a civil penalty." Among these requirements is "a statement explaining the reasoning behind the proposed penalty."[26] Respondents claim that Complainant's explanation of the penalty "do[es] not even

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[24] **Motion to Dismiss**, at 40.

[25] If this is troubling to Respondents, possibly the July 16-17, 1991, observations could be added to the complaint.

[26] 40 C.F.R. § 22.14(a)(5).

remotely meet the requirements of this rule."[27]

Complainant maintains that Respondents are precluded from raising this argument at this time: "In its Answer, the Respondent did not raise the argument that the explanation of the penalty calculation was deficient, and is therefore precluded from doing so now."[28]

Section 22.15(b) of the Consolidated Rules provides in pertinent part: "[t]he answer shall also state (1) the circumstances or arguments which are alleged to constitute the grounds of defense, (2) the facts which respondent intends to place at issue. . . ."[29] It is true that Respondents did not raise this issue their answer. However, the issue of the penalty calculation is one on which Complainant has the burden of proof.[30] This burden cannot be waived by Respondents' failure to raise the issue in their answer.[31] Accordingly, Respondents are not precluded from raising at this time the argument that the explanation of the penalty was deficient.

Turning to the merits of Respondents' argument, the penalty

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[27] **Motion to Dismiss** at 41.

[28] **Complainant's Response** at 8.

[29] 40 C.F.R. § 22.15(b).

[30] Pursuant to 40 C.F.R. § 22.24, "the complainant has the burden of going forward with and of proving that . . . the proposed civil penalty, revocation, or suspension, as the case may be, is appropriate."

[31] This situation is to be distinguished from, for example, a situation in which the respondent raises an affirmative defense not related to the complainant's prima facie case.

information furnished in the complaint is legally sufficient to meet its burden under 40 C.F.R. § 22.14(a). The issue of the adequacy of the penalty explanation was addressed in Katzson Bros., Inc. v. United States Environmental Protection Agency.[32] While that decision did not focus on section 22.14, the Tenth Circuit stated that:

> This complete absence of inquiry into the factual basis for the penalty is troubling. As the court in Harborlite Corp. v. ICC, 613 F.2d 1088 (D.C. Cir. 1979), stated:
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> > One basic procedural safeguard requires the administrative adjudicator, by written opinion, to state findings of fact and reason that support its decision. These findings and reasons must be sufficient to reflect a considered response to the evidence and contentions of the losing party and to allow for a thoughtful judicial review if one is sought. . . . Moreover, a court "cannot 'accept appellate counsel's post hoc rationalizations for agency action'; for an agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.'"
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> 613 F.2d at 1092 (quoting FPC v. Texaco, Inc., 417 U.S. 380, 397, 94 S.Ct 2315, 2326, 41 L.Ed.2d. 141 (1974))(quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69, 83 S.Ct. 239, 245-46, 9 L.Ed.2d. 207 (1962)). See also Morton v. Dow, 525 F.2d 1302 (10th Cir. 1975)(agency's decision upheld because the Administrative Law Judge made the necessary findings on the ultimate issues, clearly indicated his reasoning, and gave evidence to support his conclusions).

Katzson, 839 F.2d at 1400-01.

Moreover, in Environmental Protection Corporation v. Lee

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[32] 839 F.2d 1396 (10th Cir. 1988).

Thomas,[33] the United States District Court for the Eastern District of California relied upon Katzson to refute an Administrative Law Judge's conclusion that Section 22.14 was procedural only, and that the Administrator's failure to comply with Section 22.14 was not fatal to the ability to impose a penalty.[34] The District Court concluded that the provisions of 40 C.F.R. § 22.14 were intended to provide a factual basis for the agency's penalty proposal and to enable defendant to mount a defense.[35]

In Katzson and Environmental Protection Corporation then, the explanation for the penalty was deemed insufficient. In both cases, far less information was provided regarding the penalty calculation than was supplied here. In Katzson, for example, there was a "complete absence of inquiry into the factual basis for the penalty. . . ." Katzson, 839 F.2d at 1400. In Environmental Protection Corporation, "complainant did not provide a factual basis for its original penalty of $14,000 proposed in the complaint." In the Matter of: Environmental Protection Corporation, Docket No. RCRA-09-86-0001, Decision and Order on Remand (1989) at 4.

Here, by contrast, with the exception of the benefit component, Complainant provided a factually-based explanation for

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[33] No. CV F-87-447 EDP, Memorandum Decision Re: Cross Motions for Summary Judgment (E.D. Cal. July 13, 1988).

[34] Id. at 7-8.

[35] Id. at 8.

each of the individual assessments which comprised the total penalty assessment.[36] Thus, while arguably short of ideal, the explanation of the proposed penalty contained in the complaint here significantly exceeds what was provided in Katzson and Environmental Protection Corporation, and satisfies the regulation.[37],[38]

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[36] **Complaint** at ¶¶ 22-25. Moreover, the complaint clearly states that the penalty was calculated in accordance with the Clean Air Act Stationary Source Civil Penalty Policy (October 25, 1991), and a copy of the Penalty Policy was enclosed with the complaint. **Complaint** at ¶ 21.

[37] However, if Respondents still lack information they believe necessary to defend the penalty issue, they may apply for appropriate relief. Settlement negotiations would obviously be enhanced by full disclosure of how the penalty proposal was calculated, if such disclosure has not already been made.

[38] It is noted that Complainant says it "has nothing further that it can release to the Respondent that relates to the penalty." **Complainant's Response** at 10. Whether Complainant intended to say that it has no documentation of the factual basis for the benefit component of the penalty that has not already been provided, or that it has such documentation but considers it to be privileged, is unclear. The Clean Air Act Stationary Source Civil Penalty Policy, which Complainant employed in this action, states as follows:

> it is essential that each case file contain a complete description of how each penalty was developed as required by the August 9, 1990 Guidance on Documenting Penalty Calculations and Justifications in EPA Enforcement Actions. This description should cover how the preliminary deterrence amount was calculated and any adjustments made to the preliminary deterrence amount . . . . Only through such complete documentation can enforcement attorneys, program staff and their managers learn from each other's experience and promote the fairness required by the Policy on Civil Penalties.

Clean Air Act Stationary Source Civil Penalty Policy (October 25, 1991) at 31 (emphasis added).

Definition of "Person" in the Michigan Implementation Plan.

Respondents maintain that as a state, they are not a "person" for purposes of this enforcement action.[39] They argue that the current definition of "person" in the Michigan implementation plan, which includes a state, is illegal.[40] They maintain that this definition exceeds the delegated authority of the MDNR:

> Since the agency is only authorized to establish rules consistent with the enabling act, a question always is whether the enabling act contemplates the provision of the rule. In the instance of the Michigan Air Pollution Act, the word "person" is undefined, but utilized throughout the statute. However, in M.C.L. 336.26, the following language appears:
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> > A person who or a governmental unit who fails to obtain or comply with a permit, or comply with a final order or order of determination of the commission made under this act is guilty of a misdemeanor. . . [emphasis supplies] [sic].
>
> The phrase "or a governmental unit" was added by a 1972 amendment. The language of the statute prior to that time was:
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> > Any person who is found to have violated this act or any rule or regulation promulgated by the commission and who shall not have taken such preventative or corrective measures as are required by the commission within the time fixed by it, either originally or as extended, shall be liable for a penalty not to exceed the sum of . . . [sic]
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> The amendment . . . made clear that the term "person" does not include a governmental unit.[41]

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[39] See **Motion to Dismiss** at 31-33.

[40] Id. at 31.

[41] Id. at 32 (quoting Mich. Comp. Laws § 336.26).

Accordingly, Respondents contend that as a state, they are not subject to this enforcement action.

Complainant counters that the amendment to Section 336.26 "is simply a revision that clarifies that "person" can include a governmental unit."[42] This is the better interpretation, for three reasons. First, Section 336.26 contains the word "person" in more than the one instance quoted by Respondent. In each additional instance, it would appear to include a "governmental unit."[43] Second, the Michigan Air Pollution Act itself now includes the following definition of "person":

> (r) "Person" means any individual, partnership, corporation, association, governmental entity, or other entity.[44]

Third, M.C.L. 336.26 was recently repealed, and its replacement eliminated the term "governmental unit" altogether.[45] Each of these factors supports Complainant's interpretation of M.C.L. 336.26.

In sum, Respondents have failed to demonstrate that the current definition of "person" in the Michigan implementation plan is illegal. Accordingly, Respondents are "persons" and are subject to the Act and applicable regulations.

Estoppel Based upon Consent Order.

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[42] **Complainant's Response** at 20.

[43] See Mich. Comp. Laws § 336.26. The term "governmental unit" appears only once in Section 336.26.

[44] Mich. Comp. Laws § 336.12 (1993).

[45] See Mich. Comp. Laws § 336.26(a)-(h)(1994).

Respondents assert that Complainant is estopped from bringing this action by a December 9, 1983, consent order between the Hospital and the Michigan Department of Natural Resources.[46]

The question of whether a consent order between a state agency and a defendant precludes federal enforcement action was considered in another Clean Air Act case, United States v. SCM Corporation.[47] There, the defendant moved for dismissal or stay of the action because of an administrative consent order between the defendant and the State of Maryland's Department of Health and Mental Hygiene. In denying the motion, the court held that:

> While the actions of the state of Maryland to enforce clean air standards pursuant to state-law enforcement procedures may properly be taken into account by this Court in determining the appropriateness of the relief prayed by the plaintiff, such state action does not affect defendant's liability under federal law or preclude this Court from hearing the case on the merits.[48]

The court specified that there was no "unfairness to the defendant in the court's decision that this case may proceed despite defendant's entering into a consent order with the state agency. In a federal system, each person and entity is subject to simultaneous regulation by state and national authority."[49]

Further, in United States v. Lehigh Portland Cement

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[46] **Motion to Dismiss** at 43-45.

[47] 615 F. Supp. 411 (D.C. Md. 1985).

[48] Id. at 419 (citations omitted).

[49] Id. at 420.

Company,[50] a Clean Air Act matter which involved a prior consent order between a defendant and a state, the court held that:

> In its reading of the [Clean Air Act], which gives both federal and state courts jurisdiction to enforce provisions of a state SIP, this Court finds no limitation on the EPA (or any other federal government agencies) in bringing an action when there is or was already a parallel state proceeding.[51]

Here, similarly, Complainant is not estopped from federal enforcement of the Act on the basis of a consent order between the Hospital and the State. Federal enforcement provides an important safeguard to the public in the event of inadequate state enforcement. As the court stated in SCM:

> According to defendant's analysis, any enforcement action brought by a state agency would preclude federal action to enjoin or punish the same violations. Thus, if a state adopted an [sic] SIP which was later federally approved, the state could nullify federal enforcement simply by adopting and using a state enforcement scheme which provided for minimal penalties. This Court does not believe that Congress, in enacting stiff penalties for air pollution, meant to have those penalties subject to nullification by the states.[52]

Turning now to a separate but related issue, Respondents argue that Complainant has necessarily "assumed enforcement" of the Michigan implementation plan because Complainant brought the instant action against the state, notwithstanding the consent order.[53] Pursuant to section 113(a)(2) of the Act, the

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[50] 24 ERC 1697 (1984).

[51] Id. at 1700.

[52] SCM, 615 F. Supp. at 419.

[53] **Motion to Dismiss** at 43.

Administrator must give public notice that it has assumed enforcement.[54] Respondents maintain that "the U.S.E.P.A. did not announce that it had assumed enforcement of the Michigan S.I.P. . . ."[55]

However, as has been noted above, the requirements of section 113(a)(2) do not govern this proceeding. Although Complainant proceeded against the state, there was no requirement to proceed under section 113(a)(2), and assume enforcement. In U. S. v. Ohio Department of Highway Safety,[56] the Sixth Circuit held that section 113(a)(2) merely provides an alternative mechanism to 113(a)(1) for dealing with a situation in which a state is a party: "[t]here is no indication in the legislative history that EPA is limited to proceeding under section 113(a)(2) in every situation where a state is an offending party."[57] The court added that:

> By refusing to comply . . . the State of Ohio became a "person" in violation of a provision of the plan. To proceed under section 113(a)(2), in effect displacing the State as regulator of motor vehicles during a "period of federally assumed enforcement," would be a more drastic remedy than the one chosen by EPA in this case. . . . [W]e find nothing in the language of the Act which requires EPA to utilize (a)(2) rather than proceeding directly against the state, as it could against any other person in violation, pursuant to

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[54] 42 U.S.C. § 7413(a)(2).

[55] **Motion to Dismiss** at 43.

[56] 635 F.2d 1195 (1980).

[57] Ohio, 635 F.2d at 1204.

section 113(a)(1).[58]

Here the complaint was issued pursuant to Section 113(d) against the state as a "person" that had allegedly violated the Act. Consequently, Complainant did not need to assume enforcement, and the requirements of Section 113(a)(2) do not apply.

Estoppel Based Upon Alleged Collusion.

Respondents allege that Complainant colluded with the Michigan Department of Natural Resources to prevent Respondents from complying with the Act, and are therefore estopped from bringing this action.[59] It is contended that Complainant and MDNR purposely delayed approval of the Hospital's permit application to install pollution control equipment which, if such equipment had been operating in December, 1991, would (according to Respondents) have precluded the observations upon which the alleged violations of the Michigan implementation plan at the facility were based.[60] Respondents refer to various communications between the Hospital, MDNR, and Complainant in an effort to show collusion between Complainant and MDNR to delay approval of the permit.[61] Apart from the presumption of regularity in the conduct of such matters, and aside from the motion's failure to suggest a motive for collusion on the part of

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[58] Id.

[59] **Motion to Dismiss** at 45-48.

[60] Id. at 46-47. The permit application was approved on January 6, 1992.

[61] Id.

governmental bodies charged with promoting clean air, Complainant correctly points out that "an estoppel against the government will be permitted, if ever, only in the most extraordinary circumstances, Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 60-61 (1984), and only when the party which asserts estoppel proves that the United States has engaged in affirmative misconduct."[62] Here, Respondents have not met this heavy burden. Accordingly, Complainant is not estopped from bringing this action.

The parties will be given forty-five days in which to confer for the purpose of resuming and advancing settlement efforts.

ORDER

The parties shall report upon the status of their effort to settle this matter during the week ending July 14, 1995.

J. F. Greene
Administrative Law Judge

Washington, D.C.
May 25, 1995

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[62] **Complainant's Response** at 22; see also Office of Personnel Management v. Richmond, 496 U.S. 414, 423 (1990) (the arguments for "'a flat rule that estoppel may not in any circumstances run against the Government'" are "'substantial'") (quoting Heckler, 467 U.S. at 60).

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order was mailed to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on May 25, 1995.

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

NAME OF RESPONDENT: Kalamazoo Regional Psychiatric Hospital and Michigan Department of Mental Health
DOCKET NUMBER: CAA-020-92

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C. 20460

IN THE MATTER OF	:	
Kalamazoo Regional Psychiatric Hospital & Michigan Department of Metal Health	:	Dkt. No. CAA-020-92
Respondent	:	

ORDER DENYING MOTION TO DISMISS

Respondent's motion to dismiss this matter is hereby denied.

An opinion will be issued within the next ten days.

J. F. Greene
Administrative Law Judge

Dated: April 26, 1995
Washington, D.C.

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 April 26, 1995.

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

NAME OF RESPONDENT: Regional Psychiatric Hospital & Michigan Department of Mental Health
DOCKET NUMBER: CAA-020-92

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