UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
City of Park Rapids, Minnesota,	)	**Docket No. CWA-AO-V-004-92**
	)	
	)	
Respondent	)	

ORDER DENYING MOTION TO DISMISS, GRANTING MOTION FOR ACCELERATED DECISION AS TO LIABILITY AND DENYING MOTION FOR ACCELERATED DECISION AS TO AMOUNT OF PENALTY

This proceeding under § 309(g) of the Clean Water Act (33 U.S.C. § 1319(g)) was commenced on April 30, 1992, by the issuance of a complaint charging Respondent, City of Park Rapids, Minnesota, with violations of effluent or discharge limitations in an NPDES permit issued to the City by the State of Minnesota. The permit became effective on December 9, 1986, and expired on September 30, 1991. The violations allegedly occurred during the period April 1987 to June 1988 and constituted 273 violations of the terms of the permit and of § 301(a) of the Act. For these alleged violations, it was proposed to assess the City a Class II penalty of $124,000.

The City filed an answer on June 15, 1992, which essentially contested the Agency's jurisdiction in the matter and disputed the proposed penalty as excessive and unwarranted.

The claim that EPA lacked jurisdiction was based on a consent decree entered in State District Court for Hubbard County, Minnesota, on April 11, 1988, which placed the City on a compliance schedule for the completion of a new POTW and stipulated penalties for violations of the compliance schedule and of interim discharge limitations. According to the City, if the formula in the consent decree were followed, the penalty would not exceed $2,000.

On July 28, 1992, Complainant filed a motion for accelerated decision, alleging that the City's failure to file an answer, admitting, denying or explaining material factual allegations in the complaint constituted an admission of the facts alleged. Attached to the motion was a memorandum explaining the basis for the proposed penalty. Complainant moved that the City be found liable for the violations cited and that an order be issued assessing the City a penalty of $124,000 as demanded in the complaint.

The City served a response to the motion under date of August 8, 1992, contending that it fully complied with Rule 15(b) of the Consolidated Rules of Practice in that its answer set forth the circumstances or arguments constituting the grounds of its defense and requested a hearing. The City summarized the circumstances, set forth in its answer, under which it came to violate the effluent limits in its permit. The City also pointed out that it disputed the amount of the penalty

assessment and argued that the Agency's motion for accelerated decisionmaking should be denied.

Under date of September 2, 1992, the City filed a motion to dismiss, contending, inter alia, that primary jurisdiction to regulate effluent discharge in the State was delegated to the Minnesota Pollution Control Agency (MPCA) and through the National Municipal Policy to the state court system. Therefore, the City argued that EPA no longer had primary jurisdiction to bring the instant action. Additionally, the City contended that because the violations had already been litigated in state court, EPA was precluded from bringing the instant action by the doctrines of res judicata and collateral estoppel.

Complainant filed a reply to the City's opposition to its motion for an accelerated decision and a reply to the City's motion to dismiss on September 21, 1992. Complainant asserted that the threshold issue in its motion for an accelerated decision was whether the City had complied with Rule 22.15(b), pointing out that the requirement that the answer "clearly and directly admit, deny or explain" each of the factual allegations of the complaint was in addition to the requirement that the answer also state "the circumstances or arguments which are alleged to constitute the grounds of defense." Complainant reiterated that it had jurisdiction to institute the instant action, denied that the doctrines of res judicata or collateral estoppel were applicable and urged that the motion to dismiss be denied.

In support of its opposition to the City's motion, Complainant has submitted an affidavit by Loren K. Voigt, supervisor of the Municipal Unit of the Regulatory Compliance Section, MPCA Water Quality Division, during the period relevant to the EPA complaint, April 1987 to June 1988. Mr. Voigt states that the City's wastewater superintendent knowingly made false material statements on DMRs filed with MPCA and that the City submitted DMRs containing false analytic results for pollutants. This falsification allegedly occurred in the 1986-1988 time period. Also, the City's superintendent allegedly knowingly took inaccurate effluent samples from the wastewater treatment facility, samples that were not representative of the volume and nature of the monitored discharge and not in compliance with the monitoring requirements of the City's permit.

Mr. Voigt further states that in early 1988, the City sought from MPCA what was referred to as an "after-bid amendment" to its construction grant and, that in order to adhere to the National Municipal Policy, MPCA proposed a consent decree for the purpose of facilitating the mentioned amendment. According to Mr. Voigt, at the time of the consent decree negotiations and entry of the decree, MPCA staff were not aware of the DMR falsification and inaccurate effluent sampling and monitoring. Therefore, MPCA staff were allegedly not fully aware of the nature, frequency and magnitude of the City's NPDES permit violations. According to Mr. Voigt, if MPCA had been aware of this information at the time of the consent decree

negotiations, it would have sought an "upfront" civil penalty for the violations alleged in the complaint.[1/] To the best of Mr. Voigt's knowledge, MPCA did not inform EPA about the nature of MPCA's deliberations on the City's consent decree or about the terms and conditions of the NMP consent decree prior to entry of the decree.

The City served a reply to Complainant's opposition memorandum on October 1, 1992, contending that it was improper for the Agency to attempt exercising concurrent jurisdiction in the absence of a finding that the State has not pursued enforcement vigorously and expeditiously, that the National Municipal Policy vests primary jurisdiction with the State and that Complainant is barred from bringing this action by virtue of res judicata and collateral estoppel.

D I S C U S S I O N

A. The City's Motion To Dismiss

The City is correct that the policy statement in the CWA, § 101, 33 U.S.C. § 1251(b), provides that it is the policy of Congress that the States manage the construction grant programs under this chapter and implement the permit programs under

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[1/] This refers to para. 11 of the State's complaint which alleges that on occasion during 1987 and 1988 the City discharged effluent from its wastewater treatment facility containing more $CBOD_5$, TSS and fecal coliform than allowed by its NPDES permit. Para. 11 of EPA's complaint does not differ in substance, alleging that the City was not in compliance with the mentioned parameters of its NPDES permit during the period April 1987 to June 1988, as detailed on an attached schedule.

sections 1342 and 1344 of this title. The significance of this policy statement is at least doubtful, however, in view of the fact that § 101(d) provides that except as otherwisely expressly provided in this chapter, the Administrator of EPA shall administer this chapter [Act].

The City acknowledges that under § 309(a)(1), EPA and the states have concurrent jurisdiction for the enforcement of pollution control regulations and permit conditions.[2/] It points out, however, that the legislative history of that section indicates that federal enforcement was not to supplant state enforcement and that EPA was to "step-in" only where a state was not acting vigorously and expeditiously to enforce

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[2/] Memorandum In Support of Motion to Dismiss at 4. Section 309(a)(1) provides:

> (a) State enforcement; compliance orders
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> (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

control regulations.[3/] It is, of course, immediately apparent that § 309(a)(1) concerns administrative orders to comply or civil court actions, while § 309(g), providing for administrative penalties, was added to the Act by The Water Quality Act of 1987 (P.L.100-4, February 4, 1987). While there is no indication in the legislative history of The Water Quality Act, 133 Congressional Record H131 (January 7, 1987), reprinted U.S. Code, Cong. & Adm. News (1987) at 5-49, that any changes to the Administrator's authority to act vis-a-vis the states were intended (Id. at 29), the Act sets forth only two conditions on

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[3/] See A Legislative History Of The Water Pollution Control Act Amendments of 1972 (Vol. II) at 1482 providing in part:

> Against the background of the Clean Air Act and the Refuse Act the Committee concluded that the enforcement presence of the Federal government shall be concurrent with the enforcement powers of the States. The Committee does not intend this jurisdiction of the Federal government to supplant state enforcement. Rather the Committee intends that the enforcement power of the Federal government be available in cases where States and other appropriate enforcement agencies are not acting expeditiously and vigorously to enforce control requirements.
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> The Committee again, however, notes that the authority of the Federal Government should be used judiciously by the Administrator in those cases [which] deserve Federal action because of their national character, scope, or seriousness. The Committee intends the great volume of enforcement actions be brought by the State. It is clear that the Administrator is not to establish enforcement bureaucracy but rather to reserve his authority for the cases of paramount interest.
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> * * * *.

the Administrator's authority to assess a Class II administrative penalty. These are consultation with the State in which the violation occurred and notice and opportunity for hearing in accordance with the Administrative Procedure Act (5 U.S.C. § 554).[4/] These conditions have been fulfilled and it

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[4/] Section 309(g)(1) of the Act provides:

(g) Administrative penalties

(1) Violations

Whenever on the basis of any information available--

> (A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation 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
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> (B) the Secretary of the Army (hereinafter in this subsection referred to as the "Secretary") finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary,

the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

* * *

(2) Classes of penalties

* * *

(B) Class II

(continued...)

is concluded that the language of the statute provides no barrier to the Agency's action herein.

The City's argument that the National Municipal Policy, 49 Fed. Reg. 3832-33 (January 30, 1984), vests primary jurisdiction in the State court system is based on language in the policy to the effect that where there are extraordinary circumstances which preclude compliance by July 1, 1988, EPA will work with States and the affected municipal authorities to ensure that these POTWs are on enforceable schedules for achieving compliance as soon as possible (Id. at 3832). While the City's argument is plausible, it is concluded that the National Municipal Policy was not intended as a waiver of the Administrator's authority to seek penalties for violations of the Act. This is because the policy provides that nothing therein is intended to impede or delay any ongoing or future enforcement actions (Id. at 3832-33).

4/(...continued)

The amount of a class II civil penalty under paragraph (1) 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 under this subparagraph shall not exceed $125,000. Except as otherwise provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on the record in accordance with section 554 of Title 5. The Administrator and the Secretary may issue rules for discovery procedures for hearings under this subparagraph.

The City relies heavily on United States v. ITT Rayonier, Inc., 627 F.2d 996 (9th Cir. 1980), wherein it was held that the relationship between EPA and the Washington Department of Ecology (DOE) was sufficiently close that EPA was collaterally estopped from relitigating issues as to the interpretation of an NPDES permit issued by DOE, which had been resolved favorably to Rayonier in State courts. Most courts that have considered the issue, however, have concluded that the Administrator is the chief enforcer of the nation's water laws and that federal courts should not abrogate their responsibility to accept jurisdiction, state court proceedings notwithstanding. See, e.g., U.S. v. Rayle Coal Co., 129 F.R.D. 135 (N.D. W.VA. 1989) and cases cited. In line with this view, state court consent decrees have been held to be no bar to federal enforcement action for violations of the Clean Air Act, United States v. SCM Corp., 615 F.Supp. 411 (D.C. Md. 1985); the Safe Drinking Water Act, United States v. City of North Adams, MA, 777 F.Supp. 61 (D. Mass. 1991), and the Clean Water Act, United States v. Town of Lowell, Ind., 637 F.Supp. 254 (N.D. Ind. 1985).[5/]

[5/] It is recognized that Town of Lowell, cited by Complainant, could be distinguishable, because there the violations appeared to be continuing in contrast to the instant proceeding which seeks penalties for past violations.

Moreover, in order for issue preclusion to apply to a non-party, an existing party must be the virtual representative of the non-party. See, e.g., Antrim Mining, Inc. v. Davis, 775 F.Supp. 165 (MD, PA 1991); Symbol Technologies v. Metrologic Instruments, 771 F.Supp. 1390 (N.J. 1991) (virtual representation should not be found to have occurred without an express or implied legal relationship between the named party and non-party sought to be bound); and Moldovan v. Great Atlantic & Pacific Tea Co., Inc., 790 F.2d 894 (3rd Cir. 1986) (issue preclusion requires identity of interests). It should be noted that the Ninth Circuit has stated that Rayonier, supra, is sui generis, Aminoil, USA, Inc. v. California State, et al., 674 F.2d 1227 (9th Cir. 1982), wherein the court recognized that the structure of the CWA may place a private litigant in the unenviable and burdensome position of being required to litigate liability under the Act in two separate judicial systems.

It is recognized that if the interests of the State and EPA are broadly defined as compliance with, and enforcement of, the CWA and implementing regulations, their interests could be regarded as identical in accordance with the rule in Moldovan, supra. The fact remains, however, that the consent decree did not purport to assess penalties for past violations. Indeed,

according to Mr. Voigt, the MPCA was not fully aware of the extent of these violations at the time the consent decree was entered. Accordingly, because the consent decree did not address the matter of sanctions for the prior violations, the interests of EPA and the State may not be regarded as identical. Moreover, although the National Municipal Policy clearly contemplated that non-complying municipalities, such as the City of Park Rapids, be placed on enforceable compliance schedules, it has been concluded above that the policy was not intended as a waiver of the Administrator's authority to assess penalties. For the foregoing reasons, neither res judicata nor collateral estoppel are a bar to this action and the City's motion to dismiss will be denied.

B. Complainant's Motion For Accelerated Decision As To Liability

The issue here is not whether the City's answer complies with Rule 22.15(b) of the Consolidated Rules of Practice, but whether there is any issue of material fact as to whether the City violated its permit as alleged in the complaint. The record herein demonstrates that this question must be answered in the negative. This is because the consent decree provides, inter alia, that among objectives of the consent decree are the elimination, in accordance with the attached schedule, of

effluent discharges that violate the limitations of the City's permit, because the City's answer explains rather than denies the violations and because the City's response to Complainant's motion for accelerated decision acknowledges that characterization of its answer. The CWA is a strict liability statute and Complainant's motion for accelerated decision that the City violated its permit as alleged in the complaint and is liable for a civil penalty will be granted.

C. Amount of Penalty

As we have seen (note 4 supra), § 309(g)(2) of the Act provides that a Class II penalty may only be assessed after notice and opportunity for a hearing on the record. Additionally, Rule 22.15(a) (40 CFR Part 22) provides, inter alia, that a respondent contending that the amount of the penalty proposed in the complaint is inappropriate shall file a written answer. The City has done so and has clearly contested the amount of the proposed penalty as excessive and unwarranted. Accordingly, the City may not be deprived of its right to a hearing at which it may present evidence in support of the mentioned contentions and in mitigation of the penalty.[6/]

[6/] In accordance with Rule 22.24, Complainant has the burden of presenting a prima facie case that the proposed penalty is appropriate. Where, as here, the Act provides that ability to pay is among factors required to be considered in determining the amount of any penalty, Complainant's burden includes some showing that Respondent has the ability to pay the proposed penalty. See, e.g., In re New Waterbury Ltd., A California Limited Partnership, Docket No. TSCA-I-88-1069 (Decision After Reopened Hearing, May 7, 1993), presently on appeal.

Complainant's motion for an accelerated decision that the City be assessed a penalty of $124,000 will be denied.

O R D E R

The City's motion to dismiss is denied. Complainant's motion for accelerated decision that the City violated its permit as alleged in the complaint and is liable for a civil penalty is granted. Complainant's motion that the City be assessed a penalty of $124,000 is denied.

The amount of the penalty remains at issue and will be determined after a hearing, if a hearing is necessary.

Dated this 19th day of April 1994.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER DENYING MOTION TO DISMISS, GRANTING MOTION FOR ACCELERATED DECISION AS TO LIABILITY AND DENYING MOTION FOR ACCELERATED DECISION AS TO AMOUNT OF PENALTY**, dated April 19, 1994, in re: City of Park Rapids, Minnesota, Dkt. No. CWA-AO-V-004-92, was mailed to the Regional Hearing Clerk, Reg. V, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: April 19, 1994

ADDRESSEES:

Sean E. Hade, Esq.
Jardine, Logan & O'Brien
2100 Meritor Tower
444 Cedar Street
St. Paul, MN 55101-2160

Stephen Patrick Mendoza, Esq.
Associate Regional Counsel
Office of Regional Counsel
U.S. EPA, Region V
77 West Jackson Boulevard
Chicago, IL 60604

Ms. A. Marie Hook
Regional Hearing Clerk
U.S. EPA, Region V
77 West Jackson Boulevard
Chicago, IL 60604