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Order: First Annual Pace National Environmental Moot Court Competition

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UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

ACME INDUSTRIES, INC., Appellant,

v.

No. 88-1001

NATIONAL COUNCIL FOR THE
PROTECTION
OF THE ENVIRONMENT,
Appellee,

v.

STATE OF NEW UNION, Intervenor.

ORDER

Acme Industries, Inc., respondent below, National Council for the Protection of the Environment ("NCPE"), petitioner below, and the State of New Union, moving intervenor below, have each filed petitions to appeal different controlling questions of law from the district court's opinion below, pursuant to 28 U.S.C. § 1292(b) and Rule 5 of the Rules of Appellate Procedure. Such petitions are granted on the following questions of law:

1. Whether the district court erred in dismissing counts alleging pH, BOD, and TSS violations of Acme's permit as moot on grounds that those violations are not continuing violations as required to maintain a § 505 action under the Clean Water Act, 33 U.S.C. § 1365.

2. Whether the district court erred in failing to rule on the validity of the toxicity limit in Acme's permit.

Dated: September 15, 1988

B.M. Romulus, Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNIONNATIONAL COUNCIL
FOR THE PROTECTION
OF THE ENVIRONMENT, Petitioner,

v.

No. Cir. 86-631

ACME INDUSTRIES, INC., Respondent,

v.

STATE OF NEW UNION, Intervenor.

Remus, J. This case was brought in July of 1986 by the National Council for the Protection of the Environment ("NCPE") alleging that Acme Industries, Inc. ("Acme") is in violation of § 301(a)(1) of the Clean Water Act, (the "Act"), 33 U.S.C. § 1311(a)(1). NCPE alleges that Acme has violated and continues to violate the terms of past and present National Pollution Discharge Elimination System ("NPDES") permits issued pursuant to § 402 of the Act, 33 U.S.C. § 1342, to Acme's organic chemical manufacturing plant in the City of Fairwater, State of New Union by the United States Environmental Protection Agency ("EPA"). NCPE claims jurisdiction under the citizens suit section of the Act, § 505, 33 U.S.C. § 1365, which authorizes private citizens to enforce the Act under certain circumstances. NCPE seeks an injunction against future violations and civil penalties. The State of New Union filed a motion to intervene, which was granted. The case is now before the court on cross motions for summary judgment.

I. BACKGROUND

Acme operates an organic chemical manufacturing facility in Fairwater. It discharges its wastewater into the Fairwater River, which is heavily used for sport fishing, boating, swim-

ming and by migratory waterfowl. Acme was first issued an NPDES permit by EPA in 1974. That permit required Acme to install and operate by July 1, 1977 a wastewater treatment facility treating Acme's wastes so that they would thereafter not exceed the following effluent limitations:

POLLUTANT	RANGE	
pH	6-9	
POLLUTANT	MAXIMUM POUNDS/DAY	MONTHLY AVERAGE POUNDS/DAY
Biochemical Oxygen Demand (BOD)	1000	500
TotalSuspended Solids (TSS)	1200	600

These effluent limitations were certified by the State of New Union under § 401 of the Act, 33 U.S.C. § 1341, as necessary to meet the State's water quality standards. In other words, the State, under state law, had classified the Fairwater River for use in sport fishing, boating, and swimming and it found these limitations necessary to preserve the water quality of the river for these uses. According to § 301(b)(1)(C) of the Act, 33 U.S.C. § 1311(b)(1)(C), water quality based effluent limitations were required to have been met by July 1, 1977. The effluent limitations for BOD and TSS required greater treatment, and were therefore more limiting, than the "best practicable control technology" effluent limitations that would have otherwise been required by § 301(b)(1)(A) of the Act, 33 U.S.C. § 1311(b)(1)(A), to be met by July 1, 1977. The pH limit certified was the same as would have been required under § 301(b)(1)(A).

Acme installed a wastewater treatment plant before July 1, 1977. However, even after that date it did not achieve the required effluent limitations on a consistent basis.

The first EPA permit expired by its own terms in 1979. Acme had filed an application for reissuance of the permit in a timely manner and, in the absence of EPA action, the permit was extended by operation of law, 40 C.F.R. § 122.6. EPA

did not issue a new permit until July of 1987, a year after this case was filed. The new permit added a fourth effluent limitation: "The discharge shall not be toxic to the indigenous biota of the Fairwater River such that a 10% concentration of the treated effluent kills more than 50% of test species in a 96 hour *in situ* bioassay performed in accordance with EPA standard test method." EPA added this effluent limitation because State of New Union, in its certification under § 401 of the Act, required the limitation as necessary to meet its water quality standards. In its certification, the State wrote EPA that the "effluent limitation was developed by the New Union Department of Environmental Protection (the "Department") to implement the State's narrative water quality standard which forbids the discharge of 'toxic chemicals in toxic amount.'"

Acme challenged this certification in state court on the basis that: 1) the water quality standard was void for vagueness; 2) the standard had been adopted without following the State's Administrative Procedures Act, N. Un. Civ. Code § 36.108¹; (3) the effluent limit was an arbitrary and capricious application of the standard; and 4) the Department afforded no opportunity for comment or presentation of evidence with regard to adoption of the effluent limit for the permit certification. The state court dismissed the challenge on the basis that it had no jurisdiction to hear it.

The new permit contained the same pH limit as the previous permit, but increased the amount of BOD and TSS that could be discharged. The new limits are:

POLLUTANT	MAXIMUM POUNDS/DAY	MONTHLY AVERAGE POUNDS/DAY
BOD	1500	750
TSS	1800	900

1. "Public notice of all proposed agency actions shall be given at least thirty days prior to the date such actions are taken. . . ." In this case it is uncontested that a § 401 certification is an agency action requiring public notice, and that public notice was given fifteen days prior to the § 401 certification.

The State of the New Union certified these limitations to EPA under § 401 as necessary to meet the water quality standards set for the Fairwater River by the State. The reason given for increasing the allowed discharge of these pollutants was that other discharges of BOD and TSS into the River had ceased, allowing Acme to increase its BOD and TSS discharges without violating the State's water quality standards. These effluent limitations are more stringent than would be required by the Act's technology based standard promulgated under § 301(b)(2), which would apply now in the absence of controlling water quality based limitations.

NCPE promptly challenged the BOD and TSS effluent limitations under 40 C.F.R. Part 124, asserting that they are not legal under the newly enacted § 402(o), which NCPE characterizes as an "anti-degradation" provision. Acme challenged the toxicity limitation in the same proceeding. Their challenges are pending before EPA.

II. THE VIOLATIONS

A. *pH*. This is a measure of the acidity or alkalinity of the discharge on a 14 point logarithmic scale, with lower numbers being acidic, 7 being neutral and higher numbers being alkaline. From the issuance of the first permit until June of 1985, Acme violated its pH limitation on a regular basis about 30% of the time. Sixty percent of the violations were in the 5.0 to 5.99 range, 35% in the 4.0 to 4.99 range, 4% in the 3.0 to 3.99 range and 1% in the 2.0 to 2.99 range.

Treatment for this acidic condition is achieved by the addition of lime to neutralize the effluent. Prior to June of 1985, this was done manually. Acme explains its pre-1985 violations as being caused by a variety of operator errors. In June of 1985, Acme installed a mechanized, computer-operated lime addition system. Since that time, Acme has violated its pH effluent limits only once. That violation occurred as a result of a power outage which caused the system to fail. It lasted for 6 hours and was corrected when the power outage was over.

B. *BOD and TSS*. The effluent from Acme's facility contains organic pollutants that are broken down by biological

activity which occurs naturally and can be induced or enhanced artificially. In 1976, Acme installed a biological treatment system which features bacteria specially bred to break down the organic pollutants in Acme's wastewater. Those pollutants, however, remain in a small concentration after treatment when they are discharged into the Fairwater River, where biological activity continues to break them down. This biological activity consumes free oxygen in the river. BOD is a measure of the amount of oxygen in the river depleted by this process. Free oxygen consumed by this biological activity is not available for the propagation of the river's natural biota. Too great an oxygen demand by organic material in Acme's waste could deplete free oxygen from the river resulting in the death of all native species. BOD effluent limitations are intended to prevent this deleterious result.

TSS is the other pollutant limitation in the permit. Suspended solids can be organic material which has not been completely broken down by biological activity, inorganic material, or decomposed organic material. Suspended solids are normally removed by settling, flocculation,² or filtration.

Acme never met the BOD or TSS effluent limitations established in its first permit on a consistent basis. Its performance, however, got progressively better over time as it improved the operation of its biological treatment system. This improvement occurred primarily as a result of changes Acme made in its manufacturing process to produce a consistent influent to the treatment process. Maintaining a consistent influent improved the effectiveness of the treatment system; influents which radically vary in strength or in chemical composition can upset or even kill the bacteria which are the basis of the biological treatment.

By August of 1986, Acme had improved its treatment sufficiently so that its BOD and TSS discharges were lower than the effluent limitations established subsequently in its 1987 permit, except during a two week period each winter when extreme cold caused biological activity in the treatment system

2. Flocculation is the addition of a chemical to wastewater to cause suspended solids to precipitate out of solution.

to diminish.

C. Toxicity. This effluent limitation is a measure of how many test organisms are killed when exposed to water, 10% of which is Acme's treated wastewater, for a total of 96 hours. The test organism, brine shrimp, is prescribed in EPA's standard method for toxicity and is not one naturally occurring in the Fairwater River or which could occur there since the river is fresh water and the shrimp inhabit salt water. When Acme began measuring toxicity, its effluent regularly resulted in 80-90% mortality. After August, 1986, however, its effluent regularly resulted in 50-60% mortality, except during two week periods of extreme cold each winter.

D. Proof of violations. Acme's past and present permits required and continue to require that it sample and analyze for BOD and TSS once a day, and for pH continuously. Its present permit requires that it test for toxicity once a month. Acme must report the results monthly to EPA on an EPA-supplied form known as a Discharge Monitoring Report (DMR). DMRs are on file at EPA's Regional Office and are public information. NCPE has obtained copies of all DMRs submitted by Acme to EPA. NCPE based its notice of violation and complaint on violations reported in the DMRs and contends that the violations reported constitute admissions for the purpose of supporting its motion for summary judgment that Acme has and continues to violate the Act. NCPE's complaint, of course, did not allege violations of the toxicity limitation, because the permit containing that limitation had not been issued when the complaint was filed. NCPE subsequently moved to amend its complaint to include violations of this limitation. The motion was granted.

III. ISSUES

A. Mootness. All parties agreed that the general five year statute of limitations governs in this case, 28 U.S.C. § 2462, see, *National Wildlife Federation v. Consumers Power Co.*, 657 F. Supp. 989 (W.D. Mich. 1987). All four of the effluent limitations have been violated in the last five years, according to Acme's DMRs. Reported violations in DMRs can be used

to support plaintiff's motion for partial summary judgment that Acme has violated the Act. *See, e.g., Chesapeake Bay Foundation v. Bethlehem Steel Corp.*, 608 F. Supp. 400 (D. Md. 1987). Acme argues, however, that suit cannot be maintained against it for pH, BOD, and TSS violations because it has come into compliance with its permit with regard to these parameters and the suit is therefore moot. Indeed, Acme moves for summary judgment on this basis.³

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987) holds that citizens cannot maintain a suit for wholly past violations under § 505 of the Act. Although that opinion concerned whether violations continued at the time the complaint was filed, the Court made it clear that even if violations were continuing at the time the suit was filed, the case would become moot if the violations ceased after the suit was filed but prior to trial. There is no question that the pH violations ceased in 1985, prior to the filing of the complaint, when Acme installed an automatically operated lime addition system. There has been only one violation since then, caused by extraneous events which are unlikely to recur. Clearly the case is moot as to pH violations.⁴

The situation with BOD and TSS violations is more complicated. Acme argues they have been mooted by the issuance of the 1987 permit which sets higher limits. Moreover, Acme has demonstrated that it has met these limits on a consistent basis since the 1987 permit was issued and would have met them as of August 1986 if they had been in effect during that period. This change in permit conditions occurred after the filing of the complaint. NCPE counters that in setting the new, more lenient limits EPA acted in contravention of §

3. The State joins Acme in its motion. The State's position appears to be against its own interests, as the motion would limit the State's ability to utilize § 505 on its own behalf. But the State evidently views citizen enforcement as an unwanted intrusion on the government's enforcement prerogative and seeks to limit citizen enforcement authority. The limitation it argues for, of course, would not hamper its ability to fully exercise its enforcement authority under state law.

4. Acme also argues that this exceedence of the pH limitation was an "upset" under 40 C.F.R. § 122.41(n) and not a violation at all. The Court does not reach this issue.

402(o), that the resulting illegal effluent limits are invalid, and that the earlier, more stringent limits remain effective until replaced by valid limits. There are no cases on point. If the statute were ambiguous in this regard, reference to the legislative history of the new provision might be useful. This is not necessary, however, for the simple answer to this argument is that it is made in the wrong forum. Challenges to permits are heard by EPA itself in a full adjudicatory hearing, 40 C.F.R. Part 124, and § 509 of the Act vests the Courts of Appeals with exclusive jurisdiction to review EPA's decision on the permit challenge. This court cannot usurp the jurisdiction of the Court of Appeals by the end run suggested by NCPE. *See, City of Las Vegas v. Clark County*, 755 F.2d 697 (9th Cir. 1985).

NCPE next argues that the BOD and TSS violations in fact continue because each year Acme exceeds the limits set in the 1987 permit. The fact that extremely cold weather - an act of God - interferes with the proper functioning of Acme's treatment system on an occasional basis does not demonstrate that the earlier violations continue.

Clearly this case is moot as to pH, BOD, and TSS violations and I grant Acme's motion for summary judgment as to these alleged violations.

B. Validity of Toxicity Limitation. Acme has clearly violated the toxicity limit on a continuous, albeit decreasing, basis since that limit was first established. Acme argues in defense that the limit is invalid for the reasons it had challenged these limitations in state court (discussed above page 5). NCPE responds that this court has no jurisdiction to hear Acme's challenge to the state's § 401 certification and that even if the certification were defective procedurally, EPA would have an obligation to independently apply state water quality standards pursuant to § 301(b)(1)(C) of the Act, especially in view of the new § 402(o), 33 U.S.C. § 1342(o). The State joins NCPE in this argument and also defends its § 401 certification and narrative water quality as valid. It is clear from the discussion above that this court does not have jurisdiction under § 509, 33 U.S.C. § 1369, or any other authority to review the terms of the present permit. In any event,

Acme's administrative appeal of the toxicity limitation is pending before EPA and it may seek review by the Twelfth Circuit thereafter. In the meantime, the limitation is effective and enforceable. In contesting effluent limitations, polluters litigate on their own time. *United States Steel Corp. v. Train*, 556 F.2d 823 (7th Cir. 1977).

There is no dispute that Acme violated the toxicity limit on each occasion it conducted the required toxicity limit testing, there being some 12 such occasions to date. Accordingly, I grant the motion of NCPE and the State for partial summary judgment that Acme has violated the toxicity limit in its permit on each occasion Acme has conducted a toxicity test since the 1987 permit was issued.

IV. CONCLUSION

The parties will submit to the Court within one month hereafter a joint report on the nature of the hearing necessary for the court to order a remedy for these violations.

Each of the parties has requested in regard to the different rulings that I find, pursuant to 28 U.S.C. § 1292(b), that such rulings constitute controlling issues of law as to which there is substantial ground for difference of opinion and that immediate appeal may materially advance the ultimate termination of the litigation. I so find for all rulings in this opinion.

So ordered.

August 31, 1988

Judge M.B. Remus