

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
ROGER BARBER, d/b/a/ BARBER TRUCKING)	DOCKET NO. CWA-05-2005-0004
)	
RESPONDENT)	

ORDER REJECTING RESPONDENT’S THIRD PARTY COMPLAINT

The U.S. Environmental Protection Agency, Region V (“the Region” or “Complainant”) initiated this matter by filing and serving its “Complaint,” dated April 28, 2005, on Roger Barber d/b/a/ Barber Trucking (“Respondent”).¹ The Region filed the Complaint to assess a Class II administrative penalty pursuant to Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g). The Region alleges violations of Section 405(e) of the Clean Water Act, 33 U.S.C. § 1345(e) and of 40 C.F.R. part 503, “Standards for the Use or Disposal of Sewage Sludge,” and seeks an administrative penalty of \$60,000. Respondent, who is a *pro se* litigant, has filed its Answer and amendments to that Answer. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Rules of Practice”), 40 C.F.R. part 22.

Respondent filed a pleading dated July 14, 2005, which is titled, “Third Party Complaint in Proceeding to Assess a Class II Civil Penalty Pursuant to Section 309(lg) [sic] of the Clean Water Act, 33USC & 1319(g)” (“Third Party Complaint”). Respondent seeks to implead both the Brown County Health Department (“Brown County”) and the Southwestern Ohio District of EPA (“Ohio EPA”) into the matter before me. The Region did not name either Brown County or Ohio EPA as parties to the Region’s Complaint. The Region has not responded to Respondent’s Third Party Complaint.

In the Third Party Complaint, Respondent asserts that at all times relevant to this matter he was acting in accordance with the directives and resolutions provided to him by Brown County and Ohio EPA. Respondent contends that it was reasonable for him to operate his business under the assumption that his compliance with the directives and regulations of Brown County and Ohio EPA was sufficient on his part and that it is unreasonable to expect him to look beyond the Brown County and Ohio EPA guidelines or instructions on how to operate his business. Respondent further contends that if he was in violation of any federal regulations as stated in the complaint against him, that he

¹ In a separate order, I am granting EPA’s motion to amend the Complaint and file documentation of public notice, but that amendment constitutes a ministerial modification and has no bearing on the substance of Respondent’s attempt to implead third parties.

was innocent of knowingly committing any violations, and that at all times complained of he was making diligent good-faith efforts to operate his business in compliance with all laws. Furthermore, Respondent contends that he should be indemnified by Brown County and Ohio EPA for any fines or penalties resulting from his actions because he took all his actions under their directions and in accordance with their guidelines. Respondent concludes by contending that Brown County and Ohio EPA are third party respondents in this matter and are themselves primarily responsible and liable for any violations that may have occurred as complained of in the original complaint and that Respondent should not be held personally liable for any such violations.

Section 309(g) of the Clean Water Act authorizes the EPA Administrator (“Administrator”) to assess a class II administrative penalty against a person when the Administrator finds that person to be in violation of the Clean Water Act. 33 U.S.C. § 1319(g). Before issuing an order assessing a civil penalty, the Administrator shall give to the person to be assessed such penalty written notice of the Administrator’s proposal to issue such order and the opportunity to request a hearing on the proposed order. *Id.* The Clean Water Act thus authorizes the Administrator to assess a penalty order against a person only after the Administrator gives written notice to that person – that is, after the Administrator issues a complaint. *See id.; cf. In re Housing Authority of the City of Moundsville*, Docket No. CAA-03-2003-0211, 2004 EPA ALJ LEXIS 1, at *7 (Jan. 5, 2004).

The Administrator has delegated authority to Administrative Law Judges (“ALJs”), such as myself, “to hold hearings and perform related duties which the Administrator is required by law to perform in proceedings subject to 5 U.S.C. 556 and 557,” which includes the instant proceeding. EPA Delegations Manual, Delegation 1-37 (Nov. 1, 1983). However, under a more specific delegation regarding Clean Water Act administrative penalty proceedings, the Administrator has only delegated authority to “issue, amend, or withdraw Class II administrative complaints” to EPA enforcement offices such as the Region. *Id.*, EPA Delegation 2-52-A (May 11, 1994); *cf. Moundsville*, 2004 EPA ALJ LEXIS 1, at *7 (denying impleader in a Clean Air Act administrative penalty proceeding). Moreover, it is within the Region’s enforcement discretion to choose those it decides to proceed against. *See In re ALDI, Inc.*, Docket No. CWA-7-2000-0015, 2001 EPA ALJ LEXIS 21, at *3 (ALJ, Feb. 7, 2001) (denying a motion to dismiss an EPA Regional enforcement office’s complaint for failure to join indispensable parties).

Finally, I observe that the Rules of Practice, which govern this proceeding, do not provide for third party complaints, in contrast to the Federal Rules of Civil Procedure, which provide well-defined procedures for impleader. *Compare* 40 C.F.R. part 22 *with* F.R.C.P. 14. Where the Rules of Practice do not speak directly to a procedural matter, I may turn to the Federal Rules of Civil Procedure as guidance if their guidance is appropriate. *Moundsville*, 2004 EPA ALJ LEXIS 1, at *3-5. However, the Federal Rules of Civil Procedure are not binding on administrative penalty proceedings. *In re B&L Plating, Inc.*, CAA Appeal No. 02-08, 2003 EPA App. LEXIS 8, slip op. at 8 n.10 (EAB, Oct. 20, 2003), 11 E.A.D. _____. Furthermore, grafting such a procedure into the Rules of

Practice would contravene the design of the EPA adjudicatory system, in which the Administrator has delegated sole authority to EPA's enforcement offices to issue and amend complaints. *See* EPA Delegations Manual, EPA Delegation 2-52-A; *Moundsville*, 2004 EPA ALJ LEXIS 1, at *5-7.

Accordingly, I conclude that neither the undersigned nor the Respondent have the authority to issue a complaint against a third party in the matter before this Tribunal, and it is therefore outside our authority to implead third parties. *Accord Moundsville*, 2004 EPA ALJ LEXIS 1, at *7 (denying impleader in a Clean Air Act case; the language of the notice requirements for administrative penalty proceedings under the Clean Air Act mirrors that of the Clean Water Act).

Nevertheless, although Brown County and Ohio EPA are not named as co-respondents in this matter, Respondent is not necessarily precluded from submitting documents and witnesses from these sources for introduction into evidence in support of its defense. *See* Prehearing Order (July 6, 2005). Furthermore, the Region carries the burden of proving that the Respondent is liable and the burden of proving the appropriate penalty amount in this matter.² 40 C.F.R. § 22.24.

Dated: August 16, 2005
Washington, D.C.

Barbara A. Gunning
Administrative Law Judge

² Additionally, I note that even if I determine Respondent to be liable and assess a penalty, Respondent is not necessarily precluded from pursuing indemnification from third parties in a separate forum. I make no statement as to the validity or merits of such a claim for indemnification.