

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of

**Frank Acierno,
Christiana Town Center, LLC and
CTC Phase II, LLC**

Respondents

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) **Docket No. CWA-03-2005-0376**
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Order Denying Respondents' Motion for Partial Reconsideration

I. Introduction

This proceeding under Section 309(g) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1309(g), was commenced on September 29, 2005, by a complaint issued by the Director of the Water Protection Division, U.S. Environmental Protection Agency, Region 3 ("Complainant"), charging Respondents, Frank Acierno and Christiana Town Center, LLC ("Christiana"), with violations of Section 301 of the Act (33 U.S.C. § 1311). Specifically, the complaint alleges that Respondents failed to comply with the National Pollutant Discharge Elimination System ("NPDES") General Permit requirements for storm water discharges at the Christiana Town Center ("the Site") located in White Clay Creek Hundred, New Castle County, Delaware, by failing to comply with an applicable Sediment and Stormwater Plan, and thus with the permit, and/or operating without such a plan. For these alleged violations, Complainant seeks a penalty of \$157,500.

Respondents, through counsel, filed an answer on October 27, 2005, which denied the alleged violations and requested a hearing. The answer contained twenty-six affirmative defenses including a Motion to Suppress and Dismiss Allegations Arising From Unlawful Search and a Motion to Dismiss Acierno Completely and Christiana Partially. These motions were denied and Complainant's Motion for Leave to Amend Complaint, filed on January 30, 2006, was granted by an Order, dated June 30, 2006. Complainant's Motion for Default Order, which was based on CTC Phase II, LLC's failure to file a timely answer to the Amended Complaint, was denied by an Order, dated December 13, 2006.

On February 8, 2006, Complainant filed a Motion to Strike Certain Portions of Respondents' Answer and Certain Affirmative Defenses and a Memorandum in Support thereof. The Motion was filed pursuant to Consolidated Rule 22.16 entitled "Motions". Under date of February 23, 2006, Respondents filed a Response in Opposition to Motion to Strike Certain Portions of Respondents' Answer and Certain Affirmative Defenses and a Memorandum in support thereof. On March 6, 2006, Complainant filed a Reply to Respondents' Response in

Opposition to Motion to Strike Certain Portions of Respondents' Answer and Certain Affirmative Defenses.

In response to Complainant's Motion to Strike, the Administrative Law Judge ("ALJ") filed an Order Granting in Part and Denying in Part Complainant's Motion to Strike ("Strike Order"), dated February 28, 2007. The ALJ emphasized, inter alia, that "Respondents have not provided a sufficient basis for the affirmative defense in paragraph 102 of the answer, which asserts that Complainant's claims are barred by the statute of limitations." (Strike Order at 17). The CWA does not provide a relevant statute of limitations, but that in the present case, the ALJ maintains that 28 U.S.C. § 2462 applies, providing a 5-year statute of limitations. Due to this decision, Respondents filed a Motion for Partial Reconsideration of Order Granting Complainant's Motion to Strike ("Motion for Reconsideration"). In return, Complainant filed a Reply to Motion for Partial Reconsideration of Order Granting in Part Complainant's Motion to Strike ("Reconsideration Reply") dated March 19, 2007.

II. Arguments of the Parties

A. Respondents' Argument for their Motion for Reconsideration

Respondents argue that there are no cases establishing a five year federal statute of limitations applicable to this proceeding and contends that federal courts may apply a state statute of limitations if there is no relevant federal statute of limitations (Motion for Reconsideration at ¶¶ 2-3). According to Respondents, the alleged violations at issue are based upon actions taken by the New Castle County government, which is the delegated inspection agency for the Delaware Department of Natural Resources & Environmental Control ("DNREC"), and DNREC is the delegated CWA authority for the State (*id.* at ¶¶ 6-7). Based upon these findings, Respondents indicate that "[a]ny matter undertaken by DNREC or the County regarding their delegated responsibilities under the CWA, which the EPA has expressly consented to, would be subject to the general three (3) year statute of limitations provided for under Title 10, § 8106 of the Delaware Code." (*Id.* at ¶ 9.).

Respondents argue that courts must borrow the state statute of limitations where a federal statute lacks one (*id.* at ¶ 10 citing *Nat'l Iranian Oil Co. v. Mapco Int'l, Inc.*, 983 F.2d 485, 492 (3d Cir. 1992), but acknowledges the exception that the federal statute of limitations applies when it is more closely analogous than the state statute and is more appropriate given the federal policies at stake (*id.*). Respondents characterize the Delaware statute of limitations as addressing illegal trespasses into waters of the United States, which they believe covers this action. In the alternative, Respondents view Section 2642 as a "catch-all provision intended solely as a gap filler" not applying to the case as succinctly as Section 8106 (*id.* at ¶ 12). Given that civil rights actions and ERISA claims are governed by Section 8106, Respondents conclude that Section 8106 is more closely analogous to this federal claim and should apply (Motion for Reconsideration at ¶ 13).

B. Complainant's Reply to the Motion for Reconsideration

Complainant begins by claiming that Respondents' argument, that if a federal statute does not contain a statute of limitations the court must borrow the most closely analogous state law, is wrong because the cases Respondents cite to do not involve the U.S. government as a party¹ enforcing a "civil fine, penalty, or forfeiture." (Reconsideration Reply at 2). Further, Complainant contends that none of the case law cited in the *National Iranian Oil Company* case involved a federal agency imposing a civil penalty (id. at 2-3). Complainant contends that 28 U.S.C. § 2462 applies to EPA administrative enforcement actions for civil penalties (id. at 3 citing *3M Company v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994)) and emphasizes that although Section 2462 has not been cited to for NPDES violations, the ALJ did apply Section 2462 to an EPA administrative penalty action for illegal discharges to wetlands (id. citing *Donald Cutler*, Docket No. CWA-10-2000-0188, 2002 EPA ALJ LEXIS 78, *139-42 (ALJ Dec. 31, 2002)).

III. Discussion

Again, this Order re-emphasizes the findings in its Strike Order that 28 U.S.C. § 2462 applies to this case because it is relevant. Even though the CWA does not have an applicable statute of limitations, Section 2462 has applied to other provisions of the CWA (*Donald Cutler*) and, generally, applies to administrative civil penalty proceedings (*3M Company v. Browner*). The Delaware statute of limitations would frustrate federal policy given that the Administrator has the authority to bring an action against a person violating the CWA regardless of whether a state is overseeing the NPDES permit program (33 U.S.C. § 1319) and that Respondents must comply with CWA and not just state-imposed NPDES permit program regulations. The Administrator may enforce a state-issued permit under a federal proceeding governed by federal law. In summation, I am not persuaded that the "Strike Order" was erroneous and given the federal policies at stake, 28 U.S.C. § 2462 is the applicable statute of limitations.

ORDER

Respondents' Motion for Reconsideration is denied.

Dated this __5th_____ day of April, 2007.

Spencer T. Nissen
Administrative Law Judge

¹ Respondents did cite to *Guilday v. Dep't of Justice*, where the United States was a party to the action, but Complainant noted that the case involved claims of discrimination and reprisal against the Department of Justice (451 F. Supp. 717, 719 (D. Del. 1978)).