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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Umetco Minerals Corporation,	)	**Docket No.CAA-(113)-VIII-92-03**
	)	
Respondent	)	

Order Denying Respondent's Motion for Accelerated Decision

The complaint in this proceeding under Section 113(d) of the Clean Air Act (CAA), 42 U.S.C. § 7413(d), issued on March 31, 1992, charged Respondent, Umetco Minerals Corporation, with violating Subpart W of the National Emissions Standards for Hazardous Air Pollutants (NESHAP), 40 C.F.R. Subpart W, by failing to report results of 1990 radon flux measurements and compliance calculations for a uranium mill tailings pile.[1/] The Environmental Appeals Board (EAB) held, contrary to the ALJ

[1/] Subpart W, 40 C.F.R. §§ 61.250 et seq. (1990), codifies the National Emission Standards for Radon Emissions From Operating Mill Tailings. Section 61.254, "Annual reporting requirements", provides in part: "The owners or operators of operating existing mill impoundments shall report the results of the compliance calculations required in § 61.253 and the input parameters used in making the calculation for the calendar year shall be sent to EPA by March 31 of the following year...." Section 61.253 provides in pertinent part: Compliance with the emission standards in this subpart shall be determined annually through the use of Method 115 of Appendix B. When measurements are to be made over a one year period, EPA shall be provided with a schedule of the measurement frequency to be used...."

(Order on Cross Motions for Accelerated Decision, November 23, 1994), that Umetco's tailings pile was an "operational existing mill impoundment" subject to Subpart W (In re Umetco Minerals Corporation, CAA Appeal No. 94-6 (EAB, July 25, 1995). The EAB reached this conclusion notwithstanding the fact that Umetco's mill had been dismantled, that Subpart W is expressly inapplicable to the disposal of tailings, and that Subpart T, which was repealed in 1994, applied to the "owners and operators of all sites that are used for the disposal of [uranium mill] tailings" (40 C.F.R. § 61.220). The matter was remanded for the determination of a penalty.

Complainant proposed to assess Umetco a civil penalty of $80,000. On September 29, 1995, Umetco moved for an accelerated decision, contending that, as a matter of law, the maximum penalty that EPA may assess for the section 61.254 reporting violation found here is $25,000. Umetco argues that failure to submit the 1990 radon emissions report is a one-day violation subject to the statutory maximum of $25,000. Complainant has opposed the motion, pointing out that section 113(d) of the Clean Air Act (42 U.S.C. § 7413(d)) authorizes the assessment of multi-day penalties and asserting that Umetco's failure to submit the emissions report for one year after the report was due constituted a continuing violation subject to the maximum daily

penalty of $25,000 up to the maximum for an administrative penalty of $200,000.[2]

The ALJ may render an accelerated decision as to all or any part of the proceeding, provided no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. 40 C.F.R. § 22.20(a). Because there are no disputed factual issues pertaining to the narrow legal issue raised by Umetco, an accelerated decision is appropriate.[3] For the reasons stated below, Umetco's motion will be denied.

Discussion

Section 113(d) of the CAA authorizes the Administrator to "issue an administrative order against any person assessing a civil administrative penalty of up to $25,000, per day of violation ... where the total penalty sought does not exceed $200,000 and the first alleged day of violation occurred no more than 12 months prior to the initiation of the administrative

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[2] Complainant's Response To Umetco's Motion, dated October 16, 1995. According to Complainant, the violation continued from March 31, 1991, when the report was due, until March 31, 1992, when the complaint was filed.

[3] For the purpose of deciding Umetco's motion, it is assumed that there were multiple days of violation for which Umetco is potentially liable. There appears, however, to be a dispute as to the duration of the violation. This, of course, is a matter to be addressed at a hearing.

action...." 42 U.S.C. § 7413(d).[4] EPA may assess penalties for every day of violation, including the day of notice to the violator, until continuous compliance has been achieved. 42 U.S.C. § 7413(e)(2). EPA may not, however, assess penalties for any days during the period of noncompliance for which the violator has proven that no violation occurred or that the violation was not "continuing in nature." 42 U.S.C. § 7413(e)(2).[5]

Umetco violated the CAA by failing to send EPA the results of radon emission compliance calculations and the input parameters used in making the calculation for the calendar year 1990 by March 31, 1991, as required by 40 C.F.R. § 61.254. In order to make radon emissions calculations, Umetco, was obligated to make a radon flux measurement or measurements in accordance

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[4] A penalty greater than $200,000 may be assessed when "the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or a longer period of violation is appropriate for administrative penalty action." 42 U.S.C. § 7413(d)(1).

[5] "The violation shall be presumed to include the date of notice [to the violator] and each and every day thereafter until the violator establishes that continuous compliance has been achieved, except to the extent that the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature." 42 U.S.C. § 7413(e)(2).

with Part 61, Appendix B, Method 115.[6] Umetco will, however, never be able to submit the 1990 calculation, because it acknowledges that it never conducted radon flux monitoring in 1990.[7] Umetco asserts, that penalties should not accrue on a daily basis until submission of the report, as Complainant maintains, because neither the CAA, nor the nature of the reporting violation suggest that the violation is "continuing in nature" (Memorandum of Points And Authorities In Support of Respondent's Motion For Accelerated Decision at 1, 2).

Umetco relies heavily on United States v. Trident Seafoods Corp., 60 F.3d 556 (9th Cir. 1995), which was a Clean Air Act case involving the asbestos NESHAP (40 C.F.R. Part 61, Subpart M) (1988). The government instituted an action against Trident to recover a penalty for, inter alia, Trident's failure to give notice of intent to renovate a structure [containing asbestos]

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[6] The distribution and number of radon flux measurements required on a pile will depend on clearly defined areas of the pile (called regions) that can have significantly different radon fluxes due to surface conditions (Method 115, ¶ 2.1.2). For mill tailings after disposal, the pile is considered to consist of one [measurement] region for which a minimum of 100 measurements are required (Method 115, ¶¶ 2.1.2 and 2.1.3).

[7] Umetco's Response to EPA's Motion for Accelerated Decision, dated October 23, 1992 (R's Response to C's Motion) at 4. Although Respondent admitted that it did not conduct radon monitoring in 1990, there appears to be a factual dispute as to whether EPA agreed to accept a report submitted on July 29, 1991, as compliance with the report for the calendar year 1990.

"as early as possible before renovation begins" as required by 40 C.F.R. § 61.146(b)(4). The district court rejected Trident's argument that the violation was "one-time" which occurred on a single day, holding that the violation was continuing and extended from the time Trident reasonably should have given notice (10 days before the work began) until a state official learned of the asbestos removal, a period of 44 days. The Court of Appeals, over a vigorous dissent, reversed, ruling that the regulation was not sufficiently clear to permit the imposition of a penalty greater than the statutory maximum for a single violation. The court pointed out that neither the statute nor the regulation addressed the question of whether the notice requirement was a one-time violation or a continuing violation. The court emphasized that there were no specific time periods in the statute or regulation and that Trident's only obligation under the clear language of the regulation then in effect was to notify EPA before renovation began. The court said that this could reasonably be interpreted to mean that the only "day of violation" occurred on the day before Trident commenced renovation.

For this reason, the court in Trident distinguished cases under the Clean Water Act, i.e., Chesapeake Bay Foundation v. Gwaltney, 719 F.2d 304 (4th Cir. 1986), vacated on other grounds, 484 U.S. 49 (1987); and Sierra Club v. Simpkins Industries, Inc., 847 F.2d 1109 (4th Cir. 1988), cert. denied, 491 U.S. 904 (1989), which involved violations of permit limits shown by discharge

monitoring reports (DMRs) or failure to file DMRs which were due on a monthly or a quarterly basis. Like the penalty provision in the CAA, the penalty provision in the CWA applicable to judicially imposed penalties, 33 U.S.C. § 1319(d), provides for "a civil penalty not to exceed $25,000 [formerly $10,000] per day for each violation". In considering violations of monthly average permit limits, the court in Gwaltney reasoned that "where a violation is defined in terms of a time period longer than a day, the maximum penalty assessable for that violation should be defined in terms of the number of days in that time period". 719 F.2d at 314.

Like the situation in Trident, the violation here is not defined in terms longer than a day. The requirement is, however, that the results of the compliance calculations required by section 61.253 and the input parameters used in making the calculation for the calendar year be sent [mailed] to EPA by March 31 of the following year (section 61.254). This requirement cannot be fulfilled by simply providing EPA a notice, which could be given as late as one day prior to commencing the renovation, as in Trident and, recognizing the rule that ambiguities in a penalty regulatory scheme are to be resolved in favor of respondent, no reasonable basis has been advanced for the conclusion that failure to submit the report required herein

would or should be a one-day violation. Trident is therefore distinguishable.[8]

In any event, other decisions under the CAA, e.g., United States v. Hugo Key and Son, Inc., 731 F.Supp. 1135 (D.R.I. 1989), holding, inter alia, that a demolition contractor's failure to timely comply with an EPA information request constituted a 77-day violation of the Act; and United States v. A.A. Mactal Construction Co., Inc., 1992 U.S.Lexis 21790 (D.Kansas 1992), where violations were found to last approximately six weeks, have either assessed or laid the foundation for assessing a daily penalty as long as the violations were shown to persist.[9] Multi-day penalties have also been assessed under other statutes authorizing a "per day penalty for each violation", e.g., Atlantic States Legal Foundation v. Tyson Foods, Inc., 897 F.2d 1128 (11th Cir. 1990) (CWA 33 U.S.C. § 1319(d), daily maximum

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[8] In Simpkins Industries, supra the Fourth Circuit upheld the assessment of penalties from the beginning of the permit period even though DMRs were not required to be submitted until the end of the quarter, because defendant had taken no action to perform necessary monitoring and sampling.

[9] The Agency's Clean Air Act Stationary Source Civil Penalty Policy (October 25, 1991) assumes without analysis that a penalty may be assessed for each day a violation continues. For example, it provides in part "...violations should be assumed to be continuous from the first provable date of violation until the source demonstrates compliance..." (Id 11). This policy is clearly applicable to situations involving failure to provide EPA with notice, e.g., Appendix III, Asbestos Demolition and Renovation.

penalty applies separately to each violation of an express limitation); United States v. Ekco Housewares, Inc., 62 F.3rd 806 (6th Cir. 1995) (RCRA, 42 U.S.C. § 6928, mere cessation of discharge of hazardous waste into an impoundment was not cessation of operation and Ekco was subject to daily penalties for failure to comply with financial responsibility requirements); and In re Mobil Oil Corporation, EPCRA Appeal No. 94-2 (September 29, 1994) (EPCRA 42 U.S.C. § 11045, Mobil assessed a daily penalty for failure to immediately report a release of sulfur dioxide as required by the Act).

Umetco also cites U.S. v. Toussie, 397 US 112 (1970), to support its contention that the reporting violation at issue here is not a "continuing offense" for which daily penalties may accrue. The Supreme Court, in Toussie, held that a defendant's failure to register for the draft within five days of his 18th birthday, as required by the Universal Military Training and Service Act (UMTSA), was not a continuing offense. As a result, the defendant could not be prosecuted for failure to register eight years later, because the applicable statute of limitations had expired. The court pointed out that, although a regulation provided that registration was a continuing duty, there was nothing in the UMTSA so providing and ruled that nothing inherent in the act of registration makes the failure to do so a continuing crime. The court held that the crime was complete once the defendant passed his 18th birthday and failed to register within five days thereafter, and that, because criminal

limitations statutes are to be liberally interpreted in favor of repose, an offense should not be construed as continuing, unless the language of the statute compels such a conclusion or unless the nature of the crime is such that Congress must assuredly have intended that it be treated as a continuing one.

Toussie is not controlling here, because the criteria for determining whether an offense is one-time or continuing for the purpose of the statute of limitations in a criminal case are not necessarily determinative of whether an obligation is continuing for the purpose of determining damages or assessing a penalty. See, e.g., Beatty v. Washington Metropolitan Area Transit Authority, 860 F.2d 1117 (D.C. Cir. 1988) (a nuisance may be classified as permanent for the purpose of assessing damages and "continuing" for the purpose of determining whether the statute of limitations has run). See also United States v. Advance Machine Company, 547 F.Supp. 1085 (D.Minn. 1982) (obligation of defendant to report a product defect which could create a substantial safety hazard under Consumer Product Safety Act, 15 U.S.C. § 2604(b), held to be continuing and statute of limitations did not begin to run until report was filed or defendant had actual knowledge that Commission was adequately informed).

In United States v. ITT Continental Baking Co., 420 U.S. 223 (1975), the court construed a consent order and provisions of the Clayton and Federal Trade Commission Acts (15 U.S.C. §§ 21(l) and 45(l)) providing that "Each separate violation of such order

[of the Commission] shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense." The court held that "acquiring" as used in the consent order meant not only the initial act of obtaining the assets, but also their retention and use and, accordingly, held that the violation was continuing and that daily penalties could be imposed. This holding is relevant here because one of the bases of the decision was the conclusion that in providing for a per day offense, Congress intended to provide a meaningful deterrent to violations of Commission orders. The court did not refer to Toussie, apparently finding it not relevant.

Another case cited by Umetco is United States v. Telluride Company, 884 F.Supp. 404 (D.Colo. 1995), an action under the Clean Water Act where the court held that the statute of limitations as to an alleged unpermitted discharge of fill material into wetlands ran from the date of discharge, and rejected the government's argument that the violation continued as long as the adverse affects of the unpermitted material continued. The court relied on cases such as McDougal v. Imperial County, 942 F.2d 668 (9th Cir. 1991), which hold that the continuing violation doctrine requires a showing of continuing unlawful acts rather than mere impact from past

violations.[10] Additionally, the court cited United Airlines, Inc. v. Evans, 431 U.S. 553 (1977), a Civil Rights Act case, in which the plaintiff, who was dismissed when she married, claimed upon her reinstatement that the denial of seniority benefits during the period she was prevented from working was a continuing violation for the purpose of the statute of limitations. The Supreme Court rejected this claim, holding that the emphasis should not be placed upon mere continuity, rather the critical question was whether any present violation exists.

Among the violations at issue In re Lazarus, Incorporated, Docket No. TSCA-V-C-32-93, 1995 TSCA Lexis 11 (Initial Decision, May 25, 1995), was respondent's failure to register PCB transformers with the local fire department having jurisdiction on or before December 1, 1985, as required by regulation, 40 C.F.R. § 761.30(a)(1)(vi). Respondent's argument that assessment of a penalty for this violation was barred by the statute of

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[10] It is clear that a violation which is not continuing for the purpose of the statute of limitations may be regarded as continuing for other purposes. See, e.g., Sasser v. Administrator U.S. EPA, 990 F.2d 127 (4th Cir. 1993), cited and distinguished in Telluride supra, where the court, for the purpose of finding EPA jurisdiction to assess a penalty administratively, held that each day the pollutant remains in the wetlands without a permit constitutes an additional day of violation, the initial discharge having been made prior to the enactment of an amendment to the CWA (Pub.L. 95-217, Feb. 4, 1987), which provided for administrative penalties for violations of the Act.

limitations, because it was a one-time violation [obligation] which expired on December 1, 1985, was rejected, the ALJ reasoning that the risks the rule was intended to prevent, i.e., that fire response personnel would not be informed of the presence and location of PCBs, continued as long as the transformers were not registered. Accordingly, he concluded that the duty to register the transformers was a continuing one. A different conclusion was reached as to the requirement imposed by 40 C.F.R. §§ 761.30(a)(1)(ix) and (a)(1)(xii) that transformers in use or stored for reuse be inspected at least once every three months and that records of such inspections and maintenance history be maintained for at least three years after disposing of the transformers. The ALJ ruled that the failure to maintain records could not be considered apart from the failure to inspect and, although the obligation to inspect in each quarterly period was continuing, that obligation was complete upon the expiration of a quarterly period [at which time the statute of limitations commenced to run].

From the foregoing, it is apparent that whether an obligation is complete for the purpose of the statute of limitations is not determinative of the question of whether daily penalties may be assessed for the violation of that obligation. The purpose of requiring radon flux measurements and the submission of a report by March 31 of the measurements and compliance calculations for the preceding calendar year is to demonstrate compliance with the Radon-222 emissions standard set

forth in 40 C.F.R. § 61.252 or former § 61.222. The violation is complete for the purpose of commencing the running of the statutory period for enforcement after March 31 without the required report having been sent to EPA. The obligation to demonstrate compliance, like the obligation to inspect PCB transformers at least once each quarter in Lazarus, may, however, reasonably be regarded as continuing until the next annual report is due. In any event, Umetco, which under the Act (42 U.S.C. § 7413(e)(2)), has the burden of proving that the violation is "not continuing in nature" has not carried this burden. It is concluded that Umetco could be assessed a penalty of up to $25,000 per day not to exceed the statutory maximum of $200,000 as an administrative penalty (42 U.S.C. § 7413(d)(1)) for the violation shown here, it appearing that the first date of violation occurred no more than 12 months prior to filing of the complaint. Umetco's motion will therefore be denied.

Umetco has alleged that weather conditions during all or part of the relevant time period precluded taking radon flux measurements and there appears to be a dispute as to whether EPA representatives agreed to accept a report submitted on July 29, 1991, as compliance with the report required for 1990. In view thereof, and because determination of a penalty on a motion is seldom, if ever, appropriate, this matter will be scheduled for hearing.

ORDER

Umetco's motion for an accelerated decision that the failure to comply with the reporting requirement at issue here is a one-time or one-day violation for which the maximum penalty is $25,000 is denied. The parties will submit any supplemental prehearing exchanges containing updated lists of witnesses, summaries of expected testimony, and additional proposed exhibits on or before April 26, 1996.[11/]

Dated this 29th day of March 1996.

Spencer T. Nissen
Administrative Law Judge

11/ In the near future, I will be In telephonic contact with counsel for the purpose of scheduling a time and location for hearing.

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER DENYING RESPONDENT'S MOTION FOR ACCELERATED DECISION**, dated March 29, 1996, in re: Umetco Minerals Corporation, Dkt. No. CAA-(113)-VIII-92-03, was mailed to the Regional Hearing Clerk, Reg. VIII, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
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DATE: March 29, 1996

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