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FILED

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CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
TOLEDO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,

Case No. 3:95 CV 7044

Plaintiff,

-vs-

JUDGMENT ENTRY

HOGE LUMBER COMPANY,

Defendant.

KATZ, J.

For the reasons stated in the Memorandum Opinion filed contemporaneously with this entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the United States' motion for summary judgment (Doc. No. 34) is granted.

FURTHER ORDERED that the State of Ohio's motion for summary judgment (Doc. No. 36) is granted.

FURTHER ORDERED that Defendant's motion to continue the trial date (Doc. No. 56) is denied as moot.



DAVID A. KATZ
UNITED STATES DISTRICT JUDGE

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UNITED STATES OF AMERICA,

Case No. 3:95 CV 7044.

Plaintiff,

-vs-

MEMORANDUM OPINION

HOGE LUMBER COMPANY,

Defendant.

KATZ, J.

This action is before the Court on the United States' and the State of Ohio's motion for summary judgment on the issue of liability. Defendant Hoge Lumber Company submits its opposition and the Plaintiffs have submitted their replies thereto. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. §§ 7413(b) and 7604(a).

BACKGROUND

Defendant Hoge Lumber Company ("Hoge") is located in New Knoxville, Ohio, where it owns and operates a wood products manufacturing facility. As a result of its wood manufacturing process and since the beginning of its operations in 1940, Hoge burns its wood waste. In July 1980, Hoge purchased Boiler B004 to replace two other boilers as part of a replacement power

plant which run its facility. Boiler B004, at the time of its purchase by Hoge, was a used boiler. In December 1985, Hoge commenced the startup of Boiler B004 and experienced recurring problems resulting in delays. However, by October 1986, the power plant was operating at capacity.

Boiler B004 and its resultant operations caused and continue to cause particulate matter to be emitted into the air. It is the Government's contention that excess emissions from Boiler B004 violate portions of the Clean Air Act, 42 U.S.C. § 7413(b) and the State of Ohio's Implementation Plan ("SIP"). Specifically, the Government asserts that since the date of its installation, Boiler B004 operates and continues to operate without a permit. Next, emissions of particulate matter from Boiler B004 violated and continue to violate the general emissions limits in the Ohio SIP. Further, the Government alleges that the emissions from Boiler B004 violate and continue to violate the specific emissions limit in the "Permit to Install" granted to Boiler B004.

The State of Ohio ("Ohio") also asserts violation of the Clean Air Act as brought under a citizen's suit. Ohio also alleges Hoge never procured a Permit to Operate and that Boiler B004 operates in excess of emission limits under both the general limitations and specific limitations as listed under O.A.C. § 3745-17-10(C)(2) and § 3745-31-05.

MOTION FOR SUMMARY JUDGMENT

As an initial matter, the Court sets forth the relative burdens of the parties once a motion for summary judgment is made. Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Of course, the moving party always bears the initial responsibility of informing

the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" which it believes demonstrate the absence of a genuine issue of material fact. 477 U.S. at 323. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting Fed. R. Civ. P. 56(e)).

Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient to "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 476 U.S. 574, 586 (1986). Rather, Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. *Celotex Corp.*, 477 U.S. at 324. Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

THE CLEAN AIR ACT

Under the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, the call for "national ambient air quality standards ("NAAQS")" was set forth for various pollutants for the purpose of protecting the public health and welfare. 42 U.S.C. § 7409(a). In accordance with federal regulations, the United States Environmental Protection Agency ("EPA") has approved portions of the State of Ohio's State Implementation Plan ("SIP") with regard to the implementation, maintenance and enforcement of NAAQS which allows for enforcement under federal law. *See* 42 U.S.C. § 7413

and § 7604.

The first provision of the Ohio SIP at issue is based upon O.A.C. § 3745-35-02¹ which governs permits to operate air contaminant sources and the application process for such permits. The second provision of the Ohio SIP relevant to this case is O.A.C. § 3745-17-10² which regulates emissions of particulate matter with regard to fuel burning equipment and references the general emission limitations. The third Ohio SIP provision at issue concerns O.A.C. § 3745-31-05,³ which addresses permits to install an air contaminant source and allows a particulate limitation to be designated.

The general particulate matter emissions limitation for fuel burning equipment located in Auglaize County, Ohio and having a maximum heat input of 55 matter per million British Thermal Unit ("lb/MMBTU"), is emit no more than 0.36 lbs of particulate MMBTU of heat input. At the time the permit to install was granted, the specific particulate matter emissions limitation was 0.20 lb/MMBTU of heat input. These particulate matter limitations are not contested as incorrect by Hoge.

Under the civil judicial enforcement provision, each violation of a SIP subjects the violator to injunctive relief and a civil penalty of not more than \$25,000 per day for each violation. 42

¹ Ohio's Permit to Operate rules set forth in O.A.C. § 3745-35-01, 02, 03, and 04 were approved on June 10, 1982 by the U.S. EPA. See 40 C.F.R. § 52.1873 (1996).

² Ohio's revisions to the particulate matter emission limitations as stated in O.A.C. § 3745-17-10 were approved by the U.S. EPA on May 27, 1994 as set forth in 59 Fed. Reg. 27464.

³ Ohio's Permit to Install rules set forth in O.A.C. § 3745-31-05 were approved on October 30, 1980 by the U.S. EPA, 45 Fed. Reg. 72119 and subsequent changes to certain portions of the rule were approved on September 8, 1993, 58 Fed. Reg. 47214.

U.S.C. § 7413(b). The burden of proof in an enforcement proceeding under the Clean Air Act lies with the government. *Getty Oil Co. (Eastern Operations), Inc. v. Ruckelshaus*, 467 F.2d 349, 357 (3rd Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). Both the United States and the State of Ohio seek summary judgment on the issue of liability as to each of the three O.A.C. provisions. In addition, the State of Ohio seeks liability for violations of those provisions as they pertain to their state law claims pursuant to Ohio Rev. Code §3704.05(A) and (H)⁴.

A. Failure To Obtain a Permit to Operate under Ohio's SIP.

Under 42 U.S.C. § 7413(b):

The Administrator shall, as appropriate, in the case of any person that is the owner or operator of an affected source, a major emitting facility, or a major stationary source, *and may, in the case of any other person*, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than \$25,000 per day for each violation, or both, in any of the following

⁴ (A) No person shall cause, permit, or allow emission of an air contaminant in violation of any rule adopted by the director of environmental protection under division (E) of section 3704.03 of the Revised Code unless the person is the holder of a variance that is issued under division (F) of that section and consistent with the federal Clean Air Act permitting the emission of the contaminant in excess of that permitted by the rule of the person is the holder of an operating permit that includes a compliance schedule issued pursuant to rules adopted under division (G) of section 3704.03 of the Revised Code.

* * *

(H) No person shall do any of the following:

(1) Falsify any plans, specifications, data, reports, records, or other information required to be kept or submitted to the director by this chapter or rules adopted under it;

(2) Make any false material statement, representation, or certification in any form, notice, or report required by the Title V permit program;

(3) Render inaccurate any monitoring device required by a Title V permit.

Violation of division (H) (1), (2), or (3) of this section is not also falsification under section 2921.13 of the Revised Code.

instances:

(1) Whenever such person has violated, or is in violation of, any requirement or prohibition of an applicable implementation plan or permit. . .

(Emphasis added.)

As noted previously, Ohio's SIP has, in pertinent parts, been approved by the U.S. EPA and, therefore, meets the definition of an applicable implementation plan. Applying the requirements under the judicial enforcement section of the statute, Hoge, for purposes of this litigation, has admitted that it is a person as defined under 42 U.S.C. § 7602(e) and under Ohio's applicable SIP rules as reflected in its response to the Government's request for admissions.

Hoge's objection related the Government's alleged mischaracterization of the facility as a "major stationary source" is, for the purposes of this case, irrelevant. Because the violations against the Defendant are made under the applicable Ohio SIP rules and the definitions thereunder apply, it is of little moment whether in this action Hoge is considered a "major stationary source" under the federal regulations.

Under O.A.C. § 3745-35-02(A):

No person may cause, permit, or allow the operation or other use of any air contaminant source without applying for and obtaining a permit to operate from the director in accordance with the requirements of this rule except . . .

The Government asserts and Hoge concedes that it never had a Permit to Operate Boiler B004 "since the startup of the boiler in December, 1985, and for every day of operation since that date."

(Response to the United States' First Request for Admissions at No. 23.) Hoge does not assert that it falls under one of the exceptions to 3745-35-02. Therefore, the Court finds that both the United States and Ohio have demonstrated that Hoge operated Boiler B004 in violation of O.A.C. § 3745-35-02 and as part of Ohio's SIP rules, as federally approved by the U.S. EPA under the

~~Clean Air Act. Similarly, Ohio has demonstrated Hoge's violation of O.R.C. § 3704.05 for operating its boiler without a Permit to Install. Accordingly, Plaintiffs are granted summary judgment as to liability on these claims.~~

B. Violations of Emissions Limits.

1. Stack Tests on Boiler B004.

Defendant Hoge engaged Envisage Environmental Incorporated ("Envisage") to perform a series of eight stack tests between April 1986 and October 1995. Of the eight stack tests⁵ performed, Hoge takes issue with the tests performed, for its benefit, on December 10, 1986, October 9, 1987, and May 16, 1995.

Regarding the test performed on December 1986, Hoge asserts that this result should be disregarded as the Government acknowledged that one of the test runs was not performed at "representative conditions" and therefore, should invalidate the test results. In response, the United States correctly notes that four test runs were performed, with the second run being discounted by the Plaintiff in determining Hoge's non-compliance. As noted by Plaintiff's environmental engineer, the second run was discounted because the isokinetic rate exceeded the acceptable range of 90-110 percent, with the isokinetic rate for the second run at 121.4 percent. (Hall Affidavit at ¶¶ D and E.) That issue aside, there were three other test runs which were within the acceptable range and which demonstrated that Hoge's emissions nevertheless, were above both the general and specific emissions limits under Ohio's regulations.

⁵ The stack tests were conducted on the following dates: (1) April 10, 1996; (2) December 10 or 11, 1986; (3) October 9, 1987; (4) April 11, 1991; (5) May 9, 1991; (6) March 7, 1995; (7) May 16, 1995; and (8) October 10, 1995.

Next, Hoge contends that the October 9, 1987 test performed by Envisage and relied upon by the Plaintiffs is invalid as there were only two test runs. Under 40 C.F.R. § 60.8(f):

Unless otherwise specified in the applicable subpart, each performance test shall consist of three separate runs using the applicable test method. Each run shall be conducted for the time and under the conditions specified in the applicable standard. For the purpose of determining compliance with an applicable standard, the arithmetic means of result of the three runs shall apply. In the event that a sample is accidentally lost or conditions occur in which one of the three runs must be discontinued because of forced shutdown, failure of an irreplaceable portion of the sample train, extreme meteorological conditions, or other circumstances, beyond the owner or operator's control, compliance may, upon the Administrator's approval, be determined using the arithmetic mean of the results of the two other runs.

Envisage's report of the October 9, 1987 test, however, indicated problems during the testing as follows:

Test results indicate particulate emission emanating from wood chip fired boiler exceed Ohio Air Pollution regulatory limits. Efforts were made on October 9, 1987 to conduct particulate emission testing utilizing EPA methods 1-5. However, Envisage personnel had difficulties conducting emission tests under controlled conditions. For example, there are no controls to determine fuel consumption rate, consequently constant and a known fuel feed rate is non-existent. Fuel consistency is also unattainable. There is a flux of fuel type delivered to the boiler at any given time depending on the production throughout the plant.

(United States' Exhibit at Appendix 1i, p. 6.) Considering Envisage's account of the testing problems it seems that "other circumstances," as noted in 40 C.F.R. § 60.8(f), required the Hoge's tester to submit its results relying upon two test runs. Therefore, Hoge's objections to its own October 1987 test results as being invalid are not well taken.

Hoge also contests the test results conducted on May 16, 1995 did not reflect the "representative performance" as this is a term without definition and as such, is a genuine issue of material fact. As noted by the Plaintiffs, this Circuit in *Stone Container Corp. v. U.S.*

Environmental Protection Agency, No. 96-3479, 1996 WL 724375 (6th Cir., Dec. 16, 1996) held that the "history of 40 C.F.R. § 60.8(c) strongly suggests that the regulation was intended to allow the EPA to order regulated facilities to conduct performance tests at their *maximum rated capacities*." Opinion at p.5 (emphasis added). See also Hall Affidavit at ¶ 7. Hoge's assertions that "representative performance" has not been defined is therefore without merit.

The United States argues that because the steam loads during the first and second test runs in May 1995 were at a lower capacity than the third test run, had the steam loads been at the maximum capacity the results would have shown a violation of the general emissions standard. (Hall Affidavit at ¶ 7B.) The Plaintiffs request that the Court find a violation of both the general and specific emissions violation for the May 1995 test. Defendant does not tender a specific opposition to this argument other than its general opposition that all three of the above stated tests were invalid and not run under "representative performance." The record demonstrates that the May 1995 test determined compliance with the general emission limitation but a violation of the specific emission limitation as set forth in the Permit to Operate. However, the United States has submitted un rebutted evidence to the effect that had all three May 1995 test runs been run at the facilities' maximum rated ability, the general emission limitation would have also been violated. (*Id.*)

The undisputed facts indicate that three test runs were performed on May 16, 1995. During the first test run, Boiler B004 was operated at a steam load of 24,761 lbs/hr. which translates to 55% of its capacity and which demonstrated an emission rate of .2395 lb/MMBTU. The second test run was operated at 32,903 lbs/hr. or at 73% of capacity with an emission rate of .2773 lb/MMBTU. The third test run was completed at 35,238 lbs./hr. or 78% of capacity for an

emission rate of .3966 lb/MMBTU. The last test run was completed at 22% less than the maximum capacity and still violated both the general and specific emission standard. Based upon the un rebutted affidavit of the United States' engineer, the Court finds that even construing the evidence in the light most favorable to the non-movant, it is clear that had all the test runs been performed at or near maximum capacity, they would have demonstrated violations of both general and specific emissions limits. Therefore, Court will grant Plaintiffs summary judgment on both ~~specific and general emissions violations.~~

2. Continuing Violations.

Under 42 U.S.C. § 7413(e)(2), the penalty assessment criteria includes a presumption of a continuing violation as follows:

[W]here the Administrator or an air pollution plaintiff makes a prima facie showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice, the days of violation shall be presumed to include the date of such notice 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.

Hoge does not dispute that the notice of violations were issued on February 28, 1992 by the United States and on February 13, 1989 by the Ohio EPA. While this Court has already granted summary judgment on liability regarding Boiler B004's operation beginning on April 10, 1986, Plaintiffs also seek summary judgment on the issue of continuing violations for the time period commencing after January 1990.

Apart from the stack tests referenced above, the Plaintiffs also rely upon the deposition of Hoge's Rule 30(b)(6) representative, during which he conceded that the boiler was not operating

in compliance and expressed pessimism that it could ever achieve the .20 lb/MMBTU specific emissions limitation. (Hoge Deposition Vol. II at pp. 195.) Hoge has not presented any evidence which demonstrates that a genuine issue of material fact exists with regard to "intervening days during which no violation occurred or that the violation was not continuing in nature." 42 U.S.C. § 7413(e)(2). Given the evidence presented by the Plaintiffs, the Court finds that Plaintiffs have established a *prima facie* case of continuing violations which has not been rebutted by the Defendant. Accordingly, Plaintiffs are granted summary judgment on the issue of continuing violations under 42 U.S.C. § 7413(e)(2). However, this finding is for the Court's consideration during the penalty phase of this litigation and only goes to those days which the Plaintiffs can establish Boiler B004 was in operation.

C. No Due Process Violations.

Defendant argues that the presumption regarding the continuous violation violates his due process rights under the Fourteenth Amendment as it requires a defendant to rebut a presumption. This Court disagrees. The presumption under 42 U.S.C. § 7413(e)(2), once established by the plaintiff, merely establishes a *rebuttable* presumption which may then be overcome by the defendant. Should the defendant present evidence to overcome the presumption, the burden shifts back to the plaintiff to establish that such violations did in fact occur. In this case, Hoge cites no authority in support of its position nor has it presented evidence to rebut the Plaintiffs' evidence in support of their *prima facie* case.

Next, Hoge argues that the penalty portion of the statute is punitive or quasi-criminal in nature as it seeks to impose a penalty of up to \$25,000 a day per violation. 42 U.S.C. § 7413(b). The Supreme Court in *United States v. Ward*, 448 U.S. 242 (1980), held that a civil penalty

provision under Section 311(b)(3) of the Clean Water Act was civil in nature and does not trigger protections afforded by the Constitution to a criminal defendant. *Id.* at 250-51. Applying the same analysis utilized by the Court in *Ward, supra*, it is clear that this penalty is labeled as a civil penalty. Furthermore, it is not rendered for the purpose of punishment as it requires a court to consider the size of the business, the economic impact of the penalty on the business, good faith efforts to comply, etc., before the court assesses a monetary penalty. *See also, United States v. Nevada Power Company*, 1990 WL 149660 (D. Nev. June 1, 1990). Therefore, Defendant's constitutional arguments regarding the presumption of continuing violations are not well taken.

CONCLUSION

For the reasons stated above, the United States' and State of Ohio's motions for summary judgment are granted on the issue of liability. Defendant's motion to continue the trial date is denied as moot.

IT IS SO ORDERED.



DAVID A. KATZ
UNITED STATES DISTRICT JUDGE



**Attorney General
Betty D. Montgomery**

MEMORANDUM

TO: All EES Attorneys
FROM: April R. Bott, AAG, EES *April*
DATE: May 19, 1997
SUBJECT: Summary Judgment on Liability - Air

Please find attached a decision from the United States District Court for the Northern District of Ohio - Western Division in which the court gave the State and the U.S. summary judgment on liability in an air case.

Summary judgment, in this case included:

- (1) the determination that a boiler violated both its permit and SIP limits and;
- (2) the violations must be considered continuous because the governments made a prima facie showing of the continuous violations and defendant failed to present any evidence to the contrary.

I have the summary judgment motions and response if anyone wants to take a look at them.