UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
CITY OF ORLANDO, FL,	)	**DOCKET NO. CWA-04-501-99**
	)	
	)	
RESPONDENT	)	

ORDER DENYING MOTION TO DISMISS

The complaint in this action, initiated by the Director of the Water Management Division, United States Environmental Protection Agency, Region IV ("Complainant"), pursuant to Section 309(g)(2)(B) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1319(g)(2)(B), on March 12, 1999, charged Respondent, City of Orlando (the "City"), with the unlawful use or disposal of sewage sludge in violation of Section 405(e) of the Act, 33 U.S.C § 1345(e). Specifically, the complaint alleged that the City disposed of 136.44 dry metric tons of sewage sludge on land in 1997 in which molybdenum concentrations in samples of the sludge exceeded ceiling concentrations set forth in Table 1 of 40 C.F.R. § 503.13.[1/] Land

[1/] The ceiling concentration for molybdenum in Table 1 of § 503.13 is 75 milligrams per kilogram (mg/kg) on a dry weight basis. The complaint alleged that the City's annual sludge report, submitted on March 3, 1998, reflected molybdenum concentrations in samples taken on January 8, 1997, February 6, 1997, March 4, 1997, and April 9, 1997, were 77.5 mg/kg, 96.4 mg/kg, 84.3 mg/kg, (continued...)

disposal of sludge at concentrations in excess of those shown in the table is prohibited by 40 C.F.R. § 503.13(a)(1).[2/] This alleged violation was based on the "annual sludge report," required by 40 C.F.R. § 503.18(a), submitted by the City on March 3, 1998. For this alleged violation, Complainant proposed to assess the City a penalty of $60,000.

The City's answer, filed on April 12, 1999, raised certain affirmative defenses, including that the Complainant failed to consider an appropriate margin of error as to test results. The City contended that the proposed penalty was arbitrary and excessive and requested a hearing.

Complainant filed a motion for a default order on May 26, 1999, contending that the answer to the complaint was not timely filed. On June 18, 1999, while the motion for a default order was pending, Complainant filed a motion to amend the complaint. The motion was not accompanied by a copy of the proposed amended

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[1/] (...continued)
and 90.6 mg/kg, respectively.

[2/] The regulation at 40 C.F.R. § 503.13(a) "Sewage sludge" provides in pertinent part that "(1)Bulk sewage sludge or sewage sludge sold or given away in a bag or other container shall not be applied to the land if the concentration of any pollutant in the sewage sludge exceeds the ceiling concentration for the pollutant in Table 1 of § 503.13. (2) If bulk sewage sludge is applied to agricultural land, forest, a public contract site, or a reclamation site, either: (i) the cumulative loading rate for each pollutant shall not exceed the cumulative pollutant loading rate for each pollutant in Table 2 of § 503.13; or (ii) the concentration of each pollutant in the sewage sludge shall not exceed the concentration for the pollutant in Table 3 of § 503.13."

complaint. Complainant's motion for a default order was determined to be lacking in merit and was denied by an order, dated July 7, 1999. On July 13, 1999, Complainant filed its proposed amended complaint, adding charges for land disposal of sewage sludge having molybdenum concentrations in excess of that specified in the table at 40 C.F.R. § 503.13(b)(1) based on sludge reports submitted by the City on February 6, 1995, and February 15, 1996. The amended complaint proposed to increase the penalty to $90,000.

Over the City's opposition, the motion to amend the complaint was granted by an order, dated August 24, 1999. The order directed the City to file an answer to the amended complaint within 20 days after service of the order and directed the parties to file initial or amended prehearing exchanges within 20 days after the City had filed its answer.

Instead of filing an answer, the City, on September 17, 1999, filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 22.16 of the Consolidated Rules of Practice (40 C.F.R. Part 22)[3/] and Rule 12(b)of the Federal Rules of Civil Procedure.

Section 503.11(e) defines "bulk sewage sludge" as sewage sludge that is not sold or given away in a bag or other container

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[3/] Revisions to the Consolidated Rules of Practice were promulgated on July 23, 1999. 64 Fed. Reg. 40,137 (1999). Although the revisions were effective August 23, 1999, proceedings commenced prior to that date are subject to the rules as revised unless to do so would result in substantial injustice.

for application to the land. The City points out that the only regulation pertinent to bulk sewage sludge which it is alleged to have violated is 40 C.F.R. § 503.13(a)(1) (Motion at 2). The City emphasizes that the complaint does not refer to 40 C.F.R. § 503.10, and, in particular to § 503.10(b)(1).[4/] According to the City, the fact that ¶ 14 of the complaint alleges that a violation occurred each time bulk sewage sludge having a molybdenum concentration in excess of that in Table 1 at § 503.13 was applied to land and does not allege a violation of any other section of the regulation is fatal to the complaint, because § 503.13(b)(1) is inapplicable by virtue of § 503.10(b)(1).

Section 503.10(b)(1) provides in pertinent part: "(t)he general requirements in § 503.12 and the management practices in § 503.14 do not apply when bulk sewage sludge is applied to land if the bulk sewage sludge meets the pollutant concentrations in § 503.13(b)(3)....." (supra, note 4). Molybdenum is not listed as a pollutant in Table 3 at § 503.13(b)(3), nor is it listed in § 503.32 entitled "Pathogens" or § 503.33 entitled "Vector attraction reduction."[5/]

[4/] Section 503.10(b)(1) provides: "[t]he general requirements in § 503.12 and the management practices in § 503.14 do not apply when bulk sewage sludge is applied to the land if the bulk sewage sludge meets the pollutant concentrations in § 503.13(b)(3), the Class A pathogen requirements in § 503.32(a), and one of the vector attraction reduction requirements in § 503.33(b)(1) through (b)(8)."

[5/] The regulation has been amended to eliminate molybdenum as
(continued...)

The City also points out that the complaint does not allege that any more stringent requirements for the use or disposal of sewage sludge necessary to protect public health and the environment were imposed on the City pursuant to 40 C.F.R. § 503.5(a) or (b).[6/] Pointing to § 503.17 entitled "Recordkeeping", the City notes that only one of the fifteen requirements for certification statements by parties who prepare, derive, apply, or place sewage sludge or septage, or own property upon which surface disposal occurs refers to Table 1 of § 503.13, that is, § 503.17(a)(5)(i)(A).[7/] The City emphasizes that this subsection does not require the accompanying certification statement to incorporate

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[5/] (...continued)
a pollutant in Tables 2, 3, and 4 of § 503.13 (59 Fed. Reg. 9095, February 25, 1994). The molybdenum ceiling concentration of 75 mg/kg was, however, retained in Table 1 of § 503.13.

[6/] Motion at 3. Section 503.5(a) provides that "[o]n a case-by-case basis, the presiding authority may impose requirements for the use or disposal of sewage sludge in addition to or more stringent than the requirements in this part when necessary to protect public health and the environment from any adverse effect of a pollutant in the sewage sludge."

Section 503.5(b) provides that "[n]othing in this part precludes a State or political subdivision thereof or interstate agency from imposing requirements for the use or disposal of sewage sludge more stringent than the requirements in this part or from imposing additional requirements for the use or disposal of sewage sludge."

[7/] Section 503.17(a)(5) provides in pertinent part: If the requirements in § 503.13(a)(2)(i) are met when bulk sewage sludge is applied to agricultural land, forest, a public contract site, or a reclamation site: (i) The person who prepares the bulk sewage sludge shall develop the following information and shall retain the information for five years: (A) The concentration of each pollutant listed in Table 1 of § 503.13 in the bulk sewage sludge.

the reference to Table 1, and that the reference to Table 1 only requires that the information be developed and retained for five years. It is noted, however, that § 503.16 entitled "Frequency of monitoring" refers to the frequency of monitoring for, inter alia, the pollutants listed in Tables 1, 2, 3, and 4 of § 503.13.

The City says that the Agency recognized the regulatory dilemma created by § 503.10)(b)(1) as early as October 25, 1995, when, among other things, it proposed to specifically incorporate the table at § 503.13(b)(1)into the section "Applicability" at § 503.10(b)(1)[8/] Under the proposal, § 503.10(b) would be amended to read:

> (1)Bulk sewage sludge. The general requirements in § 503.12 and the management practices in § 503.14 do not apply when bulk sewage sludge is applied to land if the bulk sewage sludge meets the ceiling concentrations in Table 1 of § 503.13 and the pollutant concentrations in

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[8/] On October 25, 1995, the Agency issued a proposed rule, referring to standards, promulgated on November 25, 1992, for the use or disposal of sewage sludge (40 C.F.R. Parts 257, 403 and 503) and proposed amendments to, inter alia, "clarify existing regulatory requirements," 60 Fed. Reg. 54771 (October 25, 1995). The preamble to the proposed rule, 60 Fed. Reg. at 54773, provided in pertinent part:

> A. Ceiling Concentration Limits-Land Application
>
> Today's notice would amend the applicability section of the land application requirements to clarify that the ceiling concentration limits apply to all sewage sludge that is land applied. While § 503.13(a)(1) requires that all land-applied sewage sludge must meet the ceiling concentration limits in Table 1 of § 503.13, the current language in § 503.10(b)(1), (c)(1), (d), (e), (f), and (g) does not expressly require meeting the ceiling concentration limits. The proposed amendment would remove any ambiguity about the obligation to comply with the ceiling concentration limits for land-applied sewage sludge.

> Table 3 of § 503.13; the Class A pathogen requirements in § 503.32(a); and one of the vector attraction reduction requirements in § 503.33(b)(1) through (b)(8) or an equivalent vector attraction reduction requirement as determined by the permitting authority.

These and other changes were finalized on August 4, 1999, effective September 3, 1999 (64 Fed. Reg. 42552, 42573 at 42658, August 4, 1999). Because the amendment to the regulation was not finalized until after the time of the violations alleged in the complaint, the City argues that the regulation is not applicable and that the complaint should be dismissed.

Complainant's Response

In its response to the City's Motion to Dismiss, dated September 29, 1999, Complainant points out that the City filed its motion despite its disregard of the ALJ's order, dated August 24, 1999, that it file an answer to the amended complaint within 20 days of service of the order (Response at 1, 2).

Secondly, Complainant asserts that the standard for considering a motion to dismiss is whether the complaint sets forth a prima facie case and argues that a prima facie case has been established based on the record herein (Response at 3, 4). Complainant then proceeds to recite the allegations of the initial complaint and the City's answers thereto (Response at 4-7).

Regarding the City's argument that the complaint does not reference 40 C.F.R. § 503.10(b)(1), Bulk sewage sludge, Complainant

says it cannot ascertain the nexus between a provision which is not applicable and the City's motion to dismiss (Id. 7). Simply stated, Complainant emphasizes that § 503.10(b)(1) sets forth three conditions to the inapplicability of §§ 503.12 and 503.14, i.e., the bulk sewage meets the pollutant concentrations in § 503.13(b)(3), the Class A pathogen requirements in § 503.32(a), and one of the vector attraction reduction requirements in § 503.33(b)(1) through (b)(8). Complainant points out that the City has not even alleged that it complied with the three conditions. Moreover, Complainant asserts that annual reports submitted by the City do not document compliance with Class A pathogen requirements and do not include certification statements that such requirements were met (Response at 9).

Complainant points out that in its amended complaint, it specifically charged the City with violations of 40 C.F.R. § 503.13(a) for disposal of bulk sewage sludge which exceeded the ceiling concentration for pollutants in Table 1 of § 503.13 by land application.

Regarding the City's assertion that the complaint does not allege that any more stringent requirements were imposed on the City pursuant to 40 C.F.R. § 503.5(a) or § 503.5(b), Complainant says that it is unaware of any more stringent conditions that would support a violation in this matter (Response at 10).

Addressing the City's argument that a "regulatory deficiency" existed during the entire time period that the Agency claims the alleged violations occurred, Complainant reiterates its assertion that the City did not attempt to show compliance with 40 C.F.R. Part 503 regulations in accordance with § 503.10 (Response at 11). According to Complainant, the data submitted by the City would not at present substantiate such a claim. Therefore, Complainant argues that the City's claim of "regulatory deficiency" does not provide a basis for the motion to dismiss, but may be used to supplement the allegation in its answer to the effect that an EPA publication contained misleading and ambiguous information as to molybdenum concentrations.[9/]

Respondent's Reply

The City's Reply, dated October 13, 1999, first addresses the Agency's complaint that the City has disregarded the ALJ's order,

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[9/] The City's answer at paragraph 8 referred to an EPA Publication "A Plain English Guide to the EPA Part 503 Biosolids Rule," Office of Wastewater Management (September 1994), and alleged that it contains misleading and ambiguous information regarding ceiling concentrations for Molybdenum and whether those ceiling concentrations had been deleted from 40 C.F.R. § 503. The reference apparently is to the cited publication at 2, which, referring to an amendment of the Part 503 rule effected on February 25, 1994 (59 FR 9095), states: The amendment made two changes. It deleted pollutant limits for molybdenum in biosolids applied to land but retained the molybdenum ceiling limits;.... Moreover, Table 2-1 at 29, referring to ceiling concentration limits for biosolids applied to land, states that as a result of the February 25 amendment to the rule concentration limits for molybdenum were deleted from the Part 503 rule, specifically referencing Table 1 of § 503.13.

dated August 24, 1999, that it file an answer to the amended complaint within 20 days of service of the order. The City asserts that because of the amended complaint the procedural posture of the case is as if the pleading process had begun anew. The City cites Rule 12(b) of the FRCP, which provides essentially that every defense in law or in fact to a claim for relief in any pleading shall be asserted in the responsive pleading, if one is required, except that listed defenses, including failure to state a claim upon which relief can be granted, may at the option of the pleader be made by motion (Reply at 1-3). Additionally, Rule 12(b) provides that a motion making any of the listed defenses shall be made by motion before pleading if a further pleading is permitted.

Next, the City addresses Complainant's contention that the motion to dismiss should be denied, because Complainant has established a prima facie case (Reply at 3-5).The City notes that Complainant's assertions in this regard are based upon the answer to the initial complaint, which is unavailing because "it is well established that the amended pleading supersedes the initial pleading" (Reply at 4), citing, inter alia, Wellness Community Nat. v. Wellness House, 70 F.3d 46, 49 (7th Cir. 1995); In Home Health v. Prudential Ins. Co. of America, 101 F.3d 600, 603 (8th Cir. 1996) and 6 C. Wright, A. Miller & Mary Kane, Federal Practice and Procedure § 1476 at 556-557. Accordingly, the City argues that Complainant's references to the original answer are to a pleading

that effectively does not exist and cannot be used against the City (Reply at 5).

Turning to the merits, the City avers that § 503.13(a), which references Table 1 at § 503.13(b)(1), was not applicable to the City's actions during the entire time period referred to in the amended complaint, and, therefore, no violation of the Act or regulation occurred.

The City points out that 40 C.F.R. Part 503 is entitled "Standards For the Use or Disposal of Sewage Sludge" and that Subpart B governs "Land Application" of sewage sludge. Section 503.10 entitled "Applicability" addresses the applicability of the regulations or conversely, exclusions therefrom. The City further notes that § 503.10(b)(1) is entitled "Bulk sewage sludge" and sets forth those situations when additional requirements, that is, general requirements in § 503.12 and management practices in § 503. 14 do not apply. To be excluded [from §§ 503.12 and 503.14], bulk sewage sludge applied to the land must meet pollutant concentrations in § 503.13(b)(3), Class A pathogen requirements in § 503.32(a), and one of eight approved vector attraction reduction requirements in § 503.33(b(1)-(8). The City emphasizes that nowhere in § 503.10 is there a reference or incorporation of § 503.13(b)(1) (Table 1), so as to be applied to exclusions contemplated under § 503.10 (Reply at 6).

The Agency amended the regulation on August 4, 1999, so as to include the ceiling concentrations in § 503.13(b)(1) as an additional requirement to qualify for an exclusion from §§ 503.12 and 503.14. The City refers to handout material furnished by EPA at a Water Federation Pre-Conference Workshop in New Orleans on October 9, 1999, which, referring to Final Rule Technical Amendments/Corrections to the Sewage Sludge Regulation at Part 503 (Reply Exh A), provides in pertinent part:

> (1) Clarify that land application ceiling concentration limits apply to all sewage sludge that is land applied. This language was unintentionally omitted from the applicability section in the land application subpart.

The City maintains that if a party does not qualify for an exclusion under § 503.10(b)(1), then the general requirements of § 503.12 and the management practices in § 503.14 do apply. (emphasis added). Referring to Complainant's assertion that the City did not comply with the Class A pathogen requirements in § 503.32(a) and, thus did not qualify for a § 503.10 exclusion, the City says that it agrees. The City points out, however, that §§ 503.12 and 503.14 do not require, incorporate, or mention § 503.13(a)(1) or the Table at § 503(b)(1), but that § 503.12 does refer to the cumulative pollutant loading rates (Table 2) in § 503.13(b)(2) at least eight times, 11 times if references to § 503.13(a)(2)(i), which refers to Table 2, are interpreted as references to Table 2. The only reference to a pollutant loading

rate in § 503.14 is at ¶ (e)(3) to Table 4 of § 503.13, which deals with bagged or containerized sludge and is therefore inapplicable (Reply at 7).

The City has summarized the general principles and rules of statutory [regulatory] construction which it maintains govern the disposition of its motion (Reply at 7, 8). (citations omitted) Firstly, the City says that penal statutes and statutes providing for civil penalties are strictly construed. Secondly, the City points out that ambiguities in statutes [and regulations] must be resolved in favor of the defendant [respondent]. Thirdly, the City alludes to the rule of statutory construction, i.e., that, if particular language is included in one section of a statute, but omitted in another, it must be assumed that Congress [or the drafter of the regulation] acted purposefully and intentionally in that regard. Fourthly, the City notes that the mention or expression of one thing in a statute implies the exclusion of another. Finally, the City points to the general rule that where a specific provision conflicts with a general provision, the specific provision governs and that a specific statute takes precedence over a general one, regardless of the sequence in time.

According to the City, application of the above principles to § 503.13(a)(2), the only paragraph in § 503.13(a) specifically dealing with application of bulk sewage sludge to agricultural land (supra note 1), leads to the conclusion that the general

prohibition in § 503.13(a)(1) of the application of sewage sludge to land, if the pollutant concentrations exceed those in Table 1, does not apply to agricultural land, which is the instant case. The City argues that the agricultural land category was thus subject to either the cumulative loading rate (Table 2) [of § 503.13(b)] or the pollutant concentrations set out in Table 3 [of § 503.13(b)], but in no event was Table 1 applicable (Reply at 8). According to the City, the above rules of interpretation applied to § 503.10, lead to the same result, i.e., the current charge cannot stand and the complaint should be dismissed.

The City notes that the Agency omitted [from § 503.(10)b)] required critical references to Table 1 at § 503.13.(b). Although the Agency considers that this omission has been rectified by the 1999 amendments to the regulation discussed above, the City emphasizes that it did not qualify for the exclusions in § 503.10(b). Specifically, the City points out that, if the exclusionary part of § 503.10 does not apply,[10/] then the City must comply with §§ 503.12 and 503.14, in which no mention of § 503.13(a)(1) or (b)(1) is made, but numerous references to § 503.13(b)(2) appear (Reply at 9). Because the City has not been charged with a violation of §§ 503.12 or 503.14 or § 503.13(a)(2),

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[10/] The charge here is the application of sewage sludge having molybdenum concentrations in excess of that in Table 1 at § 503.13(b)(1) to land, while exclusions in §§ 503.10(c) and (d) concern bulk material derived from sewage sludge. Therefore only the exclusions in § 503.10(b) are applicable or potentially applicable.

the City argues that the complaint should be dismissed for failure to establish a prima facie case and for failure to state a claim upon which relief may be granted.

Discussion

While the general rule that an amended pleading supersedes an initial pleading is as stated by the City, the City's argument that its answer to the initial complaint may not be used for any purpose is erroneous. The rule is that an admission in a superseded pleading is admissible evidence in a civil action and is treated like any other extrajudicial admission made by a party or his agent. See, e.g., Contractor Utility Sales Co., Inc. v. Certain-Teed Products Corporation, 681 F.2d 1061 (7th Cir. 1981). Such admissions are controvertible and, therefore, may not be relied upon to support summary judgment. It is concluded, however, that an admission in a superseded pleading may be used to support a prima facie case and thus withstand a motion to dismiss. Here, the City's answer admitted, among other things, the language of § 503.13(a)(1), that its annual sludge report reflected that the quantity of sewage sludge alleged in the complaint was applied to land in 1997, and that the report reflected that the sludge contained the molybdenum concentrations alleged in the complaint. Moreover, the amended complaint alleges essentially the same violations as alleged in the initial complaint, i.e., that bulk

sewage sludge having molybdenum concentrations in excess of the 75 mg/kg specified in Table 1 of § 503.13 was applied to land, during other time periods.

Although the admissions in the City's answer may be controvertible for any number of reasons, it is concluded that as a preliminary matter the amended complaint alleges a cause of action sufficient to withstand a motion to dismiss. Whether the prohibition in § 503.13)(a)(1) was applicable during the time periods alleged in the complaint is a separate issue which we now address.

Complainant's Reply to the City's motion focuses on whether the exclusions in § 503.10(b) from the application of the General requirements of § 503.12 and the Management practices of § 503.14 apply. Concluding that the City has not shown compliance with § 503.10 and that the exclusions in § 503.10(b) are not applicable, i.e., that §§ 503.12 and 503.14 do apply, Complainant seems oblivious of the fact that the City is not charged with a violation of the General requirements or of Management practices. It is true that § 503.13(a)(1), read by itself, unambiguously prohibits the application of bulk sewage sludge or sludge sold or given away in a bag or other container to land, if the concentration of any pollutant in the sludge exceeds that in Table 1 of § 503.13. Pollutants in Table 1 of § 503.13 include molybdenum at a ceiling concentration of 75 mg/kg. Section 503.13(a)(1) may not be

considered in isolation, however, and that section is applicable, if at all, only through application of § 503.10 “Applicability”, § 503.10(b)(1) of which governs the application of bulk sewage sludge to land. The exclusions from the application of §§ 503.12 and 503.14 are not applicable and these sections apply.

Section 503.12 is entitled “General requirements” and, as the City points out, refers in several instances to cumulative pollution loading rates in § 503.13(b)(2), but contains no reference to pollutant ceiling concentrations in Table 1 of § 503.13. Section 503.12(a), however, provides:

> “No person shall apply sewage sludge to land except in accordance with the requirements of this subpart.”

The Agency relies on the quoted provision to incorporate the prohibition in § 503.13(a)(1) in the regulation governing the application of all sewage sludge to land, while the City, noting the absence of any reference to § 503.13(a)(1) or to Table 1 in § 503.12, contends that the rules of statutory construction, i.e., that in case of conflict a specific provision overrides a general provision and that a specific statute takes precedence over a general statute, mean that § 503.13(a)(1) is not applicable. The City makes essentially the same argument with reference to § 503.13, pointing out that § 503.13(a)(2) does not refer to Table 1 and is the only provision specifically applicable to the application of bulk sewage sludge to agricultural land.

The City's arguments, while innovative and ably presented, are not accepted. Firstly, it should be noted that no conflict between the application of § 503.13(a)(1) through the general provision of § 503.12(a) and other provisions of § 503.12 has been alleged or shown, nor is there any apparent conflict between the prohibition of § 503.13(a)(1) and § 503.13(a)(2), which refers to Table 2, Cumulative Pollutant Loading Rates (kilogram per hectare) of § 503.13, and Table 3, Pollutant Concentrations Monthly average concentration (milligram per kilogram) of § 503.13. Secondly, a rule of statutory [or regulatory] construction not specifically referred to by the City is that all provisions of a statute or regulation be given effect, if possible. Perhaps in recognition of this rule, the City, pressing its contention that the prohibition of § 503.13(a)(1) is not applicable by virtue of the fact that § 503.13(a)(2) specifically applies to bulk sewage applied to, inter alia, agricultural land, asserts that the prohibition in § 503.13(a)(1) must have been intended to apply to "other categories" [of land]. These "other categories" are not identified, however, and if no such categories exist, the interpretation advocated by the City would render § 503.13(a)(1) surplusage, contrary to the mentioned rule of statutory and regulatory construction.

Section 503.11 of the regulation defines agricultural land,[11/] forest,[12/] a public contract site,[13/] and a reclamation site.[14/] Other categories of land referred to in the regulation are lawns and home gardens. Because this includes all categories of land upon which sewage sludge may be applied for beneficial purposes,[15/] the City's assertion that § 503.13(a)(1) must have been intended to apply to categories other than those listed is rejected.

The only reference to § 503.13 in § 503.14 entitled "Management practices" is to Table 4 in § 503.14(e) which applies

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[11/] Section 503.11(a) defines "agricultural land" as land on which a food crop, a feed crop, or a fiber crop is grown. It includes range land and land used as pasture.

[12/] Section 503.11(g) defines "forest" as a tract of land thick with trees and underbrush.

[13/] Section 503.11(l) defines a "public contract site" as land with a high potential for contact by the public. This includes, but is not limited to, public parks, ball fields, cemeteries, plant nurseries, turf farms and golf courses.

[14/] Section 503.11(n) defines a "reclamation site" as drastically disturbed land that is reclaimed using sewage sludge. This includes, but is not limited to, strip mines and construction sites.

[15/] Referring to pathways of potential exposure to pollutants in sewage sludge, the preamble to the initial rule (58 Fed. Reg. 9248) provides in pertinent part: The rule distinguishes between sewage sludge that is applied to the land for a beneficial purpose and sludge disposed of on the land. For the final regulation, EPA looked at potential exposure when sludge is used as a fertilizer or soil conditioner under two generic categories: agricultural land and non-agricultural land. Agricultural land application would include use by a farmer to grow food or feed crops, on pasture and rangeland, use by large agri-business enterprises as well as use by the home gardener..... Non-agricultural uses include use on forest land, reclamation sites and public contact sites.....

to sewage sludge in a bag or other container and is inapplicable, in any event, because Table 4 does not include molybdenum as a pollutant.

The City is correct that the only provision of § 503.17 entitled "Recordkeeping" that refers to Table 1 of § 503.13 is § 503.17(a)(5)(i)(A) and that the certifications specified by this section do not reference the ceiling concentrations in Table 1 of § 503.13. Section 503.17(a)(5), however, applies only when the cumulative pollutant loading rates in Table 2 of § 503.13 are met when bulk sewage sludge is applied to, inter alia, agricultural land, and does not have the significance attributed to it by the City, because § 503.17 was not amended when molybdenum was deleted as a pollutant in Tables 2, 3 and 4 of § 503.13.

The Agency proposed to amend § 503.10(b)(1) to include specific reference to Table 1 of § 503.13 in October of 1995 and finalized this and other amendments to the regulation in August 1999, effective September 3, 1999 (supra, note 8 and accompanying text). According to the Agency, the amendment expressly requires that the ceiling concentration limits in Table 1 of § 503.13 apply to all sewage sludge that is land applied (64 Fed. Reg. 42553, August 4, 1999). Although the characterization as "express" is difficult to accept, the amendment accomplishes this by making it clear that compliance with § 503.13(a)(1) is a condition precedent to the exclusion from the "General requirements" of § 503.12 and

the “Management practices” of § 503.14. Here, the exclusion from the applicability of §§ 503.12 and 503.14 does not apply, and, as we have seen, the prohibition in § 503.13(a)(1) is applicable through the general language of § 503.12(a) to the effect that no person shall apply sewage sludge to land except in accordance with the requirements of this subpart. It is therefore clear that, contrary to the City’s contention, the amendment had no effect on the City’s obligation to comply with § 503.13(a)(1).

The City is correct that the EPA publication “A Plain English Guide to the EPA Part 503 Biosolids Rule” contains ambiguous and misleading information as to whether molybdenum has been deleted as a pollutant from, the Part 503 Rule. Chapter 1 of the Guide, referring to the amendment to the Rule effected on February 25, 1994, states that the amendment deleted pollutant limits for molybdenum in biosolids applied to land but retained the molybdenum ceiling limits (supra, note 9). This could easily be read as an indication that molybdenum was no longer a pollutant for purposes of the rule insofar as land application of sewage sludge was concerned. Moreover, Table 2-1 at 29 indicates that limits for molybdenum had been deleted from the Part 503 Rule, specifically referring to Table 1 of § 503.13 (Id.). The Guide makes clear, however, that it is not a substitute for the actual rule and, accordingly, is not a defense to a violation of the rule. Evidence

that the City relied on the Guide would, of course, be admissible in mitigation of the penalty.[16/]

The rule that an ambiguous regulation will not support a penalty is closely related to the due process rule that a penalty may not be imposed for violation of a regulation if the regulation fails to give fair notice of conduct prohibited or required. As to the former rule, see Liberty Light and Power, TSCA Appeal No. 81-4, 1 E.A.D. 696 (JO, October 27, 1981). See also Cole v. Young, 351 U.S. 536, 76 S.Ct. 861 (1956) (ambiguities in executive order construed against government). As to the latter rule, see Rollins Environmental Services, Inc. v. EPA, 937 F.2d 649, 652 (D.C. Cir.

[16/] Because molybdenum has been deleted as a pollutant from Tables 2, 3 and 4 of § 503.13, Complainant should be fully prepared to substantiate the seriousness of the violations at the hearing.

1991); General Electric Company v. U.S. EPA, 53 F.3d 1324 (D.C. Cir. 1995); and CWM Chemical Services, Inc., et al., TSCA Appeal No. 93-1, 6 E.A.D. 1 (EAB May 1, 1995). Although the 1994 and 1999 amendments to the regulation appear to have been the source of some confusion, it is concluded that through close attention the requirements of the regulation are sufficiently discernible as to withstand attack on either ambiguity or failure to provide fair notice grounds. The motion to dismiss will, therefore, be denied.

In filing a motion to dismiss in lieu of an answer to the amended complaint, the City appears to have relied on Rule 12(b) of the Federal Rules of Civil Procedure which allows defenses such as failure to present a claim upon which relief may be granted to be made by motion. Although the FRCP are not binding in this proceeding, the Rules are considered to be useful guides. For all that appears, the City's motion was made in good faith and not for purposes of delay. Accordingly, the City will be given another opportunity to file an answer to the amended complaint.

ORDER

The City's motion to dismiss is denied. The City shall file an answer to the amended complaint within 30 days of the date of service of this order.

Dated this 20th day of December 1999.

Original signed by undersigned

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Spencer T. Nissen
Administrative Law Judge