IP 99-1692-C M/F US v. SIGECO [3]
Judge Larry J. McKinney Signed on 7/26/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
SOUTHERN INDIANA GAS AND ELECTRIC COMPANY,	)	CAUSE NO. IP99-1692-C-M/S
	)	
	)	
Defendant.	)	

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
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UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	IP 99-1692-C-M/F
SOUTHERN INDIANA GAS AND ELECTRIC COMPANY, Defendant.	)	

ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT
REGARDING UNIT 3 REFURBISHMENT

Defendant Southern Indiana Gas and Electric Company ("SIGECO") has filed a motion for summary judgment on the United States' ("the Government") claims against it under the Clean Air Act, 42 U.S.C. § 7401, *et seq*. This particular motion concerns various projects SIGECO completed at one of its facilities in 1997. SIGECO had sought and obtained a determination from the Indiana Department of Environmental Management ("IDEM") that none of the Act's requirements was applicable to the project. Nonetheless, the Government claims that IDEM's decision was incorrect, and it is now seeking injunctive relief and civil penalties as a result of SIGECO's alleged violation of the Act. SIGECO contends that the Government is barred from pursuing its claims because: (1) the Act makes IDEM's decision binding on the Government; (2) IDEM is the Government's agent for implementing the Act's programs and the Government is bound by IDEM's determination because of their agency relationship; and (3) the Government is equitably estopped from asserting a view that is inconsistent with IDEM's determination. The Court has reviewed the parties' arguments, and for the reasons explained below it **DENIES**

SIGECO's motion for summary judgment.

I. FACTUAL BACKGROUND

The few facts necessary to resolve this particular dispute are not contested. SIGECO performed a refurbishment project in 1997 at Culley Unit 3 ("Unit 3") that involved the outlet sections of the Unit 3 secondary superheater with new steam tubes, the replacement of sections of the Unit 3 turbine with new blades of a more advanced design, and other miscellaneous repairs. *Statement of Facts* ¶ 1. The Unit 3 refurbishment took advantage of advances in design and technology to both improve Unit 3's efficiency and to increase the capability of Unit 3 to generate electricity. *Id*. ¶ 2.

In early 1997, SIGECO approached IDEM regarding the potential application of the Act's requirements to the Unit 3 refurbishment. SIGECO made a number of written and oral submissions to IDEM regarding the project. *Id*. ¶ 3. On August 22, 1997, SIGECO made a formal written request for a determination that the project was exempt from permitting requirements because it was "routine maintenance, repair or replacement." *Id*. ¶ 5. SIGECO also filed a construction permit application for the Unit 3 refurbishment for use in the event the IDEM determined that a permit was necessary under the Act. *Id*. ¶ 6. In addition, SIGECO filed a petition for an interim construction permit, a device that allows construction to begin while a source waits for a construction permit to be granted or a decision to be made that no permit is needed. *Id*. ¶ 7. SIGECO's petition for an interim permit apparently was granted, and SIGECO performed the Unit 3 refurbishment on the basis of that permit. *Id*. ¶¶ 8-9. SIGECO completed construction of the project in late December 1997. *Id*. ¶ 10.

On January 28, 1998, IDEM formally determined that the Unit 3 refurbishment was not subject to the Act's requirements that are at issue in this case. *Id*. ¶ 11. This determination was based upon IDEM's decision that the Unit 3 refurbishment fell within the "routine maintenance, repair, and replacement" provision contained in applicable regulations. *Id*. ¶ 12. After receiving IDEM's determination, SIGECO released Unit 3 for normal operations, and resumed its business of generating electricity for the citizens of Indiana. *Id*. ¶ 14. IDEM has not withdrawn its determination. *Id*. ¶ 16.

At some point, the Government decided that IDEM's determination was inaccurate, and that the projects at Unit 3 did not fall under the "routine maintenance, repair, and replacement" provisions of the applicable regulations. The Environmental Protection Agency ("EPA"), the federal agency responsible for enforcing the Act, sent SIGECO a notice of its violation of the Act on November 3, 1999. It then filed this lawsuit seeking injunctive relief and the imposition of civil penalties.

II. SUMMARY JUDGMENT STANDARDS

As stated by the Supreme Court, summary judgment is not a disfavored procedural shortcut, but rather is an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *see United Ass'n of Black Landscapers v. City of Milwaukee*, 916 F.2d 1261, 1267-68 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1317 (1991). Motions for summary judgment are governed by Rule 56(c) of the Federal Rules of Civil Procedure, which provides in relevant part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to

> interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Once a party has made a properly-supported motion for summary judgment, the opposing party may not simply rest upon the pleadings but must instead submit evidentiary materials which "set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). A genuine issue of material fact exists whenever "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The nonmoving party bears the burden of demonstrating that such a genuine issue of material fact exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Logan v. Caterpillar, Inc.*, 246 F.3d 912, 923 (7th Cir. 2001). It is not the duty of the court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party bears the responsibility of identifying the evidence upon which he relies. *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996). When the moving party has met the standard of Rule 56, summary judgment is mandatory. *Celotex*, 477 U.S. at 322-23; *Shields Enters., Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1294 (7th Cir. 1992).

In evaluating a motion for summary judgment, a court should draw all reasonable inferences from undisputed facts in favor of the nonmoving party and should view the disputed evidence in the light most favorable to the nonmoving party. *Estate of Cole v. Fromm*, 94 F.3d 254, 257 (7th Cir. 1996), *cert. denied*, 519 U.S. 1109 (1997). The mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment. *Anderson*, 477 U.S. at 248; *JPM Inc. v. John Deere Indus. Equip.*

Co., 94 F.3d 270, 273 (7th Cir. 1996). Irrelevant or unnecessary facts do not deter summary judgment, even when in dispute. *Clifton v. Schafer*, 969 F.2d 278, 281 (7th Cir. 1992). "If the nonmoving party fails to establish the existence of an element essential to his case, one on which he would bear the burden of proof at trial, summary judgment must be granted to the moving party." *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1124 (7th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997).

III. DISCUSSION

A. THE EFFECT, IF ANY, OF IDEM'S DETERMINATION

There is no dispute that in 1998, IDEM issued a determination to SIGECO that its activities with respect to Unit 3 "will not trigger the requirements under [New Source Performance Standards] NSPS or [Prevention of Significant Deterioration] PSD." *SIGECO Ex. 11*.[1] IDEM agreed with SIGECO that "the replacement of the existing steam tubes and turbine blades can be considered a 'like-kind replacement' under 326 IAC 2-2-1 for purposes of PSD." *Id*. In addition, IDEM found that "this activity by SIGECO falls under the 'maintenance, repair, and replacement' exemption for 326 IAC 12-1 for NSPS." *Id*. Based upon this determination, SIGECO released Unit 3 for normal operations. The Government now claims that IDEM's determination was incorrect, and seeks to hold SIGECO liable for its alleged violations of the Act.

[1] The NSPS and PSD provisions of the Act contain complicated statutory and regulatory provisions. To resolve this motion, however, it is not necessary to examine the particular requirements of those provisions. Instead, the Court's only task is to determine what effect, if any, IDEM's 1998 applicability determination had on the Government's ability to bring an enforcement action. Accordingly, the Court need only discuss the relevant enforcement provisions contained in the Act.

SIGECO strongly contends that IDEM's determination forecloses any action by the Government. For one thing, SIGECO claims that it would be unfair to subject it to liability under the Act for relying upon a determination from IDEM, which is the state agency the Government authorized to issue such determinations. Relying upon one district court case and *dicta* from the Seventh Circuit, SIGECO contends that the Government cannot now collaterally attack, through this enforcement action, IDEM's determination.

In *United States v. AM General*, 34 F.3d 472 (7th Cir. 1994), the EPA filed suit against a source that had obtained a permit from the county health department. The EPA proceeded under 42 U.S.C. § 7413(b)(3), which allows for a remedy against a person who attempts to construct or modify a stationary source after a finding of violation by the EPA. Because there was no violation *after* a finding of a violation, the court found that the suit was not authorized by statute. SIGECO seizes upon language in the opinion that noted that the court found nothing in the Act that would allow the EPA to "mount a collateral attack on a permit by bringing a civil penalty action as many as five years after the permit had been granted and the modification implemented." *Id*. at 475. The Seventh Circuit continued to discuss, however, whether the EPA could have proceeded under § 7413(b)(1), the provision at issue in this case. It stated that "it is an unsettled question whether operating under a duly issued permit, albeit one that should not have been issued because it failed to impose requirements found in a state implementation plan, violates that plan. The statutory language implies 'yes' . . ." *Id*. at 474 (citing 42 U.S.C. § 7413(a)(1)).

Thus, *AM General* is not directly on point because the Government in that case was proceeding

under a different enforcement statute. In this case, the Government proceeds under 42 U.S.C. § 7413(a), which provides that the Administrator may bring a civil action in accordance with § 7413(b) whenever it finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit. Under § 7413(b)(1), the Administrator can seek injunctive relief and a civil penalty of up to $25,000 per day for violations of any requirement or prohibition of an applicable implementation plan or permit.

SIGECO also relies upon *United States v. Solar Turbines*, 732 F.Supp. 535 (M.D. Pa. 1989), which was an action by the EPA under 42 U.S.C. § 7477 for injunctive relief to prevent Solar Turbine from undertaking a particular construction project. The court held that the action could not go forward because a state agency had issued a permit to Solar Turbines for the very construction the Administrator sought to halt. It found that "EPA cannot as a matter of law pursue enforcement action against an owner/operator who has committed no violation that can be attributed to it other than to act in accordance with a permit it received from an authorized permit-issuing authority, but which permit EPA believes the issuing authority improperly granted." *Id*. at 539. "Accepting EPA's position would not only be contrary to the general enforcement scheme of the Clean Air Act, but would also lay waste to a source's ability to rely on a permit it has been issued by an authorized state permitting agency." *Id*. at 540. Again, however, in *Solar Turbines* the EPA proceeded under § 7477, and the court thus had no occasion to address the ability of EPA to bring an enforcement action under the "plan or permit" language in § 7413(a) and (b)(1).

As one other district court has noted, the *Solar Turbines* decision may make sense from a policy

standpoint. *See United States v. Campbell Soup*, No. CIV-S-95-1854, 1997 WL 258894, at *5 (E.D. Cal. March 11, 1997). "Perhaps a state issued permit should be a safe harbor. Otherwise vast economic consequences potentially may befall a company that has attempted to comply in good faith with a state permit." *Id*. Similarly, it might make sense as a matter of policy to allow a source like SIGECO to rely on a state agency's determination with respect to its obligations under the Act without fear of a later enforcement action by the Government. On the other hand, as noted in the *Campbell Soup* opinion, there is another side to this policy consideration. For instance, there may be cases where a state erroneously grants a source a permit that allows it to construct and/or operate in such a manner that places the public health at risk. In such a case, should the Government be absolutely prohibited from taking action against the source to remedy the violation?

The plain language of § 7413 indicates that in such a situation the Government is not precluded from acting. Indeed, that section's broad language provides that the Administrator can bring an action whenever it finds that any person has violated "any requirement or prohibition" of "an applicable implementation plan or permit." There is no language in the Act that precludes the Government from initiating an enforcement action if a source has already obtained a permit – or in this case, an applicability determination – from a state agency. Maybe there is a sound policy reason for providing such a safe harbor provision in the Act, but that decision must be left to Congress. As the court noted in *Campbell Soup*, however, equitable considerations may play an important part in the consideration of any remedy. Based upon a plain reading of § 7413, the Court finds that the Government's action is not barred by IDEM's 1998 applicability determination. To the extent SIGECO seeks summary judgment on that basis, the Court **DENIES** its

motion.

B. WAS IDEM'S DECISION BINDING ON THE GOVERNMENT?

SIGECO next argues that because the Government delegated all of its authority to IDEM to implement the NSPS and PSD programs, IDEM was the Government's agent and its applicability determination is therefore binding. While the Government delegated certain authority to IDEM with respect to the NSPS and PSD programs, it also retained authority to enforce the Act. For example, with respect to the PSD program, the Government provided that "[i]f the State enforces the delegated provisions in a manner inconsistent with the terms and conditions of this delegation or the Clean Air Act, USEPA may exercise its enforcement authority contained in the Clean Air Act with respect to sources within the State of Indiana subject to the PSD provisions." *Sam Portanova Declaration, Government's Ex. 27, at EPA5PW1007164*.

With respect to the NSPS program, the Act itself provides that when the Administrator finds that a state procedure for implementing and enforcing the NSPS program is adequate, he shall delegate to the State any such authority he has to implement and enforce such standards. 42 U.S.C. § 7411(c)(1). The very next section, however, clearly states that "nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section." 42 U.S.C. § 7411(c)(2). When it delegated such authority to the State, it again provided that "[t]his delegation in no way limits the Administrator's concurrent enforcement authority as provided in Sections 111(c)(2) and 112(d)(2) of the Clean Air Act." *Id. at EPA5PIN002269*.

Thus, contrary to SIGECO's position, the Government did not completely divest itself of all authority to enforce the provisions of the Act. Instead, the Act and the letters delegating such authority to the State of Indiana explicitly reserve the Government's right to independently enforce the NSPS and PSD provisions. Even if IDEM were an agent of the Government, the scope of that agency and its authority would be defined by the Act and those letters. Because the Government has the power to act on its own to enforce the Act, IDEM's applicability determination is not binding on the Government. To the extent SIGECO's motion is based upon the premise that IDEM was an agent of the Government, and that the Government was bound by IDEM's applicability determination, the Court **DENIES** SIGECO's motion.

C. IS EQUITABLE ESTOPPEL APPLICABLE?

Finally, SIGECO asserts that the doctrine of equitable estoppel bars the Government from bringing this enforcement action. Equitable estoppel against the government is disfavored and is rarely successful. *Gibson v. West*, 201 F.3d 990, 993 (7th Cir. 2000). To establish equitable estoppel, SIGECO must show the following elements: (1) the Government knew the facts; (2) the Government intended that its conduct would be acted upon, or acted so that SIGECO had a right to believe it was so intended; (3) SIGECO was ignorant of the facts; and (4) SIGECO reasonably relied on the Government to its substantial injury. *Edgewater Hospital, Inc. v. Bowen*, 857 F.2d 1123, 1138 (7th Cir. 1988). In addition to these elements, SIGECO must also show that the Government's action amounted to affirmative misconduct. *Id*. There is no evidence that SIGECO was ignorant of the fact that the Government had retained authority to enforce the act. Indeed, that authority was a matter of public record because it was contained in the Act itself, and in the letters delegating the authority, which were published in the Federal Register. Even if it were ignorant

of that fact, however, its equitable estoppel claims still fails because there is no evidence of any affirmative misconduct on the part of the Government. SIGECO points to IDEM's applicability determination as an example of affirmative misconduct, but the Court disagrees. Instead, there was simply a disagreement between the Government and IDEM regarding an interpretation of the Act's regulations. With no evidence of any affirmative misconduct, SIGECO has failed to prove the elements of equitable estoppel. As a result, the Court **DENIES** SIGECO's motion on that basis, as well.

IV. CONCLUSION

In sum, the Court concludes that nothing in the Act precludes this enforcement action with respect to the 1997 project on Unit 3, despite the fact that SIGECO received an applicability determination from IDEM that indicated the NSPS and PSD programs were inapplicable. In addition, IDEM's determination was not binding on the Government, and SIGECO has provided no basis for invoking equitable estoppel. Accordingly, the Court **DENIES** SIGECO's Motion for Summary Judgment Regarding the Unit 3 Refurbishment in its entirety.

IT IS SO ORDERED this _____ day of July, 2002.

LARRY J. MCKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana

Distribution attached.

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