UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF	**)**	
	)	
JULIE'S LIMOUSINE &	**)**	**DOCKET NO. CAA-04-2002-1508**
COACHWORKS, INC.,	**)**	
	)	
RESPONDENT	**)**	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS AND
ORDER DENYING RESPONDENT'S MOTION FOR BILL OF PARTICULARS

BACKGROUND

On June 28, 2002, the United States Environmental Protection Agency (the "EPA" or "Complainant") filed a Complaint against Julie's Limousine & Coachworks, Inc. ("Respondent" or "Julie's") pursuant to the EPA's enforcement authority under Section 113(d) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. §7413(d). The Complaint alleges that Respondent, a limousine and coach rental company, violated the CAA by failing to conform to certain requirements governing service work on motor vehicle air conditioners ("MVACs"). Specifically, Complainant asserts, in four counts, that Respondent failed to employ properly trained and certified MVAC technicians (Count I); failed to use proper MVAC equipment when servicing MVACs for consideration (Count II); failed to submit MVAC equipment to the EPA for certification (Count III); and failed to respond truthfully to a CAA §114(a) Information Request Letter (Count IV). The EPA seeks an administrative penalty of $43,018.50 for the alleged violations.

On August 9, 2002, Respondent submitted a Motion to Dismiss, or in the Alternative, for a Bill of Particulars ("Motion"). Complainant opposes the Motion and, on August 29, 2002, filed Complainant's Memorandum in Response to Respondent's Motion to Dismiss and Bill of Particulars ("Response").

In a Prehearing Order entered on September 30, 2002, the parties were directed to file their respective prehearing

exchanges. The first prehearing exchange, Complainant's, is not due to be filed until December 31, 2002.

STANDARD FOR ADJUDICATING RESPONDENT'S MOTION

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. Part 22. The Rules of Practice address motions to dismiss at 40 C.F.R. § 22.20. Section 22.20(a) provides in pertinent part that:

> The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

The Environmental Appeals Board considers motions to dismiss under Section 22.20(a) to be analogous to motions for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP"). *In the Matter of Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3, 4 E.A.D. 819, 827 (EAB 1993).

Rule 12(b)(6) of the FRCP provides for dismissal when the complaint fails "to state a claim upon which relief can be granted." It is well established that dismissal is warranted for failure to state a claim when "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also McCulloch v. PNC Bank, Inc.*, 298 F.3d 1217, 1220 (11th Cir. 2002). This standard for dismissal further requires that the allegations in the complaint be taken as true and that all inferences be drawn in favor of the plaintiff.[1] *See McCulloch*, 298 F.3d at 1220. Accordingly, to prevail in its Motion, Respondent must show that the EPA's allegations, assumed to be true, do not prove a violation of the CAA as charged. In short, Respondent must demonstrate that the EPA has failed to establish a prima facie case.

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[1] The FRCP are not binding on administrative agencies but many times these rules provide useful and instructive guidance in applying the Rules of Practice. *See Oak Tree Farm Dairy, Inc. v. Block*, 544 F. Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); *In re Wego Chemical & Mineral Corporation*, 4 E.A.D. 513, 524 n. 10 (EAB 1993).

DISCUSSION

Respondent proffers several arguments to support its Motion to Dismiss. First, Respondent disputes the authority of the EPA to pursue this enforcement action under the regulations cited in the Complaint, namely 40 C.F.R. §§ 82.34(a)(2) [Count I], 82.34(a)(1) [Count 2], and 82.42(a) [Count III]. Respondent asserts that, in servicing the MVACs of its vehicles, only the refrigerant known as "R-134" was used during the period material to the Complaint. Motion at 2. Complainant's Response does not suggest that any refrigerant other than R-134 is at issue in this proceeding. The thrust of Respondent's argument is as follows:

> Although the term "refrigerant" was expanded as of November 15, 1995 to include not just CFC-12, but R-134, no standards or requirements were promulgated by the EPA at that time for R-134 recover/recycling equipment or the training and certification of technicians using R-134.

Motion at 5. Similarly, Respondent states that "no one could certify that it was 'properly using' 'approved' R-134 refrigerant recycling equipment" because the relevant regulations did not pertain to R-134. Motion at 5. Such regulations which would encompass a cause of action based on R-134 did not become effective, according to Respondent, until January 29, 1998. Motion at 6. Respondent concludes that "if the EPA's allegations here are based on R-134, there could be no potential violation until after January 29, 1998." Motion at 7.

Respondent's argument that the regulations at issue were inapplicable to R-134 does not meet the standard to warrant dismissal of the Complaint at this time. Foremostly, the Complaint alleges that violations occurred both before and after January 29, 1998.[2] Not only does Respondent's challenge to the regulations fail to address the alleged post-January 29, 1998 violations, but this challenge also raises a serious dispute of regulatory interpretation that is not ripe for adjudication on this Motion for dismissal. While the EPA apparently concedes that regulations requiring the use of MVAC *recycling* equipment for R-134 became effective in 1998, the EPA nonetheless asserts, contrary to Respondent's position, that MVAC *recovery* equipment for R-134 has

[2] Count I alleges that violations occurred from January 1, 1997 through approximately June 17, 1998. Count II alleges that violations occurred from January 1, 1997 through July 22, 1998. Count III alleges that certification for the MVAC equipment was due on or before January 1, 1997 and that such certification was not secured until February 3, 1999. Complaint at 5-8.

been required by the regulations since 1995. Response at 4. Complainant relies on the fact that, as of November 15, 1995, the venting of R-134 has been illegal under Section 608(c) of the CAA, 42 U.S.C. §7671g(c). Response at 3.

At this stage of the proceeding, it is sufficient to note that the parties disagree over the applicability of the regulations cited in the Complaint to the refrigerant R-134. It would be premature to analyze the merits of each party's arguments at this juncture. The parties' dispute must be more fully fleshed out through the prehearing exchange and at an evidentiary hearing, if necessary. Further, as neither party has cited any case law concerning the interpretation of the regulations at issue, it is presumed that this dispute raises a question of first impression. Additional development and briefing of this issue may be necessary. Finally, I note that Respondent in its Motion does not address directly Count IV in the Complaint. For these reasons, dismissal at this stage would be inappropriate, and Respondent's Motion must be denied.

In addition to Respondent's denial of liability under the regulations, Respondent also claims that it was the victim of an "insidious scheme" in which an independent contractor, Gary Roberts, misappropriated refrigerant and MVAC parts and also serviced vehicles of other customers on Julie's premises. Motion at 9. To the extent that Respondent suggests that the charges in the Complaint are directed at the wrong party (i.e., that the purported violations, if any, stem not from Julie's misconduct, but from that of the independent contractor), Respondent's Motion to Dismiss also fails. Respondent submitted no affidavits or similar evidence to support its claims concerning Mr. Roberts. In the Complaint, the EPA alleges that Gary Roberts was an employee of Respondent. *See* Complaint at ¶16. The EPA further supports this allegation in its Response by asserting that Gary Roberts was a vice-president of Respondent's corporation, and it has submitted a 1998 Dunn & Bradstreet Report containing information to the same effect. Response at 5; Complainant's Exhibit 3. As such, at this time Respondent has not shown that dismissal is warranted for failure to state a claim.

The Complaint also survives Respondent's challenge that this penalty action comes as untimely. Respondent "does not believe that the Administrator of the EPA and the Attorney General have jointly determined that a longer period of violation is appropriate for this administrative penalty action," as required under CAA

§113(d)(1), 42 U.S.C. §7413(d)(1).[3] Motion at 11. I observe that Respondent was justified in believing that, absent the required waiver, the Complaint was barred under the statute of limitations for civil administrative proceedings. In the interest of judicial economy and to spare a respondent the effort of raising a futile argument, proof of the waiver should have accompanied the Complaint and not, as here, the EPA's Response to the Motion to Dismiss. Nonetheless, Complainant has presented documentation demonstrating that the required waiver had been obtained to prosecute the alleged violations in this case which are older than 12 months. Response at Complainant's Exhibit 5. The waiver from the United States Department of Justice is dated April 8, 2002. The Complaint was subsequently filed on June 28, 2002. Thus, the Complaint is timely and should not be dismissed on this ground.

Lastly, Respondent advances its argument in favor of dismissal on grounds that the Complaint is generally lacking in specificity and fails to fairly notify Respondent of the alleged violations. If this tribunal declines to dismiss the Complaint, Respondent requests, alternatively, that the EPA be compelled to file a bill of particulars describing in more discrete detail the circumstances of each alleged violation. I agree with the EPA's assertion, contained in its Response, that the Complaint adequately sets forth a prima facie case on all four counts. *See* Response at 9-12. Complainant meets its burden of alleging sufficient facts to support the charges against Respondent. Complainant adequately apprises Respondent of the nature of each alleged violation and the relevant time period for each. Therefore, dismissal is not appropriate. Also, Respondent's request for a bill of particulars is rejected as premature. Further development of each party's case is expected through the prehearing exchange which, as indicated above, has yet to occur. Moreover, as Complainant observes, Respondent is not precluded from seeking to compel discovery after the prehearing exchange takes place. Response at 14. At the current stage of the proceedings, however, Respondent's request for additional information is denied.

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[3] This section provides that the Administrator's authority to assess civil administrative penalties "shall be limited to matters where . . . the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where the Administrator and the Attorney General jointly determine that a matter involving . . . a longer period of violation is appropriate for administrative penalty action."

ORDER

For the foregoing reasons, Respondent's Motion to Dismiss, or in the Alternative, for a Bill of Particulars is **DENIED**.

_____
Barbara A. Gunning
Administrative Law Judge

Dated: November 26, 2002
Washington, DC

In the Matter of Julie's Limousine & Coachworks, Inc.,
Respondent Docket No. CAA-04-2002-1508

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Respondent's Motion to Dismiss and Order Denying Respondent's Motion for Bill of Particulars**, dated November 26, 2002, was sent this day in the following manner to the addressees listed below.

_____
Mary Keemer
Legal Staff Assistant

Dated: November 26, 2002

Original and One Copy by Pouch Mail to:

Patricia Bullock
Regional Hearing Clerk
U.S. EPA, Region 4
Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303-8960

Copy by Pouch Mail and Facsimile to:

Lucia C. Mendez, Esq.
Associate Regional Counsel
U.S. EPA, Region 4
Atlanta Federal Center
61 Forsyth Street, SW
13th Floor, EAD
Atlanta, GA 30365

Copy by Regular Mail and Facsimile to:

Ward A. Meythaler, Esq.
Robert W. Merkle, Esq.
Merkle & Magri, P.A.
5510 West LaSalle Street
Tampa, FL 33607