UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE CASE EXAMINER

In The Matter Of:	:	Contractor Listing Docket
	:	
	:	No. 07-89-LO68
VALMONT INDUSTRIES, INC.	:	
	:	**ORDER ON MOTION TO STRIKE**
Valley, Nebraska	:	

This proceeding is under the United States Environmental Protection Agency's Procedures for Removing a Facility from the List of Violating Facilities, 40 C.F.R. Part 15, Subpart C. As a matter preliminary to the Removal Hearing, 40 C.F.R. § 15.24, the Case Examiner sought to define on the record the condition giving rise to the conviction in the underlying criminal case because the purpose of the Removal Hearing is to determine whether that condition has been corrected. Based upon materials supplied by the Listing Official and upon the submissions of the parties, the Case Examiner has defined the condition giving rise to the conviction on the record but a motion to strike made in connection with this issue is still pending.

Valmont Industries, Inc. filed the instant motion to strike ("Motion") on February 2, 1990, seeking an order from this Case Examiner striking from the record in this proceeding "...all material contained in the Agency's Statement of Conditions Which Gave Rise to Mandatory Listing and Response to Request for Delisting" ("Agency Statement"). The Agency Statement and Valmont's January 26, 1990 letter to the Case Examiner regarding the condition giving rise to the conviction in the underlying criminal case were submitted pursuant to the Case Examiner's oral and written directives of January 17 and 18, 1990.

The Agency filed its response to the instant motion on February 14, 1990 ("Response"). This ORDER addresses Valmont's February 2, 1990 Motion to strike and the Agency's February 14, 1990 Response to that motion.[1]

---

[1] On February 7, 1990 Valmont filed a separate motion to strike "The Determination Not to Remove Facility From The EPA List of Violating Facilities and Addendum to Determination Dated January 12,1990 and all documents attached thereto" ("Determination").

Although the procedural rules governing this proceeding, 40 C.F.R. Part 15, Subpart C, contain no provision for motions to strike, or for motions of any kind, I am entertaining motions made in good faith to clarify issues and to establish the parties' positions on these issues for the record. I would grant a motion to strike immaterial, impertinent, scandalous or excessively redundant matter from the record, consistent with Rule 12(f) of the Federal Rules of Civil Procedure. I would also grant a motion to strike matter that would significantly and improperly confuse issues in the case, consistent with my obligations under 40 C.F.R. § 15.24. See, In The Matter of Tremco, Inc., Docket No. TSCA-88-H-05 (Order granting Complainant's motion to strike affirmative defenses); In the Matter of Waste Management, Inc., Docket NPDES-09-84-0037 (Order granting Complainant's motion to strike 52 affirmative defenses.)

Taken as a whole, the Agency Statement does not constitute immaterial, impertinent, scandalous or excessively redundant matter, and with one exception discussed below, does not significantly and improperly confuse issues in the case. I take the Agency Statement as a whole initially because Valmont's motion asks me to "...strike from the record all material contained in the Agency's Statement..." Motion, p.1. As Valmont points out, this Agency Statement was submitted pursuant to the Case Examiner's instructions, given orally during a conference call on January 17, 1990 and confirmed in writing the next day. The Agency Statement contains and explains the Agency's version of the condition giving rise to the conviction. Agency Statement, p. 4; citing Determination, p.10. That one paragraph is what I was looking for; the Agency Statement has served its purpose.

There are two specific areas where Valmont's motion merits more detailed consideration. First, Valmont found "disconcerting" a false quotation of the Information filed in the underlying criminal case, found at pages 5-6 of the Agency Statement. Motion, p.2. The Agency has conceded that the language it quoted deviated from the actual language of the Information filed. Response, p.2. Accordingly, I am ordering stricken from the record the following phrases in the quotation from the Information: "February 5, 1987, to on or about September 30, 1987"; "...falsify, tamper with and..." To conform to the Information as filed, the following must be added; "April 9, 1987"; "defendant Valmont." The quotation in its entirety shall read:

> On or about April 9, 1987, in the District of Nebraska, defendant Valmont did knowingly render inaccurate a monitoring method required to be maintained under Title 33, United States Code, Sections 1251-1387, in that, at times when sampling was being conducted to be reported to the Nebraska Department of Environmental Control

as required by permit, defendant reduced or caused to be reduced the amount of pollutants flowing into the galvanizing wastewater treatment plant in order to obtain test results which would make the wastewater treatment plant appear to be in compliance with its permit.

Second, Valmont claims that the Agency has either mischaracterized or misread certain paragraphs in the Presentence Report in the underlying criminal case as providing support for the false quotation discussed above, and directs the Case Examiner's attention to the following language, appearing at page 11 of the Agency Statement:

> In actuality, Valmont was discharging into waters of the United States its wastewater which contained excessive levels of zinc which is defined to be a pollutant under the applicable regulations; and, because it was apparently unable or unwilling to treat this wastewater correctly, Valmont falsified its required reports and it resorted to months of falsifying monitoring methods in an attempt to get results which would indicate it was not violating the law.[2]

Valmont asks the Case Examiner whether the cited paragraphs of the Presentence Report support the Agency's "accusation" (Valmont's term) of "months of falsifying monitoring methods" (the Agency's language). Valmont also cites nine additional references in the Agency's Statement to the allegedly continuing nature of Valmont's 1987 conduct in the area of wastewater monitoring and reporting. Presumably, Valmont wants the Case Examiner to strike all these references because the Information filed mentioned only a single date, April 9, 1987 on which Valmont knowingly rendered inaccurate a monitoring method and made false statements in a Discharge Monitoring Report.

The cited paragraphs of U.S. Probation Officer's excellent Presentence Report are portions of "Defendant Valmont Industries' Statement." They summarize the technical and regulatory history of Valmont's galvanizing operation. Paragraph 21 describes Valmont's galvanizing wastewater treatment system. Paragraph 22 describes Valmont's planning and installation of an acid recycling system. Paragraph 23 describes the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) and Valmont's classification as a direct discharger. Paragraph 24 describes Valmont's NPDES permit history and current zinc effluent limitations and discharge monitoring requirements. Paragraph 25, highlighted by the Agency Statement footnote, describes a June, 1986 Compliance Order issued by the Nebraska Department of Environmental Control, based upon Valmont's violations

---

[2] The Agency Statement footnote reads: "Presentence Report, paragraphs 21-25. See, especially, paragraph 25."

violations of the daily average effluent limitation for zinc, which required Valmont to composite 8 grab samples a day rather that the single grab sample specified in the NPDES permit. I find this paragraph to be supportive of the Agency's position that Valmont was "...apparently unable or unwilling to treat this wastewater correctly..." Statement, p.11. I do not find support for the rest of the Agency's "accusation" in paragraphs 21-25 of the Presentence Report.

There is support for the "accusation" of ongoing or continuing monitoring and reporting irregularities at Valmont during 1987. The Statements of Codefendants Prorok and Hawk describe the sampling procedure and flow manipulations they observed. Presentence Report, paragraphs 33-62. The U.S. Attorney's Office's version of the offense states: "...for a 9-month period in 1987 high levels of zinc were found in the samples analyzed. However, a review of the respective monthly DMR's revealed that these high levels of zinc were not being reported." Presentence Report, paragraph 7.

Valmont's desire to limit the record to the single date specified in the first two counts of the Information is clear and understandable. But the Information is a negotiated document. Although it addresses only Valmont's criminal Clean Water Act violations committed on or about April 9, 1987 and other defendants' criminal Clean Water Act violations not relevant to this proceeding, the Information and negotiated plea are not the only information relevant to this proceeding. It is obvious to me from the Presentence Report and from the Agency's Response to the instant motion that the Agency has information supportive of the allegation of continuing violations during 1987.

The Agency stands by the substance of the false quotation of the Information contained in the Agency Statement, and is prepared to prove its assertions. Response, p.2. The Agency has acknowledged an error with regard to the false quotation from the Information.(Id.) This ORDER corrects that error on the record. There is no need to strike the Agency Statement.

Although there is more in the Agency's Statement than I have asked for, none of it is immaterial, impertinent, scandalous, confusing or excessively redundant. Accordingly, Valmont's motion to strike the Agency Statement of Conditions Which Gave Rise to Mandatory Listing and Response to Request for Delisting is **DENIED.**

FEB 2 S 1990

Benjamin Kalkstein

Benjamin Kalkstein
Case Examiner