IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

MURPHY OIL USA, INC.,

Defendant.

OPINION AND ORDER

00-C-0-0409-C

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Defendant Murphy Oil USA, Inc. has moved for reconsideration of an order granting summary judgment to plaintiff United States of America on plaintiff's claim that defendant violated Wis. Admin. Code § NR 439.06(3)(c) and the Clean Air Act, 42 U.S.C. §§ 7401 - 7642, by failing to use Reference Method 21 in its leak detection and reporting program. Defendant raised its motion for reconsideration shortly before trial; I deferred action on it until after the trial was over and the parties had had an opportunity to brief the issue. Defendant's burden was to show that there was evidence in the record that required a different disposition of the motion. I conclude that defendant has not met that burden.

Defendant has not cited any new evidence but has reargued many of the same points it brought up in opposition to plaintiff's motion for summary judgment. Its arguments are

no more convincing now than they were before.

Wis. Admin. Code § 420.05(4) regulates emissions of volatile organic compounds from petroleum refineries. It requires the owner or operator of a refinery to identify all valves in gas service; maintain a leak log of leaks not repaired within 15 days; seal valves at the end of pipes or lines in volatile organic compound service with a second valve, blind flange, plug or cap; and place on a leaking component a weatherproof and readily visible tag bearing an identification number and the date the leak was discovered. Wis. Admin. Code § 439.06(3)(c) requires the owner or its contractor to use Method 21 in 40 C.F.R. part 60, Appendix A for identifying leaks.

Defendant's contractor conducted a leak inspection at defendant's Superior refinery from June 8 to June 11, 1998. On June 17, 1998, inspectors from defendant's National Enforcement Inspection Center began a review of the refinery components subject to § 420.05(4). Over a three day period ending on June 19, the inspectors looked at 40% of the 6,640 valves and similar components that defendant's contractor had reviewed. The inspectors reported leaks at 2.7% of the 2,688 components they reviewed; defendant's contractor had found leaks at only 0.56%. In addition, plaintiff's inspectors identified a number of missing valve tags and end caps. Plaintiff's inspectors calibrated their instruments daily; they were accompanied on June 17 and 18 by representatives of defendant's contractors and employees of defendant; and they reported only leaks that were

confirmed by the escorts on those days. On June 19, however, they reported leaks without confirmation because the escorts declined to accompany them. I concluded from the facts that plaintiff's inspectors found so many more leaks than defendant's contractor had found, despite the short passage of time between the two reviews, and that the only reported leaks were those confirmed by the escorts representing defendant that defendant's contractor could not have been following Method 21.

Defendant contends that it was a speculative leap to conclude from the mere difference between the results of the two reviews that its contractor had failed to do its job properly. Its expert witness suggests that a number of factors could account for the difference, such as changes in weather, temperature or air pressure or operating procedures at the refinery. However, defendant does not adduce any evidence to show that there were any such changes, leaving its expert witness's suggestion merely speculation. The other "facts" and conclusions in the expert report are merely conclusions without supporting facts or a recitation of the regulations and requirements for conducting leak detection inspections.

Defendant asserts that plaintiff is arguing out of both sides of its mouth when it attacks the ability of defendant's contractors to conduct a Method 21 review and then uses the confirming measurements of these same contractors as evidence that its own measurements were correct. Defendant omits mention of the deposition testimony of Ken Garing, head of the valve inspection team, who described the instances in which he or other

members of his team had to show defendant's contractors or employees where to place their instruments for checking a particular leak. He testified, for example, that

> If we would find the leak, we would tell them what the valve was, and they would endeavor to find the leak. There were several – more than several occasions when we would tell them where the valve is and they would be unable to find the leak and they would say, "We can't find the leak," and we would have to go back and literally put our OVA [organic vapor analyzer] instrument in a right angle at the right place on the valve to get the reading.
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> When they did that, they would subsequently get the leak definition.

Garing dep., Dkt. #78, at 126. Garing testified also that defendant's contractors failed to identify all components, id. at 121, that the individual in charge of the program did not have a leak log, id. at 122, did not know why defendant had not fixed some benzene valves down to the 1000 ppm in the leak definition, id., and did not know who was responsible for monitoring which components, id. at 123. He added that many of the escorts were unable to answer simple questions about the monitoring program. Id. at 123-24. If defendant believes that the mere difference in results is not sufficient to sustain the finding that defendant's contractor had not followed Method 21, these additional examples of inexperience and lack of knowledge supply additional proof that defendant was not complying with the method.

Defendant argues that plaintiff's reports cannot be taken as authoritative because plaintiff cannot produce its calibration logs for the June 17-19 period. It does plaintiff no

credit to have misplaced these logs but it does not defeat their claim. Not only did two of the team members, Ken Garing and Armando Bustamante, testify that the team members calibrated their instruments each morning before beginning their inspection but the escorts confirmed every reported leak. Had the inspection team's instruments not been calibrated properly, one would expect them to differ from the escorts' readings. That they did not is evidence of proper calibration.

When plaintiff chose the valves and other components it wanted to inspect, it did not use a statistical sample in making its choice. According to defendant, plaintiff's failure to do so makes its findings suspect. Defendant does not suggest why this would be so. Its contractor was under an obligation to inspect *every* valve and component that might emit volatile organic compounds and it claimed to have done so. Defendant does not say why checking 40% of the valves and components just inspected would not provide a fair sampling of the thoroughness of the contractor's work. Defendant's expert speculated that plaintiff might have made a selective choice of the valves and other components it inspected but it offers no proof to this effect and does not even suggest how such a selection might be made.

Defendant has produced the declaration of Mark Darby, an employee of defendant's contractor, who was present during the first two days of plaintiff's inspection. Darby avers that on many occasions, he and the other escorts were unable to confirm plaintiff's inspector's readings, that four of the 16 open-ended lines identified during the inspection

were double-valved under normal conditions, that 48 of the 49 of the valves that were missing tags were identified on defendant's data base and that it is not unusual for tags to be missing. This declaration does nothing to undercut plaintiff's claim. Darby does not aver that any leak was reported that had not been confirmed; he admits that twelve of the open-ended lines that were identified were not double-valved as they should have been and that 49 valves were missing tags, despite the fact that defendant's contractor had inspected them just the week before. He does not say whether he or anyone else explained the double-valving of the four lines he thinks were identified incorrectly as open-ended.

Finally, there is defendant's argument that plaintiff's inspectors entered the refinery with a predisposition to find more leaks than defendant's contractors had found. One would think that defendant's contractor would enter with the reverse predisposition: to find more leaks than plaintiff would be able to identify. Such a predisposition is to be admired rather than disparaged. After all, that is the point of the monitoring and the inspection of the monitoring. Of course, if overzealousness leads to false or inaccurate results, it would be improper but defendant has not identified any alleged leaks or other violations of the regulations that were the subject of a false report.

In summary, defendant has not shown that there is any reason to reconsider the decision granting plaintiff summary judgment on the sixth claim of its complaint.

ORDER

IT IS ORDERED that defendant Murphy Oil USA, Inc.'s motion for reconsideration of the order granting plaintiff summary judgment on claim six of its complaint is DENIED.

Entered this _____ day of July, 2001.

BY THE COURT:

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BARBARA B. CRABB
District Judge