UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
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	)	
COAST WOOD PRESERVING, INC.,	)	**Docket No. EPCRA-9-2000-0001**
	)	
	)	
RESPONDENT	)	

ORDER ON COMPLAINANT'S MOTION IN LIMINE AND MOTION TO EXPUNGE

ORDER ON RESPONDENT'S MOTION TO STRIKE THE EPA'S REBUTTAL PREHEARING INFORMATION EXCHANGE

Introduction

This case arises under the authority of Section 325(c) of Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. § 11045(c), also referred to as the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"). The proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32.

On September 28, 2000, the United States Environmental Protection Agency (the "EPA" or "Complainant") filed a Complaint against Coast Wood Preserving, Inc. ("Respondent" or "CWP") alleging six violations of Section 313 of EPCRA, 42 U.S.C. § 11023, and its implementing regulations at 40 C.F.R. Part 372. Specifically, the Complaint charges that Respondent is subject to and violated the reporting requirements of Section 313 of EPCRA and the Toxic Chemical Release Reporting: Community Right-To-Know Rule at 40 C.F.R. Part 372. The Complaint alleges that Respondent is a "person," as defined by Section 329(7) of EPCRA, 42 U.S.C. § 11049 (7), and

that Respondent is the owner and operator of a "facility," as that term is defined by Section 329(4) of EPCRA and 40 C.F.R. § 372.3, subject to the toxic chemical release reporting requirements under Section 313 of EPCRA and 40 C.F.R. §§ 372.22, 372.30.[1]

On June 28, 2001, the undersigned administrative law judge ("ALJ") issued Orders "Denying Complainant's Motion for Accelerated Decision"[2] and "Denying Respondent's Cross-Motion for Accelerated Decision" and scheduling the hearing in this matter.[3]

In the EPA's Rebuttal to Coast Wood Preserving, Inc.'s Prehearing Information Exchange filed on May 9, 2001, the EPA moves that the undersigned ALJ exclude certain proposed evidence submitted by Respondent in its prehearing exchange and "expunge" Article IV of Respondent's prehearing exchange concerning its statement as to why the proposed penalty should be reduced or eliminated.[4] On May 29, 2001, Respondent filed Coast Wood Preserving, Inc.'s Opposition to, and Motion to Strike, the EPA's Rebuttal Prehearing Information Exchange. On May 31, 2001, the EPA filed Complainant's Response to Coast Wood Preserving, Inc.'s Opposition to, and Motion to Strike, the EPA's Rebuttal Prehearing Information Exchange ("EPA's Response"). These motions and responses are the subject of the instant Order.

Motion in Limine versus Rebuttal and Motion to Expunge
Opposition versus Motion to Strike

In the EPA's Rebuttal to Coast Wood Preserving, Inc.'s Prehearing Information Exchange, the EPA moves to "expunge" that portion of Respondent's prehearing exchange under Article IV, which consists of Respondent's arguments and explanation as to why the penalty should be reduced or eliminated. In addition to its motion to "expunge," Complainant moves to exclude certain evidence that Respondent intends to present at the hearing, which is identified in its prehearing exchange. However, the caption for Complainant's filing is "EPA's Rebuttal to Coast

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[1] The Complaint alleges that the "facility" at issue is comprised of several establishments, including CWP and Cal Coast Wholesale Lumber, Inc. ("Cal Coast") as both establishments are located on a single site and are owned/or operated by the same person. Complaint at ¶10.

[2] By Order dated July 31, 2001, Complainant's Motion to Forward the June 28, 2001, Order to the Environmental Appeals Board ("EAB") for interlocutory review of the Order Denying the EPA's Motion for Accelerated Decision was denied. *See* Section 22.29 of the Rules of Practice, 40 C.F.R. § 22.29.

[3] The hearing is scheduled for September 5, 2001, (and continuing if necessary on September 6, 2001) in San Francisco, California.

[4] The EPA filed its prehearing exchange on March 26, 2001, and Respondent filed its prehearing exchange on April 25, 2001.

Wood Preserving, Inc.'s Prehearing Information Exchange" and does not identify either motion contained within the filing. Complainant's rebuttal prehearing exchange and the motions contained therein are more appropriately characterized as a motion in limine and will be treated as such.

Pursuant to the procedural rules governing this administrative proceeding, the standard for admitting evidence is that "all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value..." shall be admitted into the record. Section 22.22 (a) of the Rules of Practice, 40 C.F.R. § 22.22 (a). The EPA's motion in limine (the "EPA's Motion"), which requests the exclusion of certain evidence proposed by Respondent, will be adjudicated under this standard.

In response to the EPA's Motion, Respondent filed "Coast Wood Preserving, Inc.'s Opposition to, and Motion to Strike, the EPA's Rebuttal Prehearing Information Exchange." In support of its motion to strike, Respondent argues that the EPA's rebuttal prehearing exchange is a substantively and procedurally defective attempt to exclude evidence that it intends to introduce at the hearing. Respondent, therefore, moves to strike Complainant's rebuttal prehearing exchange.

Generally, motions to strike pertain to pleadings, including defenses. *See* Rule 12 (f) of the Federal Rules of Civil Procedure; 2A Moore's Federal Practice P 122.21 at 112-210 (1995); Wright & Miller, Federal Practice and Procedure: Civil § 1380, 644 - 658 (1990). Respondent's motion, captioned as a Motion to Strike, is more appropriately characterized as opposition to Complainant's motion in limine. Accordingly, Respondent's Motion to Strike is treated as a responsive filing ("Respondent's Opposition"), and the Motion to Strike is denied as moot.

Discussion

This Order must be read in the context of the June 28, 2001, Orders Denying Complainant's Motion for Accelerated Decision and Denying Respondent's Cross-Motion for Accelerated Decision. The EPA's Motion for Accelerated Decision as to liability was based on its assertion that Respondent's Answer was defective under Section 22.15 (b) of the Rules of Practice, 40 C.F.R. § 22.15 (b), and thus the material factual allegations contained in the Complaint should be deemed admitted. The EPA's Motion for Accelerated Decision essentially was a motion to strike Respondent's Answer. In the June 28, 2001, Order it was determined that Respondent's Answer was adequate to meet the requirements of 40 C.F.R. §22.15(b) and, as such, the EPA's Motion for Accelerated Decision was denied.

The June 28, 2001, Order also addressed Respondent's Cross-Motion for Accelerated Decision. Respondent's Cross-Motion for Accelerated Decision was based on its assertion that the EPA regulation at 40 C.F.R. § 372.22 (b), which was promulgated pursuant to Section 313 of EPCRA, is invalid as a matter of law. Specifically, Respondent argued that 40 C.F.R. § 372.22 (b) creates a new standard, inapposite to federal law, for piercing the corporate veil. In the June 28, 2001, Order it was found that Respondent had failed to demonstrate sufficient compelling

circumstances to warrant a review of the regulation in question.[5] As a result, Respondent's Cross-Motion for Accelerated Decision was denied.

This brings us to the present matter. The EPA argues, as it did in its Motion for Accelerated Decision, that Respondent's Answer failed to meet the requirements of 40 C.F.R. § 22.15 (b) for an Answer and such failure means that the allegations raised in the Complaint are deemed admitted under 40 C.F.R. §22.15 (d). According to Complainant's argument, Respondent is attempting to supplement its fatally deficient Answer through its prehearing exchange and thus much of Respondent's proposed testimony and exhibits contained in its prehearing exchange is irrelevant and should be excluded from the record.

In response, Respondent maintains that its prehearing exchange complies fully with all regulatory requirements and the Prehearing Order issued in this matter. Respondent argues that its defenses to liability are all based on either proper denials of the EPA's allegations or valid affirmative defenses raised in its Answer, and that the EPA is fully informed as to how it intends to defend this action.

As a preliminary matter, I note that Respondent's explanation as to why the penalty should be reduced or eliminated as contained in Article IV of its prehearing exchange includes its position and proposed supporting evidence as to its alleged liability in this matter. The directive of the Prehearing Order at ¶3 for the Respondent to submit a statement explaining why the proposed penalty should be reduced or eliminated was intended to elicit proposed evidence to be submitted only at the penalty phase of the proceeding. Here, Respondent has combined the proposed evidence from both the liability and penalty phases in Article IV of its prehearing exchange.

Respondent has advanced several arguments concerning its alleged liability in Article IV which include the following:

1. The EPA cannot treat CWP and Cal Coast as being under "common control" as required under the EPA regulation at 40 C.F.R. § 372.22 (b) because this regulation piercing the separate corporate entities of CWP and Cal Coast is invalid as a matter of law.

2. The EPA's regulations concerning the EPA's need to establish the value of services provided and/or products shipped at multi-establishment facilities are illegally vague and

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[5] The undersigned declined to assume authority to review the validity of the regulation in view of Respondent's failure to overcome the presumption against entertaining a challenge to the validity of a regulation and the absence of an affirmative grant of authority to review the validity of final Agency regulations. *See Woodkiln, Inc.*, CAA Appeal No. 96-2, 7 E.A.D. 254, 269 (EAB, July 17, 1997); *Norma J. Echevarria and Frank J. Echevarria, d/b/a Echeco Environmental Services*, CAA Appeal No. 94-1, 5 E.A.D. 626, 635 (EAB, Dec. 22, 1994); *see also B.J. Carney Industries, Inc.*, CWA App. No. 96-2, 7 E.A.D. 171, 194-5 (EAB, June 9, 1997).

ambiguous.

3. Cal Coast's contribution of services and/or products shipped exceed that of CWP's.

4. The EPA's Complaint fails to state a claim for 1995 EPCRA violations. Specifically, Count I is defective in that it fails to allege that CWP contributes more value of services provided and/or products shipped than Cal Coast for 1995.[6]

In connection with these arguments, Respondent states that it will introduce the testimony of Mr. Gatton, controller of CWP, and that Mr. Gatton's expected testimony includes the following topics:

A) the annual usage of certain chemicals by CWP near the EPCRA reporting thresholds;

B) the revenue streams and accounting for CWP and Cal Coast demonstrating that Cal Coast generates more value in terms of services provided and/or products shipped than CWP;

C) the number of full-time employees employed by CWP falls below the 10 employee threshold of EPCRA; and

D) the incorporation of CWP and Cal Coast as separate corporations.[7]

In light of the June 28, 2001, ruling that Respondent's Answer is adequate to meet the procedural requirements of 40 C.F.R. § 22.15 (b) and that the allegations contained in the Complaint are not deemed to be admitted, Complainant's motion to exclude the proposed evidence concerning those allegations (Respondent's arguments at ¶¶ 3, 4; Gatton's testimony at ¶¶ A, B, C) is denied. To this extent, Complainant's motion in limine is denied.

Similarly, in light of the June 28, 2001, Order, all proposed evidence concerning the alleged invalidity of the EPA regulations at issue in this matter (Respondent's arguments at ¶¶ 1 and 2; Gatton's testimony at ¶ D) is excluded as irrelevant. To this extent, Complainant's motion in limine is granted. However, this ruling does not mean that the EPA is relieved of meeting its

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[6] Although this argument raised by Respondent in paragraph 4 may properly be the subject of a motion to strike, such motion has not been filed in this matter. Moreover, in general, striking a portion of a pleading is not favored and is considered a drastic remedy. *See Lunsford v. United States*, 570 F.2d 221, 229 (8th Cir. 1977). The general policy is that pleadings should be treated liberally, and that a party should have the opportunity to support its contentions at hearing. *See Ciminelli v. Cablevision*, 583 F. Supp. 144, 162 (E.D.N.Y. 1984).

[7] The two remaining topics of Mr. Gatton's expected testimony concerning factors to be considered in determining any penalty amount listed by Respondent in its narrative summary are not at issue in the parties' instant motions.

burdens of presentation and persuasion to show that the violation occurred as set forth in the Complaint and that the relief sought is appropriate. *See* Section 22.24 (a) of the Rules of Practice, 40 C.F.R. § 22.24 (a). In order to meet these burdens, the EPA must establish its *prima facie* case, including all jurisdictional elements under EPCRA and its implementing regulations. *Id*.[8]

Complainant raises several additional objections to proposed evidence submitted by Respondent in its prehearing exchange. First, Complainant contends that the excerpts concerning Mr. Gatton's proposed testimony in Respondent's prehearing exchange do not comply with the requirement for the "expected testimony" language contained in the Prehearing Order. Complainant indicates that the Respondent's description of Mr. Gatton's testimony does not allow Complainant the opportunity to prepare for the hearing. Complainant's argument is to no avail. I find that Respondent's narrative summary of Mr. Gatton's expected testimony is sufficient and affords Complainant a reasonable opportunity to prepare for the hearing. *See* Section 22.19 (a)(2)(i) of the Rules of Practice, 40 C.F.R. § 22.19 (a)(2)(i). Contrary to Complainant's wishes, Respondent cannot provide the expected testimony of Mr. Gatton to be given on redirect or as a rebuttal witness, if any.

Complainant also reiterates its argument that much of Mr. Gatton's expected testimony is irrelevant because the testimony concerns allegations that have been deemed admitted because of the defective Answer. Again, this argument is rejected as discussed above.

Second, the EPA points out that the proposed documents and exhibits submitted by Respondent in its prehearing exchange were not numbered as instructed in the Prehearing Order. Respondent explains that it originally numbered its documents to "facilitate the precise identification of relevant passages in the documents." However, in light of the Prehearing Order and the EPA's objection to its numbering system, Respondent has corrected its document numbering system to reflect the requirements of the Prehearing Order. Therefore, Complainant's objection is now moot.

Third, the EPA, noting that Respondent has submitted several EPA publications in its prehearing exchange, moves that Respondent be instructed to identify the specific provisions of the EPA publications it intends to present at hearing. Further, the EPA requests that the undersigned instruct Respondent to set aside these EPA publications so that they can be admitted to the record upon motion by Respondent to take official notice of the particular document.

On the other hand, Respondent argues that the EPA cites no authority to support its position that Respondent must identify the particular provisions of the proposed documents that it intends to use at the hearing. Respondent also argues that it is under no obligation to do so. Respondent moves the undersigned to take official notice of the EPA publications identified as Respondent's

[8] Each matter of controversy shall be decided upon a preponderance of the evidence. *See* Section 22.24 (b) of the Rules of Practice, 40 C.F.R. § 22.24 (b).

Exhibit 22, and Exhibits 28-30 pursuant to Section 22.22 (f) of the Rules of Practice, 40 C.F.R. § 22.22 (f).

In light of the June 28, 2001, Orders on the parties' cross-motions for accelerated decision, Complainant's request to have Respondent specify the provisions of the EPA publications that it intends to present is now considerably narrowed in scope. Indeed, it would expedite the disposition of the proceeding and be most helpful for the parties if Respondent were to specify those provisions of the EPA documents it intends to cite during the hearing. As such, Respondent is directed to provide such information to the EPA. *See* Section 22.19 (b)(7) of the Rules of Practice, 40 C.F.R.§ 22.19 (b)(7). Pursuant to the parties' motions, I will take official notice of the EPA publications identified in Respondent's proposed Exhibits 22 and 28 - 30 upon motion at the hearing. *See* Section 22.22 (f) of the Rules of Practice, 40 C.F.R. § 22.22 (f).

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Fourth, the EPA objects that certain exhibits of Respondent's proposed evidence are not certified as true copies of the document represented. In response, Respondent notes that the EPA again cites no legal authority supporting the proposition that Respondent must certify its exhibits at this stage of the proceeding. Respondent points out that its exhibits were filed by declaration verifying that the documents are true and correct copies. Further, Respondent maintains that the EPA's Motion is vague in referencing exactly which documents it is seeking to have certified by Respondent and Respondent requests that the EPA be directed to provide a written list that identifies the particular documents and objections that the EPA is making to those documents. I find it unnecessary to rule on the parties' requests at this time. Any objection to the admission of exhibits into the record based on authenticity may be raised at the hearing. *See* Section 22.22 (e) of the Rules of Practice, 40 C.F.R. § 22.22 (e).

Fifth, the EPA objects to the admission of Respondent's Monthly Summary Pesticide Use Reports contained in Exhibit 14 on the basis of relevancy. In support of this argument, the EPA cites the EAB's decision in *Catalina Yachts, Inc*., EPCRA Appeal Nos. 98-2 & 98-5 (EAB, Mar. 24, 1999), slip op. at 14, in which the EAB reiterated its holding that supplying information to state and local agencies regarding toxic chemicals not reported to the EPA does not mitigate a failure to comply with the reporting requirements of Section 313 of EPCRA with respect to Form R's. The EPA moves to bar the presentation of the Pesticide Reports as being irrelevant.

Respondent argues that its Exhibit 14, which is the March 13, 2000, correspondence from CWP to the EPA, must be viewed in the proper context. Respondent maintains that this correspondence is submitted to show that it is a different corporation from Cal Coast and to demonstrate why corporate structures should not be pierced. According to Respondent, the Pesticide Reports, which were attached to the original correspondence, were provided to present a full and complete copy of that correspondence and to avoid the appearance of incomplete disclosure. Moreover, Respondent submits that the EPA's reliance on *Catalina* to support the exclusion of the Pesticide Reports is misguided. In this regard, Respondent asserts that *Catalina* addresses the issue of chemical usage information being made available to public agencies other than the EPA for the

purpose of penalty mitigation. Here, Respondent states that it submitted the Pesticide Reports for the purpose of demonstrating why the corporate structure should not be pierced and not for the purpose of penalty mitigation.

Inasmuch as Respondent maintains that the Pesticide Reports in its Exhibit 14 were submitted for the purpose of demonstrating why corporate structures should not be pierced, the Pesticide Reports will be excluded as irrelevant. As previously discussed, evidence relating to the alleged invalidity of the EPA regulations at issue is excluded as irrelevant. To this extent, the EPA's motion in limine is granted.

ORDER

Complainant's Motion in Limine is Granted in Part and Denied in Part. Complainant's Motion to Expunge is Denied.

Respondent's Motion to Strike Complainant's Rebuttal Prehearing Exchange is Denied as moot.

The Hearing in this matter will be held beginning at 9:30 a.m. on Wednesday, September 5, 2001, in San Francisco, California, continuing if necessary on September 6, 2001. The Regional Hearing Clerk will make appropriate arrangements for a courtroom and retain a stenographic reporter. The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete.

IF EITHER PARTY DOES NOT INTEND TO ATTEND THE HEARING OR HAS GOOD CAUSE FOR NOT BEING ABLE TO ATTEND THE HEARING AS SCHEDULED, IT SHALL NOTIFY THE UNDERSIGNED AT THE EARLIEST POSSIBLE MOMENT.

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Barbara A Gunning
Administrative Law Judge

Dated: August 24, 2001
Washington, D.C.