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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
KETCHIKAN PULP COMPANY	)	Docket No. [CWA] 1089-12-22-309(g)
	)	
	)	
Respondent	)	

ORDER RULING ON POST HEARING MOTIONS

I. Motion to Admit Exhibit C-14

There is currently pending a motion by the Complainant to admit Exhibit C-14, which is a letter dated April 4, 1990, together with enclosures thereto, from counsel for the Respondent Ketchikan Pulp Company (KPC) to counsel for the Complainant. This material had originally been identified at the evidentiary hearing as Complainant's Exhibit C-13, but that exhibit was withdrawn when Respondent's counsel objected on the basis that the material was part of then ongoing settlement negotiations. The withdrawal of C-13 was, however, without prejudice to admission being sought after the hearing following the Complainant's investigation as to the status of this data. The motion renews the request for admission of this information and takes the position that, while the material had been received as part of settlement discussions, it contains no mention of settlement negotiations, offers, acceptances, comments on settlement terms or on KPC's willingness to settle, or statements concerning liability or any other issues relevant to the case. Therefore, Complainant argues that admission of the material is not barred merely because it was received during settlement discussions.

Complainant notes that the material includes 12 pages of notes made by two KPC employees, which notes relate to draining of the aeration basin and water treatment plant settling tank, and calculate the amount of pollutants discharged in the process. In addition, the exhibit contains two diagrams of KPC's secondary waste water treatment plant and a table of Respondent's waste water monitoring data during August 1989. Therefore, the Complainant contends that C-14 provides relevant factual material relating to the matters at issue in this proceeding.

Respondent objects to admission of the C-14 on the basis of the material was provided during settlement negotiations about two and one-half years before the evidentiary hearing. KPC avers that the exhibit contains factual material prepared by its attorney during settlement negotiations and for the specific

purpose of attempting settlement. In addition, Respondent takes the position that the exhibit was not part of the prehearing exchange and that the Respondent was not given a reasonable opportunity to review this evidence as required by Section 22.19(b) of the EPA Rules of Practice (Rules), 40 C.F.R. §22.19(b). Therefore, Respondent asserts that the Complainant should not be allowed to submit this exhibit more than 2 years after the prehearing order and that fairness requires that the exhibit be rejected. Respondent avers that it is prejudiced by admission of this document since it will be forced to use valuable time in its briefing to respond to the admission of this data. KPC also included with its opposition a motion to close evidence to avoid having to expend further time from its briefing period to respond to any more attempts to introduce new evidence.

Complainant in reply contests that there are any statements of counsel that would be inadmissible as part of settlement discussions since the statements do not relate to the negotiations. Complainant further avers that the Respondent has not identified which facts and material was allegedly prepared by Respondent's attorney during settlement negotiations and contends that Rule 408 of the Federal Rules of Evidence excludes only evidence of statements made during settlement negotiations, not factual evidence that happened to have been assembled or changed hands during the course of settlement discussions. Moreover, Complainant asserts that Exhibit C-14 was not included in the prehearing exchange because Complainant did not anticipate introducing it at the evidentiary hearing. Further, Complainant notes that Section 22.19(b) of the Rules does not absolutely bar admission of an exhibit not included in the prehearing exchange, but provides that documents that have not been exchanged shall not be introduced into evidence without permission of the presiding officer. Complainant argues that the exhibit should be permitted into evidence since it is necessary to rebut the factual testimony of Respondent's witness Robert Higgins, who testified concerning KPC's ability to keep the aeration basin contents mixed even without aeration continuing. Therefore, Complainant argues that C-14 should be admitted as containing rebuttal evidence that there was no mixing during the draining of the aeration basin.

Complainant also asserts that Exhibit C-14 is highly probative of facts central to the case because it consists primarily of contemporaneous notes taken by KCP's technicians who were involved with the discharges at issue. Complainant further asserts that Respondent is not prejudiced by admission of the document because it was not surprised by its contents, which had been prepared by KPC's own employees. Moreover, Complainant contends that the fact that C-14 is being offered post hearing nullifies any surprise that the Respondent could have experienced and provides KPC with the reasonable opportunity to review new evidence required by Section 22.19 of the Rules, since KPC will

have an opportunity to respond to the exhibit during the post hearing briefing.

In addition, Complainant opposes the motion made by the Respondent to close evidence. Complainant avers that a ruling on future motions to introduce evidence would be premature, even though no such future motions are contemplated at present. Complainant takes the position that any rulings on future motions to admit further evidence should be made after the motions have been filed and considered.

On analysis, it can be concluded that Exhibit C-14 should be admitted into evidence but only for a limited purpose. The argument relating to settlement negotiations does not bar entry of the exhibit into evidence since the Complainant correctly points out that what is barred on this basis are such items as offers or acceptances, comments on settlement terms or willingness to settle, and statements concerning liability or other issues relevant to the case. Here, the material at issue is not of that nature, even though it was apparently exchanged in connection with settlement discussions. Moreover, the data would have been discoverable by other means and, therefore, should not be excluded merely because it was secured in the course of settlement discussions.

Of more concern, however, is the fact that the material was not included in the prehearing exchange. It is clear that Complainant wishes to use some of the data not merely for rebuttal but substantively to support certain of the facts relating to the alleged violations themselves. Since this data was in the hands of the Complainant long before the prehearing exchange took place, it should have been included as an exhibit in the prehearing exchange if it was to be used for proof of substantive facts. It is correct that material introduced into evidence at hearing for the purpose of rebutting testimony does not have to be part of the prehearing exchange since the party seeking admission of such evidence cannot be charged with knowing exactly what the sworn testimony will be at hearing. Therefore, a document can be used to rebut factual matters stated by a witness without having been part of the prehearing exchange. As a result, Exhibit C-14 is hereby admitted into evidence but for the limited purposes of rebutting the testimony of the Respondent's witness Higgins regarding KPC's ability to keep the aeration basis mixed even without aeration continuing. This is the only purpose for which C-14 will be considered and the Complainant cannot use the data substantively in its briefing in an attempt to prove facts otherwise contained in Exhibit C-14.

As to closing evidence, Complainant has taken the correct position with regard to whether a ruling should be made prior to any further filing of motions to admit new evidence. Such a ruling would be premature and a prospective ruling of that nature

would not be appropriate. Therefore, Respondent's motion to close evidence is denied.

II. Motion to Admit Exhibit R-3 and/or Exhibit R-3A

Also pending is a motion by KPC to admit Respondent's Exhibit R-3 and an alternative motion by KPC to admit Respondent's Exhibit R-3A. Exhibit R-3, which was provided in the prehearing exchange, consists of excerpts from a January 1976 document entitled Development Document for the Interim Final and Proposed Effluent Limitations Guidelines and Proposed New Source Performance Standards for the Bleached Kraft, Groundwood, Sulfite, Soda, Deink, and Non-Integrated Paper Mills Segment of the Pulp, Paper, and Board Mills Point Source Category (hereinafter Document I). KPC offered Exhibit R-3 into evidence to support the assertion that the Agency knew as early as 1986 that pulp mills had spills and took that into account when promulgating the effluent limitation guidelines. At hearing, the Complainant objected to the admission of R-3 because it was allegedly a draft document which resulted in a December 1976 document titled Development Document for Effluent Limitations Guidelines (BPCTCA) for the Bleached Kraft, Groundwood, Sulfite, Soda, Deink and Non-Integrated Paper Mills Segment of the Pulp, Paper, and Paperboard Point Source Category (hereinafter Document II). Respondent avers that Document I was used to support officially promulgated regulations and was not merely a draft. KPC asserts that Document II, although applied to a more limited rulemaking, also supports the Respondent's position that the Agency knew that spills occurred at pulp mills yet did not consider spill control necessary to meet the effluent limitations guidelines.

Respondent contends that R-3 should be admitted since it was drafted by the Agency, communicates the state of the Agency's knowledge before it issued the KPC permit at issue in this cause and was used by the Agency to promulgate the final rule. The Respondent alleges that there is nothing in Document II that suggests the Agency altered its position regarding spills at pulp mills after it published Document I, and that the administrative history shows that the Document I is not a draft, but a final document. Therefore, KPC asks that R-3 be admitted into evidence or, in the alternative, requests that Exhibit R-3A be admitted. Exhibit R-3A is made up of excerpts from Document II that allegedly support the position taken by KPC regarding the Agency's knowledge of spills at pulp mills and the lack of need for having spill control as part of the effluent limitations.

Complainant, in its response to the motion to admit R-3, contends that the motion should be denied in part and granted in part. Complainant argues that R-3 is an interim document and is not probative as to whether EPA considered spill control technology when promulgating effluent standards. Complainant

avers that Document II superseded Document I and that the later document shows that the Agency promulgated final effluent standards for pulp mills after considering spill control technology to be a viable option to the discharges of spilled materials. Complainant also quotes further language from Document II in support of its position. Therefore, Complainant asks that the motion to admit Exhibit R-3 be denied, but does not object to the entry into evidence of Exhibit R-3A.

In reply, Respondent notes that Document I was promulgated by the Agency to support the interim best practicable control technology currently available (BPT) for pulp mills and to support the best available technology economically achievable (BAT) and the new source performance standards (NSPS) limits. KPC contends that Document I was not an interim document and that there is no language in Document II stating that it superseded Document I. Respondent avers that Document II could not have superseded Document I since Document II does not discuss BAT or NSPS limits. Respondent avers that R-3 is a better exhibit since it clearly shows that the Agency considered spill control as technology that would be warranted to meet BAT and NSPS limits, but was not needed to meet BPT limits. Since Document II did not consider BAT or NSPS issues, KPC asserts that that document is less clear that the Agency affirmatively decided that spill control is not a control technology encompassed by BPT.

Respondent also contends that the Rules favor liberal admission of evidence and that Complainant has not made any showing that Exhibit R-3 is not reliable. KPC further notes that the prehearing order provided a time to reply to the opposing party's prehearing exchange but that the Complainant waited until the last day of the evidentiary hearing to object to Exhibit R-3.

Treating this last argument first, it should be noted that a reply to a prehearing exchange is not meant to encompass every objection to the admission into evidence of the other party's exhibits but is rather a mechanism by which the parties are able to provide their positions in rebuttal to the opposing party's evidentiary presentation. The fact that the issue was not raised in the prehearing reply does not limit the opposing parties right to object to the admission of a particular document into evidence at hearing.

On a substantive basis, it would appear that the Respondent's position is better taken and that Exhibit R-3 should be admitted into evidence. While the Complainant characterized the Document I as a draft, this does not appear to be the case. On review, the excerpts submitted from Document I indicate that it contained interim regulations that were in effect at the time it was promulgated. This is different than a draft document used for evaluation purposes until a final document is formulated. Therefore, it is arguable that evidence of the Agency position

with regard to spill control can be adequately shown by reference to Document I. Accordingly, Exhibit R-3 is admitted into evidence. However, since the parties are in dispute over the Agency position on spill control, and since that position is dealt with in Exhibit R-3A, it seems reasonable to also admit into evidence Exhibit R-3A, so the parties will be able to expound fully on their arguments relating to this issue. And, since the Complainant has the right to add additional language from the documents of which the exhibits are excerpts, Exhibit R-3A is expanded to include the added language from Document II cited by the Complainant in its response to the motion to admit Exhibit R-3. Accordingly, Exhibit R-3A as amended is also admitted into evidence.

SO ORDERED

Daniel M. Head
Administrative Law Judge

Dated: _____
Washington, DC

IN THE MATTER OF KETCHIKAN PULP COMPANY, Respondent
[CWA]-1089-12-22-309(g)

CERTIFICATE OF SERVICE

I certify that the foregoing Order Ruling on Post Hearing Motions, dated December 7, 1992, was sent in the following manner to the addressees listed below.

Original by Pouch Mail to:

Marian Atkinson
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Copy by Facsimile Process and Regular Mail to:

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Dated: 12/7/92
Washington, D.C.