

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
J. S. CHEM CORPORATION,) **Docket No. CWA-02-2000-3407**
)
Respondent)

ORDER ON COMPLAINANT’S MOTION TO STRIKE

The Complaint in this matter alleges that Respondent, J.S. Chem Corporation, discharged storm water associated with industrial activity without a National Pollutant Discharge Elimination System (NPDES) permit from December 30, 1998 to July 25, 2000, and that Respondent failed to seek NPDES permit coverage for such discharges, in violation of Sections 301(a) and 308(a) of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1318(a). Complainant timely filed its Prehearing Exchange, and Respondent belatedly submitted a Prehearing Exchange on July 26, 2001. An accelerated decision was issued on August 10, 2001, finding Respondent liable for the violations alleged in the Complaint, and reserving the issue of the amount of penalty for further proceedings. On August 20, 2001, Complainant submitted a Rebuttal to Respondent’s Prehearing Exchange and a Motion to Strike (Motion). To date, the undersigned has not received any response to the Motion from Respondent.

In its Motion, Complainant seeks to strike the testimony of both of the witnesses Respondent proposes in its Prehearing Exchange and all of the three documents Respondent proposes as exhibits for the hearing.

Respondent’s Prehearing Exchange summarizes the testimony of its proposed witness, Mr. Sergio Sabat, president and plant manager of Respondent, as follows:

Mr. Sergio Sabat will testify about Respondent’s activities aimed towards complying with the [NPDES] Storm Water Program since 1992 until July, 2000. Mr. Sabat will also testify concerning Respondent [sic] compliance activities under the storm water NPDES general permit that expired on December 29, 1998 and similar activities under the multi-sector general permit (“MSGP”) for which coverage was not obtained before said date. He will also testify on the reasons for seeking coverage under the general permit, in August 1997, instead of the then already available “MSGP.”

Respondent’s Prehearing Exchange summarizes the testimony of its other proposed witness, Mr. Jose Antonio Sabat, P.E., vice president and technical director of Respondent, as

follows, in part:

Mr Jose Antonio Sabat is a licensed chemical, professional engineer. . . . On occasion he shares company regulatory compliance obligations with his brother Sergio. He will testify on his signing of a Notice of Intent form, dated August 12, 1997, seeking coverage under the “NPDES” Storm Water Program and company regulatory compliance efforts under said program. He will describe manufacturing operations and storm water management activities at J.S. Chem Corp. facility.

Respondent’s Prehearing Exhibit 1 is a Notice of Intent (NOI) for Storm Water Discharges under the NPDES General Permit, dated August 11, 1997. The other two of Respondent’s Prehearing Exhibits are identified as Complainant’s Prehearing Exhibits 6, which is a copy of EPA’s Table Records, and 20, which is a copy of Respondent’s 1997 and revised 2000 Storm Water Prevention Plan.

Complainant’s position is that the testimony of Respondent’s proposed witnesses lacks probative value as to the proposed penalty, which is the only matter in controversy. Complainant argues that no explanation is given as to how the testimony is relevant to statutory factors in Section 309(g) of the Clean Water Act for determining the penalty. Complainant objects to Respondent’s Prehearing Exhibits for the same reasons.

Because motions to strike are not addressed in the applicable procedural rules, 40 C.F.R. Part 22, Federal court practice with respect to the Federal Rules of Civil Procedure (FRCP) may be looked to for guidance. Federal Rule of Civil Procedure (FRCP) 12(f) provides that a “court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.” Thus, motions to strike generally seek to strike material, such as affirmative defenses, from pleadings. On the other hand, a motion in limine is the appropriate vehicle for excluding testimony or evidence from being introduced at hearing. Complainant requests the exclusion of testimony and evidence on the basis that they lack relevancy and probative value, which is an appropriate basis for a motion in limine. Accordingly, Complainant’s Motion will be treated as a motion in limine.

The Consolidated Rules of Practice provide that “[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value” 40 C.F.R. § 22.22(a)(1). Evidence as to the penalty issue must be relevant and of probative value as to the criteria set forth in the statute for determining a penalty. The criteria are set forth in Section 309(g)(3) of the Clean Water Act, as follows:

In determining the amount of any penalty assessed . . . the Administrator . . . shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

Testimony of Sergio Sabat and Jose Antonio Sabat as to Respondent's compliance efforts under the storm water permits, storm water management activities, and reasons for seeking coverage under the general permit rather than the MSGP permit, may include testimony which is relevant to the circumstances or gravity of the violation and/or Respondent's degree of culpability. Therefore, their testimony cannot be considered at this point in the proceeding to be irrelevant or not probative as to the penalty assessment criteria.

As to a party's prehearing exhibits, the party is not required to explain the relevancy of the exhibits to the issues presented. The relevancy of a document may not be readily apparent on its face. Respondent's Prehearing Exhibit 1, a Notice of Intent for Storm Water Discharges, includes references to MSGP applicants, and may be relevant to Respondent's witnesses' testimony. Respondent's Prehearing Exhibit 3, Respondent's Storm Water Prevention Plan, may be relevant to circumstances and/or gravity of the violation. Respondent's Prehearing Exhibit 2 appears to be EPA's computer record as to Respondent's facility. It cannot be determined at this time that Respondent's Prehearing Exhibits are irrelevant or of little probative value with respect to the penalty.

Accordingly, Complainant's request to exclude testimony of Respondent's witnesses and Respondent's Prehearing Exhibits is **DENIED**.

Susan L. Biro
Chief Administrative Law Judge

Dated: October 12, 2001
Washington, D.C.