UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
HIGHTOWER PLATING AND MANUFACTURING CORP. AND WILLIAM KOCH,	)	Docket No. RCRA-09-94-0004
	)	
Respondents	)	

ORDERS

Respondent, William Koch (respondent or Koch), filed a motion on December 1, 1994[1], to be dismissed as a respondent in this proceeding pursuant to 40 C.F.R. § 22.20(a). United States Environmental Protection Agency, Region IX (complainant or EPA), responded in opposition to this motion on December 12. In its opposition, complainant filed three additional motions requesting the following: leave to file an amended complaint; to compel discovery; and an accelerated decision on certain affirmative defenses. On December 22, respondent offered a reply to complainant's opposition. This reply violates paragraph 13, in the undersigned Administrative Law Judge's notice and order of June 10, and thus, is not considered. Respondents, Koch and Hightower Plating and Manufacturing Corp. (Hightower), responded in opposition to complainant's motions on February 27, 1995. The above motions will be addressed seriatim.

[1] Unless otherwise indicated, all dates are for the year 1994.

I.

Based upon an inspection in September 1993, complainant issued an administrative complaint charging Koch and Hightower with nine counts under Section 3008(a)(1) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(a)(1). The complaint alleged that Koch is the "owner" of the facility involved in the various counts, and as defined in 22 California Code of Regulations (CCR) § 66260.10. (Compl. ¶¶ 2, 9.)[2]

Respondent, Koch, seeks to be dismissed on the basis that it is not an owner of the facility. At all times, before and after the asserted violations, Koch claims it was never the owner of the facility. To support the position, it presented a copy of Hightower's lease and certified copies of quitclaim deeds, which documented KMW Associates (KMW) as the owner of the facility from January 1983 until the present. (Resp't Mot., Exs. A, C-D.)

Complainant first contends the mere fact that Koch may not hold legal title to the facility does not absolve him of liability under RCRA. In complainant's view, a person may be liable as an owner under RCRA based upon facts demonstrating control over a facility. (Complainant's Mot. in Opp'n at 2.) To support its assertion, complainant cites cases holding corporate officers, stockholders and plant supervisors liable for RCRA violations, despite their lack of legal title to a RCRA facility. Following these cases, complainant argues that Koch, as president of

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[2] On August 1, 1992, California received authorization to administer its own hazardous waste management program under Section 3006 of RCRA, 42 U.S.C. § 6926. (Compl. ¶ 4.)

Hightower, may have exercised sufficient control over Hightower to be liable under RCRA.

Complainant next argues that Koch is listed as the installation's legal owner on Hightower's notification of hazardous waste activity form. (Complainant's Mot. in Opp'n, Ex. A at 1.) Accordingly, the signed form constitutes an admission of Koch's status as owner. In the alternative, complainant avers that this owner statement raises factual issues which require additional discovery as to why Koch is listed as the owner.

The guidelines for this motion are set forth in 40 C.F.R. § 22.20(a), which states in pertinent part, that a respondent is entitled to a dismissal where the complainant has failed to establish a prima facie case or other grounds which show no right to relief on the part of complainant.

The crux of this motion centers on the meaning of "owner" under the applicable regulations. "Owner" means the person who owns a facility or part of a facility. A "facility" is defined as all contiguous land and structures, other appurtenances, and improvements on the land used for the treatment, transfer, storage, resource recovery, disposal or recycling of hazardous waste. 22 CCR § 66260.10. These definitions are virtually identical to their federal counterparts. See 40 C.F.R. § 260.10.

In this case, complainant has not sufficiently established that Koch is an "owner" of the "facility" under 22 CCR § 66260.10. First, respondent has presented certified copies of quitclaim deeds verifying KMW's legal title to the land on which the facility is

located. (Resp't Mot., Exs. C-D.) Second, Hightower's lease also confirms KMW as the "owner" of both the real property and any structures on the land too. The lease explicitly states the lessee hires from the lessor on a nonexclusive basis all of the land, buildings, structures, and other appurtenances situated on the property described therein (emphasis added). Moreover, any additions or alterations to the premises become a part of the realty and belong to the lessor. (Resp't Mot., Ex. A at 1-2.) These provisions remove any doubt that KMW is the sole "owner" by retaining the exclusive ownership and control over the entire "facility." Cf. In re Ford Motor Co., et. al., RCRA Appeal Nos. 90-9 & 90-9A at 2-3 (Administrator, October 2, 1991)(where both title holder of real property and operator of the facility were "owners" pursuant to a license agreement, which granted the operator ownership over all buildings and improvements on the land). Other than the hazardous waste notification form[3], complainant has not rebutted respondent's documentation that KMW is the "owner" of the "facility."

Further, none of the cases cited by complainant stands for the proposition that an owner may be liable under RCRA due to control over a facility. These cases either concern liability of an operator or liability under Section 7003 of RCRA, which contains a different standard of liability from owner/operator liability under Section 3004 of RCRA, 42 U.S.C. § 6924, 40 C.F.R. Part 264. See In

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[3] Although Koch was listed as the owner, this form was not signed by Koch.

re Southern Timber Products, Inc., RCRA (3008) Appeal No. 89-2 at 32, order on motion for reconsideration, (CJO, February 29, 1992). The complaint, however, only alleges that Koch is an "owner." Thus, the cases cited by complainant are inapplicable. It is concluded that complainant's allegation that Koch is an "owner" of the facility is dismissed, but Koch is not dismissed from these proceedings. (See, infra, section II.) However, this determination is granted without prejudice to complainant renewing its allegation if discovery establishes that Koch is the legal owner of KMW. (See, infra, section III.)

II.

Complainant seeks leave to file an amended complaint to add KMW as a respondent alleging it to be an "owner" of the facility. Also, complainant requests leave to assert that Koch is a "generator" of hazardous waste and an "operator" of the facility. Complainant's basis is that at the time it filed the complaint it did not know KMW held title to the land where the facility is located. Additionally, Koch was not originally named as an "operator" or "generator" because complainant was unaware of certain facts which respondents subsequently raised.

On a threshold question of jurisdiction, respondents initially oppose complainant's amended complaint due to alleged violations of California regulations. In respondents' view, complainant can only enforce regulations adopted by EPA but not those by the states. Respondents' position is misplaced. It has been settled that under

Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), EPA can enforce state regulations issued by an authorized state hazardous waste program. See In re CID-Chemical Waste Management of Illinois, Inc., RCRA (3008) Appeal No. 87-11 (CJO, August 18, 1988); In re Landfill, Inc., RCRA (3008) Appeal No. 86-8 at 2 n.2 (CJO, November 30, 1990)(citing, inter alia, Wyckoff Co. v. EPA, 796 F.2d 1197, 1200-01 (9th Cir. 1986); U.S. v. T & S Brass and Bronze Works, Inc., 681 F. Supp. 314, 317 n.3 (D.S.C. 1988), modified, 865 F.2d 1261 (4th Cir. 1989)).

Turning to the merits of the motion, it is a generally accepted principle that amendments to pleadings are granted liberally where the ends of justice are thereby served and no prejudice results to the opposing party. Foman v. Davis, 371 U.S. 178, 182 (1962); In re Port of Oakland and Great Lakes Dredge and Dock Company, MPRSA Appeal No. 91-1 at 41 (EAB, August 5, 1992). Respondents, however, do not allege any prejudice by the motion. Instead, respondents contend that the causes of action, as a matter of law, cannot be asserted against either Koch or KMW because the counts involve violations by "generators," and neither Koch nor KMW are "generators" as defined by 22 CCR § 66260.10.

It is premature at this point to address the substantive merits of the allegations in complainant's amended complaint. If respondents wish to make a motion to dismiss based upon these new allegations, they are free to do so. Nevertheless, good cause has been demonstrated that the new claims in the amended complaint concern alleged violations already at issue, and no prejudice or

delay would result since no trial date has been scheduled. On this basis, it is concluded that the amended complaint should be accepted and respondents given a chance to answer the same.[4]

III.

After failing to acquire certain requested information through voluntary means, complainant filed a motion to compel discovery. Complainant seeks to obtain information pertaining to Koch's alleged status as an operator and officer of the facility as well as Hightower's contention of inability to pay the proposed penalty. Respondents oppose any discovery relating to Koch or KMW[5] because the latters' alleged liability as owners has no basis. Thus, any discovery request cannot lead to any relevant evidence.

The extent to which any discovery is granted beyond the prehearing exchange is determined by 40 C.F.R. § 22.19(f). Section 22.19(f)(1) allows further discovery when there is a determination: that such discovery will not unreasonably delay the proceeding; that the information is not otherwise obtainable; and that the information has significant probative value.

Complainant's discovery request seeks the production of several documents. (Complainant's Mot., Ex. C.) Requests numbered "1, 2, 3 and 7" all pass the three-prong test of Section

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[4] However, the allegation in paragraph 10 of the amended complaint, regarding Koch as an "owner," is dismissed. (Complainant's Mot., Ex. B.)

[5] Respondents also oppose any discovery related to Anillo Industries which is apparently affiliated with the Koch family. (Complainant's Mot. at 8.)

22.19(f)(1) in that: there is no delay since no trial date has been set; the documents are all business records within the control of Hightower; and the documents also have significant probative value relating to Koch's alleged status as a generator and/or operator of the facility. Request number "4" meets the discovery test due to its importance in determining potential owner liability. Request number "5" has significant probative value concerning the alleged owner/operator status of the respondents. Requests numbered "6 and 9" do not have significant probative value because they concern an entity, Anillo Industries, shown not to be within the scope of this matter. Request number "8" is relevant to Hightower's ability to pay the proposed penalty. Request number "10" for all of respondents' documents relating to their affirmative defenses is overly broad. It is concluded that requests numbered "1, 2, 3, 4, 5, 7 and 8" are **GRANTED**, and requests numbered "6, 9 and 10" are **DENIED**.

IV.

Complainant filed a third motion moving for an accelerated decision concerning respondents' third, fifth and sixth affirmative defenses for being insufficient as a matter of law. Respondents assert that their claims are valid defenses to the alleged violations. In the alternative, these defenses are relevant as mitigating factors to determine the amount of potential civil penalties.

Some initial thoughts are appropriate here. Section 22.20(a) can entertain such a motion, however, this motion is in essence a

motion to strike affirmative defenses. When EPA's Consolidated Rules of Practice, 40 C.F.R. Part 22, have no direct rule regarding a pleading, the Federal Rules of Civil Procedure (Fed. R. Civ. P.) can be referred to for guidance. See, e.g., In re Halocarbon Products Corp., Docket No. TSCA-90-H-18 at 2 (Order Granting Motion to Strike, July 16, 1991). Under Fed. R. Civ. P. 12(f), motions to strike are generally disfavored because they are a drastic sanction. 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d § 1380 (1990). Further, motions to strike should be denied when the sufficiency of the defense depends on disputed questions of fact or law. Oliner v. McBride's Industries, Inc., 106 F.R.D. 14, 17 (S.D.N.Y. 1985). However, such a motion is proper when the defense is insufficient as a matter of law. Kaiser Aluminum and Chemical Sales, Inc. v. Avondale Shipyards, 677 F.2d 1045, 1057 (5th Cir. 1982), reh'g denied, 683 F.2d 1373 (5th Cir. 1982), cert. denied, 459 U.S. 1105 (1983).

With this backdrop, we turn now to the specific affirmative defenses. Respondents' third affirmative defense concerns the defense of laches. (Resp't Answer, ¶ 83.) Complainant cites numerous authorities for the settled principle that laches is no defense to alleged violations when the government is suing to protect the public right or interest. As this proceeding involves the United States acting in its governmental capacity to protect the public's health and safety, complainant's position is well-taken. See, e.g., In re Waterville Industries, Inc., Docket No. RCRA-I-87-1086 at 6 (Order, June 23, 1988); U.S. v. Marine Shale

Processors, Inc., 1993 U.S. Dist. LEXIS 10974 (W.D. La. 1993) at *6 (striking affirmative defense of laches in RCRA claims); See also U.S. v. Arrow Transp. Co., 658 F.2d 392, 394 (5th Cir. 1981)(citing U.S. v. Summerlin, 310 U.S. 414, 416 (1940)), reh'g en banc denied, (1981), cert. denied, 456 U.S. 915 (1982)(denying laches defense against the United States under the Rivers and Harbors Act). It is concluded that respondents' third affirmative defense is insufficient as a matter of law and is stricken.

Respondents' fifth and sixth affirmative defenses assert that their alleged failure to comply with the regulations was "wholly or partially caused by actions of the federal, state and/or local government or was attributed to causes beyond the reasonable control of the respondents." (Resp't Answer, ¶¶ 85, 86.) Complainant argues that these defenses are inadequate as a matter of law because RCRA is a strict liability statute. Thus, no demonstration of a causation element is required for respondents to be liable for any alleged violation.

Respondents contend that the statute or regulation still must apply to a respondent regardless of whether or not the standard is strict liability. As Koch was not an operator who controlled the facility, any alleged violation occurred beyond his reasonable control. Additionally, respondents argue that the facility was inspected by state agencies[6] without any of these agencies issuing

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[6] Respondents state that they have been inspected by state agencies, such as the Orange County Health Care Agency and the County Sanitation Districts Orange County, which are also responsible for checking compliance with the regulations at issue here. (Resp't Mot. in Opp'n at 15.)

violations to respondents. Thus, respondents continued to operate under the assumption they were in compliance with RCRA.

Respondents' fifth affirmative defense disputes the applicability of the regulations to Koch. Although RCRA may not require proof of causation as a strict liability statute, the regulations are only enforceable against those persons specified therein. Respondents' defense raises disputed questions of law and fact regarding the applicability of the generator and operator regulations to Koch. It is concluded that respondents' fifth affirmative defense should not be stricken.

Respondents' sixth affirmative defense in essence asserts an implied acquiescence of their conduct by certain state agencies. This defense relies on a frail reed. Like laches, implied acquiescence in a regulated entity's statutorily prohibited acts by the government is no defense to a suit by the same to protect the public interest. U.S. v. Nevada Power Co., 31 ERC 1888, 1891 (D. Nev. 1990). Moreover, whether or not a state agency even issues violations is irrelevant for a decision by U.S. EPA to initiate federal enforcement proceedings, after notice is given to the state pursuant to Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2). It is concluded that respondents' sixth affirmative defense is insufficient as a matter of law and should be stricken.

IT IS ORDERED that:

1. Koch's motion to be dismissed entirely as a respondent from this proceeding be **DENIED**, but be **GRANTED** as to Koch's status as an owner without prejudice.

2. Complainant's motion to compel discovery of production of documents be **GRANTED** for requests numbered "1, 2, 3, 4, 5, 7 and 8," and be **DENIED** for requests numbered "6, 9 and 10." Respondents shall deliver up these documents to complainant by May 8, 1995.

3. Complainant's motion to amend its complaint be **GRANTED**. The amended complaint shall be served within 20 days following service of respondents' discovery, and respondents shall be given 20 days from the service date of the amended complaint to serve their answer.

4. Complainant's motion for an accelerated decision for respondents' third and sixth affirmative defenses be **GRANTED**, and be **DENIED** for respondents' fifth affirmative defense.

Frank W. Vanderheyden
Administrative Law Judge

Dated: April 4, 1995

IN THE MATTER OF HIGHTOWER PLATING & MANUFACTURING CORP. and WILLIAM KOCH, Respondents,
Docket No. RCRA-09-94-0004

Certificate of Service

I certify that the foregoing Order, dated 4/4/95, was sent this day in the following manner to the below addressees:

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Dated: April 4, 1995