

2/15/96

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Dominick's Finer Foods, Inc.,	)	Docket No. [CERCLA]/EPCRA-007-95
	)	
Respondent	)	

ORDER DENYING RESPONDENT'S MOTION  
TO STRIKE SECTION 104(E) REQUEST

This matter arises under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, and the Emergency Planning and the Community Right-To-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11001 *et seq.* The United States Environmental Protection Agency ("EPA") alleges that Dominick's Finer Foods, Inc. ("Dominick's"), violated both CERCLA and EPCRA as a result of a release of anhydrous ammonia at its facility. With respect to the alleged CERCLA violation at issue in this case (Count I), EPA made two information requests to Dominick's pursuant to Section 104(e) of that statute. 42 U.S.C. § 9604(e). Following the second information request, Dominick's filed the present motion to strike, arguing that the information request by EPA exceeded the scope of inquiry allowed by Section 104(e) of CERCLA, and violated the discovery provisions of the Consolidated Rules of Practice, 40 C.F.R. § 22.19(f). In response, EPA asserts that the Section 104(e) information requests are a proper use of its statutory authority to independently gather information regarding CERCLA violations. For the reasons set forth below, Dominick's motion to strike is denied.

Briefly, the underlying facts are as follows. On January 9, 1995, EPA filed an administrative complaint against Dominick's alleging the CERCLA and EPCRA violations at issue here. In the complaint, EPA charged that the violations stem from respondent's May 14, 1992, discovery of a release of anhydrous ammonia, a hazardous substance as that term is defined in Section 101(14) of CERCLA. 42 U.S.C. § 9601(14). Prior to filing the complaint, on February 24, 1993, EPA had served upon respondent an information request pursuant to Section 104(e) of CERCLA. Dominick's responded to this request. Subsequently, on October 19, 1995, after the filing of the complaint in this case, EPA presented Dominick's with a second Section 104(e) information request. Both information requests relate to the same alleged CERCLA violation.<sup>1</sup> As noted, it is this second information request at which Dominick's directs its motion to strike.

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<sup>1</sup> Dominick's submits that EPA's second information request "seeks information concerning not only a potential release of ammonia but also the effort and time spent in answering [the] earlier 1993 § 104(e) information request." Motion to Strike at 1.

obtain by means of a Section 104(e) information request, how the Agency may obtain the information, and the sanctions available for noncompliance with a valid request. The fact that there may be a pending action in which the parties are subject to the discovery rules of Section 22.19(f) is by no means a basis for restricting EPA's information gathering rights under CERCLA. Indeed, in several administrative decisions arising under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, it has been held that EPA may not be enjoined from exercising its statutory investigative authority to request information solely because of the pendency of a related administrative action. See Del Val Ink and Color, Inc., RCRA II-91-0104 (January 12, 1993), at 6-7; Florida Dept. Of Transportation, RCRA 92-16-R (October 29, 1993), at 3-6; and Coors Brewing Co., RCRA-VIII-90-09 (January 4, 1991), at 11-15.<sup>2</sup> Respondent Dominick's has not shown why a different result should obtain under CERCLA.

Accordingly, for the foregoing reasons, Dominick's motion to strike EPA's October 19, 1995, information request is denied.

Carl C. Charneski

Carl C. Charneski  
Administrative Law Judge

Issued: February 15 1996  
Washington, D.C.

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<sup>2</sup> These RCRA decisions are consistent with the development of federal caselaw. See e.g., Linde Thomson Langworthy Kohn & Van Dyke v. RTC, 5 F.3d 1508 1518 (D.C. Cir. 1993)(Statute authorizing RTC investigations does not contemplate the termination of investigative authority upon commencement of civil proceedings.); National Standard Company v. Adamkus, 881 F.2d 352, 363 (7th Cir. 1989)("The mere pendency of a related civil action does not automatically preclude EPA's use of other authorized law enforcement techniques...."); and In Re Stanley Plating Co., 637 F.Supp. 71, 72-73 (D.Conn. 1986)(Nothing in RCRA suggesting that civil action restricts EPA to investigative techniques in accordance with discovery rules).