UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

Port of Anacortes, Docket No. TSCA-10-96-0088

RESPONDENT

ORDER DENYING MOTION TO INTERVENE

This proceeding was initiated on September 25, 1996 by a complaint filed by Region 10 of the U. S. Environmental Protection Agency, charging the Respondent, Port of Anacortes (Respondent or Port), with violating section 15 of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2614, and regulations promulgated thereunder, 40 C.F.R. Part 761. The complaint alleged that in the Port's warehouse storage area, a container of used oil contaminated with PCBs was stored. The complaint further alleged that the Port failed to mark its PCB storage area and PCB container, failed to comply with regulatory criteria for flooring and continuous curbing in its PCB storage area, and failed to notify EPA as a generator of PCB-contaminated waste oil with an on-site storage facility, as required by regulations at 40 C.F.R. §§ 761.40, 761.65 and 761.205.

The Port generally denied the factual allegations in the complaint and alleged that it promoted good environmental practice by providing waste oil disposal containers at its public marina, that it does not treat, store or dispose of hazardous waste in the ordinary course of its business, that it had been the victim of a "dumping" event and should not be subject to penalties under TSCA as a result of this incident.

Respondent further explained that:

The Port of Anacortes has a contract with a private oil disposal contractor, which calls for the disposer to pick up and remove waste oil from the waste oil containers on a periodic basis. During the course of removal activity by the said private contractor, it would appear that PCB contamination was determined to be in one of the waste oil containers at the marina. The waste oil,

including the contaminated oil, was removed by the contractor, apparently leaving residual PCB contamination within the individual waste oil container. (Answer ¶ 3).

Under date of February 18, 1997, Burlington Environmental Inc., doing business as Philip Environmental (Philip), moved to intervene in this proceeding pursuant to 40 C.F.R. § 22.11. Philip is the private oil disposal contractor referred to in the Port's answer. Philip alleges that the Port delivered a quantity of PCB-contaminated oil to Intervenor in 1996, which oil was not properly tested and identified prior to the delivery. As a result of the Port's refusal to take actions allegedly required by federal law to identify the waste and notify the Intervenor, Philip avers that other waste collected by Intervenor was contaminated, causing it to incur substantial additional costs in handling and disposal. Motion at 3.

Philip's position is that rather than being the victim of a dumping incident, the Port has not followed legal requirements of which it was, and is, aware concerning the storage, identification, [and] disposal of waste. (Motion at 4). Philip states that as a result of the Port's negligence, the public and business operations like Philip's are put at hazard and the effectiveness of laws governing waste disposal and environmental protection are compromised. Philip asserts that to the extent the Port seeks to implicate Philip in the Port's waste disposal problems, Philip needs to be a participant in these proceedings to protect its own interests. Philip points out that the Port has not been cited for offering PCBs to a transporter known not to be licensed for the transport of PCBs; or for consigning PCBs to a facility not known to be a PCB storage facility.

Philip argues that any ruling which does not take [into account] its role as a regulated waste disposal entity and the "attempts of Respondent to shift its waste disposal burdens to [Philip] will prejudice [its] interests and ability to do business within the requirements of state and federal law." Motion at 5. Philip asserts that its interests are not represented, that the Port is hostile to Philip's interests, and that "EPA is seeking to enforce the law without consideration of the manner in which Respondent seeks to shift its compliance failures onto other, nonparticipatory parties in this case. " Id. Philip says that, because it is fully acquainted with the facts underlying this matter, it is ready to file its response immediately and that no delay in proceedings will result [from its intervention]. Additionally, Philip says that it has tried to resolve its dispute with the Port without success and has sought to intervene herein after finding no other resolution possible.

Complainant and Respondent have opposed the Motion to Intervene, contending that Philip has not satisfied the criteria for intervention set forth in Rule 22.11 of the Consolidated Rules of Practice, 40 C.F.R. Part 22. The Port asserts that Philip's interests are not implicated in this administrative proceeding and denies that it is attempting to implicate Philip in its waste disposal problems. (Opposition to Burlington Environmental's Motion To Intervene, dated March 26, 1997, at 1, 2). Although acknowledging that it has a dispute with Philip concerning the amount of a bill presented by Philip, the Port denies that it is attempting to hold Philip responsible for the violations alleged in the complaint or that Philip is responsible for the conduct which resulted in the proposed penalties against the Port. The Port says that Philip is attempting to intervene in order to gain tactical advantage in its dispute with the Port and points out that EPA has no jurisdiction over such contractual disputes. Because Philip has not shown any interest that will be implicated by a final order herein, let alone an interest which will be "adversely affected" within the meaning of Rule 22.11, the Port argues that the motion to intervene should be denied.

Complainant contends that the motion to intervene should be denied, because the alleged dispute between the Port and Philip is immaterial to the instant proceeding as there are separate issues and interests involved. (Response Of EPA To Motion To Intervene, dated March 26, 1997). Complainant explains that its interest is to obtain a finding of liability and a penalty assessment against, or a settlement with, the Port for regulatory violations stemming from the improper storage of oil contaminated with PCBs. On the other hand, the dispute between the Port and Philip concerns the allocation of the cost of disposing of PCB-contaminated oil, which Complainant says is of no concern to EPA and not relevant to the instant proceeding.

Complainant acknowledges that some of the waste oil containing PCBs, which is the basis for the Agency's claim of improper storage, is apparently the same waste oil which Philip hauled away and disposed of at a cost which it now contends is the responsibility of the Port. (Response at 2). Complainant emphasizes that the issues in this administrative matter are centered upon storage of the oil at the Port, while the primary interest of Philip began when the oil was picked up and extend to disposal of the oil. While Philip may believe that a liability judgment against the Port will assist Philip in pursuing its claim against the Port, Complainant points out that, if the case is settled, there may not be a finding of liability. Moreover, as an intervenor Philip may oppose a settlement, believing that a liability judgment would be preferable and in its interest. Complainant asserts that Philip should not be

in a position to interfere with a settlement EPA believes is in the public interest merely because the settlement is opposed to Philip's private interest.

Complainant emphasizes that improper storage rather than disposal is the issue here and that it is aware that storage at the Port is the Port's responsibility. (Response at 3). Complainant argues that whatever Philip did to dispose of the oil is not relevant to this proceeding and that allowing Philip to intervene will likely interfere with the proper prosecution of this matter and impair the expeditious progress of the proceeding. (Id. 4). In sum, Complainant opposes the motion to intervene, because Philip has failed to demonstrate that its presence in the proceeding would not unduly prolong or otherwise prejudice the rights of the original parties.

In a status report, dated April 30, 1997, counsel for Complainant reported that the parties have reached an agreement in principle and have initiated negotiations over the specific terms of a settlement.

DISCUSSION

Rule 22.11 of the Consolidated Rules of Practice (40 C.F.R. Part 22) is entitled "Intervention". Paragraph (c) of that Rule provides as follows:

(c) Disposition. Leave to intervene may be granted only if the movant demonstrates that (1) his presence in the proceeding would not unduly prolong or otherwise prejudice the adjudication of the rights of the original parties; (2) the movant will be adversely affected by a final order; and (3) the interests of the movant are not being adequately represented by the original parties. The intervenor shall become a full party to the proceeding upon the granting of leave to intervene.

In order for its motion to be granted, Philip must demonstrate compliance with the three elements listed in Rule 22. 11 (c) . In re Rockwell International Corporation, TSCA Appeal No. 87-5, 2 EAD 453 (CJO, October 23, 1987) . For the reasons hereinafter appearing, Philip has not demonstrated that its motion complies with these elements and the motion will be denied.

Complainant has reported that it has reached a settlement in principle with the Port and that it has initiated negotiations over the specific terms of the settlement. Although Philip has alleged that it is ready to file its response immediately and has disputed any notion that its intervention would unduly prolong the proceeding, allowing Philip to intervene at this time will almost

certainly complicate, delay, and perhaps, negate any settlement. See, e.g. In re Chemical Waste Management, TSCA Appeal No.84-3, 1 EAD 851 (CJO, Order Granting Motion To Intervene, May 23, 1984) (emphasizing that prolongation of proceeding as a result of intervention must be undue) . Indeed, as a party, Philip's interest would seem adverse to a settlement, which may not contain an admission of liability or findings adequate to materially buttress Philip's claim against the Port. See Rule 22.18 (b) (2) (consent agreement may provide that respondent neither admits nor denies factual allegations of complaint).

Accordingly, Philip has not been shown that its presence as a party would not "unduly prolong or otherwise prejudice the adjudication of the rights of the original parties" within the meaning of the f irst proviso of Rule 22.11 (c). [1/] This result is inherent in the factual situation presented by the complaint and Philip's motion and is not solely dependent on the fact a tentative settlement has been reached. Moreover, Philip hasn't shown that its interests will be adversely affected by a final order and, therefore, any prolongation or delay in the proceeding caused by Philip's participation is "undue." Rockwell, supra.

Philip has not demonstrated that it would be adversely affected by a final order in this proceeding. Complainant emphasizes that the violations charged, namely improper storage of PCBs, failure to mark PCBs, and failure to submit notification to EPA as a PCB generator, stem from the storage of PCBs by the Port and thus are solely the Port's responsibility. Although Philip presumably could be charged with the improper transportation and disposal of PCBs, this eventuality, under the facts as alleged, is not dependent upon whether Philip is permitted to intervene herein. The Port disclaims any contention that Philip is in anyway responsible for the violations alleged or for the proposed penalties assessed against the Port.

The disposition herein of any factual issues which may have some relation to the transportation and disposal activities of Philip has not been shown to have an adverse effect on Philip. A consent agreement and consent order operates as a contract between the parties thereto (Chemical Waste Management, supra), and thus any agreements as to facts or conclusions therein would not be binding upon Philip. Moreover, a decision by the ALJ herein would not be binding on Philip in another enforcement proceeding under the doctrine of res judicata, because Philip is not a party, or in privity with, a party to this proceeding. [2/] While it may well be true that findings adverse to the Port, i.e., that the Port was negligent and knew or should have known of the PCB contamination, would tend to strengthen Philip's claim against the Port, the ALJ has no jurisdiction over such claims and there is no basis for collateral estoppel. [3/]

Moreover, Philip is free to pursue its claim against the Port in another forum. [4/]

Likewise, findings favorable to the Port, that is, that the contamination resulted from the acts of a person or persons unknown and that the Port had no reason to suspect the contamination, might tend to weaken Philip's claim, but are in no sense binding on Philip.

The final element of Rule 22.11(c) is a showing that the interests of the movant are not being adequately represented by existing parties. Philip's interest is not identical to that of EPA and is necessarily adverse to that of the Port. Complainant's interest is to obtain a finding of liability or an admission of no contest and a sanction as vindication of the PCB regulatory program. On the other hand, Philip's interest is in garnering evidence and securing findings to buttress its contention that the Port was negligent, and thus responsible for the additional costs of handling and disposal of oil contaminated by virtue of being commingled with PCB-contaminated oil picked up from the Port. These findings may be useful in pressuring the Port to settle or in litigation. TSCA is, however, a strict liability statute and the complaint is not based upon negligence, nor need Complainant prove negligence, in order to prevail. In view thereof, and in view of the fact that Philip's claim against the Port is outside the ALJ's jurisdiction, the motion to intervene may not be sustained on the basis that Philip's interests are not adequately represented. Moreover, to the extent Philip's motion is based upon alleged risk or damage to entities such as Philip which are engaged in the collection, storage, and disposal of industrial and other types of waste, or damage to the PCB-regulatory program, it is presumed that representation by Complainant is adequate. In re Chemical Waste Management, supra.

ORDER

Philip's motion for leave to intervene is denied.

Dated this 9th day of June 1997.

SpencerT. Nissen

Administrative Law Judge

[1/] The State of Alabama was allowed to intervene in Chemical Waste Management, supra, because the proposed settlement involved matters in addition to

assessment of a penalty, the State would be adversely affected by the proposed consent agreement allowing storage of PCBs and the State demonstrated that its interests were not adequately represented by EPA.

[2/] See, e.g., In re Wego Chemical & Mineral Corporation, TSCA Appeal No. 92-4, 4 EAD 513 (EAB, February 23, 1993) and cases cited (res judicata requires a showing of (1) a final judgment on the merits in a prior action (2) involving the same parties [or those in privily therewith] (3) the subsequent proceeding is based upon the same cause of action.

[3/] Another name for collateral estoppel is issue preclusion and it is well settled that in order for issue preclusion to apply to a non-party, an existing party must be the virtual representative of the non-party. See Antrim Mining, Inc. v. Davis, 775 F.Supp. 1390 (MD, PA 1991) ; Symbol Technologies v. Metrologic Instruments, 771 F.Supp. 1390 (N.J. 1991) (virtual representation should not be found to have occurred without an express or implied legal relationship between the named party and the non-party sought to be bound); and Moldovan v. Great Atlantic & Pacific Tea Companv, 790 F.2d 894 (3rd Cir. 1986) (issue preclusion requires identity of interests). If facts suff icient for issue preclusion to apply are present, intervention would be precluded because representation by an existing party is presumptively adequate.

[4/]

See, e.g., Commodities Futures Trading Commission v. Heritage Capital Advisory Services, Ltd, 736 F.2d 384 (7th Cir. 1984) (where proposed intervenor could protect its interest by asserting constructive trust theory in other forums and to the extent proposed intervenor's interest could be impaired by a bank's motion to segregate funds, its interest was adequately represented by the CFTC, intervention as a matter of right under FRCP Rule 24(a)(2) was properly denied). Although Consolidated Rule 11 provides only for permissive intervention (Rockwell, supra) , Heritage Capital is instructive on the question of when the availability of relief in other forums precludes intervention as a matter of right. A fortiori, denial of permissive intervention under the circumstances present here, the ALJ having no jurisdiction over Philip's claim against the Port, cannot be an abuse of discretion.

CERTIFICATE OF SERVICE

I hereby certify that the original of this ***ORDER DENYING MOTION TO INTERVENE,*** *dated June 9, 1997,* ***in re: PORT OF ANACORTES, Dkt. No. TSCA-10-96-0088,*** *was mailed to the Regional Hearing Clerk,Reg. X, and a copy was mailed to Respondent and Complainant, and Intervenor (Philip's) (see list of addressees).*

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Date:June 9, 1997

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