UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR
Decision Published At Website - http://www.epa.gov/aljhomep/orders.htm

IN THE MATTER OF	**)**	
	)	
LAKE COUNTY,	**)**	**DOCKET NO. CAA-8-99-11**
	)	
RESPONDENT	**)**	

ORDER REQUIRING AMENDED ANSWER TO REQUESTS FOR ADMISSION

By an order, dated June 28, 2000, Complainant was directed to respond to Request Nos. 1 through 6 of the County's Requests For Admission, submitted during the ADR process on December 17, 1999. Complainant filed a response to the order on July 12, 2000. On July 25, 2000, the County served a motion, supported by a brief, for determination of the sufficiency of certain of Complainant's responses to the requests for admission or, alternatively, for an order deeming such matters to have been admitted. Complainant filed a response to the motion on August 15, 2000.

Although the County's motion is directed only at Complainant's responses to Request Nos. 3 through 6, Complainant's response overlooks this limitation on the extent of the motion. In view thereof and in the interest of clarity, the requests and Complainant's responses thereto will be set forth in whole or in part. These requests are:

Request No. 1: “The Inspection Report For the Lake County Landfill (Report) prepared by Betsy (Wahl), dated June 3, 1999, at page 3 states that photographs 8 through 13 depict refrigerators with ‘refrigerant charge intact.’ None of the refrigerant systems on these refrigerators was tested to determine whether they were charged in excess of four inches of mercury vacuum.”

Complainant’s response stated essentially that Complainant has not tested the refrigeration systems to determine whether they were charged in excess of four inches of mercury vacuum and that it does not know whether Respondent has conducted such testing.

Request No. 2: “At page 2 of the Report it states: ‘At least six refrigerators were identified in the metal pile that had the refrigerant charges intact, i.e., there was no evidence of removal or evacuation of refrigerant.’ None of the refrigeration systems on these refrigerators was tested to determine whether they were charged in excess of four inches of mercury vacuum.”

Complainant’s response to this request was the same as its response to Request No. 1. Notwithstanding that these responses to the County’s Request Nos. 1 and 2 clearly admitted that Complainant had not tested the refrigerant systems on the referenced refrigerators to determine whether the refrigerators were charged in excess of four inches of mercury vacuum and that Complainant did not know whether the County had performed such testing, Complainant’s response to the County’s present motion states that

it cannot truthfully admit or deny the matters contained in the County's Request Nos. 1-4, because of the ambiguous manner in which the requests were drafted. (Response at 3).

Request No. 3: "Regarding the refrigerators referenced in RA No. 2, the Report states: 'All of the refrigerant lines and hoses were intact.' These lines and hoses were not inspected to determine the presence of a hole 1/16 inch diameter in size."

Complainant's response refers to the Waste Management District's Policy regarding the removal of appliance refrigerants, which provides in part: "(o)nce an appliance is determined to be free of refrigerants, a large 'X' is painted on the appliance and it is taken to the metal pile for recycling." Complainant's response also refers to the inspection of the County Landfill, conducted on May 18, 1999, and states that the inspectors, Betsy Wahl and Lewis McLeod, walked all around the pile of refrigerators which had been partially crushed in preparation for recycling, "and saw no 'X's." Additionally, the response states that "they [the inspectors] closely inspected the refrigerant lines and hoses for any evidence that the refrigerant had been evacuated from the lines previously, and found none." (Id. 2).

Request No. 4: "Regarding the refrigerators referenced in RA No. 2, the Report states 'None of the refrigerators in the metal pile was painted with a large 'X'....' The original intact surface

of each of the four sides and the original intact surface of the top and bottom of each of these refrigerators were not inspected."

Complainant's response repeats the assertion that during their visits to the County Landfill on May 18, 1999, the inspectors, Ms. Wahl and Mr. McLeod, walked around the pile of refrigerators which had been partially crushed in preparation for recycling and "saw no 'X's" (Id. 3). Complainant refers to the Waste Management District's Policy which provides that refrigerators are to be painted with a large 'X' once they were determined to be free of refrigerants and that the purpose of this policy was to indicate refrigerators that had previously been evacuated. Complainant points out that the purpose of the Policy would not have been effectuated, if 'X's had somehow been painted on the limited number of surfaces not visible to the inspectors or on missing surfaces. The response concludes by stating that given that not a single 'X' could be found on the visible surfaces of the refrigerators in the pile, it was highly improbable that an 'X' appeared on any of the surfaces of those refrigerators.

Complainant's response to the County's motion as to Request Nos. 3 and 4 is included within the statement that it cannot truthfully admit or deny the matters contained in Request Nos. 1-4, because of the ambiguous manner in which these requests were drafted.

Request No. 5: “No testing of the refrigerators referred to above was done to determine the presence of chlorofluorocarbon-12.”

Complainant’s response stated that during the hearing, EPA inspector Betsy Wahl will testify (1) how she determined the age of the refrigerators from their appearance; and (2) her determination that chlorofluorocarbon-12 was used in refrigerators of that age (Id. 4). Complainant’s response to the County’s present motion admits Request No. 5.

Request No. 6: “Complainant EPA did not determine whether the refrigerators referred to above were evacuated or were not evacuated of refrigerants at the time they were received at Respondent’s facility.”

Complainant’s response refers to the regulation, 40 C.F.R. § 82.156(f), which provides that persons (including scrap recyclers and landfill operators), who take the final step in the disposal process of a small appliance, must either (1) recover any remaining refrigerant from the appliance in accordance with paragraph (g) or (h) of this section as applicable; or (2) verify that the refrigerant has been removed from the appliance or shipment of appliances previously. Complainant emphasizes that in accordance with § 82.156(f)(2) the verification must include a signed statement from the person from whom the appliance or shipment of appliances was obtained that all refrigerant that has not leaked previously has been recovered from the appliance or shipment of

appliances in accordance with § 82.156(h) and that, as required by §§ 82.166(i) and 82.166(m) these statements must be maintained by the person disposing of the small appliances for a minimum of three years unless otherwise indicated.

Complainant reiterates the assertions that at the time of the inspection on May 18, 1999, the inspectors walked all around the pile of partially crushed refrigerators and "saw no 'X's" and that they closely examined refrigerant lines and hoses for evidence that refrigerant had previously been evacuated and found none. Additionally, Complainant asserts that the time of the inspection, Ms. Wahl asked both, Jim Jones, the landfill operator, and Susan Brueggman, then the County's Solid Waste Program Manager, for signed statements from the person or persons from whom the appliances were received that all refrigerant which had not leaked from the appliances had previously been recovered or for the County's records of the disposal of recovered refrigerants. Complainant says that no such records were available at the landfill and that no such records have been received to date by Ms. Wahl.[1/]

Complainant's response to the County's present motion as to Request No. 6 is that good faith requires that Complainant qualify its answer with respect to Request No. 6. Complainant maintains

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[1/] The County has acknowledged that on May 18, 1999, it had no statements pursuant to § 82.156(f)(2) in its possession (Response, dated April 11, 2000, to ALJ's letter-order at 3).

that it has done so on pages 4-6 of its response to the County's Requests for Admission.

Discussion

In support of its motion, which the County states is made pursuant to Consolidated Rule 22.19[e] and FRCP Rule 36(a), the County quotes from the Order Granting in Part Requests for Admission, dated June 28, 2000, to the effect that the history of [former] Rule 22.19(f)), "Other discovery", indicates the Rule was intended to incorporate discovery available under the Federal Rules of Civil Procedure. The County also quotes from FRCP Rule 36(a), providing in pertinent part that: "The answer [to a request for admission] shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." The County points out that Rule 36(a) authorizes the party who has requested admissions to move for a determination of the sufficiency of the answers or objections and authorizes the court, if it determines that an answer does not comply with the rule, to order either that the matter is admitted or that an amended answer be served.[2/]

[2/] FRCP Rule 36(a) provides in pertinent part: The party who has requested admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the (continued...)

Citing Audiotext Communications Network, Inc. v. U.S. Telecom, Inc., 1995 WL 625744 (D. Kan.), copy attached, the County argues that Complainant's responses to Request Nos. 3, 4, 5, and 6 subvert the purpose of requests for admission and ignore the standards for a [proper] response (Brief at 4). According to the County: "None of the Responses specifically admit or deny the succinct statement of fact stated in each Request. No Response states a reason why Complainant can not admit or deny the matter. No Response contains statement of reasonable inquiry. No Response states an objection. Each Response contributes nothing toward narrowing the issues for trial and amounts to nothing more than restatement of Complainant's theory of the case as stated in the complaint." (Id.). Therefore, the County requests that Complainant's Responses to Request Nos. 3, 4, 5, and 6, be deemed insufficient and that Complainant be ordered to serve forthwith amended responses in compliance with Rule 36(a) or alternatively, that said Requests be deemed admitted.

Complainant's response is largely devoted to establishing what is not and cannot be truly contested, i.e., that the FRCP are not controlling in this proceeding. This is true for several reasons including the fact that the FRCP govern proceedings in United States district courts (FRCP Rule 1), that the Part 22 Consolidated Rules of Practice govern administrative adjudicatory proceedings

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[2/] (...continued)
requirements of this rule, it may order either that the matter is admitted or that an amended answer be served.

for, inter alia, the assessment of civil penalties under the Clean Air Act (Rule 22.1(a)(2)), and that the Consolidated Rules are not identical to the FRCP. See, e.g., Asbestos Specialists, Inc., TSCA Appeal No. 92-3, 4 E.A.D. 819 (EAB, October 6, 1993). The FRCP and decisions thereunder are, however, useful guides in interpreting the Consolidated Rules. This is seemingly especially true as to discovery, because, although current Rule 22.19(e) "Other discovery" obviously contains limitations, such as on the taking of depositions, which are not in the FRCP, there is historical evidence that the Part 22 discovery rule was intended generally to

incorporate discovery available under the FRCP.[3/] Therefore, I will use FRCP Rule 36 as a guide in determining the adequacy of Complainant's responses to the County's requests for admission.

Complainant's responses to Request Nos. 1 and 2 acknowledge that Complainant did not test the refrigeration systems on referenced refrigerators to determine whether they were charged in excess of four inches of mercury vacuum and that Complainant does not know whether the County conducted such testing. These responses are clear admissions and nothing further from Complainant in that respect may be required.

Request No. 3 refers to the refrigerators referenced in Request No. 2 and to the inspection report which states that "(a)ll of the refrigerant lines and hoses [on these refrigerators] were in tact." Complainant is asked to admit that these lines and hoses were not inspected to determine the presence of a hole 1/16th inch diameter in size. Request No. 4 refers to the refrigerators referenced in Request No. 2 and to the inspection report which states that "(n)one of the refrigerators in the metal pile were painted with a large 'X'...." Complainant is asked to admit that

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[3/] See, e.g., Safety-Kleen Corporation, Docket Nos. RCRA-1090-11-10-3008(a) & RCRA-1090-11-11-3008(a), Order on Discovery (ALJ, December 6, 1991), footnote 5, which indicates that the Part 22 discovery rule had its origin in the Rules of Practice Governing Hearings Under Section 6 of the Federal Insecticide, Fungicide and Rodenticide Act (40 C.F.R. § 164.51, 1974) and that the preamble to that rule states that "discovery procedure was provided to incorporate the applicable Federal Rules of Civil Procedure" (38 Fed. Reg. 19371, July 20, 1973).

the original intact surface of each of the four sides and the original intact surface of the top and bottom of each of these refrigerators were not inspected.

Complainant's assertion that it cannot truthfully admit or deny Request Nos. 3 and 4, because of the ambiguous manner in which these requests were drafted is "wide of the mark" and is rejected. There is nothing ambiguous about the statement that "[intact] lines and hoses [on the referenced refrigerators] were not inspected to determine the presence of a hole 1/16th inch diameter in size." Complainant's response notes the Waste Management District's policy to mark appliances which have been evacuated of refrigerant with a large 'X', states that the inspectors saw no 'X's on the refrigerators in the pile of partially crushed refrigerators and, in addition, states that the inspectors closely inspected all of the refrigerant lines and hoses for any evidence that the refrigerant had been previously evacuated from the appliances and found none.

FRCP Rule 36(a) allows denials of requests for admission without explanation and denials with qualification. Although it is unlikely that the purpose of the inspection of the mentioned lines and hoses was to determine the presence of a hole or holes 1/16th inch diameter in size, it may also be that, because of the intensity/cursory nature of the examination, it is unlikely/likely that such holes, assuming the holes existed, would have escaped the

attention of the inspectors. These, of course, are matters for exploration at the hearing. Complainant, however, will be given another opportunity to admit, deny or deny with qualifications this request.

Request No. 4 refers to the statement in the inspection report that "(n)one of the refrigerators in the metal pile were painted with a large 'X' " and asks Complainant to admit that the original intact surface of each of the four sides and the original intact surface of the top and bottom of each of these refrigerators were not inspected. Complainant's response to this request reiterates that the inspectors "saw no 'X's" on refrigerators in the pile of partially crushed refrigerators and states that the Waste District's policy concerning the painting of large 'X's on appliances from which the refrigerant had previously been evacuated would not have been effectuated, if an 'X' had been painted on the limited number of surfaces not visible to the inspectors. Complainant concludes by stating that it is highly improbable that any 'X' appeared on any surface of these refrigerators.

"Original intact surface" in this request presumably refers to the surface of refrigerators, which have not been crushed or detached from the refrigerator of which the surface is or was a part, in the pile of crushed or partially crushed refrigerators. If Request No. 4 is so interpreted, Complainant's response could be construed as a qualified denial, i.e., that all visible surfaces of

the refrigerators were inspected. Complainant will be given an opportunity to clarify its response.

As previously indicated, Complainant has admitted Request No. 5 and has alleged that it cannot truthfully admit or deny Request No. 6 which asks Complainant to admit that it did not determine whether the refrigerators referred to in the requests were evacuated or not evacuated of refrigerants at the time they were received at the County's facility. Complainant's response refers to the regulation (40 C.F.R. § 82.156(f)) previously described (ante at 5, 6), requiring persons such as Respondent to either recover any remaining refrigerant from the appliance in accordance with paragraph (g) or (h) of that section or to verify that the refrigerant has previously been evacuated. Complainant emphasizes that neither the manager of the landfill or the County's waste program manager was able to produce any signed statements from the persons from whom the appliances were received that all refrigerant which had not previously leaked had been evacuated; nor were they able, at the time of the inspection, to produce any records of the County's disposal of recovered refrigerants. Complainant repeats the assertion that the inspectors did not see any 'X's on refrigerators in the pile of crushed or partially crushed refrigerators and that inspection of intact lines and hoses revealed no evidence that refrigerant had previously been evacuated from these appliances.

Complainant has advanced reasons why it is unlikely that refrigerant in the refrigerators referred to in the requests had previously been evacuated.[4/] Because this response could be interpreted as a qualified denial, Complainant will be given another opportunity to clarify its response to this request.

Order

Within ten days of the date of this order, Complainant is directed to admit, deny or deny with qualifications the County's

[4/] This request is closely related to the County's assertion that, if the refrigerant in the refrigerators had not been evacuated at the time the refrigerators were received at the County's landfill, the provisions of § 82.156(f)(2) are not applicable. This was the County's Request for Admission No. 7, which was denied in the June 28th order.

Request for Admission Nos. 3, 4, and 6. If Complainant fails to do so, these requests will be deemed to be admitted.

Dated this 24th day of August 2000.

Original signed by undersigned

Spencer T. Nissen
Administrative Law Judge