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**
106 FOURTH AVENUE EAST	)	
POLSON, MT 59860,	)	
	)	
RESPONDENT.	)	

ORDER GRANTING IN PART REQUESTS FOR ADMISSION

The complaint in this action, issued September 30, 1999 by the Assistant Regional Administrator, Office of Enforcement, Compliance, and Environmental Justice, U.S. Environmental Protection Agency, Region VIII ("Complainant"), pursuant to Section 113(d)(1)(B) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7413(d)(1)(B), as amended, charged Respondent, Lake County, Montana with violating regulations at 40 C.F.R. Part 82, Subpart F, Protection of Stratospheric Ozone: Recycling and Emissions Reduction. Specifically, the complaint alleged that the County violated 40 C.F.R. § 82.156(f) when it failed to: (1) recover the chlorofluorocarbon-12 ("CFC-12") refrigerant that remained in six

refrigerators[1/] in accordance with § 82.156(h); or (2) verify that the CFC-12 had been previously evacuated from the refrigerators.[2/] For these alleged violations, Complainant proposed to assess the County a penalty of $36,000.

The County answered, denying knowledge of the allegations and of the alleged violations (Answer, dated October 25, 1999). The County denied liability for any "penalty" and requested a hearing.

By letter-order, dated March 9, 2000, the ALJ directed the parties to file pre-hearing exchanges on or before April 14, 2000. On April 11, 2000, the County responded to the ALJ's order, and enclosed a copy of its Requests for Admission, dated December 17, 1999, which it had submitted during the ADR process.[3/] Respondent

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[1/] Based upon an inspection of Lake County's facility on May 18, 1999 by Betsy Wahl, an Enforcement Officer and authorized EPA inspector , and Lewis McLeod, an Air Quality Technician for the Confederated Salish and Kootenai Tribes of the Flathead Nation, the six refrigerators were found to have refrigerant system lines that were neither cut nor crimped. In other words, the lines were intact. (Complaint ¶ 10). Complainant further alleged that the refrigerators had been partially crushed in preparation for recycling and were in an open pile, but that none of the refrigerators had been prepared for recycling in accordance with Attachment A of Respondent's Solid Waste Management District's Policy regarding removal of appliance refrigerants, dated August 1995 (C's Phx 2).

[2/] Complainant alleged that the refrigerators are small appliances as defined in 40 C.F.R. § 82.152 (Complaint ¶ 13).The regulation, 40 C.F.R. § 82.152, provides in pertinent part that a "(s)mall appliance means any of the following products that are fully manufactured, charged, and hermetically sealed in a factory with less than five (5) pounds of refrigerant: refrigerators and freezers designed for home use, ..."

[3/] In a letter to the Lake County attorney, dated January 3, 2000, counsel for Complainant referred to the ongoing ADR process,

sought the ALJ's assistance in obtaining responses to the following requests:

1. The Inspection Report for The Lake County Landfill (Report) prepared by Betsy [Wahl], dated June 3, 1999, at page 3 states that photographs numbered 8 through 13 depict refrigerators with "refrigerant charge intact". None of the refrigeration systems on these refrigerators was tested to determine whether they were charged in excess of four inches of mercury vacuum.
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.
3. Regarding the refrigerators referenced in Request 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 1/16th inch diameter in size.
4. Regarding the refrigerators referenced in Request No. 2, the Report states: "None of the refrigerators in the metal pile were painted with a large "X"..." The original intact surface of each of the four sides and the original intact surface of

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expressed the hope that this process would result in an expeditious settlement and declined to respond to the County's request at that time upon the ground that it would be premature.

the top and bottom of each of these refrigerators were not inspected.

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

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.

7. If the refrigerators referred to in Request No. 6 were not evacuated of refrigerants at the time they were received at Respondent's facility the provisions of 40 C.F.R. § 156(f)(2)[4/] do not apply to those refrigerators.

8. Respondent does not "reclaim" refrigerant as defined by 40 C.F.R. § 82.152.

9. Respondent is not a "reclaimer" subject to the provisions of 40 C.F.R. § 82.166(g) and/or 40 C.F.R. § 82.166(h).

[4/] The County apparently intended to cite subparagraph (f)(2) of 40 C.F.R. § 82.156(f), which provides in pertinent part: (f) Effective July 13, 1993, persons who take the final step in the disposal process (including but not limited to scrap recyclers and landfill operators) of a small appliance, room air conditioning, MVACs, or MVAC-like appliances must either:

(1) Recover any remaining refrigerant from the appliance in accordance with paragraph (g) or (h) of this section as applicable; or

(2) [v]erify that the refrigerant has been evacuated from the appliance or shipment of appliances previously. Such verification must include a signed statement from the person from whom the appliance or shipment of appliances is obtained that all refrigerant that had not leaked previously has been recovered from the appliance or shipment of appliances in accordance with paragraph (g) or (h) of this section as applicable.....

Complainant responded to the County's request under date of April 28, 2000, noting that the initial request, received on December 21, 1999, was unaccompanied by either a motion for leave to file or a statement of the specific grounds for, or other evidence or legal memorandum relied upon in support of, the request, as required by 40 C.F.R § 22.16(a). Further, Complainant pointed out that the request was not filed and served on either the Regional Hearing Clerk or the ALJ. Complainant concluded that the request was not intended to become part of the record.

In the event, however, that the request was deemed to constitute a motion, Complainant argued that the motion should be denied. Firstly, Complainant asserted that the request was premature because it was filed on April 11, 2000, three days before the scheduled due date of April 14, 2000, for the submission of pre-hearing exchanges. Secondly, Complainant pointed out that Respondent would have an opportunity at the hearing to cross-examine the individuals who conducted the inspection of the County's facility on May 18, 1999, regarding Request Nos. 1 through 6, if they failed to provide answers during their direct testimony.

Regarding numbers 7 through 9 of the County's request, Complainant argues that these requests require Complainant to draw legal conclusions [which are not properly the subject of requests for admission]. With respect to Requests Nos. 8 and 9, Complainant emphasizes that it must draw legal conclusions based upon facts

that Respondent is in the best position to know. In conclusion, Complainant requested that it be accorded leave to file a request for admissions in the event that the County's request is granted.

In its Reply to Complainant's response to the County's request to compel responses to its requests for admission, dated May 8, 2000, the County cites Rule 22.19(e) of the Consolidated Rules of Practice,[5/] which provides, in part, that "(5) [n]othing in this paragraph (e) shall limit a party's right to request admissions or stipulations, . . ." The County argues that the quoted language essentially permits requests for admission to be served at anytime, and that Rule 22.16(a), which governs motions, does not contain any provision requiring requests for admission to be made by motion.

Deriding Complainant's assertion that Respondent would have the opportunity to cross-examine witnesses for Complainant who conducted the inspection at the hearing, the County says that Complainant apparently views the purpose of an adjudicatory hearing as for "surprise and discovery".

The County characterizes as "disingenuous at best" Complainant's argument that responding to the requests for admission requires Complainant to draw legal conclusions based upon

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[5/] The "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" were revised, 64 Fed. Reg. 40,137 (July 23,1999), effective on and after on or after August 23, 1999.

facts which Respondent is in the best position to know. The County says that it has no knowledge whatsoever of the six refrigerators referred to in the complaint. Moreover, the County points out that Complainant did not "shy from making legal conclusions in the complaint." According to the County, evidence supporting the allegations against it is "wholly owned by Complainant." The County therefore argues that Complainant should be ordered to respond to its requests which were served almost five months ago.

DISCUSSION

Under the Consolidated Rules of Practice prior to the 1999 revision (supra note 5), requests for admission were held to be a form of discovery governed by then Rule 22.19(f). Safety-Kleen Corp., Docket Nos. RCRA-1090-11-10-3008(a) & 11-11-3008(a), Order on Discovery (ALJ, December 6, 1991). This conclusion was based upon the history of the Consolidated Rules of Practice, which indicated that Rule 22.19(f) was intended to incorporate discovery available under the Federal Rules of Civil Procedure. If this holding applies to Rule 22.19(e), the present discovery rule, requests for admission are to be made by motion, which must comply with the requirements for "other discovery" in the mentioned rule.

Consolidated Rule 22.19(e)(5), providing in part that "(n)othing in this paragraph (e) shall limit a party's right to request admissions or stipulations.." had no counterpart in the

prior rule and the question is whether this language removes any limitations such as time, e.g., after the information exchange provided by paragraph (a) of this section, or other limitations, e.g., the information sought has significant probative value on a disputed question of material fact, on the "other discovery" contemplated by Rule 22.19(e). Language in the preamble that "(p)aragraph (e)(5) states that none of the § 22.19(e) limitations on discovery limit a party's right to request admissions or stipulations...." indicates that this question must be answered in the affirmative.[6/] It is concluded, however, that at this stage compliance by the party receiving the request is voluntary and that, if the party submitting a request wishes to compel a response, the motion therefor must comply with the requirements for "other discovery" in Rule 22.19(e). The conclusion that Rule 22.19(e)(5) contemplates an initial request, to which any response is voluntary, is supported by the fact that Rule 22.19(e)(1)(ii), limiting the ALJ's authority to order "other discovery", contains a proviso "which the non-moving party has refused to provide voluntarily". This conclusion is also supported by the fact that

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[6/] The preamble to the final Part 22 revised rule, at 64 Fed. Reg. 40160 (1999), provides in pertinent part: "Paragraph (e)(5) states that none of the § 22.19(e) limitations on discovery limit a party's right to request admissions or stipulations, a respondent's right to request Agency records under the Federal Freedom of Information Act ("FOIA"), 5 U.S.C. 552, or EPA's authority under the Act to conduct inspections, issue information request letters or administrative subpoenas, or otherwise obtain information."

Rule 22.19(e)(5) refers to stipulations, which would not ordinarily be subject to compulsion. Moreover, the conclusion that a motion to compel responses to, e.g., requests for admission, must comply with the requirements for other discovery in Rule 22.19(e) is supported by the fact that the ALJ may order "such other discovery" only if certain findings are made.[7/]

Here, the County's letter seeking the ALJ's assistance in obtaining responses to its requests for admission has been treated as a motion to compel and the only question is whether the motion sufficiently complies with Rule 22.19(e) so as to warrant that it be granted in whole or in part. Complainant's objection that the request is premature, because it was filed (submitted) three days prior to the scheduled due date for the submission of pre-hearing exchanges is lacking in substance, because this objection would not be available if the motion were re-filed at this time. Until it is ruled upon, a motion such as the County's may be regarded as continuing and it is nonsensical to dismiss a motion upon grounds which an immediate re-filing of the motion would obviate. This objection is overruled.

[7/] Rule 22.19(e) provides in pertinent part: The Presiding Officer may order such other discovery only if it: (i) [w]ill neither unreasonably delay the proceeding nor unreasonably burden the non-moving party; (ii) [s]eeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and (iii) seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought...

Complainant makes no contention that granting the County's motion will unreasonably delay the proceeding or unreasonably burden Complainant. I find that these requirements for other discovery have been met. Similarly, it is clear that the County seeks information which is most reasonably obtained from Complainant and which the Complainant has refused to provide voluntarily. Complainant has not argued that the information the County seeks does not have significant probative value on a disputed issue of material fact relevant to liability. Indeed, by claiming that the information will be available through cross-examination of its witnesses at the hearing, Complainant appears to concede the relevance of the information. Complainant will be ordered to respond to the County's Request Nos. 1 through 6.

Request No. 7 asks Complainant to admit that if the refrigerators [referred to in the complaint] were not evacuated of refrigerants when the refrigerators were received at the County's facility, the provisions of § 82.156(f)(2) do not apply to those refrigerators. Complainant has objected to this request upon the ground that it requires Complainant to draw a legal conclusion. The operative condition here as to the application of § 82.156(f) (supra note 4)to Respondent is whether the County takes the final step in the disposal process of small appliances, a fact about which there does not appear to be a dispute. If the County takes the final step in the disposal process of small appliances, it must

either: (f)(1) recover any remaining refrigerant in the appliance in accordance with paragraph (g) or (h) of this section or (f)(2) verify [through signed statements] that the refrigerant has [previously) been evacuated from the appliance or shipment of appliances. Asking Complainant to admit that § 82.156(f)(2) is inapplicable if the refrigerant has not previously been evacuated from the appliances, may raise an issue of whether verification of evacuation may be shown by means other than signed statements.[8/] Moreover, implicit in this issue is the question of whether Complainant or the County has the burden of demonstrating that the appliances were or were not evacuated of refrigerant prior to being received by the County. These matters are more appropriately addressed after the issues are clearly joined and all the evidence is heard. The County's Request for Admission No. 7 will be denied.

Request Nos. 8 and 9 may be readily addressed. Request No. 8 asks the Complainant to admit that the County does not "reclaim" refrigerant as defined in § 82.152 and Request No. 9 asks Complainant to admit that the County is not a "reclaimer" subject to the provisions of §§ 82.166(g) and 82.166(h). These requests clearly call for legal conclusions based upon information that the County is in the best position to know. Request Nos. 8 and 9 will be denied.

[8/] In its Response, dated April 11, 2000, to the ALJ's pre-hearing exchange order, the County stated that on May 18, 1999, it had no statements pursuant to 40 C.F.R. § 82.156(f)(2) in its possession (Id.3).

ORDER

The County's Requests for Admission are granted in part and denied in part as indicated above.[9/] Complainant will respond to

[9/] Complainant has moved that it be accorded leave to file requests for admission, if the County's motion is granted and Complainant deems it necessary. The Rules of Practice, of course, apply to Complainant as well as to the County. If Complainant desires the County's response to requests for admission, it must first ask for the County's voluntary response. Complainant's motion for the issuance of a subpoena for the attendance at the hearing of Mr. Frank Crowley, an employee of the Montana DEQ, will be granted after a date and precise location for the hearing are established.

Request Nos. 1 through 6 submitted by the County on or before July 14, 2000.[10/]

Dated this 28th day of June 2000.

Original signed by undersigned
_____
Spencer T. Nissen
Administrative Law Judge

[10/] Regarding Complainant's Motion for Clarification, Complainant is free, after the initial exchange of pre-hearing information and absent a cut-off date established by the ALJ, to file a motion for discovery, including the production of documents, at any time. It is noted, however, that there is little point in requesting the County to produce documents which it has denied possessing.