8/28/91

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Perkin-Elmer Corporation (The),	)	**Docket No. EPCRA-I-91-1007**
	)	
Respondent	)	

ORDER GRANTING LEAVE TO INTERVENE

Du Pont Photomask, Inc. ("Du Pont") moved for leave to intervene in this case, which was brought against The Perkin-Elmer Corporation ("Respondent") by the Regional Administrator, Region I, U.S. Environmental Protection Agency ("Complainant"). Du Pont's motion stated that Respondent had no objection to the motion, but Complainant then filed an objection. For the reasons set forth below, Du Pont's motion is granted.

Background

Complainant issued a complaint against Respondent on December 31, 1990 under Section 325 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11045. The complaint was apparently based on an EPA inspection on or about January 31, 1990 of a facility owned and operated by Respondent in Danbury, Connecticut. The complaint charged Respondent's failure to file, as required by the Act, one Form R in 1988 and two Form Rs in 1989, and proposed a $17,000 civil penalty for each failure, for a total penalty of $51,000.

In its answer, Respondent admitted most of the factual allegations of the complaint, but stated that the Danbury facility

had been sold to Du Pont; and Respondent challenged the penalty assessment. Du Pont moved to intervene, asserting that it is a wholly-owned subsidiary of E.I. du Pont de Nemours and Company, that it had purchased Respondent's Danbury facility on March 16, 1990, and that it is required by the purchase agreement to bear responsibility for any penalty arising out of the instant proceeding. (A copy of the purchase agreement was attached to Du Pont's motion.) As noted, Du Pont's motion stated that Respondent did not object to its intervention, but Complainant then did object.

Arguments of Du Pont and Complainant

Du Pont claimed that, because of its financial responsibility for any civil penalty, its interests are inadequately represented by the parties. Moreover, Du Pont argued, its participation would aid an expeditious resolution of the case, because its financial responsibility would make it an effective negotiator of a settlement with Complainant; and Du Pont noted the encouragement of settlement in Section 22.18 of the Agency's Consolidated Rules of Practice (40 C.F.R. § 22.18).

Complainant observed that Section 22.11 of the Consolidated Rules (40 C.F.R. § 22.11), which governs Du Pont's motion to intervene, requires that an intervention satisfy each of three criteria; and Complainant contended that Du Pont fails to satisfy any of them. First, Section 22.11 requires that an intervention not unduly prolong the case; and Complainant argued that such prolongation would be exactly the consequence of Du Pont's exercise

of the rights accorded a party by the Consolidated Rules.

Second, Section 22.11 requires that the intervenor be adversely affected by a final order; and Complainant argued that the purchase agreement for the Danbury facility is insufficiently clear on Respondent's financial responsibility for a civil penalty imposed in this proceeding. Third, Section 22.11 requires that the intervenor's interests not be adequately represented by the original parties. Here Complainant contended that Respondent can make any argument that Du Pont could, and that Respondent's interest in protecting its reputation will motivate it to present a sound defense. For Du Pont's failure to meet the third criterion of Section 22.11, Complainant cited In the Matter of Rockwell International Corporation, TSCA Appeal No. 87-5, Docket No. TSCA-PCB-VIII-86-028, Order on Interlocutory Appeal (October 23, 1987) at 10.

Complainant argued further that all of the alleged violations occurred during Respondent's ownership and operation of the Danbury facility. Thus it is Respondent that is legally liable for any of such violations found to have been committed, Complainant stated, and Respondent's liability therefor remains unaffected by its sale of the facility.

Discussion

The chances that Du Pont's intervention would facilitate a faster conclusion of this case are enough to warrant granting it leave to intervene. The circumstances here are such that this case may well be settled through negotiations. Respondent's answer

generally admitted all of the factual allegations in the complaint that sought to establish liability; and Du Pont stated that it will be responsible for any civil penalty, and that it is interested in settlement negotiations.[1] It makes sense that Du Pont's direct participation would facilitate these negotiations.

As to the three criteria for intervention in Section 22.11, the first is avoiding undue prolongation of the proceeding. Allowing Du Pont's intervention should, as suggested, serve actually to speed, not delay, the conclusion of this case. Nonetheless, if settlement negotiations fail and the case is resolved through litigation, any time connected with Du Pont's participation should be fairly controllable, since the fact situation underlying the alleged violations is relatively simple and is uncontested by Respondent.

As for an adverse effect on Du Pont of the final order in this case, a reading of the purchase contract, especially the two sections specified by Du Pont, reasonably supports Du Pont's interpretation that it is liable for any civil penalty. Complainant's challenge to this interpretation was stated simply in general terms, without a citation of any specific language or clause in the contract. Thus Du Pont's interpretation is sustained by a preponderance of the evidence. Per Rockwell International Corporation, supra at 7, this contractual obligation of Du Pont to

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[1] In addition, the amount of the civil penalty at issue appears moderate for firms of the size of Du Pont and Respondent, so that neither would seem motivated to litigate out of a financial need to try to reduce any penalty to a small fraction of the amount proposed.

pay any civil penalty satisfies the adverse effect criterion of Section 22.11.[2]

The third criterion from Section 22.11 concerns the adequacy of Du Pont's representation by Respondent. In Rockwell International Corporation, cited by Complainant in the instant case, the Department of Energy ("DOE") sought intervention because it was contractually obligated to reimburse the respondent Rockwell International Corporation ("Rockwell") for any civil penalty for environmental noncompliance. DOE's motion for intervention was denied specifically because DOE was held to be adequately represented by Rockwell. "Rockwell's reputational interest and DOE's monetary interest are sufficiently similar to assure adequate representation" (Rockwell International Corporation, supra, at 10-11).

But the primary argument here of Du Pont--that its

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[2] A related point was mentioned in Rockwell International Corporation (supra, at 6 n.5): the public policy aspects of reducing economic incentives for a company to comply with environmental statutes when somebody else promises reimbursement for any sanctions for noncompliance. In the instant case, Complainant has not argued that Respondent's sale of its Danbury facility violated public policy by reducing Respondent's incentives to obey environmental laws.

Respondent sold the Danbury facility to Du Pont on March 16, 1990, which was after the January 31, 1990 EPA inspection on which the subsequent December 31, 1990 complaint was apparently based, and after the 1988 and 1989 violations alleged in the complaint. This time sequence suggests a reasonable possibility that Respondent and Du Pont, in determining the sale price for the Danbury facility, knew enough about a potential EPA enforcement action so that it was a factor serving to lower the sale price. Thus Respondent may already have sustained some financial loss from its alleged environmental noncompliance, in addition to the injury to its business reputation.

intervention will speed settlement negotiations, because it will pay the settlement bill--was not raised in Rockwell International Corporation.[3] Hence that decision is not dispositive on this point. The alternative suggested for DOE by Rockwell International Corporation (supra, at 11)--that DOE participate as an amicus curiae--would be unhelpful for Du Pont in settlement negotiations.

It does seem true, as contended by Complainant, that in any litigation, any argument that Du Pont might make could as well be made by Respondent. In this respect, Du Pont is adequately represented by Respondent.

But the decisive vehicle for resolving this case, as suggested above, may well be settlement negotiations. In these negotiations, the interests of Du Pont and Respondent could diverge. If those negotiating fail to agree to a settlement, they are remitted to litigation; here the main burden would seemingly fall on Respondent, which best knows any evidence that could mitigate or eliminate the proposed penalty. If, on the other hand, the case is resolved through a settlement, the major burden would fall on Du Pont, which will write the check.

Consequently, in settlement negotiations, Respondent and Du Pont may well assess differently how much of a civil penalty it would be worth agreeing to in order to avoid litigation. Since

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[3] The issue was not raised although it was stated that "the parties have successfully negotiated an agreement regarding remediation of the alleged violations, and only the issue of a monetary penalty prevents the matter from being completely resolved" (footnote omitted) (Rockwell International Corporation, supra, at 1-2).

settlement negotiations seem a logical vehicle for resolving this case, Du Pont's proposed intervention satisfies the third criterion of Section 22.11 that its interests not be adequately represented by the original parties.

In sum, settlement negotiations appear a reasonable method for resolving this case; they would be aided by Du Pont's participation; and Du Pont's intervention satisfies the three criteria of Section 22.11. Accordingly, Du Pont will be allowed to intervene.

Order

Du Pont's motion for leave to intervene is granted.

Thomas W. Hoya
Administrative Law Judge

Dated: June 2, 1971

In the Matter of Perkin-Elmer Corporation (The), Respondent
Docket No. EPCRA-I-91-1007

Certificate of Service

I certify that the foregoing **Order Granting Leave to Intervene**, dated June 28, 1991, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

Marianna Dickinson
Regional Hearing Clerk
U.S. Environmental Protection Agency
J.F. Kennedy Federal Building
Boston, MA 02203

Copy by Regular Mail to:

Counsel for Complainant:

Scott B. Garrison, Esquire
Toxics Litigation Division (LE-134P)
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Counsel for Respondent:

Charles J. Heinzer, Esquire
Senior Corporate Attorney
The Perkin-Elmer Corporation
761 Main Avenue
Norwalk, CT 06859-0001

Maria Whiting
Secretary

Dated: June 28, 1991