UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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

IN THE MATTER OF	)	
	)	
UNITED STATES AIR FORCE	)	**DOCKET NO. RCRA-6-98-001**[1/]
TINKER AIR FORCE BASE,	)	
	)	
RESPONDENT	)	

ORDER ON COMPLAINANT'S MOTION TO DISREGARD AND STRIKE RESPONDENT'S EXHIBIT 3

ORDER ON COMPLAINANT'S SUPPLEMENTAL MOTION TO STRIKE RESPONDENT'S EXHIBIT 8

ORDER SCHEDULING HEARING

This proceeding arises under the authority of Section 9006 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 699le, commonly referred to as RCRA.[2/] Complainant, the United States Environmental Protection Agency (the "EPA" or "Complainant"), has filed a Complaint against Respondent, the United States Air Force, Tinker Air Force Base, alleging various violations of the underground storage tank regulations issued pursuant to RCRA. The Complaint proposes a compliance order, requesting documentation verifying

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[1/] The Docket Number in this case has been changed to conform with the uniform docketing system used by the Office of Administrative Law Judges in agreement with the Office of Enforcement and Compliance Assurance.

[2/] Complainant's Motion to Consolidate the above-captioned proceeding with another separately docketed proceeding before the undersigned (Matter of United States Air Force Tinker Air Force Base, Docket Number UST-6-98-002-AO-1, and United States Air Force Tinker Air Force Base, Docket Number CAA-R6-P-9-OK-98040) was denied in an Order entered on December 17, 1998.

correction of the alleged violations, and a civil administrative penalty of $96,703 for the alleged violations. The proceeding is governed by 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 (the "Rules of Practice"), 40 C.F.R. §§ 22.1-32.[3/]

As part of its prehearing exchange in this matter, Respondent filed a Motion to Dismiss Complainant's Administrative Complaint and a Motion for Accelerated Decision. In an Order entered on May 19, 1999, the undersigned denied the motion to dismiss, concluding that this tribunal has jurisdiction over the subject matter of the Complaint and that the Administrative Law Judge ("ALJ") is not precluded from addressing Respondent's motion for accelerated decision on its merits. The undersigned granted the motion for accelerated decision, concluding that the EPA does not have statutory authority under RCRA's underground storage tank provisions to assess administrative penalties against Respondent, another federal agency. The EPA filed an appeal with the Environmental Appeals Board ("EAB") from the ALJ's May 19, 1999, Order on Respondent's Motion for Accelerated Decision.

On April 18, 1999, Respondent requested that the Department of Justice's Office of Legal Counsel ("OLC") provide a formal opinion concerning the question of whether the EPA has authority to assess civil monetary penalties against Federal facilities for violations of the underground storage tank requirements of RCRA. On June 14, 2000, the OLC issued its opinion concluding that RCRA clearly grants the EPA the authority to assess penalties against federal agencies for underground storage tank violations and that the EPA's underground storage tank field citation procedures do not violate RCRA or the Constitution.

In light of the OLC's legal opinion, the EAB on June 29, 2000, issued Respondent an Order to Show Cause, ordering Respondent to show cause why the ALJ's Order granting the Motion for Accelerated Decision should not be reversed and the matter remanded to the ALJ for further proceedings. Following its consideration of the parties' responses to the Order to Show Cause, the EAB concluded that as to the pending case, the OLC opinion should be regarded as dispositive. In a Remand Order entered on July 27, 2000, the EAB

[3/] The Rules of Practice were revised effective August 23, 1999. Proceedings commenced before August 23, 1999, are subject to the revised rules unless to do so would result in substantial injustice.

reversed the ALJ's Order granting the Motion for Accelerated Decision and remanded this matter for further proceedings. The undersigned has been designated by the August 8, 2000, Order of the Chief Administrative Law Judge to preside in this proceeding on Remand.

Pursuant to the Prehearing Order entered on March 24, 1998, the parties submitted their prehearing exchange in this matter. At the time the May 19, 1999, Order granting Respondent's Motion for Accelerated Decision was issued, Complainant's Motion to Disregard and Strike Respondent's Exhibit 3 and Supplemental Motion to Strike Respondent's Exhibit 8 were pending.[4/] Accordingly, those motions are now addressed on Remand.

Complainant moves to strike Respondent's proposed Exhibit 3, which is contained in Respondent's prehearing exchange, on the ground that it was obtained as a confidential settlement offer made in good faith and should not be the subject of correspondence to the ALJ or discussed at a formal hearing. Complainant asserts that the Federal Rules of Evidence, the Federal Rules of Procedure, and case law support the confidentiality of statements shared at settlement meetings by excluding settlement discussions and materials from formal testimony.

I agree with Complainant's argument that Respondent's proposed Exhibit 3 should be stricken and disregarded as inadmissible settlement material. Section 22.22(a)(1) of the governing Rules of Practice, 40 C.F.R. § 22.22(a)(1), provides that "evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence (28 U.S.C.) is not admissible." Proposed Exhibit 3 consists of a "new UST Penalty Offer" sent by Complainant's counsel to Respondent's counsel via facsimile on June 2, 1998, following the parties' settlement conference. Proposed Exhibit 3 clearly falls within the purview of Section 22.22(a)(1) of the Rules of Practice, 40 C.F.R. § 22.22(a)(1), concerning inadmissible evidence relating to settlement. Moreover, as pointed out by Complainant, Respondent failed to respond to its Motion to Disregard and Strike Respondent's Exhibit 3 in a timely manner. Under Section 22.16(b) of the Rules of Practice, 40 C.F.R. § 22.16(b), "[a]ny party who fails to respond within the designated period waives any objection

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[4/] Complainant's Motion to Disregard and Strike Respondent's Exhibit 3 was filed on July 23, 1998, and Complainant's Supplemental Motion to Strike Respondent's Exhibit 8 was filed on September 16, 1998.

to the granting of the motion."[5/] As such, Complainant's Motion to Disregard and Strike Respondent's Exhibit 3 is **Granted.**

Complainant also moves to strike Respondent's proposed Exhibit 8, which is contained in Respondent's supplemental prehearing exchange, on the ground that the exhibit is settlement material that would be excluded under Rule 408 of the Federal Rules of Evidence and, thus, is inadmissible under Section 22.22(a)(1) of the Rules of Practice, 40 C.F.R. § 22.22(a)(1). Complainant claims that the documents in proposed Exhibit 8 are statements made in the process of settlement discussions and relate only to settlement discussions and potential terms of settlement.

In addition, Complainant moves to strike Respondent's narrative concerning proposed Exhibit 8 which is contained in Respondent's supplemental prehearing exchange at pages 2-3. Complainant asserts that this narrative improperly discusses confidential details of settlement matters and addresses arguments that more properly should have been raised by Respondent in response to Complainant's Motion to Disregard and Strike Respondent's Exhibit 3. Complainant further asserts that in the narrative, Respondent's counsel incorrectly characterizes Complainant's settlement offer and incorrectly attributes a statement to Complainant's counsel.

In response to the Supplemental Motion to Strike Respondent's Exhibit 8, Respondent argues that its proposed Exhibit 8 is documentary and rebuttal evidence to the conclusions reached by Complainant in Count 1A of the Complaint and, as such, is relevant, material, and probative of the factual basis of Count 1A. Respondent maintains that Rule 408 of the Federal Rules of Evidence does not require the exclusion of any evidence merely because it is presented in the course of compromise negotiations and that this rule does not require exclusion when the evidence is offered for another purpose.

As discussed above, Section 22.22(a)(1) of the governing Rules of Practice provides that "evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence is not admissible." Rule 408 of the Federal Rules of Evidence states:

[5/] Section 22.16(b) of the Rules of Practice, 40 C.F.R. § 22.16(b), in effect prior to August 23, 1999, stated: "If no response [to a written motion] is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion."

> Evidence of ... accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

28 U.S.C. Rule 408.

Respondent's arguments that the documents contained in its proposed Exhibit 8 are not excluded from presentation at hearing by Section 22.22(a)(1) of the Rules of Practice and Rule 408 of the Federal Rules of Evidence are persuasive. Without commenting on the probative value to be accorded the documents contained in proposed Exhibit 8, I find that such documents would not be excluded under Rule 408 of the Federal Rules of Evidence. *See Freidus v. First Nat'l Bank,* 928 F.2d 793 (8th Cir. 1991); *In the Matter of Wego Chemical & Mineral Corporation,* TSCA Appeal No. 92-4, 4 E.A.D. 513, 529-31 (EAB, Feb. 24, 1993). The Exhibit 8 documents are proffered by Respondent in its attempt to rebut the factual basis for the violations alleged in Count 1A of the Complaint. This evidence cannot be excluded under Rule 408 merely because it was presented in the course of compromise negotiations. Thus, the documents contained in proposed Exhibit 8 are found to be admissible. *See* Section 22.22(a)(1) of the Rules of Practice, 40 C.F.R. § 22.22(a)(1). Accordingly, Complainant's Supplemental Motion to Strike Respondent's Exhibit 8 is **Denied, in part**.

However, any proposed testimony as described by Respondent in its narrative for proposed Exhibit 8 or other evidence relating to settlement would be excluded under Rule 408. The narrative for proposed Exhibit 8 set forth by Respondent on pages 2 and 3 of its supplemental prehearing exchange pertain to statements admittedly made in the process of settlement negotiations. Respondent's attempt to present such information to me in such manner is disingenuous. As any evidence concerning statements contained in the narrative for Exhibit 8 or any other evidence relating to settlement would be excluded under Rule 408, such evidence is not admissible under Section 22.22(a)(1) of the Rules of Practice. To

this extent, Complainant's Supplemental Motion to Strike Respondent's Exhibit 8 is **Granted, in part**.

Finally, I note that there has been considerable animosity between the parties, two federal agencies. To the extent that this matter continues toward hearing, both parties would be well served by proceeding in a more considered manner.

As the parties have submitted their prehearing exchange in this matter and there are no remaining motions for adjudication, the parties should prepare for hearing. Both parties, in their prehearing exchange, state that they reserve the right to supplement their proposed exhibit and witness lists. Both parties are reminded that this proceeding is governed by the Rules of Practice. Sections 22.19(a) and 22.22(a) of the Rules of Practice, 40 C.F.R. §§ 22.19(a), 22.22(a), provide that documents or exhibits that have not been exchanged and witnesses whose names have not been exchanged at least fifteen (15) days before the hearing date shall not be admitted into evidence or allowed to testify unless good cause is shown for failing to exchange the required information.

Further, the parties are advised that every motion filed in this proceeding must be served in sufficient time to permit the filing of a response by the other party and to permit the issuance of an order on the motion before the deadlines set by this order or any subsequent order. Section 22.16(b) of the Rules of Practice, 40 C.F.R. § 22.16(b), allows a 15-day period for responses to motions and Section 22.7(c), 40 C.F.R. § 22.7(c), provides for an additional 5 days to be added thereto when the motion is served by mail. Both parties are hereby notified that the undersigned will not entertain last minute motions to amend or supplement the prehearing exchange absent extraordinary circumstances.

The file indicates that the parties have held settlement discussions in this matter. However, no settlement has been reached. EPA policy, found in the Rules of Practice at Section 22.18(b), 40 C.F.R. § 22.18(b), encourages settlement of a proceeding without the necessity of a formal hearing. The benefits of a negotiated settlement may far outweigh the uncertainty, time, and expense associated with a litigated proceeding. However, the pursuit of settlement negotiations or an averment that a settlement in principle has been reached will not constitute good cause for failure to comply with the requirements or schedule set forth in this Order.

The parties are hereby directed to hold a settlement conference on this matter on or before **September 22, 2000**, to

attempt to reach an amicable resolution of this matter. *See* Sections 22.4(c)(8), 22.19(b)(1) of the Rules of Practice, 40 C.F.R. §§ 22.4(c)(8), 22.19(b)(1). The EPA shall file a status report regarding such conference and the status of settlement on or before **October 6, 2000.**

In the event that the parties have failed to reach a settlement by that date, they shall strictly comply with the requirements of this order and prepare for a hearing. In connection therewith, on or before **October 31, 2000**, the parties shall file a joint set of stipulated facts, exhibits, and testimony. *See* Section 22.19(b)(2) of the Rules of Practice, 40 C.F.R. § 22.19(b)(2). The time allotted for the hearing is limited. Therefore, the parties must make a good faith effort to stipulate, as much as possible, to matters which cannot reasonably be contested so that the hearing can be concise and focused solely on those matters which can only be resolved after a hearing.

The Hearing in this matter will be held beginning at 9:30 a.m. on Tuesday, **November 14, 2000**, in Oklahoma City, Oklahoma, continuing if necessary on November 15, and 16, 2000. The Regional Hearing Clerk will make appropriate arrangements for a courtroom and retain a stenographic reporter. The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete.

IF EITHER PARTY DOES NOT INTEND TO ATTEND THE HEARING OR HAS GOOD CAUSE FOR NOT BEING ABLE TO ATTEND THE HEARING AS SCHEDULED, IT SHALL NOTIFY THE UNDERSIGNED AT THE EARLIEST POSSIBLE MOMENT. The status report and stipulations required by this Order to be sent to the Presiding Judge, as well as any other further pleadings, shall be addressed as follows:[6/]

Judge Barbara A. Gunning
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Ave., NW
Washington, DC 20460
Telephone: 202-564-6258

Original signed by undersigned

[6/] Note that there is a change of address for the United States Environmental Protection Agency.

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Barbara A. Gunning
Administrative Law Judge

Dated: 8-18-00
Washington, DC