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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
State of Connecticut	)	Docket No. CWA-2-I-97-1084
Dept. of Transportation,	)	
(District 1 Maintenance	)	
Service Center)	)	
	)	
Respondent	)	

ORDER DENYING MOTION TO REOPEN CONSENT ORDER

The Region 1 Office of the United States Environmental Protection Agency (the "Complainant" or "Region") filed a Complaint against the State of Connecticut Department of Transportation (the "Respondent" or "Department") on September 30, 1997. The Complaint charged the Respondent with several violations of the Clean Water Act ("CWA") §311(j)(1), 33 U.S.C. §1321(j)(1), with respect to its facility known as the District 1 Maintenance Service Center, located in Weathersfield, Connecticut. The Complaint sought assessment of a civil penalty in the amount of $52,625 against the Department. The Respondent filed an Answer to the Complaint. The proceeding was then assigned to the EPA's Office of Administrative Law Judges pursuant to the EPA Consolidated Rules of Practice, 40 CFR Part 22.

The undersigned Administrative Law Judge issued a Prehearing Order on December 18, 1997, establishing a schedule for the filing of prehearing exchanges by the parties of intended witnesses and evidence. Before the exchanges were due, the parties jointly moved, on March 4, 1998, for an extension on the basis that they had reached a settlement in principle in this matter. The extension was granted and the parties duly submitted a fully executed copy of a Consent Agreement and Final Order ("CAFO") dated June 15, 1998. The CAFO requires the Respondent to pay a civil penalty of $46,025.

On July 7, 1998, the Department filed a "Motion to Re-0pen Consent Agreement and Order."[(1)] The Department states that "changed circumstances" have now permitted the Department to offer a new proposal for a supplemental environmental project ("SEP") in the State of Connecticut that would offset part or all of the agreed civil

penalty. The Respondent adds that "new information" will enable it to offer a significant modification a previously submitted proposal for a SEP. The earlier failure to reach agreement on a SEP, "in retrospect," appears to have been caused by "misunderstandings and miscommunications." The motion further states that Respondent has discussed this motion with counsel for the Region, "who has no objection."

There are several obstacles that will prevent the granting of the motion to reopen the CAFO. First and most fundamentally, the Administrative Law Judge no longer has jurisdiction over this proceeding. The CAFO itself (at ¶4) provides that the Respondent waives its right to an administrative hearing under the CWA on the allegations in the Complaint. The CAFO (at ¶8) also states that its provisions shall be binding on the Respondent. In ¶9, the Agreement declares that it constitutes a settlement by EPA of all claims for judicial or administrative civil penalties for the violations alleged in the Complaint. The CAFO was fully executed by duly authorized representatives and counsel for both parties, and conformed with the requirements for such settlement agreements set forth in 40 CFR §22.18. Once such a CAFO is filed with the Regional Hearing Clerk, the proceeding is concluded and is no longer within the jurisdiction of the Office of Administrative Law Judges.

The Respondent correctly points out that there is no provision in the EPA Rules of Practice for reopening a consent agreement or consent order. The Rules do include provisions for reopening a hearing and for reopening a final order by the Environmental Appeals Board - 40 CFR §§22.28 and 22.32, respectively. Respondent states it would be consistent with those provisions to reopen a "non-final" orders. There is however nothing "non-final" about the CAFO executed in this case. By its own terms it is binding on the parties, and finally and completely resolves this matter.

Any analogy to the standards for reopening a hearing will not aid this motion. Respondent's vague allusions to "changed circumstances" and "new information" fall far short of the specific grounds and good cause required to be shown in order to reopen a hearing under §22.28. The Department's references to "misunderstandings and miscommunications" likewise fall short of alleging any fraud or irregularity in the negotiation of the CAFO. The parties apparently had competent representation, as well as ample time and opportunity to reach their settlement by mutual consent. The concept of including a SEP to benefit the environment in Connecticut is desirable, but it was not included in the final CAFO that was consented to by both parties.

For these reasons, the motion to reopen the CAFO in this case will be denied. This proceeding will remain closed so far as the Office of Administrative Law Judges is concerned.

Notwithstanding this order, the parties may not necessarily be precluded from executing another consent agreement, with at least equal solemnity as the CAFO, that could abrogate, modify, or supplement the CAFO. I will leave it to the parties to research that possibility and derive their own course of proceeding. Such an additional agreement could result in either re-instituting this proceeding for a hearing, or renegotiating the civil penalty with a SEP component. For our records, the parties are requested to send a copy the Office of Administrative Law Judges of any such modification of the CAFO in this case.

Order

The Respondent's motion to reopen the Consent Agreement and Final Order in this proceeding is denied.

Andrew S. Pearlstein
Administrative Law Judge

Dated: July 15, 1998
Washington, D.C.

1. In a companion case, Docket No. RCRA-I-97-1083, the Region charged the Department with violations of the Resource Conservation and Recovery Act at another facility in the State of Connecticut. The Respondent has made an identical motion to reopen the Consent Agreement and Order in that proceeding as well. In a separate order issued today, that motion will also be denied.