UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Department of Energy,	)	
Rocky Flats Field Office	)	Docket No. CERCLA-VIII-98-11
	)	
	)	
	)	

Order on Motion in Limine

In this proceeding pursuant to Section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. Section 9609, the Administrative Complaint sets forth two violations arising out of Respondent's alleged failure to comply with the terms of an agreement under Section 120 of CERCLA, (42 U.S.C. 9620). The complaint relates that EPA and the United States Department of Energy ("DOE") entered into an agreement on July 19, 1996, titled "Final Rocky Flats Cleanup Agreement." ("RFCA") Joint Exhibit 1.

More particularly, EPA alleges, in Count 1 that, based on monitoring results taken at the GSO3 sampling station, the surface water quality for plutonium violated the standard established in the RFCA by exceeding the 0.15 pCi/L limit during the period from June 13 through July 2, 1997, and, in Count 2, that the surface water quality for americum also exceeded the 0.15 pCi/L limit, during the period from June 13 through June 24, 1997. Both of these exceedances, EPA maintains, constitute violations of Section 120 of CERCLA, and consequently DOE is subject to penalties under CERCLA Section 109.

On July 13, 1999 EPA filed a Motion in Limine, seeking to bar the testimony of two listed DOE witnesses[(1)] on the grounds that testimony from them concerning agreements reached as to penalties for exceedances would be irrelevant, immaterial and in violation of the parol evidence rule. In the Memorandum in Support of Motion in Limine ("Memorandum"), EPA asserts that the RFCA, finalized after two years of negotiation, is an integrated agreement, encompassing 84 pages along with 13 attachments and 10 appendices, and that it is clear and unambiguous on the issue of penalties for exceedances of surface water quality standards at RFCA points of compliance. EPA contends that interagency agreements, such as the RFCA, are equivalent to judicial consent decrees and that they should be interpreted using ordinary contract principles. Referring to those principles, EPA observes that the starting point is the plain language of the four corners of the contract and that where a consent decree is clear on its face, it is inappropriate to consider extrinsic evidence.

EPA directs attention to the clarity of the RFCA on the subject of the terms governing penalties for exceedances of surface water quality standards at points of compliance, referring to the "Regulatory Approach," and "Enforceability" sections as well as to paragraph 2.4(C) of Attachment 5. The Regulatory Approach section provides that exceedances of in-stream concentrations triggers penalty liability "*in accordance with paragraph 219*." Paragraph 219, in turn provides, without equivocation, that "any violation ... of this Agreement **will be subject to civil penalties under sections 109 and 310(c) of CERCLA**." (emphasis added). Finally, describing the entire Attachment 5 as "denot[ing] EPA's ***discretion*** on the assessment of penalties," EPA refers to the language of paragraph 2.4(C) which provides that exceedances "***may*** be subject to civil penalties under sections 109 and 310(c) of CERCLA." (emphasis added). All three references in the RFCA, EPA maintains, clearly set forth that exceedances "can result in penalties " thereby eliminating the need to look for extrinsic explanations. EPA Memorandum in Support at 6-7.

In its Response[(2)], which includes the affidavit of Attorney Richard J. DiSalvo, DOE notes that the RFCA does not contain an integration clause and asserts that the RFCA's Statement of Purpose envisions looking beyond the four corners of the agreement. Response at 5. Additionally, DOE maintains that its desire to offer testimony of the circumstances surrounding the formation of the RFCA, testimony which will focus on the use of the word "may" in Attachment 5, does not violate the 'four corners rule' in any event. Further, DOE argues that the proposed testimony is not for the purpose of contradicting or adding to the terms of the agreement, but rather seeks only to explain that the word "may" was used to reflect that not all exceedances would result in a penalty. Id. at 6.

Courts have recognized that evidence of antecedent negotiation and interpretation do not violate the parol evidence rule where there is ambiguity. Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 702 F.Supp. 1317, (E.D. Mich. 1988). In deciding whether there is ambiguity, the presence of an integration clause is a significant consideration, as such a clause indicates that the document represents the parties' entire agreement. Ambiguity refers to "intellectual uncertainty" but the language of agreements must not be tortured to invent ambiguity where none exists. Weston Services, Inc. v. Halliburton NUS Envtl. Corp., 839 F.Supp.1144, 1146 (E.D. Pa. 1993).

Were resolution of this issue dependent only upon the "Regulatory Approach" section (Part 8 of RFCA) and paragraph 219, EPA's position on the issue of penalties would be sustained. However, Attachment 5's use of the word "may" adds an element of ambiguity to the issue. Further, EPA itself points to Attachment 5's use of "may" in paragraph 2.4(c) and the RFCA definition of the scope of the Agreement expressly includes the Attachments. In this regard, the Court is unable to find language

supporting EPA's characterization of Attachment 5, as reflecting EPA's discretion on the assessment of penalties. The affidavit of Attorney DiSalvo, while not yet subject to cross-examination nor balanced by possible rebuttal testimony, indicates that EPA would only seek a civil penalty where contamination did not originate from pre-existing (pre 1970) diffuse Buffer Zone contamination.

At this point a clear path to the resolution of this issue is not discernable. The use of the term "may," at least where statutory construction is involved, can be construed to mean "shall" or "must" when the statute involves the public interest or enforcement discretion but that is not the complete inquiry. United States v. Wilson, 853 F.2d 869, 872 (11th Cir. Aug. 1988). Mr. DiSalvo's affidavit seems to suggest that a penalty would be imposed only where the contamination originated from a source other than the pre-1970 diffuse low-level contamination. If this were accepted, an issue would appear to arise as to which party bears the burden of showing the source of the contamination, a critical determination, particularly given that the source of the contamination exceedance may be unknowable[(3)]. Yet it would seem unlikely that EPA would agree to such an interpretation without including those particulars in the Agreement. The absence of such particulars would seem to be an indication that the use of "may" simply describes that EPA has enforcement discretion in particular instances of exceedances.

Given these competing interpretations, the Court is of the view that additional argument would be useful. Accordingly the Motion will be further entertained at the outset of the hearing. The Court will consider the testimony of the DOE witnesses Mr. DiSalvo and Mr. Howell, their cross-examination, as well as the testimony of EPA witness(es) and their cross-examination, together with any additional legal arguments the parties may wish to offer on the issue, before ruling on the Motion in Limine. Following the ruling the case will proceed, as appropriate, on the remaining issues.

So Ordered.

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William B. Moran
United States Administrative Law Judge

Dated: August 17, 1999

1. The witnesses are Mr. Richard DiSalvo and Mr. Timothy Howell, two DOE attorneys who were involved in the negotiation of the RFCA.

2. The focus of this Order concerns whether extrinsic evidence may be received on the issue of penalties for exceedances of surface water quality at the points of compliance, but the Court notes that Respondent does not take issue, at least in its Response, with the proposition that interagency agreements may be viewed as akin to judicial consent decrees and subject to the general rules of contract construction. The Court is also aware that Respondent disagrees with EPA's characterization of the circumstances that resulted in the RFCA.

3. It also seems to the Court that the parol evidence issue would become moot if EPA, in its case in chief, is able to present evidence regarding the circumstances of the sampling which effectively rules out pre-1970 contamination as a contributor to the results which reflected an alleged exceedance.