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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
PUERTO RICO AQUEDUCT) Docket No. EPCRA-02-99-4003
AND SEWER AUTHORITY)
)
Respondent)

ORDER DENYING MOTION FOR INTERLOCUTORY APPEAL,
DENYING COMPLAINANT'S MOTION TO STRIKE,
AND PROVIDING AN EXTENSION OF TIME TO FILE DISPOSITIVE MOTIONS

I. Background

The Complaint in this matter, issued pursuant to Section 109 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9609, and Section 325 of the Emergency Planning and Community Right-To-Know Act (EPCRA), 42 U.S.C. § 11045, alleged that Respondent, Puerto Rico Aqueduct and Sewer Authority (PRASA or Respondent) failed to immediately notify the National Response Center, the Local Emergency Planning Committee (LEPC), and the State Emergency Response Commission (SERC) of a release of four 2,000-pound containers of chlorine from its sewage treatment facility, as soon as Respondent had knowledge of the release. Based on these allegations, the Complaint charged Respondent with violations of Section 103(a) of CERCLA, 42 U.S.C. 9603(a), and Section 304(b) of EPCRA, 42 U.S.C. 11004.

Answering the Complaint, Respondent asserted that as a result of Hurricane Georges

and resultant extensive flooding, chlorine cylinders were buried under the debris of the concrete building in which they were located at Respondent's facility, that three chlorine cylinders were recovered with their content of chlorine intact, and that no leak or release into the environment occurred. Respondent further asserted in its Answer that a search continues "for a possible and uncertain fourth cylinder."

Respondent filed a Motion to Dismiss the Complaint on July 6, 1999, on grounds that Complainant had not alleged facts which, if proven, would establish the occurrence of a release. Respondent's Motion to Dismiss was denied in an Order Denying Motion to Dismiss, dated October 4, 1999 (Order).

On October 15, 1999, Respondent served a Motion for Interlocutory Appeal (Motion), requesting certification of the Order for immediate appeal to the Environmental Appeals Board (EAB) pursuant to 40 C.F.R. § 22.29(b). Respondent further requested a stay of proceedings pending resolution of the appeal, should certification for appeal be granted. On October 26, 1999, Complainant filed an Opposition to the Motion.

Respondent's Motion requests interlocutory appeal on three grounds: (1) that the Order is premised on a definition of "release" which is inconsistent with the definition in Section 101(22) of CERCLA and Section 329(8) of EPCRA; (2) that contrary to law, the Order is premised on the theory that liability may be based upon a mere threat of a release, rather then the occurrence of an actual release; and (3) that Complainant failed to allege any facts in support of its allegation that there was a "release" within the meaning of CERCLA and EPCRA, and alleged no facts which if proven would establish that there was an actual "release."

The parties filed Prehearing Exchanges. On September 7, 1999, Complainant filed its Rebuttal Prehearing Exchange, requesting that a certain document and testimony of certain witnesses be stricken from Respondent's Prehearing Exchange. On September 22, 1999, Respondent submitted an Opposition to Rebuttal Prehearing Exchange From Complainant.

II. Motion for Interlocutory Appeal

The Rules of Practice provide at 40 C.F.R. § 22.29(b) that the presiding judge may recommend any order or ruling for review by the EAB when:

> (1) The order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion; and
>
> (2) Either an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.

As to its first basis for appeal, Respondent argues that the decision denying its Motion to Dismiss is based on the undersigned defining "release" to include "lost" closed containers of hazardous substances, and that such definition is inconsistent with the plain language of the statutory definition. The statutory section at issue, Section 101(22) of CERCLA, states that "the term 'release' means any spilling, leaking, . . . or disposing into the environment (including the abandonment or discarding of barrels, containers and other closed receptacles

containing any hazardous substance)." Respondent's position is that there is a "release" of closed receptacles only when they are "abandon[ed] or discard[ed]," and not when they are "lost."

However, the Order denying the Respondent's Motion to Dismiss states at page 5, that "it is not necessary to determine on this Motion the question of whether there was a 'release' where those [three] containers were lost and then found intact [since] . . . . Respondent has not established a failure to state a claim as to the fourth container referenced in the Complaint [that has not yet been recovered]." Thus, the prior Order did not reach and decide the question of whether closed containers which are "lost" (as compared to abandoned or discarded) are "released" within the meaning of CERCLA and EPCRA. Consequently, Respondent's first basis for appeal does not present a valid reason for interlocutory review of the Order.

As to Respondent's second basis for appeal, Respondent argues, "the Presiding Officer takes the position in the Order that containers of hazardous waste may be declared abandoned, and therefore released, when such containers are 'lost' and 'may pose a serious, immediate threat to health or the environment because it is not known whether the containers are damaged or leaking'" which is "tantamount to declaring that a threatened release is equivalent to a release." Motion at 4. The undersigned Presiding Officer has not taken such a position in the Order on the Motion to Dismiss. The passage Respondent refers to, from page 7 of the Order, addresses Respondent's argument distinguishing abandonment from a mere escape of a container of hazardous waste on the basis of the potentiality in an abandonment situation for an actual release to occur over time.[(1)] In support of that argument, Respondent cites to dicta in *A & W Smelter v. Clinton*, 146 F.3d 1107 n. 9 (9th Cir. 1998), that leaving drums in a desert constitutes abandonment because over time there *could be* a release into the environment. The Order points merely out that such dicta is inconsistent with the opinion in *Fertilizer Institute v. U.S. EPA,* 935 F.2d 1303 (D.C. Cir. 1991), that only an actual release and not a threatened release triggers CERCLA reporting requirements. The Order points to other language in the *A & W Smelter* opinion which appears consistent with the *Fertilizer Institute* opinion: "where the hazardous substance presents a serious, immediate threat to health or the environment, and the owner is not present, EPA would be justified in declaring the waste abandoned." 146 F.3d at 1112. The Order suggests that either abandonment or loss of a container could pose such an immediate threat to health or the environment. The Order does not conclude or determine for the purposes of this action that loss of a container, or a threatened release, constitutes a release under CERCLA. Thus, Respondent's second basis for appeal does not present a valid reason for interlocutory review of the Order

As to Respondent's third basis for appeal, Respondent believes that "the Order decided that EPA Region II is not required to allege facts to support the occurrence of a release." Motion at 4. Respondent asserts that the date of the release, number of containers released, type and quantity of substance contained therein, and the source of the release relate only to circumstances surrounding the release and do not support the allegation that what occurred in fact was a release. As to the cases cited in the Order, *Pape v. Great Lakes Chemical Co.*, Civ. No. 93 C 1585, 1993 U.S. Dist. LEXIS 14674 (N.D. Ill, Oct. 19, 1993) and *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149 (9th Cir. 1989), holding that a CERCLA complaint need not specifically allege the manner in which the release occurred, Respondent claims, "[i]n fact, there is a difference of opinion as to the applicability"of those decisions, which concern private cost recovery under Section 107(a) of CERCLA. Motion at 6. Respondent does not cite to any authority, but merely refers to court decisions, cited in the Order, holding that mere conclusory allegations unsupported by factual assertions are insufficient to state a claim. As discussed in the Order (at 6), the latter decisions are not inconsistent with *Pape* and *Ascon.* Respondent does not provide any authority inconsistent with the *Pape* and *Ascon* decisions, and does not support its argument that those decisions are inapplicable to the present matter. Therefore, Respondent has not established that the sufficiency of the Complaint is an important question of law upon which there

are substantial grounds for difference of opinion.

III. Request to Strike Testimony and Document from Respondent's Prehearing Exchange

Complainant, in its Rebuttal Prehearing Exchange, requested that an Executive Order issued by the Governor of Puerto Rice and the testimony of certain witnesses in Respondent's Prehearing Exchange be stricken because they lack relevancy and probative value. Complainant asserts that such testimony, as to Puerto Rico and PRASA procedures for management of emergencies, coordination with government representatives, and notification among Puerto Rico agencies, has no probative value or relevance as to the violations in the Complaint, which allege failure to notify the NRC, SERC and LEPC. As to the Executive Order, Complainant asserts that it is irrelevant, does not comply with Rule 401 of the Federal Rules of Evidence, and does not override any Federal regulation.

Respondent, in its Opposition to this request, asserts that the document and testimony is expected to provide evidence that Respondent notified those agency representatives of the Puerto Rican Government with emergency response expertise of the displacement of the chlorine cylinders, and expected to establish that under the circumstances the notifications satisfied the notification provisions of CERCLA and EPCRA. Respondent asserts that such testimony and evidence will allow a determination as to whether the notification requirements were satisfied and as to any appropriate penalty.

First, the Federal Rules of Evidence are not binding on EPA administrative enforcement proceedings. Second, regardless of relevance and probative value as to liability, Complainant has not established that the testimony and document are irrelevant or lack probative value as to the penalty. The determination of penalties under Section 109 of CERCLA and Section 325 of EPCRA include factors of culpability, attitude and other matters as justice may require. The Interim Final Enforcement Response Policy for Sections 304, 311, and 312 of EPCRA and Section 103 of CERCLA states that these factors include consideration of the degree of control Respondent had over the situation at issue, speed and completeness of achieving compliance, and unique circumstances. Complainant has not established that the testimony and Executive Order are not relevant or probative as to those considerations.

IV. Extension of Time

By Order dated October 12, 1999, the parties were granted an extension of time until October 30, 1999 to file dispositive motions. This ruling on Respondent's Motion for Interlocutory Appeal is being issued only a few days prior to the October 30 deadline. Although the parties should be prepared for the October 30 deadline in the event that the Motion for Interlocutory Appeal and stay is denied, in the interest of judicial economy and in anticipation that the parties will need extra time after this ruling to prepare any dispositive motions, the deadline for such motions will be extended for two weeks, until November 12, 1999.

ORDER

1. Respondent's Motion for Interlocutory Appeal is **DENIED.**

2. Complainant's request to strike a document and testimony from Respondent's Prehearing Exchange is **DENIED.**

3. The parties shall file any motions dispositive on the issue of liability by **November 12, 1999.**

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Susan L. Biro
Chief Administrative Law Judge

Dated: October 26, 1999
Washington D.C.

1. See, Reply to Complainant's Opposition to Motion to Dismiss, pp. 3-4.