

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of)
)
Spang and Company,) Docket No. RCRA-III-169
)
Respondent)

ORDER ON MOTIONS

As you have been previously notified, I have been designated to preside in the above captioned matter. (Order of Redesignation, June 23, 1997.) This proceeding arises under Section 3008 of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928 et seq. This case has been pending since the filing of the initial complaint dated November 15, 1989. On May 1, 1996, Administrative Law Judge Greene granted EPA's Motion for Accelerated Decision as to Liability. Thus, substantively, the issue of an appropriate penalty remains. Currently pending before the undersigned are various motions which will be disposed of with this Order.

Respondent's Motion for Discovery

On May 22, 1997, ⁽¹⁾ Respondent filed a motion requesting discovery in this matter. The motion requests the production of various documents by complainant. These documents deal with the calculation of the proposed penalty in this case. In addition, respondent requests the taking of depositions of certain EPA witnesses also for the purpose of determining the calculation of the penalty.

By filing dated June 11th, Complainant filed a motion requesting an extension of time to reply to Respondent's Motion for Discovery and EPA's Response to Respondent's Motion for Discovery. In its motion for extension of time EPA states that illness (pneumonia) and duties surrounding the recent death of counsel's mother prevented the timely filing of the response to

respondent's Motion for Discovery. This motion for extension of time is unopposed by respondent.⁽²⁾

It is this Administrative Law Judge's view that good cause has been shown for the delay in responding to respondents' Motion. Given the circumstances, EPA counsel's delay rises to the level of "excusable neglect" as defined by 40 C.F.R. § 22.07(b). Therefore, complainant's Motion for Extension of Time to Reply to Respondent's Motion for Discovery is hereby Granted.

I next look to the Motion for Discovery itself and the EPA's Reply thereto. EPA objects to providing the documents requested on the grounds that they are "otherwise available" to respondent. EPA asserts that respondent recently filed a Freedom of Information Act ("FOIA") request to obtain these documents and that "EPA has begun the process involved in providing them."

40 C.F.R. § 22.19 (f) (1) states:

[f]urther discovery, under this section, shall be permitted only upon determination by the Presiding Officer:

(i) That such discovery will not in any way unreasonably delay the proceeding;

(ii) That the information to be obtained is not otherwise obtainable; and

(iii) That such information has significant probative value.

Measuring the request against these regulatory factors and comparing the FOIA request with the documents at issue in respondent's motion for discovery, it appears that these documents are "otherwise obtainable" via the FOIA request and that preparations were underway as early as June 9th to provide this information to respondent.⁽³⁾ Therefore, respondent's request for the production of documents is Denied. However, counsel for EPA is reminded to oversee that the

FOIA information is provided to respondent.

As to the request for the depositions of EPA witnesses Jonathan Libber (BEN/ABEL Coordinator, EPA Office of Regulatory Enforcement); and the EPA representative who prepared the civil

penalty calculations in this case, I look to 40 C.F.R. §22.19 (f) (2) which states:

The Presiding Officer shall order depositions upon oral questions only upon a showing of good cause and upon a finding that:

(i) The information sought cannot be obtained by alternative methods; or

(ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

Using these criteria, I find that there does exist an alternative method for obtaining this information. Namely, as described in complainant's response, the provision of "narrative explanations in affidavits by EPA personnel involved." The use of affidavits will inform respondent of these witnesses' expected testimony; they will presumably be sworn statements which can be used by respondent's counsel at the hearing much as deposition testimony could be used.

Complainant is hereby directed to provide, in a timely manner, affidavits from all witnesses it expects to testify at the hearing of this matter. The affidavits should provide a full summary of each witnesses expected testimony and refer to documents used in the formation of their opinions and conclusions. To the extent not already provided, all documents cited shall also be provided to respondent.

Further, the undersigned will provide ample opportunity at the hearing to allow respondent's counsel to fully explore these witnesses' testimony. Therefore, respondent's request for depositions in this matter is Denied.

Complainant's Motion for the Submission of the Penalty Issue for a Decision on Briefs and Other Supporting Documentation

The next motion pending is Complainant's Motion for the Submission of the Penalty Issue for a Decision on Briefs and Other Supporting Documentation dated May 23rd. Respondent filed

by pleading dated June 6th their Response in Opposition to Complainant's Motion.

EPA asserts that their counsel is well versed in the facts of this case as well as all aspects of the penalty calculation and as such, complainant's counsel is "well qualified to present the Revised Penalty and supporting documentation in briefs."⁽⁴⁾ Respondent counters that among other matters, that "the decisional record in this case has not been fully developed. Spang intends at trial to present evidence not of record, including environmentally beneficial expenditures and activities undertaken."⁽⁵⁾

This matter is governed by our procedural rules at 40 C.F.R. § 22.15 (c) *Request for hearing*, it states:

A hearing upon the issues raised by the complaint and answer shall be held upon the request of respondent in the answer.

(emphasis supplied)

Respondent notified the parties to this dispute in its original answer dated November 14, 1989 that they wanted a hearing to be held in this matter. They have consistently maintained this position throughout these proceedings. Section 22.15(c) is unequivocal in this respect. Respondent is entitled to a hearing in this matter. Therefore, complainant's Motion for the Submission of the Penalty Issue for Decision on Briefs is Denied.

Motion for Default

The next related group of motions deal with the untimely filing of EPA's Pretrial Exchange materials. Complainant's pretrial exchange was to be filed "No later than June 13, 1997"⁽⁶⁾ On June 18th, respondent filed their Motion for Default citing EPA's failure to file their pretrial exchange in accord with Judge Greene's May 9th Order. By pleading dated June 17th, EPA filed Complainant's Motion for Extension of Time to File a Pretrial Exchange and their Pretrial Exchange.

EPA's motion again cites to their counsel's having pneumonia, attending to affairs relating to her mother's death as well as "the press of other matters" and counsel's "confusion" as to whether the presiding officer would decide whether this matter required a hearing before pretrial submissions were due. Counsel

for EPA requests that her failure to timely file EPA's pretrial exchange be deemed excusable neglect pursuant to 40 C.F.R. § 22.07(b). Respondent opposes EPA's Motion for Extension of Time and lastly EPA filed a Response to Motion by Respondent for Order of Default.

EPA counsel's confusion over believing that the Presiding Officer would first rule on whether the penalty issue could be submitted on briefs and then order the filing of pretrial materials in and of itself, probably would not constitute "excusable neglect" sufficient to allow this matter to proceed. However, in light of the other considerations mentioned in EPA's Motion for Extension of Time and Response to Motion by Respondent for Default Order, and discussed herein previously, the undersigned believes that good cause has been shown to deem EPA's untimely filing of their pretrial exchange as excusable neglect.

Therefore, Respondent's Motion for Default Order is Denied. EPA's Motion for Extension of Time to File a Pretrial Exchange is Granted.

Except as otherwise directed by this Order, the parties are reminded that Judge Greene's May 9th Order reflects a June 27th deadline for "any change in the proposed list of witnesses or changes or additions regarding the documents to be offered, in light of the June 13, 1997, exchange." The parties are advised that compelling circumstances would need to be presented to justify the inclusion of additional evidentiary submissions after June 27th.

Finally the parties are directed to file a joint status report no later than August 29, 1997 indicating the length of time each of their direct cases will take to present. The parties shall also indicate their preference for a hearing date, either September 16 or September 23, 1997. The parties are advised that the hearing in this matter is scheduled to take place in Pittsburgh, Pennsylvania.

So Ordered.

William B. Moran

Administrative Law Judge

Dated: August 20, 1997

Washington, DC

IN THE MATTER OF SPANG AND COMPANY,

Respondent

Docket No. RCRA-III-169

CERTIFICATE OF SERVICE

I certify that the foregoing **Order on Motions**, dated August 20, 1997, was sent in the following manner to the addressees listed below:

Original by Pouch Mail to: Lydia A Guy

Regional Hearing Clerk

U.S. EPA, Region 3

841 Chestnut Building

Philadelphia, PA 19107

Copy by Regular Mail to:

Counsel for Complainant: Patricia D. Hilsinger, Esquire.

Assistant Regional Counsel

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Counsel for Respondent: William T. Marsh, Esquire

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Butler, PA 16003-0751

Aurora Jennings

Legal Assistant

Office of Administrative Law Judges

Environmental Protection Agency

Dated: August 20, 1997

Washington, DC

1. Unless otherwise indicated, all dates referenced herein will be for the 1997 Calendar year.

2. 40 C.F.R. § 22.16 (b) states in pertinent part, "If no response is filed within the

designated period, the parties may be deemed to have waived any objection to the granting of the order."

3. See June 9 Letter from EPA to John E. Beard, III, re: Freedom of Information Act Request : 03-RIN-00971-97.

4. Complainant's May 23 Motion at ¶4.

5. Respondent's June 9 Response at ¶15.

6. Order for Pretrial Exchange, Judge Greene, May, 9, 1997.