

5/30/96

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
L&C Services, Inc.,) Docket No. VII-93-CAA-112
)
Respondent)

ORDER GRANTING IN PART AND DENYING IN PART
RESPONDENT'S MOTION TO STRIKE

L&C Services, Inc. ("L&C"), moves to strike seven documents attached to the Environmental Protection Agency's ("EPA") post-hearing brief. L&C also moves to strike references in EPA's brief to documents which it asserts were not admitted into evidence.¹ For the reasons that follow, L&C's motion is granted as to Attachments 2, 3, 4, 5, 6, and 7, and it is denied as to Attachment 1.

Attachments 2, 4, and 7 are portions of EPA documents. Attachment 2 contains selections from the 1979 and 1984 editions of the EPA guidance document, "Asbestos Containing Materials in School Buildings, Part 2." Each selection consists of one page of text. Attachment 4 is a 1990 document titled, "National Emission Standards for Asbestos - Background Information for Promulgated Asbestos NESHAP Revisions." This attachment contains two pages of text. Attachment 7 is also a 1990 document titled, "Common Questions on The Asbestos NESHAP." This attachment consists of one page of text.

L&C argues that because these documents are unauthenticated, they are improperly relied upon by EPA. The respondent further argues that it has had no opportunity to present to the court these documents in their entirety, that it has been denied the opportunity to present rebuttal evidence relating to the information contained in the documents, and that it also has been denied the opportunity to cross-examine any sponsoring EPA witnesses concerning the contents of these documents.

L&C's arguments are well-taken. While EPA claims that Attachments 2, 4, and 7 are "widely, publicly disseminated," and "publicly available", this assertion alone is insufficient for their inclusion into the record. The appropriate time for the submission of these attachments was

¹ L&C specifically objects to references on page nine of EPA's brief to Exhibit A of L&C's Motion for Summary Judgment and Dismissal, and to Exhibit 2 of Williams Pipe Line Company's prehearing exchange.

at the hearing in this case, at which time L&C would have been given the opportunity either to challenge or to explain their contents. To the extent that EPA argues that these, or any of the other challenged documents, were placed in issue in this case as a result of witness testimony, EPA is wrong. The transcript references cited by complainant do not support such a proposition. Moreover, to allow EPA to rely upon these piecemeal documents at the briefing stage would unduly prejudice L&C and runs counter to the very purpose for which the hearing in this case was held. Accordingly, for the reasons advanced by L&C, Attachments 2, 4, and 7 are stricken.

Attachment 3 consists of two pages. EPA states that "Attachment 3 is from a publicly available encyclopedia, that is available at public libraries and by computer access." EPA Resp. at 4. EPA submits further that this document was intended to aid both the respondent and the court. It is unclear to the court, however, exactly where this document came from and exactly what it means. As such, it is not an aid to the court. Moreover, at page 21 of its brief, EPA cites Attachment 3 for the following proposition: "Latex paint is permeable. It will not keep the asbestos fibers beneath it dry." Inasmuch as Attachment 3 is cited by EPA for the purpose of establishing a fact in this case -- i.e., that latex paint will not keep asbestos fibers dry --, for the reasons mentioned above, it likewise should have been offered as an exhibit at the hearing. Therefore, Attachment 3 is stricken.

Attachment 5 is a 1991 document titled, "Refresher Course on the Revised Asbestos NESHAP - Draft Instructor Manual". The cover sheet bears the name and emblem of Alliance Technologies Corporation. This attachment contains one page of text. It suffers from the same deficiencies as the attachments previously discussed. In addition, Attachment 5 is a refresher manual not from respondent L&C, but apparently from a corporation not even a party to this case. Accordingly, Attachment 5 likewise is stricken.

Attachment 6 is titled, "Appendix D, Analysis Data Table". It consists of six pages. Appendix D was not admitted into evidence in this case. Rather, it is a part of Exhibit 2 of the prehearing exchange submitted by the Williams Pipeline Company. This company was dismissed from the case as a respondent prior to the evidentiary hearing. Because the prehearing exchange is not part of the evidentiary record, Attachment 6 was improperly relied upon by EPA. Accordingly, it is stricken.

Attachment 1, however, was properly relied upon by complainant. Attachment 1 is a selected portion from a May 11, 1991, survey conducted by Diversified Environmental Technologies, Inc. This document is titled, "Asbestos Inspection-Survey, Idle Refinery Units/Areas, Augusta, Kansas Refinery for Williams Pipe Line Company." The pages comprising Attachment 1 were made part of the record in this case as Exhibit A to L&C's Motion for Summary Judgment and Dismissal. L&C, therefore, cannot demonstrate that it will be prejudiced by EPA's employment of an exhibit to its own substantive motion. Respondent's request to strike Attachment 1 is denied.

ORDER

L&C's motion to strike is granted as to Attachments 2 through 7 to EPA's post-hearing brief, and as to references in EPA's post-hearing brief to these attachments. Respondent's motion to strike is denied as to Attachment 1.

Carl C. Charneski

Carl C. Charneski
Administrative Law Judge

Issued: May 30, 1996
Washington, D.C.

In the Matter of L & C SERVICES, Respondent
Docket No. VII-93-CAA-112

Certificate of Service

I certify that the foregoing ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION TO STRIKE, dated May 30, 1996, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

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Dated: May 30, 1996