UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Department of Defense) Docket No. CAA-09-98-17
Davis-Monthan Air Force Base,)
)
Respondent)

Order On Respondent's Motion To Compel Discovery[(1)]

This case originated when the Pima County Arizona Department of Environmental Quality ("PDEQ") was notified by the Respondent that there had been asbestos NESHAP[(2)] violations under the Clean Air Act ("CAA"), 42 U.S.C. § 7413(d), during a renovation project at Building 4210, Davis-Monthan Air Force Base when floor tiles, containing asbestos material, were pulled up during removal of carpet. Thereafter, actions were taken to seal the site and there is agreement that the problem has been abated. Significantly, "Respondent admits the substantive factual violations underlying EPA's Complaint." Respondent's Motion at 4. Rather the matters in issue swirl around Respondent's affirmative defenses regarding EPA's jurisdiction and authority to bring this action, and, should those affirmative defenses be rejected, Respondent's objections to the appropriateness of the $81,020.00 civil penalty[(3)] EPA seeks for the admitted violations. Although PDEQ began an enforcement action for the violations, Respondent refused to pay a civil penalty or to perform a supplemental environmental project, asserting, as its defense, sovereign immunity. Thereafter, PDEQ having determined that it could not proceed with its enforcement action, referred the matter to EPA, resulting in the filing of the instant Complaint on September 30, 1998.

Respondent's Motion to Compel Discovery, filed on April 30, 1999, seeks "limited discovery to support its affirmative defenses and to explore PDEQ's testing procedures [regarding the presence of asbestos]. Motion at 4. At the time of filing its Motion Respondent noted that the procedural rules spoke to the issue of

discovery.[(4)] This provision was supplanted by the new Part 22 procedural rules, which now govern this proceeding. Section 22.19, while revised, continues to address the matter but the test for ordering discovery remains the same. Discovery may be ordered by the judge where it neither unreasonably delays nor unreasonably burdens the non-moving party, seeks information that is most reasonably obtained from the non-moving party, and "[s]eeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought." 40 CFR § 22.19(e). While more precise, the new discovery provision, as pertinent here, employs essentially the same "significant probative value" test.

Respondent concedes that EPA met its request for two of the five categories of documents for which it seeks discovery, items 2 and 5, and that it partially complied with some of item number 3, leaving the balance of item 3 and items 1 and 4 in issue. Motion at 5. As to items 1 and 4, Respondent relates that the requested information is relevant to its affirmative defense based on the 12 month statute of limitations provision set forth in 42 U.S.C. § 7413 (d) and Respondent's overfiling defense. In this regard Respondent wishes to "fully explore EPA's involvement with the PDEQ investigation and PDEQ's closure of the case." Motion at 7.

Citing to In the Matter of Lyon County Landfill, 5 CAA 96-011, 1998 EPA ALJ LEXIS 68, August 21, 1998, (Lyon County- ALJ) Respondent also maintains that in this case, as in Lyon County-ALJ, EPA's filing was not within the statute of limitations. Further Respondent seeks to delve into the surrounding facts "to fully determine the propriety of the waiver decision process." Motion at 6. Respondent's inquiry is aimed at determining "whether the Department of Justice was fully informed that this was a local enforcement case," a factor it deems significant to its position that a federal facility need not pay an administrative penalty *for a State or local enforcement action.*" Motion at 7. (emphasis added).

Respondent also maintains that it is essential that it be permitted to depose PDEQ employees Frank Bonillas and Kathi Lawrence, as they are "the two critical local enforcement officials responsible for investigating Respondent's case." Motion at 8. These depositions are, in large measure, directed at Respondent's exploration of material in support of its overfiling defense. However, Respondent also wants to inquire of Mr. Bonillas regarding discrepancies between his investigation reports and PDEQ lab tests. Motion at 9.

In response[(5)], EPA observes that Section 113(d)(1) of the Clean Air Act addresses the general time frame within which the Administrator may bring actions seeking civil administrative penalties, and that the section includes a waiver provision for the general time frame. Complainant also notes that, in fact, a waiver was obtained in this instance. EPA advances several bases for denying the information Respondent seeks, including the attorney work product and the deliberative process privileges, that the Complainant did not have the documents in its particular EPA region, and that the documents are not pertinent to establishing that a waiver was in fact issued in this case. EPA also maintains that the statutory provision of Section 113(d)(1) itself precludes inquiry into the subject matter of Respondent's objects of discovery, stating "[a]ny such determination [regarding waiver] by the Administrator and the Attorney General shall not be subject to judicial review."

Regarding the depositions of Mr. Bonillas and Ms. Lawrence, EPA notes that Respondent's basis for these also relates to its overfiling defense but maintains that the present case is distinguishable from Harmon Industries, Inc. v. Browner[(6)], 19 F.Supp. 2d 988 (W.D. Mo. 1998) ("Harmon I "), as that case involved construction of distinct statutory language under the Resource Conservation and Recovery Act (RCRA), and also because, unlike Harmon I, there is no state administrative consent order involved in the present action. Further, EPA reiterates that these witnesses will be called for the hearing, affording Respondent the opportunity to cross-

examine them at that time.

DISCUSSION

For the reasons which follow, Respondent's Motion is DENIED. Respondent's efforts to discover information relating to the circumstances surrounding EPA's decision to initiate its own civil administrative action fails to satisfy the materiality requirement for ordering additional discovery. Contrary to Respondent's belief, this is not a "local/State" action. Rather it is a proceeding under Section 113(d) of the Clean Air Act and the NESHAP asbestos provisions under Sections 112 and 114 of that Act.

Regarding Respondent's interest in delving into the waiver decision exception to the twelve month period for the initiation of an administrative action, the Court agrees with EPA that the statute unequivocally provides that "[a]ny such determination by the Administrator and the Attorney General [regarding, as pertinent here, a longer period to initiate the action] ***shall not be subject to judicial review.***" (emphasis added). As the statute makes plain, no inquiry may be made into the decisional process itself. Thus, permissible inquiry can only pertain to whether a waiver was in fact issued, an event that has not been questioned here.

Further, Respondent's assertion, relying in part upon the decision in Lyon County-ALJ, that the Complaint was filed beyond the statute of limitations and that the waiver process can not extend beyond twelve months from the first alleged date of the violation's occurrence, unless a continuing violation is involved, has been subsequently resolved by the decision of the Environmental Appeals Board In re: Lyon County Landfill, CAA Appeal No. 98-6, 1999 EPA App. LEXIS 26, August 26, 1999 (Lyon County- EAB) holding that the "exceptions clause of section 113(d)(1) does not contain a durational component" but rather authorizes waivers "where violations of any duration occurred more than twelve months prior to the initiation of the administrative action." 1999 EPA App. LEXIS 26, *4.

In addition, Respondent's reliance upon Harmon I is rejected because, putting aside, without comment, the other arguments raised by EPA, the present case is distinguishable on the basis that the State entity in Harmon I "acknowledged full satisfaction, released all RCRA claims and waived any claim for monetary penalties..." 19 F. Supp 2d at 989. Here, the Respondent, having raised the sovereign immunity defense to defeat the state from imposing any penalty whatsoever, can hardly turn around and claim that EPA is now precluded from seeking a civil penalty because of the state proceeding, which Respondent successfully stymied.

Last, for the reasons already set forth, the depositions of Mr. Bonillas and Ms. Lawrence are also denied. In addition, Respondent's further basis for deposing Mr. Bonillas, in order to inquire about alleged discrepancies between his investigation reports and PDEQ lab tests, is also rejected as those aspects can be adequately explored during the cross-examination of that witness.[(7)]

So Ordered.

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William B. Moran

United States Administrative Law Judge

Dated: November 17, 1999

1. Shortly after the subject Motion, EPA filed a Motion to Deny Discovery regarding Respondent's planned interview of Mr. Jon Marting, an inspector with the Arizona Department of Environmental Quality, asserting that Respondent must first satisfy the procedural rules requirements for further discovery. In its Response, Respondent noted that EPA does not control State of Arizona witnesses and that it should not be precluded from preparing its defense. The Court did not opt to intercede in the apparently voluntary interview. No further filings were received regarding this matter, and it is presently regarded as an inactive issue.

2. "Asbestos NESHAP" refers to National Emission Standards for Hazardous Air Pollutants for asbestos. Section 112 (d) of the Clean Air Act, 42 U.S.C.§ 7412(d).

3. Given the circumstances surrounding this admitted violation, including among other factors, Respondent's self-reporting of the event and questions regarding the amount of asbestos involved, the Court, without prejudging EPA's position on the proposed penalty, does have some questions about the propriety of the amount sought and awaits a full airing of those issues at hearing, should the parties be unable to arrive at settlement on the penalty issue.

4. Respondent incorrectly cited 40 CFR § 22.20. The provision then, as now, is found at 40 CFR § 22.19.

5. Respondent thereafter filed a Reply to EPA's Response and EPA, in turn, filed a Reply to Respondent's Reply. The theme of Respondent's Reply is a continuation of the points made in its original Motion for discovery, basically an inquiry into the details surrounding EPA's involvement with PDEQ and the origins of EPA's Complaint in this matter, as part of Respondent's theory that this proceeding is actually a disguised local/State case. EPA's Reply points out that this is neither a joint enforcement action nor a local/State case.

6. Subsequent to the submissions on this Motion, the Eighth Circuit affirmed the district court's ruling in Harmon I. 191 F.3d 894; U.S. App. LEXIS 22405; September 16, 1999.

7. The Court, while noting again that the Respondent concedes the fact of violation, assumes that Respondent already has Mr. Bonillas' investigation reports as well as the PDEQ lab tests and therefore has the foundation to prepare for its cross-examination, as part of its effort to show that the penalty proposed by EPA is inappropriate. If the Respondent does not have both of these, EPA is directed to provide them immediately.

In the Matter of Department of Defense, Davis-Monthan Air Force Base, Respondent
Docket No. CAA-09-98-17

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Respondent's Motion To Compel Discovery,** dated November 17, 1999 was sent this day in the following manner to the addressees listed below:

Original by Regular Mail to:

Danielle E. Carr
Regional Hearing Clerk
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____
Maria Whiting-Beale
Legal Staff Assistant

Dated: November 17, 1999