

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
F. C. HAAB COMPANY, INC.) Docket No. EPCRA-III-154
)
Respondent)

**ORDER DENYING MOTION TO REOPEN ADMINISTRATIVE RECORD AND
PERMITTING COMPLAINANT TO FILE ANSWER TO RESPONDENT'S REPLY**

By pleading dated November 3, 1997, Complainant filed a motion to reopen the administrative record for the limited purpose of accepting the "Declaration of Joseph Hollingsworth" attached to the motion. By response, dated November 13, 1997, Respondent filed an opposition to Complainant's motion. Complainant filed an answer to that response on November 17, 1997.⁽¹⁾ For the reasons set forth below, Complainant's motion shall be denied.

As support for its motion, Complainant notes that its witness, Hollingsworth, testified during the hearing "that he submitted to EPA a draft complaint and a preliminary recommended penalty of \$210,000." However, Complainant states that "[u]pon further reflection, Mr. Hollingsworth now believes that his testimony was confused on this point and that he actually submitted to EPA a preliminary recommended penalty of **\$255,000**, not \$210,000." (Emphasis added.) Complainant asks that Mr. Hollingsworth's Declaration be accepted into the record "in the interest of full candor towards the tribunal." In its answer to Respondent's Reply, Complainant states again its belief that full candor to the court and to Respondent was the reason for its motion. However, Complainant states that "in its own Post-Hearing Brief, EPA refrained from relying on Mr. Hollingsworth's testimony regarding the amount of his proposed penalty," and that "EPA's Post-Trial Brief was carefully tailored to avoid prejudicing Haab." Respondent argues that Complainant has not supported its request to reopen the record, and that if the motion were granted, Respondent would be severely prejudiced.

This motion falls under Rule 28 which states as follows:

§ 22.28 Motion to reopen a hearing. (a) Filing and Content. A motion to reopen a hearing to take further evidence must be made no later than twenty (20) days after service of the initial decision on the parties and shall (1) state the specific grounds upon which relief is sought, (2) state briefly the nature and purpose of the evidence to be adduced, (3) show that such evidence is not cumulative, and (4) show good cause why such evidence was not adduced at the hearing.

40 C.F.R. § 22.28(a) (1996). [\(2\)](#)

The critical portion of Mr. Hollingsworth's Declaration states ". . . I realized that I may have been confused during a portion of my testimony. Upon further reflection, I believe that the preliminary recommended penalty that I calculated and submitted to EPA was \$255,000 . . ." Hollingsworth Declaration, Exh. C at 1, ¶ 4 (emphasis added). However, there is no documentation or other evidence to support this assertion by Mr. Hollingsworth. Complainant has not shown "good cause why such evidence was not addressed at the hearing." Rule 22.28(a). Further, a motion to reopen the hearing "cannot be used as a means for correcting errors in strategy or oversights at hearing." In the Matter of Ketchikan Pulp Co., Docket No. CWA-1089-12-22-309(g), 1996 CWA LEXIS 14, *15 (Sept. 5, 1996). Accordingly, the motion is denied.

However, one further comment is required. Complainant based its motion, in part, upon an effort to be fully candid with the court. While Complainant's motion was not granted, the undersigned commends Complainant for bringing this matter to the attention of the undersigned and Respondent so that an appropriate evaluation of the situation could be made.

Charles E. Bullock
Administrative Law Judge

Dated: November 24, 1997
Washington, D.C.

1. Because of the complexity of this matter, Complainant's November 17, 1997 pleading is accepted.

2. *But see, In the Matter of Commercial Cartage Co*, 1997 CAA LEXIS 15, at *61 which held that a motion to reopen the record **prior to** the issuance of an initial decision would be addressed pursuant to the Judge's discretion under Rule 22.16, 40 C.F.R. § 22.16 (1996) rather than Rule 22.28. However, my reading of Rule 22.28 does not reach that conclusion. There is nothing in the language "no later than twenty (20) days after service of the initial decision on the parties" that would limit application of the Rule 22.28 only to the 20-day period after the initial decision is issued. Thus, I respectfully disagree with that finding in *Commercial Cartage*.

IN THE MATTER OF F. C. HAAB COMPANY, INC., Respondent,

Docket No. EPCRA-III-154

Certificate of Service

I certify that the foregoing Order, dated November 24, 1997, was sent this day in the following manner to the below addressees. Original by Regular Mail to:

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Dated: November 24, 1997