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Retyped August 24, 1995 - BLH

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

\_\_\_\_\_)  
In re )  
Del Val Ink & Color, Inc., )  
  ) Respondent )  
\_\_\_\_\_)

Docket No. II RCRA-91-0104

ORDER ON MOTIONS

Respondent, Del Val Ink and Color, Inc. (Respondent or Del Val), has submitted a motion for an order dismissing the complaint in this matter for prosecutorial abuse and to enjoin the United States Environmental Protection Agency (EPA or Complainant) from obtaining certain documents from S & W Waste, Inc. (S & W Waste).

Complainant has filed a reply in which it opposes Respondent's motion and requests that the motion be denied. Complainant has also moved for an indefinite postponement of the hearing date in this matter.

The EPA instituted this civil administrative proceeding pursuant to Section 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA), by the issuance of a complaint against Del Val.

The complaint alleged that Respondent had shipped restricted hazardous wastes to an off-site treatment facility without

notifying the off-site treatment facility in writing of the appropriate treatment standards and that Respondent failed to accurately classify by hazardous waste number the hazardous waste on certain of its hazardous waste manifests. Respondent has asserted that it complied with applicable RCRA notification requirements regarding the off-site treatment of hazardous waste, segregated its hazardous waste, and properly classified its hazardous waste on the appropriate manifests.

The parties filed their prehearing exchanges in November, 1991. On motion of Complainant, the EPA's prehearing exchange, Complainant, the EPA's prehearing exchange was amended in February of 1992 and in response, the Respondent amended its prehearing exchange in May of 1992.

Some five months after Respondent filed its amended prehearing exchange, Complainant sought further discovery by moving for an order requiring the Respondent in this matter to answer under oath certain written interrogatories because as Complainant put it: "To date, the documentation provided by Respondent to Complainant on these issues has been incomplete and contains a number of significant internal inconsistencies. Complainant therefore has been unable to assess Respondent's management and disposal of its hazardous waste."

By order of October 28, 1992, I denied Complainant's motion for further discovery because it would "unreasonably delay the proceeding" and because the Complainant had "not established

that the information being sought has significant probative value with respect to the specific-violations alleged in the complaint."

On November 23, 1992, Issued a notice of prehearing conference and hearing to be held beginning on January 26, 1993.

Respondent's Motion: Del Val now seeks an order dismissing the complaint for prosecutorial abuse and enjoining EPA from obtaining the documents it seeks from S & W Waste by directing the government to withdraw its request.<sup>1</sup>

Respondent contends that EPA's latest attempt to locate information to support its complaint in this matter has crossed the boundary line of good faith prosecution. Complainant "in an clear example of prosecutorial abuse, " is alleged to have bypassed the Consolidated Rules of Practice and circumvented my recent order denying EPA's motion for further discovery by requesting specific information relating to this case directly from S & W Waste, a company engaged by Del Val to handle aspects of Del Val's waste management. Respondent further contends that at all material times EPA has been aware of S & W Waste's involvement and Del Val has

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<sup>1</sup> Respondent bases its motion upon several provisions in the Consolidated Rules of Practice, 40 C.F.R. Part 22. The Presiding Officer shall have the authority to "[r]ule upon motions...and issue all necessary orders, "40 C.F.R. Section 22.04(c)(2), and "[d]o all other acts and take all measures necessary for the maintenance of order for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules." 40 C.F.R. Section 22.04(c)(10). Pursuant to 40 C.F.R. Section 22.04(c), "[q]uestions arising at any stage of the proceeding which are not addressed in these rules or in the relevant supplementary procedures shall be resolved at the discretion of the Administrator, Regional Administrator or Presiding Officer, as appropriate."

previously supplied S & W Waste documents to the EPA and advised the EPA that S & W Waste would be a witness in this matter.

Respondent maintains that "EPA's desperate, bad faith attempts to circumvent...[my order denying further discovery], serves to underscore that EPA cannot support its complaint but lacks the rectitude to admit its error and withdraw the complaint. Under such circumstances, dismissal is warranted."

Complainant's Response and Complainant's Motion: Complainant asserts that it has honored my order by not seeking further discovery from Respondent. Complainant has not communicated or attempted to communicate with Respondent or either its witnesses regarding this matter since the January 30, 1992 settlement conference, at which Respondent's counsel were present. Complainant maintains that it was not sought information for which a privilege exists.

As for Respondent's claim that "S & W Waste would be a witness in this matter," Complainant submits that according to Respondent's Prehearing exchange Respondent's only witnesses are Frank A. Hamel, Jr., who is identified as president of Del Val Ink and Color, Inc. & David A. Ardito, who is identified as a technical representative of S & W Waste. Assuming that a corporation could be a witness, Respondent did not advertise Complainant that S & W Waste would be a witness in this case, but rather that Mr. Ardito would be a witness.

Complainant emphasize that it did not communicate with Mr. Ardito after he was first names as a witness. Complainant

states that Respondent has not cited any case law showing that it is improper to talk to a nonparty witness, but it is not even necessary to reach this issue since EPA never approached Respondent's witness.

Complainant admits that it has sought information from S & W Waste (from employees of S & W Waste other than Mr. Ardito) regarding Respondent's hazardous waste activities. However, EPA insists that information from S & W Waste is not immunized under the attorney-client privilege for the simple reason that S & W Waste is not the client of Respondent's counsel in this matter and indeed, S & W Waste is not even a party to this proceedings.

Complainant also maintains that Respondent's argument overlooks the fact that S & W Waste is regulated under RCRA and that EPA representatives are entitled to seek information from it by statute, more particularly by Section 3007 of RCRA, 42 U.S.C. Section 6927.<sup>2</sup> Complainant insists that Respondent's argument flies in the face of this statutory authority of EPA.

Finally, Complainant states that S & W Waste manages hazardous waste and is regulated by RCRA. A RCRA permit has been issued to S & W Waste by New Jersey, pursuant to state requirements authorized

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<sup>2</sup> Section 3007 of RCRA states:

For purposes of developing or assisting in the development of any regulation or enforcing the provisions of this chapter, any person who generates, stores, treats, transport, disposes of, or otherwise handles or has handled hazardous waste shall, upon request of any officer, employee or representative of the EPA, duly designated officer, employee or information relating to such wastes and permit such person at all reasonable times to have access to and to copy all records relating to such wastes. (Emphasis added.)

by EPA and equivalent to RCRA. The permit requires that S & W Waste receive certain information from concerns such as Del Val and requires that S & W Waste maintain such "monitoring information" for a period of time. "Respondent's immunization of S & W from contacts unable to talk to an entity regulated by it, and being unable to obtain information required to be maintained by permit and relevant to suspected violation of law.

In summary, Complainant asserts that counsel for Respondent confuses who his client is and assumes that his naming of a possible witness from another entity (S & W Waste) supersedes investigative authority conferred upon EPA by Congress. "His fear of the government digging further into the facts leads him to make unjustified claims of impropriety. Respondent refuses to provide information sought from his client and request that S & W Waste refuse to provide information EPA is entitled to by statute, and then challenges the propriety of the government's inquiry. Respondent's motion is baseless, and should be rejected.

Complainant also moves "for indefinite postponement of the hearing date" so that it can "continue its efforts to dig further in the relevant facts" and "to investigate these matters." This would be done "by seeking information that federal statute mandates Complainant have access to."

Complainant's reliance upon Section 3007 of RCRA, 42 U.S.C. Section 6927 is well-taken. The EPA may issue demands for information pursuant to Section 3007 during the pendency of this proceeding, particularly with respect to "persons," such as

S & W Waste, who are not parties to this proceeding; I am without authority to enjoin such action.<sup>3</sup> There is no basis to find that such Section 3007 information requests constitute prosecutorial abuse. Therefore, Respondent's motion to dismiss the complaint and to enjoin EPA from seeking and obtaining such information must be denied.

Complainant's motion for an indefinite postponement of the hearing date in this matter likewise must be denied. Under the Administrative Procedure Act (APA) the Respondent in this case has a right to a hearing and the Agency has a duty to provide a hearing within a "reasonable" time.<sup>4</sup>

In the present matter the question comes down to what sort of delay would be "tolerable." A reasonable delay in these proceedings would not prejudice Respondent. On the other hand, the indefinite length of Complainant's open-ended request for a postponement of the hearing is cause for concern. It is possible that such an indefinite delay could result in an

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<sup>3</sup> In re Coors Brewing Co., Docket No. RCRA-VIII-90-90, Order on Motions (Jan. 4, 1991) at 28; In re Stanley Plating Co., Inc., 637 F. Supp. 71,72 (D. Conn. 1986).

<sup>4</sup> The APA provides, in pertinent part: "With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. Section 555(b). Furthermore, it provides that on judicial review a court shall "compel Agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. Section 706(1).

"intolerable delay" in providing the hearing to which Respondent is entitled and in concluding this matter.<sup>5</sup>

Moreover, the basis for Complainant's motion, namely further "investigation" of this matter does lend some credence to Respondent's claim that "EPA cannot support its complaint." To further investigate the basis for a complaint some 18 or more months after the complaint had been filed, some 13 months after the prehearing exchanges had been made, and after the date for the hearing had been set, does appear to be moving the cart around before the horse after the journey has begun. Investigations normally precede the issuance of complaints. At the very least, an investigations normally precede the issuance of complaints. At the very least, an investigation to produce evidence sufficient to establish a prima facie case should be completed before a complaint is issued.

In the exercise of my authority pursuant to 40 C.F.R. Section 22.04(c), I hereby cancel the hearing set for January 26-28, 1993. I direct that a telephonic prehearing conference be held pursuant to 40 C.F.R. Section 22.19 no later than January 29, 1993, for the purpose of setting a new date for the hearing in this matter. Such hearing shall be held before April 1, 1993. In the meantime,

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<sup>5</sup> Marine Facilities, Inc.; Marine Movements, Inc., Docket No. TSCA-PCB-92-0124 (June 19, 1992).



if Complainant should conclude that it is not prepared for a hearing before that date, it is suggested that Complainant consider filing a motion to withdraw the complaint without without prejudice pursuant to 40 C.F.R. Section 22.14(e).

So ORDERED.

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Henry B. Frazier, III  
Chief Administrative Law Judge

Dated: January 12, 1993