6/22/94

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
Dana Corporation-Victor Products Division	)	Docket No. V-W-90-R-14
	)	and
and	)	
	)	Docket No. V-W-90-R-15
BRC Rubber Group, et al.,	)	
	)	
Respondents	)	

ORDER ON MOTIONS FOR ACCELERATED DECISION

This order rules on the following motions for accelerated decision/summary judgment:

1. The Respondents' BRC Rubber Group, Chaffee Rentals, Charles V. Chaffee, Clifford Chaffee and Karen Chaffee (collectively "BRC") Motion for Summary Judgment dated March 18, 1991,

2. The Complainant's (EPA Region V) Motion for Accelerated Decision Against All Respondents dated April 19, 1991, and

3. The Respondent Dana Corporation-Victor Products Division's ("Dana") Motion for Summary Judgment dated April 20, 1991.

Action on these motions has been stayed several times to allow the parties additional time to pursue settlement discussions. Those discussions have not produced a settlement. Nor would a further delay in ruling on the instant motions appear to enhance the prospects of settlement. In these circumstances, action on the subject motions is appropriate.

I. Background

This case involves the alleged failure of the Respondents Dana and BRC to comply with the requirements of a Consent Agreement and Final Order ("CAFO"). The CAFO between Dana and the EPA was executed on December 13, 1982. The Complainant seeks to assess penalties against Dana and BRC.

The CAFO recites the following stipulations:

> 1. Respondent has been served with a copy of the Complaint with Notice of an Opportunity for Hearing on this matter. The Administrator has

jurisdiction over this matter pursuant to Section 3008 of the Resource Recovery and Conservation Act (RCRA), 42 U.S.C. 6928.
2. Respondent owns and operates an existing hazardous waste management facility as defined by 40 C.F.R. 260.10.
3. Respondent submitted a notification of hazardous waste activity pursuant to 42 U.S.C. 6930 on October 28, 1980.
4. Respondent filed a Part A permit application with the EPA for operation of a hazardous waste management facility on November 17, 1980.

The CAFO required Dana to cease all treatment, storage, or disposal of any hazardous waste, and to comply with the Consolidated Permit Regulations, 40 C.F.R. Parts 122 and 124, as if it had filed a timely notification pursuant to Section 3010(a) of RCRA and as if it had submitted a Part A application. (CAFO at 2.)

By letter dated January 18, 1984, Dana notified the State of Indiana that it had ceased operations at the facility in February 1983. Dana, however, did not submit a written closure plan to the State of Indiana. On April 18, 1985, the State of Indiana advised Dana that it must submit a closure plan for its facility within thirty days.

In May of 1985, Dana sold the facility to Chaffee Rentals, who in turn leased the facility to BRC Rubber Group. On May 2, 1988, the Indiana Department of Environmental Management (IDEM) directed Dana to submit either a Part B application or a closure plan. On September 15, 1988, IDEM directed Dana that it had thirty days to comply with the May 2, 1988 order. Dana allegedly did not comply.

On June 28, 1988, IDEM inspected the facility (now operated by BRC Rubber Group). It found that no Part A permit application or closure plan had been filed as required by 329 IAC 3-41-3 and 329 IAC 3-21-3. IDEM issued a "Violation Letter" on September 12, 1988, directing BRC Rubber Group to submit a revised Part A application and to comply with all interim status standards.

On March 7, 1990, the Director, Waste Management Division, Region V, of the EPA, filed separate administrative complaints against Dana and BRC Rubber Group.

The EPA filed an amended complaint on August 16, 1990, which among other things, added Chaffee Rentals and the principals of that partnership, Charles V. Chaffee, Clifford Chaffee and Karen J. Chaffee, as the current owners of the facility, and as parties respondent. Judge Yost consolidated the two cases by Order issued April 27, 1990.

The Complaint, as amended, charged Dana with the following: 1) failure to provide written notice to BRC of the facility's status and subsequent requirements in violation of 320 IAC 4.1-41-3, 2) failure to provide financial assurance for closure in violation of 320 IAC 4.1-22-4, 3) failure to provide liability coverage in violation of 320 IAC 4.1-22-24, and 4) failure to demonstrate financial responsibility in violation of 320 IAC 4.1-38-3.

The Complaint, as amended, charged BRC with the following: 1) failure to submit a Part A application in violation of 320 IAC 4.1-38-3, 2) failure to submit a closure plan in violation of 320 IAC 4.1-21-3, 3) failure to provide financial assurance in violation of 320 IAC 4.1-22-4, and 4) failure to establish liability coverage in violation of 320 IAC 4.1-22-24.

II. The Motions for Summary Disposition

A. BRC

BRC argues that the EPA does not have the authority to enforce 329 IAC 3 against BRC because the revisions and recodifications in 329 IAC 3 have not been approved by the EPA. BRC maintains that 329 IAC 3, which the EPA seeks to enforce, did not become effective until 1988. Thus, any obligations BRC would have had under the hazardous waste rules would have arisen out of 320 IAC 4.1, not 329 IAC 3. BRC asserts that even if the EPA had sought to enforce the applicable regulations set out at 320 IAC 4.1, neither respondent has any liability under those rules. BRC argues that the only liability the EPA seeks to impose arises out of the alleged activities of Dana before Chaffee's purchase of the property in 1985.

B. Dana

Dana argues that it is not subject to the RCRA closure and financial assurance requirements. Dana says that it filed the hazardous waste notifications and Part A application as a "protective filer." Dana claims it filed "in an effort to avoid penalties for noncompliance despite the fact that RCRA regulated activities did not take place." (Dana Corporation's Brief in Support of Motion for Summary Judgment at 11.)

Dana maintains that it agreed to the CAFO to preserve its status as a protective filer. According to Dana, the CAFO indicates no independent certification or determination that the facility was a RCRA Subtitle C regulated facility. Dana, like BRC, also challenges the EPA's authority to enforce 329 IAC 4.1.

C. Complainant

The EPA contends that it has the authority to enforce 329

IAC because that section is merely a recodification of 320 IAC. The Complainant further argues that Respondents are estopped to deny Dana's earlier stipulations found in the CAFO.

The Complainant asserts that BRC is in privity with Chaffee, and in turn, with Dana, for collateral estoppel purposes. It is therefore liable for violations resulting from failure to comply with the CAFO.[1/] In addition, the Complainant argues that BRC's lack of knowledge of Dana's activities and the facility's status under RCRA does not affect their liability.

III. Discussion

At the outset I find that challenges to the authority of the EPA to enforce 329 IAC are moot. The EPA's filing of the second amended complaints, accepted by Judge Yost, replaced the cites to 329 IAC with the appropriate sections of 320 IAC.

BRC claims that the only liability the EPA seeks to impose against it arose out of the alleged activities of Dana. Therefore, Dana's liability will be examined first.

A. Dana's Liability

The Complainant cites U.S. v. Allegan Metal Finishing Company, 696 F. Supp. 275 (W.D. Mich. 1988) to establish Dana's liability arising from the CAFO. In Allegan, defendant entered into a CAFO with the EPA after the EPA's filing of a civil complaint. The action arose when the EPA filed a complaint due to "unsatisfied contingent terms of the CAFO." Id., at 283. Thus, the case is indistinguishable from the present case with respect to Dana.

Allegan held that the CAFO operated as an admission that the defendant owned and operated a hazardous waste facility. Allegan, 696 F. Supp. at 286. In addition, the Allegan court held that the EPA could bring an action to enforce noncompliance with a CAFO. Id., at 296 (stating "it is proper for plaintiff to bring an action to enforce the CAFO.").

Accordingly, for the purposes of this action, Respondent Dana is bound by the terms of the CAFO and is liable for any failure to comply with the CAFO.

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BRC Rubber Group, Inc., Chaffee Rentals and the individual Chaffee Respondents are referred to collectively as "BRC Respondents" in Complainant's motion. This order will follow that same protocol.

Dana seeks to avoid liability under the CAFO by claiming it is a "protective filer." This court is not persuaded by the protective filer argument. As noted by Complainant, a party who files under a CAFO or compliance order is not a protective filer. (Complainant's Memorandum in Response to Dana Corporations Brief in Support of Dana's Motion for Summary Judgment at 14.)

50 Federal Register 38946 (September 25, 1985), also cited by Complainant, discusses the status of those facilities which were, like those of Dana, operating under Section 3008 compliance orders:

> [T]he Agency believes that it should also address the problem of those facilities which never qualified for interim status, or who are operating under Interim Status Compliance Letters or 3008 Compliance orders. 40 C.F.R. 265.1(b) states that "the standards in this Part apply to those owners and operators of facilities . . . who have failed to provide timely notification as required by Section 3010 of RCRA, and/or failed to file Part A of the Permit Application as required by 40 C.F.R. 270.10 (e) and (g).

Dana operated under a 3008 Compliance Order once it signed the CAFO. Therefore, it cannot claim protective filer status. A protective filer is defined as a filer that is "not considered by the Agency to be in Interim Status . . . ." 50 Fed. Reg. 38946 (1985) (emphasis added). The EPA entered into the CAFO to grant Dana Interim Status. Therefore, Dana lost any possibility of being a protective filer when it signed the CAFO.

Dana's second contention, that it viewed the CAFO as a means to preserve its protective filer status, is without merit. The Respondent asserts that the CAFO is not based on an independent determination that the facility was RCRA subtitle C regulated. However, the CAFO states in plain terms that "Respondent shall fully comply with the Consolidated Permit Regulations as if" it had been granted interim status." (CAFO at 2 (emphasis added) (citations omitted)).

In essence, Respondent Dana seeks to reopen the issues that the CAFO closed. Having signed the CAFO, Dana is bound by its terms.

B. BRC's Liability

The Complainant has not established that BRC is liable for Dana's failure to comply with the CAFO. BRC received no notification of the facility's status under RCRA until the IDEM contacted it in 1988, years after it took control of the

facility. BRC has not conducted any operations at the facility in violation of RCRA.

The Complainant, however, argues that despite the lack of knowledge, BRC is liable for failure to comply with RCRA regulations. Support for the Complainant's position is lacking.

The Complainant cites Vineland Chemical Co. Inc. v. United States EPA, 810 F.2d 402 (3d Cir. 1987) for the proposition that "failure to comply with permit procedures results in strict liability." (Complainant's Memorandum in Opposition to BRC's Motion For Summary Judgment And in Support of Complainant's Motion for Accelerated Decision and for Motion to Strike Affidavits at 42.) However, Complainant's reliance on Vineland is misplaced.

Vineland deals with a company that failed to file the required financial assurances when it filed its compliance certification. As a result, the EPA revoked the company's permit for failure to comply fully with the certification requirements. The court held that the EPA had the authority to strictly enforce its regulations, and to revoke the company's Interim Status, where there had been only partial compliance with RCRA regulations. Vineland, 810 F.2d at 404-05.

Vineland, has little in common with BRC's situation. BRC did not independently violate any RCRA provisions. BRC's alleged violations arise out of the CAFO between Dana and the EPA executed years before BRC began leasing the facility. The strict liability asserted by Complainant, therefore, does not apply to BRC.

The Complainant also relies on U.S. v. Northeastern Pharmaceutical & Chemical Co., Inc. (NEPACCO), 810 F.2d 726 (8th Cir. 1986) for the assertions that BRC is liable "whether or not their own operations would bring them within the scope of RCRA" and "whether or not they know of Dana's activities on the site." (Complainant's Memorandum in Opposition to BRC's Motion For Summary Judgment And in Support of Complainant's Motion for Accelerated Decision and for Motion to Strike Affidavits at 43.) Again, Complainant's reliance is misplaced.

The NEPACCO court held that "RCRA imposes strict liability upon past off-site generators and transporters of hazardous substances." NEPACCO, 810 F.2d at 748. The court imposed strict liability because the actions of the defendant, prior to the enactment of RCRA, posed a present danger to the environment. Id., at 741. NEPACCO is distinguishable from the present case. NEPACCO conducted activities with hazardous wastes that posed a danger to the environment, and all parties involved had knowledge of NEPACCO's activities. BRC has never conducted any activities in violation of RCRA and had no knowledge of the facility's

status when it assumed control. Therefore, BRC is not liable under the reasoning of the NEPACCO court.

The Complainant also relies upon Golden State Bottling Co. v. N.L.R.B., 414 U.S. 168 (1973), saying that "Golden State is indistinguishable here." (Complainant's Reply Memorandum to Respondent's Memorandum In Opposition To Complainant's Memorandum For Accelerated Decision at 8.) Complainant writes "[t]he Court further stated that 'Persons acquiring an interest in property that is a subject of litigation are bound by, or entitled to the benefit of, a subsequent judgment, despite a lack of knowledge.'" Id., at 8 (quoting Golden State, 414 U.S. at 180).

The Complainant neglected to include the citation of the quotation above. When the Golden State decision is reviewed in its entirety, its clear that the quotation does not represent the holding in that case. Indeed, Golden State is distinguishable and is inapplicable to the present action.

The petitioner in Golden State purchased a business with knowledge of past violations. Golden State, 414 U.S. at 170. The Court held "that a bona fide purchaser, acquiring, with knowledge that the wrong remains unremedied . . . may be considered in privity with its predecessor. . . ." Id., at 180 (emphasis added). Thus, BRC, who acquired the facility without any knowledge of past violations, is not liable for Dana's failure to comply with the CAFO.

IV. Conclusion

The Judge may render an accelerated decision, as to all or any part of the proceeding, if no genuine issue of material fact exists. 40 C.F.R. § 22.20(a).

I conclude that no genuine issue of material fact exists as to the question of liability of Dana. The Complainant is entitled to judgment as a matter of law. Dana has violated 320 IAC 4.1-41-3, 320 IAC 4.1-22-4, 320 IAC 4.1-22-24, and 320 IAC 4.1-38-3 as alleged by the Complainant. Consequently, the motion for partial accelerated decision on the issue of liability against Dana is granted. I further find that the amount, if any, of the civil penalty to be assessed remains controverted. It is not susceptible to resolution through the summary disposition papers before me.

No genuine issue of material fact exists as to the question of liability of BRC. BRC is entitled to judgment as a matter of law. I find that Respondent BRC has not violated 320 IAC 4.1-38-3, 320 IAC 4.1-21-3, 320 IAC 4.1-22-4, and 320 IAC 4.1-22-24, as alleged in the complaint. Consequently, BRC's motion for accelerated decision is granted.

The Complainant and Dana should continue their settlement discussions focusing on the appropriate level of the penalty to be assessed. A joint status report shall be filed by the Complainant and Dana on or before August 19, 1994. If settlement is not imminent at that time, a hearing date will be established.

Jon G. Lotis
Administrative Law Judge

Dated: June 22, 1994
Washington, D.C.

IN THE MATTER OF DANA CORPORATION-VICTOR PRODUCTS DIVISION AND BRC RUBBER GROUP, Respondent,
Docket Nos. V-W-90-R-14 AND V-W-90-R-15

CERTIFICATE OF SERVICE

I certify that the foregoing Order On Motions For Accelerated Decision, dated June 22, 1994, was sent in the following manner to the addressees listed below:

Original by Regular Mail to:

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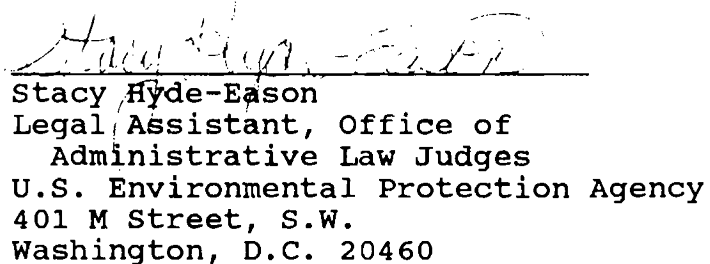

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Dated: June 22, 1994
Washington, D.C.