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10/25/95

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Lackland Training Annex	)	**Docket No. RCRA VI-311-H**
San Antonio, Texas	)	
	)	
Respondent	)	

ORDER DENYING REQUEST FOR CERTIFICATION OF INTERLOCUTORY APPEAL

Under date of May 23, 1995, Respondent, Lackland Training Annex (Lackland), served a motion for certification of interlocutory appeal pursuant to Rule 22.29 of the Consolidated Rules of Practice (40 C.F.R. Part 22) of the order, dated May 12, 1995, which, inter alia, denied Lackland's motion that Complainant be found in default and granted Complainant's motion for an accelerated decision as to liability. Complainant has not responded to the motion. For the reasons hereinafter appearing, the motion will be denied.

Lackland operated an open burning/open detonation (OB/OD) unit for thermal treatment of waste military munitions near the Lackland Air Force Base from 1982 until 1992. Lackland was found to have violated section 3005(a) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6925(a), and Title 31 of the Texas Administrative Code, section 355.43(a), by operating a hazardous waste treatment unit without a permit and without interim status, as charged in the complaint. The complaint, issued under section

3008(a) of RCRA, proposed to assess a penalty of $346,500 for the violations.

Lackland has requested that all adverse rulings in the May 12 order be certified for interlocutory appeal to the EAB. While Lackland recites that the rulings involve important questions of law or policy upon which there are substantial grounds for difference of opinion, and that an immediate appeal will materially advance the ultimate termination of the proceeding, it has not advanced any new or independent grounds for the motion. Instead, Lackland merely relies on the arguments submitted in support of its motions, which were denied in the May 12 order.

D I S C U S S I O N

Rule 22.29 of the Consolidated Rules of Practice, entitled "Appeal from or review of interlocutory orders and rulings", provides in pertinent part:

> (a) Request for interlocutory appeal. . . . Appeals from other orders or rulings shall lie only if the Presiding Officer . . . upon motion of a party, certifies such orders or rulings to the Environmental Appeals Board on appeal. Requests for such certification shall be filed in writing within six (6) days of notice of the ruling or service of the order, and shall state briefly the grounds to be relied upon on appeal.
> (b) Availability of interlocutory appeal. The Presiding Officer may certify any ruling for appeal to the Environmental Appeals Board when
> (1) the order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion, and
> (2) either (i) an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or (ii) review after the final order is issued will be inadequate or ineffective.

The rulings upon which Lackland requests certification do not meet these criteria. Each ruling will be considered separately.

1. Motion to Dismiss for Default and Request to Delay Prehearing Exchange (Parts I and II of Order)

Lackland's motion to dismiss because of Complainant's technical default in failing to timely file a prehearing exchange was denied as a matter within the ALJ's discretion. The Consolidated Rules of Practice provide that "[a] party may be found in default . . . after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer." Rule 22.17(a) (emphasis added). Although there is no doubt that Complainant as well as Lackland may be found in default, it is well settled that the law favors resolution of disputes on their merits and that forfeitures are not favored. **Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d** §§ 2681-85, pp. 398-429. See also In re Thoro Products Co., (CERCLA /EPCRA) Docket No. EPCRA VIII-90-94 (Order Denying Motion For Default Judgment, etc., March 6, 1991) and cases cited. A party will not ordinarily be found in default where the alleged default has been cured and no prejudice has been alleged or shown. In re General Electric Company, Docket No. TSCA-IV-89-0016 (Order Denying Motion For Default Order, March 5, 1990).

In its request for certification, Lackland reiterates that "Complainant still has not complied with the Pre-Hearing Exchange Order," and cites its previous pleadings on the issue.

Lackland argued that EPA did not file the narrative portion of its proposed penalty calculation, and thus did not comply with the direction in the prehearing exchange order to submit an explanation of the reasoning behind the proposed penalty. In its prehearing exchange, EPA submitted a penalty calculation worksheet. Lackland argues that it contains a flaw, and does not reflect the amendments to the complaint, changing the allegation of "treating hazardous waste without a permit or interim status" to "operating a hazardous waste management unit without a permit or interim status," although the penalty amount is the same in the original and amended complaints.

EPA also submitted an eight page rationalization of how it arrived at the proposed penalty, which Lackland asserts is insufficient because it is "post hoc." That is, it was apparently not developed contemporaneously with the calculation of the proposed penalty in the original complaint.

In the letter, dated January 25, 1994, directing the prehearing exchange, Complainant was required to submit a copy of the civil penalty computation worksheet and a statement conforming to 40 C.F.R. § 22.14(a)(5), explaining the reasoning behind the proposed penalty. The documents EPA has submitted appear on their face to comply with the direction in the prehearing exchange letter. The Consolidated Rules of Practice, set forth generally the documents required to be submitted in a prehearing exchange as follows:

> copies of all documents and exhibits which each party intends to introduce into evidence . . . . Documents that have not been exchanged . . . shall not be introduced into evidence . . . without the permission of the Presiding Officer. The Presiding Officer shall allow the parties reasonable opportunity to review new evidence.

40 C.F.R. § 22.19(b). This provision is satisfied when documents are submitted which meet each requirement of the prehearing order. Any discrepancies, inadequacies, or incompleteness within such documents are curable, such as by motion for "other discovery," under 40 C.F.R. § 22.19(f), and are not the basis for an extreme a sanction such as default.

Complainant has complied with the prehearing exchange order, albeit not within the time limit set therein. In addition, EPA filed a timely motion to delay the prehearing exchange.

It has been held that the sanction of dismissal should not be imposed for failure to comply with a pretrial production order unless the failure is due to wilfulness, bad faith, or any fault of the party. Salahuddin v. Harris, 782 F.2d 1127 (2nd Cir. 1986).

Lackland has not alleged an abuse of discretion on the part of the ALJ in denying its motion for default, and has not shown that the issue involves an important question of law or policy upon which there are substantial grounds for difference of opinion. The motion for certification of this issue will be denied.

Similarly, no basis is found for interlocutory appeal of the ruling granting Complainant's request to delay its prehearing

exchange. That request was granted as a matter within the ALJ's discretion in order that matters at issue might be resolved on their merits and because it did not appear that Lackland would thereby be prejudiced. See Rule 22.07(b). See also, In re Michael C. Sadd, d/b/a/ Sadd Laundry and Dry Cleaning Services, Docket No. RCRA-09-90-002 (Order, August 29, 1991) (late filing of prehearing exchange accepted, notwithstanding the fact respondent had not demonstrated that its failure to timely move for an extension pursuant to Rule 22.07(b) was the result of excusable neglect).

2. Motion to Strike (Part III of Order)

Complainant's motion to strike Lackland's affirmative defenses was denied in principal part, but was granted with respect to defenses numbered 2, 3, 4, 10, 12, and 13. Without elaboration, other than citation of its cross-motion for accelerated decision and motion to dismiss, Lackland simply asserts that the latter rulings deny it the fair proceeding specified by the Rules of Practice, § 22.04(c). That provision states, in part: "The Presiding Officer shall conduct a fair and impartial proceeding, assure that all facts are fully elicited, adjudicate all issues, and avoid delay." There is no basis upon which to find that Lackland is, or will be, denied a fair and impartial hearing or proceeding.

Lackland has had a full opportunity to present facts and arguments in opposition to the motion to strike. These arguments were fully and carefully considered in the May 12 order. Lackland

has not requested or specified any discovery necessary to support its position as to these defenses.

In defense number 2, Lackland argued that EPA's failure to allow it to consult with the Administrator, and the Agency's failure to promulgate regulations providing for such consultation, prior to issuance of the order at issue, violated § 6001(b)(2) of the Federal Facilities Compliance Act, which is an amendment to RCRA (42 U.S.C. § 6961). In a notice and proposed rule published in the Federal Register, however, EPA gave notice that it interpreted the cited section to require consultation only after the completion of all administrative proceedings, including an appeal to the EAB. 58 Fed. Reg. 49044 (September 12, 1993); 60 Fed. Reg. 15208 (March 22, 1995). This interpretation is supported by the language of § 6001(b)(2): "[n]o administrative order issued to such a department, agency, or instrumentally shall become final until such department, agency, or instrumentality has had the opportunity to confer with the Administrator". (emphasis added) Lackland has not advanced any rationale which would support a contrary conclusion or a finding that the Agency's interpretation of the section was not permissible.

In its third defense, Lackland claimed that EPA had failed to furnish a notice of apparent deficiency in its Part A permit application, as required by 40 C.F.R. § 270.70(b). This defense was struck on two grounds: First, the State agency, TWC, notified Lackland of deficiencies in its Part A and Part B RCRA permit applications. Second, the violation at issue was not based

upon such deficiencies, but was based upon failure to submit timely notification of hazardous waste activity under section 3010(a) of RCRA and Part A of the permit application prior to the date it began operating. Lackland has not provided any reason or argument which would support certification of this issue.

"Failure to state a claim upon which relief may be granted" was the asserted basis for defense number 4. Lackland's chief argument was that the complaint did not contain an adequate statement of the reasoning behind the proposed penalty, as required by Rule 22.14(a)(5). Because the alleged defects were curable [by a motion for a more definite statement or by discovery] and because dismissal for such reasons would, of necessity, have permitted leave to amend, it was concluded that dismissal was not warranted under the circumstances. Lackland has not demonstrated that there is a substantial basis for difference of opinion as to the validity of this ruling.

Defense number 10 alleged noncompliance with the Paperwork Reduction Act (PRA). The PRA prohibits an agency from subjecting a person to any penalty for failing to maintain or provide information to an agency where an information collection request promulgated by the agency does not comply with the PRA. Opposing Complainant's motion to strike, Lackland merely argued that it should have the opportunity for discovery on this defense, and that it relates to the penalty and as such should not be stricken. A successful PRA defense, however, precludes an agency from subjecting a person to any penalty for failing to maintain or

provide information to the agency. 44 U.S.C. § 3512. A finding that the PRA does not apply, as in the present case, does not affect the penalty amount. Therefore, the issue is appropriate to address on dispositive motions as to liability, i.e. motions to dismiss and for accelerated decision, rather than in the calculation of the penalty. In the May 12 order, it was noted that the complaint alleged violations of a statutory provision and a state regulation, not a regulation promulgated by EPA. It was concluded that the duty to obtain a RCRA permit is statutory , and thus that the PRA was inapplicable. Lackland has not supplied any argument or authority to the contrary. Moreover, Lackland has not demonstrated that discovery is necessary regarding defense number 10, nor has it specifically described the discovery sought.

In defenses 12 and 13, Lackland argued that EPA exceeded its authority in attempting to enforce portions of the State hazardous waste program, and that EPA has no authority to enforce the State program, because the Texas Water Commission (TWC) and its successor responsibly administered the hazardous waste program. As noted in the May 12 order, the Final Rule by which Texas was authorized to operate its hazardous waste program provides that EPA retains the right to take enforcement actions under section 3008 of RCRA. 49 Fed. Reg. 48300, 48305 (December 12, 1984). Section 3008(a)(2) of RCRA authorizes EPA to bring enforcement actions in states which have EPA-approved hazardous waste programs, the only express condition being that notice must be given to the state in which the violation occurred prior to initiating such action.

In defense number 12, Lackland argued that, because EPA had not incorporated the Texas hazardous waste program into 40 C.F.R. Part 272 "Approved State Hazardous Waste Management Programs", and indeed had expressly declined to do so (59 Fed. Reg. 1723, April 12, 1994), EPA lacked the authority to enforce the Texas program. As pointed out in the May 12 order, however, there is no indication that such incorporation is, or was intended to be, a condition precedent to EPA's ability to enforce a state's program, and the reservation of the Agency's right in that respect in the notice of approval of the Texas program refutes any such contention. While Lackland's argument appears to be one of first impression, it has not cited any language in the regulation or preambles thereto or other authority which would support a finding that there are substantial grounds for difference of opinion on this issue. As noted in the May 12 order, requirements of state hazardous waste programs which were not incorporated in Part 272 have been enforced by EPA in final agency and federal court decisions. The motion for certification of these issues will be denied.

3. Motions for Accelerated Decision and to Dismiss

With regard to the rulings on the cross motions for accelerated decision and motion to dismiss, Lackland did not specify any grounds to be relied upon on interlocutory appeal to the Board, but merely cited the motions and replies upon which these rulings were based. Three principal issues were raised in

those motions, namely: (1) whether the explosives burned and/or detonated in the OB/OD unit were hazardous wastes, (2) whether Lackland was authorized to operate the unit under interim status, and (3) whether Lackland is liable for a violation after enactment of the Federal Facility Compliance Act (FFCA).

It was concluded as to the first issue that the military explosives treated by Lackland are solid wastes in accordance with the definition in section 1004(27) of RCRA: "any . . . other discarded material, including solid, liquid, semisolid or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from commercial activities . . . ." The fact that the definition did not specifically include "military activities" was held not to preclude such activities being encompassed by the definition. Authority cited by Lackland was found not to support a contrary interpretation.

The explosives were further held to be reactive, i.e. "capable of detonation or explosive reaction if subjected to a strong initiating source or if heated under confinement," and thus hazardous wastes. 40 C.F.R. § 261.23. Lackland has not shown any substantial grounds for difference of opinion as to whether the munitions and materials involved were hazardous wastes as defined in the Act and regulation.

As to the second issue, Lackland had filed a notification of hazardous waste activity and Parts A and B of a hazardous waste permit application in 1990, and apparently believed it had interim status authorization to operate the thermal treatment unit. The

State agency responsible for issuing hazardous waste permits was apparently confused with respect to whether Lackland's facility qualified for interim status. Lackland, however, did not meet the criteria for interim status in RCRA section 3005(e), specifically to notify EPA of hazardous waste activity and to update Part A of its permit application before operating the OB/OD unit. For these reasons, the May 12 order concluded that Lackland did not have interim status for its hazardous waste treatment unit. I am unable to find that this ruling involves an important question of law or policy upon which there are substantial grounds for difference of opinion.

As to the third issue, Lackland was charged with violating section 3005(a) of RCRA and of a State regulation which prohibits any person from storing, treating or disposing of hazardous waste without first having obtained a permit. 31 Texas Administrative Code § 335.43(a). Lackland ceased treating hazardous waste in the unit before the effective date of the FFCA (October 6, 1992), which authorized assessment of civil penalties against federal facilities for violations of RCRA. Pub.L. 102-386, Title I, § 104, 106 Stat. 1507 (October 6, 1992), codified 42 U.S.C. § 6001. In 1990, Lackland filed a notification of hazardous waste activity and Parts A and B of hazardous waste permit application, and was issued a hazardous waste permit for the unit by the State of Texas in April 1993. Federal and Texas regulations require owners and operators of hazardous waste management units to have permits "during the active life (including the closure period)

of the unit." 40 C.F.R. § 270.1(c); 31 Texas Administrative Code 335.2(i).

In the May 12 order, it was found that Lackland did not comply with the requirements for closure of a hazardous waste site, and never achieved interim status for the unit. Lackland was found to have violated section 3005(a) of RCRA and section 335.43(a) of the State code continuously from the time it began treating the hazardous waste until it received the permit. It was noted that no penalties may be assessed for that portion of the violation which preceded the effective date of the FFCA, but that each day of violation after enactment of the FFCA may be considered a separate violation subject to the assessment of penalties. Because a hazardous waste management unit is considered to be active until final closure, Lackland may be subject to penalties for each day that the unit was active after October 6, 1992, until the permit was issued. It is concluded that the fact that Texas officials were apparently confused as to whether Lackland's waste management unit was entitled to interim status and the other circumstances, including the fact that Lackland applied for permits and ceased treating hazardous waste prior to the effective date of the FFCA, are matters more appropriately addressed in determining a penalty rather than on interlocutory appeal. The motion for certification on this issue will be denied.

O R D E R

For the reasons stated above, Lackland's request for certification of interlocutory appeal is denied.*

Dated this 25th day of October 1995.

Spencer T. Nissen
Administrative Law Judge

*Absent a settlement of this matter, I will contact counsel in the near future for the purpose of establishing a time and location for a hearing.

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER DENYING REQUEST FOR CERTIFICATION OF INTERLOCUTORY APPEAL**, dated October 25, 1995, in re: Lackland Training Annex, Dkt. No. RCRA-VI-311-H, was mailed to the Regional Hearing Clerk, Reg. VI, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: October 25, 1995

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