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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)) DEPARTMENT OF DEFENSE) 98- 17) DAVIS- MONTHAN AIR FORCE BASE,)) RESPONDENT)	Docket No. CAA- 09-
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ORDER ON RESPONDENT'S MOTION TO AMEND ITS ANSWER
AND MOTION TO DISMISS COMPLAINT

This case originated when the Pima County Arizona Department of Environmental Quality ("PDEQ") was notified by the Respondent that there had been asbestos NESHAP⁽¹⁾ 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. In other filings, Respondent had admitted the substantive factual violations underlying EPA's Complaint. However, from the outset it has objected to the appropriateness of the \$81,020.00 civil penalty⁽²⁾ EPA seeks for the 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.

A. Respondent's Motion to Amend Answer.

Respondent's Motion seeks to retract the critical admissions made in its November

2, 1998 Answer and, consequently, the reaffirmation of those admissions which it made in its April 30, 1999 Motion to Compel Discovery in which it stated: "Respondent admits the substantive factual violations underlying EPA's Complaint." Respondent's Motion to Compel Discovery at 4.

In support of its Motion, Respondent maintains that after receiving the April 29, 1999 Prehearing Exchange materials, which included "complete copies of the lab reports," and the benefit of Respondent's interview of Mr. John Marting, it discovered "numerous inconsistencies and discrepancies which belie [the essential charges involving the six Count asbestos related charges which make up the Complaint.] Respondent relates that some of the lab samples found only traces or no amount of asbestos, while other sample results were at or below 10 percent, a finding requiring use of the more precise "point counting" for measuring the amount present. Respondent further asserts that sample contamination and chain of custody issues are also lurking.

EPA, in its Response, while acknowledging the general principle that leave to Amend an Answer (as well as leave to amend the Complaint) is freely given, observes that improper motives, such as bad faith, undue delay, and futility of amendment are considered in assessing the propriety of the Motion. EPA notes that Respondent's own asbestos survey "done in 1985 or 1988" established the presence of asbestos, that Respondent's Office of Special Investigations ("OSI") told PDEQ that it was conducting an investigation into the improper removal of asbestos containing floor tiles from Building 4210, that Respondent's Commander, in a November 3, 1995 letter, acknowledged the violations, and that the document identified as "FBNV 950128," as well as Respondent's November 3, 1995 Application for PDEQ Permit, all point to Respondent's admission that the violations occurred and consequently call into question its good faith in seeking the present amendment to its Answer.

Upon consideration, the Motion to Amend the Answer is granted. However, Respondent is advised that if, after the opportunity for a full presentation at hearing, it appears that, in fact, there was no good faith basis for the Respondent to challenge the fact of violation, then the Court may take that into consideration in determining the appropriate penalty and, in such an event, the Court could weigh, along with all the other factors, whether the penalty should be increased above the amount proposed by EPA on that basis. Therefore, the Court suggests that the Respondent reevaluate the good faith basis⁽³⁾ for this Motion before availing itself of this Order granting the Motion to Amend the Answer and, within fourteen days, either withdraw the Motion or formally file the Amended Answer.

B. Respondent's Motion to Dismiss the Complaint.

Respondent's Motion also seeks to have the Complaint dismissed on the basis that, in light of the lab reports received during discovery and Respondent's interview of Mr. Marting, EPA can no longer establish a prima facie case. Motion at 7- 13. Respondent maintains that "numerous general discrepancies in the collection, testing and reporting of the samples" make the reports unreliable. Id. at 13. Further, Respondent asserts that "perhaps the most important reason why EPA cannot prove its case, however, is that critical evidence has been destroyed." Id. Respondent argues that, given suspect positive lab results, and no opportunity for it to retest the samples, "dismissal is the only viable option." Id. at 14.

In Response, EPA incorporates the arguments it presented in addressing the Motion to Amend the Answer.

Upon consideration, which includes Respondent's Reply in Support of its Motion, the Motion to Dismiss is DENIED.

THIS CASE MAY NOW BE SET FOR HEARING. NO FURTHER MOTIONS WILL BE ENTERTAINED. THE HEARING WILL BE HELD IN TUSCON, ARIZONA. A CONFERENCE CALL WILL BE ARRANGED SHORTLY TO SCHEDULE THE HEARING DATES.

SO ORDERED.

William B. Moran
United States Administrative Law Judge

Dated: November 30, 1999
Washington, D.C.

1. "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).
2. 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.
3. The Court wishes to emphasize that, at *this point*, despite the late reconsideration by Respondent at a time well after the prehearing exchange documents, it ascribes no bad faith to Respondent's Motion to Amend its Answer.

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