UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
John K. Tebay, Jr., d/b/a	)	Docket No. EPCRA-III-236
Tebay Dairy Company,	)	
	)	
A Sole Proprietorship,	)	
	)	
Respondent	)	

Order Regarding Complainant's Motion in Limine

In this proceeding under the Emergency Planning and Community Right-to-Know Act of 1986, ("EPCRA"), 42 U.S.C. Section 11045 and the Consolidated Rules of Practice, 40 C.F.R. Part 22, Complainant, EPA, has filed a Motion in Limine seeking to exclude evidence in four distinct categories.

First, EPA seeks to exclude testimony and exhibits relating to the Local Emergency Planning Committee, ("LEPC"), as irrelevant to the proceeding. In response, Respondent Tebay notes that it has been charged with failing to file Material Safety Data Sheets ("MSDS") sheets with the State Emergency Response Commission ("SERC"). Tebay asserts that SERC records have not always been well maintained and that it has been an "accepted practice" for SERC to verify with LEPC whether a filing could have been sent to SERC but misplaced. In short, the argument is that one could check with LEPC to determine whether SERC had such records filed. If permitted to introduce evidence of this practice, Tebay would then demonstrate that LEPC had no such records available and therefore that this verifying method was unavailable.

Tebay also maintains that LEPC evidence is relevant to demonstrate a lack of harm

associated with the alleged violations, and that regulations (presumably LEPC regulations) alleged to have been violated have been repealed as overly burdensome. Last, Respondent contends, generally, that the administrative complaint itself violates substantive and procedural due process and equal protection rights under the United States Constitution.(1)

The First Amended Administrative Complaint, filed September 3, 1999, in the wake of the Court's August 3, 1999 Order, granting EPA's Motion to Amend the Complaint, deletes all allegations relating to the LEPC. As amended, the Counts now only allege that the Respondent did not submit MSDSs to the West Virginia SERC by April 1, 1995, and that it did not submit an Emergency Hazardous Chemical Inventory Form to SERC for calendar years 1994 and 1995.

As noted in the Court's Order, the effect of EPA's Motion was significant in two respects. First, one Count was dropped entirely and, second, the proposed penalty was amended downward by more than $21,000.00. With the removal of all allegations relating to LEPC and the concomitant significant reduction in the proposed penalty, the Court agrees that LEPC related evidence has become immaterial to this proceeding. Therefore, consistent with 40 C.F.R. § 22.22(a), this evidence will not be admitted. Further, the Court notes that EPA will call two witnesses from the West Virginia Office of Emergency Services, Mr. Bradford and Ms. Muncy, and that Tebay will have a full opportunity to cross examine those witnesses regarding the unreliability of the SERC records maintained by the West Virginia Office of Emergency Services, including inquiring whether that Office has ever had to verify whether there had been SERC filings by checking with the LEPC.

Second, EPA's Motion seeks to preclude evidence exchanged during settlement negotiations. Tebay seeks to introduce evidence regarding a January 12, 1999 letter from EPA Counsel discussing EPA's policy on Compliance Incentives for Small Businesses and a December 15, 1998 letter regarding EPA's enforcement actions for other gas stations in EPA Region III. EPA maintains that Section 22.22(a) of the Rules renders such evidence inadmissible as excludable, consistent with the provision's reference to Rule 408 of the Federal Rules of Evidence.

The January 12th letter addresses Counsel's rationale explaining why Tebay did not qualify for a penalty reduction under the policy, while the December 15th letter discloses that, as far as EPA Counsel was aware, no EPCRA complaints had been filed against gas stations in Region III during a twelve month span ending with September 30, 1998. Counsel for Tebay does not directly challenge EPA's grounds for the exclusion of this evidence, asserting that EPA's inspection was initiated on one (allegedly erroneous) basis and then shifted to a general inspection, and that the documents sought to be introduced show bias and prejudice on EPA's part.

Both letters will be excluded. As to the January 12th letter, disclosed at the behest of the Alternative Dispute Resolution Judge ("ADR Judge"), the letter merely explains why the Respondent did not meet the Policy on Compliance Incentives. In this regard, it is observed that Tebay will be free to cross-examine the EPA witness who calculated the proposed penalty, including asking whether that Policy was considered in the calculation. As to the December 15th letter, evidence that there were no EPCRA actions filed against gas stations in the Region is not material to whether Tebay violated the cited EPCRA provisions.

Tebay is reminded that the penalty determination is now within the authority of the Presiding Judge to determine and that, if liability is established, the judge may depart from EPA's proposal, as long as a rational basis for doing so can be articulated. The EPCRA enforcement provision, Section 325, does not identify specific factors to be considered when calculating penalties for Section 311 and

Section 312 violations. EPA, as a matter of policy, looks to the statutory factors listed in Section 325 (b)(1)(C). These factors are: the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, *and such other matters as justice may require*.

EPA also moves to exclude all testimony and exhibits relating to the Respondent's ability to pay unless there is disclosure, in a timely manner, regarding Respondent's financial status as an individual and as a sole proprietor of Tebay. Respondent, in response, argues that only the Schedule C for the gas station operation is relevant and that the individual's financial interest in unrelated enterprises should not be considered in determining the Respondent's ability to pay the penalty proposed. As the Amended Complaint names both John K. Tebay, Jr. and Tebay Dairy Company, a sole proprietorship, as Respondents, the financial health of both Respondents is relevant *at least to the extent that Respondent is asserting an ability to pay issue.* Therefore, to the extent Tebay wishes to pursue this consideration, it must submit complete financial information regarding both John K. Tebay and Tebay Dairy Company. However, as to the consideration of all other factors in deciding an appropriate penalty, the Court again refers to its authority, as stated above.

Finally, EPA seeks to exclude any testimony or exhibits relating to its Small Business Policy as it is used only at the settlement stage. As the Policy clearly states that its use is limited to settlement purposes, it may not be introduced in this proceeding.

So Ordered.

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William B. Moran
United States Administrative Law Judge

Dated: September 30, 1999

1. Tebay's arguments based on alleged violations of the United States Constitution are vague in that there is no explanation of the basis for its contention that the administrative complaint itself and, even more obscurely, that EPA, has violated its due process and equal protection rights. It is noted that Constitutional challenges to the cited provisions themselves are rarely entertained in administrative enforcement proceedings. In contrast, constitutional challenges directed at issues such as whether due process has been afforded *in the context of a particular proceeding* are cognizable, but Tebay has not asserted such "as applied" claims here. See, e.g., In re Turner Brothers Trucking, Co., RCRA-VI-505-H, February 4, 1986. To the extent that Tebay asserts that the hearing is necessary to, as Respondent describes it, "vouch the record," this Order does not impact upon the EPA's burden to put forth a prima facie case. The Order only speaks to the exclusion of immaterial documents and testimony.

In the Matter of Tebay Dairy Company, Respondent
Docket No. EPCRA-III-236

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Regarding Complainant's Motion In Limine**, dated September 30, 1999 was sent this day in the following manner to the addressees listed below:

Original by Regular Mail to:

Lydia A. Guy
Regional Hearing Clerk
U.S. EPA
1650 Arch Street
Philadelphia, PA 19103-2029

Copy by Regular Mail to:

Attorney for Complainant:

Rodney Travis Carter, Esquire
Assistant Regional Counsel
U.S. EPA
1650 Arch Street
Philadelphia, PA 19103-2029

Attorney for Respondent:

Robert K. Tebay, III, Esquire
Lantz & Tebay
331 Juliana Street
Parkersburg, WVA 26101

_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: September 30, 1999