9/10/91

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of	*	
	*	
DANA CORPORATION-VICTOR	*	Docket Nos. V-W-90-R-14
PRODUCTS DIVISION and	*	and V-W-90-R-15
BRC RUBBER GROUP,	*	
(Consolidated)	*	
	*	
Respondents	*	

ORDER ON MOTIONS

When people ask how many hearings I have a year they are surprised at the low number. What, they ask, do you do when you're not in Court? I have a big motion practice, I reply. What does that mean, they ask? I show them this file and they nod understandingly.

With the help of my large staff (none) I hope that I have properly sorted out this case so that I may rule intelligently on all the motions, cross-motions and replies now before me.

I suppose that the first order of business would be to address the several motions to strike the affidavits of various persons previously filed by all parties.

The first one I can find is a motion by the Complainant to strike the affidavits of Messrs. Linde, Cape and Moody submitted as exhibits by BRC in support of its motion for summary judgement. The Complainant later filed an identical motion as to the same affiants in conjunction with Dana's motion for summary judgement.

The Complainant argues, in support of its motion, that the Respondents are precluded from introducing any evidence as to the

RCRA status of its Churubusco, Indiana facility due to the operation of the principle of collateral estoppel because of the Consent Agreement and Final Order ("CAFO") signed by Dana in a prior RCRA § 3008 administrative enforcement action. The reader's attention is directed to pp. 7-19 of the Complainant's Memorandum in Opposition to BRC's Motion for an Accelerated Decision and pp. 1-5 of Complainant's Memorandum in Opposition to Dana's Brief in Support of Its Motion for Summary Judgement. Is it all clear so far?

PROCEDURAL BACKGROUND

On October 25, 1982, EPA filed a Civil Complaint against the Respondent Dana Corporation, Victor Products Division, alleging violations of RCRA. In essence, the Complainant accused the Respondent with operating a RCRA governed facility without first obtaining interim status. Although Dana filed a timely Part "A" application, its notice of hazardous waste activity under § 3010 of RCRA was not filed timely. It was filed on October 28, 1980 and thus the facility never attained interim status. This late filing identified the following hazardous wastes as being generated, treated, stored and disposed of and transported: F007, F008, F009, V161, V151 and D001. Although one could speculate that Dana may have been uncertain as to its RCRA status in 1979 when it filed its Part "A" application, it could hardly have still been confused over a year later when it filed its notification under § 3010. The statute had been in existence for two years and the regulations finalized for almost a year and a half. The matter was settled by

the execution of a CAFO dated December 13, 1982. (See Complainant Attachment 3 to its Motion for an Accelerated Decision). Stipulation # 2 of the CAFO states that "The Respondent owns and operates an existing hazardous waste management facility as defined by 40 CFR § 260.10."

In early March 1990, the Agency filed the current separate civil actions against the Respondents, which cases were later consolidated by the Court.

In September of 1990, the Agency moved to file an Amended Complaint which named the new owner of the facility to be Chaffee Rentals, a partnership run by three Chaffees, who are also major stockholders of BRC Rubber Group to whom the partnership leased the premises following its purchase thereof from Dana Corporation. The motion was granted.

Following many months of motions for time extensions, motions in limine, motions to strike, motions to file amended answers, interrogatories and other discovery, the parties filed cross-motions for accelerated decisions which resulted in another flurry of motions which are all now before me.

The affidavits sought to be struck by EPA, noted above, were attachments to the Respondents' separate motions for an accelerated decision.

The gist of the affidavits are that Dana Corporation never operated a RCRA controlled facility, it was a protective filer of its Part "A" application, the wastes handled were not hazardous, all wastes were moved off-site within 90 days of their generation

and in any event it was a small quantity generator and thus not subject to RCRA. Mr. Moody, the plant manager swore that he only signed the CAFO as "a protective measure to validate the previously filed documents as they had been filed late." Who knows what that means?

It should be noted that in filing the first Complaint in 1982, the Agency relied, in part, upon the "Part "A" Application and Notification Form filed by Dana in which it identified the wastes it handled which were listed or identified hazardous wastes. They were spent cyanide plating bath solutions from electroplating operations; plating bath sludges; spent stripping and cleaning bath solutions, methyl isobutyl ketone; methanol; and ignitable wastes.

Mr. Moody also swears that at the time he filed the Part "A" application he did not know whether or not the facility was covered by RCRA and didn't know the legal significance of the words "treatment, storage or disposal." As I recall, the RCRA regulations and law had been in effect for a considerable period of time prior to the date upon which the Part "A" application had to be filed. Dana Corporation is not a "mom and pop" operation, a point Dana itself makes in its pleadings. It is a Fortune "500" company. Where was corporate counsel when this apparently incompetent plant manager filed the application? Had Mr. Moody just arrived back from a distant planet? Was his phone out of order? Was an EPA death squad outside of his office armed with uzis? I think not.

Dana is bound by its assertions made in its Part "A"

application, the § 3010 notification and by the stipulation contained in the CAFO its agent signed.

The Complainant's motion to strike the three above-mentioned affidavits is **GRANTED**. Obviously, BRC's motion to supplement its pre-hearing exchange is **DENIED**.

Next on the agenda is the Respondents' Motions to Strike the Affidavits of Messrs. Khara, Crawford and Sohoepke which are attachments to Complainant's Motion for an Accelerated Decision. Dana, which filed the first motion later endorsed by BRC, argues that the affidavits should be stricken for the following reasons: (1) the affiants were not identified or listed as potential witnesses in the pre-hearing exchange; (2) Mr. Khara, an employee of the consulting firm of Metcalf and Eddy, has no first-hand knowledge of the subject facility and yet he attempts to render an opinion regarding the nature of the waste, volume of the waste and character of the waste generated at the facility; (3) Mr. Crawford, an employee of the Indiana Department of Environmental Management since 1989, was not listed in the pre-hearing exchange; (4) Mr. Schoepke, also an employee of Metcalf and Eddy, was not listed in the pre-hearing exchange. The Respondents thus argue that since they were not listed in the pre-hearing exchange, they would not be entitled to testify at the trial and thus their affidavits are likewise not admissible and should be stricken.

In its reply filed on June 19, 1991, the Complainant resists the motions and states that as to Mr. Crawford, he was, in fact, listed as a witness in its June 15, 1991 pre-hearing exchange.

That seems to take care of Mr. Crawford.

As to the affidavit of Mr. Schoepke, the Complainant states that the only information contained therein relates to the fact that on his visit to the facility in 1990 he was told that BRC owned the facility and no mention was made of Chaffee Rentals. This information is substantiated by other data in the file to the effect that Chaffee Rentals bought the property from Dana and subsequently leased it to BRC. The affidavit is at best, cumulative and at worst, redundant. It seems to add no additional information except that it confirms that BRC is the operator of the facility, an issue, which I don't believe is in controversy. However, due to the gargantuan size of this record I will allow the affidavit to stay in just in case I missed something. Sort of like Mr. Moody.

As to the argument that neither Mr. Schoepke nor Mr. Khara were previously identified in the pre-hearing exchange, I usually don't put great store in that fact unless the witness is brought into the trial as a surprise without prior notification to the other parties. Such is not the case here since we are nowhere near the hearing stage and the Respondents would not be prejudiced since they have had long advance notice of the existence of these persons and know what they intend to say, if called. Just to clarify this situation, I will **GRANT** Complainant's motion to supplement its pre-hearing exchange to include them and Ms. Stein.

As to the notion that Mr. Khara's affidavit is inadmissable because he had no first-hand knowledge of the facility, that too

must be rejected. It is Agency-wide practice, for example, to have a supervisor draft the Complaint and calculate the penalty without ever having seen or visited the facility. His work product is based upon inspection reports of others and data and information contained in the Agency files. To my knowledge, none of my colleagues have ever refused to allow such testimony and I know I haven't. Mr. Khara's testimony as to the quantities of waste handled is not based upon speculation or conjecture but rather upon the application of simple mathematics using data provided by Dana itself. It is an exercise that could be done by any reasonably intelligent high school senior (if such a creature still exists) and certainly by one possessing Mr. Khara's credentials.

The next item to consider is the Agency's Motion to File a Second Amended Complaint against all Respondents dated April 19, 1991. The Respondents filed their vigorous replies in opposition to motion on May 13th and 11th, 1991, after having sought and been granted an extension of time to file.

The Complainant argues that it wishes to file a Second Amended Complaint to clear up a few minor problems in its First Amended Complaint and to incorporate new penalties calculated under the Agency's newly adopted RCRA Civil Penalty Policy ("RCPP") issued in October of 1990.

In their motions for summary determination the Respondents argued that EPA doesn't have the authority to enforce Title 329 of the Indiana regulations since they have not yet been approved by EPA. This seems to be true. The Agency wishes to amend to make it

clear that they are enforcing Title 320 of the rules, which have been approved by EPA.

It also wishes to amend the Complaint as to BRC et al to include the wastes F007 and F009 which they included in their First Amended Complaint against Dana Corporation but neglected to include in their Amended Complaint against BRC.

Since the two titles of the Indiana rules are virtually identical, I have no problem with that issue. The same applies to the amendment to the BRC Complaint. Neither or these changes would, in my judgement, subject the Respondents to any meaningful prejudice. The motion as to these amendments is **GRANTED**.

As to the new penalty calculation, which the Agency treats rather casually in its motion, we have a radically different scenario. The amendments would increase the proposed civil penalties against all respondents 25 fold. In other words from several tens of thousands of dollars to over one million in both Complaints.

As noted above, the new RCPP was adopted in October of 1990, well after the bringing of this action. The Agency argues that the preamble to the new RCPP authorizes such a move.

The language referred to states that:

> The 1990 RCPP is immediately applicable and should be used to calculate penalties sought in all RCRA Administrative Complaints or accepted in settlement of both administrative and judicial civil enforcement actions brought under the statute after the date of the policy, regardless of the date of the violation. To the maximum extent practicable, the policy shall also apply to the settlement of administrative and judicial enforcement actions instituted prior to but not yet resolved as of the date the policy is issued.

The Agency argues that since this case is still in the "settlement" stage the new RCPP can be applied. It further states that the new policy applies to cases in which no good faith offer of settlement has been communicated among the parties and in this case "no offers of settlement, much less good faith offers of settlement" have been proffered by any of the Respondents. In support of this argument, the Complainant has attached to its Reply Brief an affidavit of Ms. Kathie Stein who identifies herself as "Associate Enforcement Counsel for RCRA in the Office of Enforcement." Ms. Stein then proceeds to qualify herself as an expert in the field of Agency penalty policy.

As to the facts in these cases, Ms. Stein states that: " in cases instituted prior to the date of issuance of the RCPP, the Agency's position is to encourage, but not require, settlement of the actions pursuant to the RCPP." (Emphasis supplied). That statement hardly helps the Complainant here. Ms. Stein then goes on to say that: "in issuing the RCPP, the Agency contemplated that regions may, as appropriate, amend Administrative Complaints to seek penalties consistent with the RCPP, regardless of when the cases were filed." I find no support in the preamble for such a notion and it pre-supposes that regions are free to amend a Complaint any time it suits them. This, of course, is nonsense. The Agency may only amend a Complaint, as a matter of right, before any responsive pleadings have been filed by the Respondents. After that, they may amend only by leave of the Regional Administrator or the Presiding Judge, as appropriate.

Although Ms. Stein has a title bigger than my desk, her opinions carry little or no weight with me. She is merely one of the legions of lawyers employed by EPA headquarters attempting here to render an opinion on a matter which is entirely in my hands.

Since the Agency filed its motion to amend on the same day as it filed its motion of an accelerated decision against all Respondents, it can hardly be taken seriously when it asserts that settlement discussions are ongoing. This notion is further undermined by the fact that all Respondents had previously filed motions for accelerated decisions in their favor. Clearly settlement discussions had long since broken down and the parties are in open warfare. This is further bolstered by the May 18, 1990 Status Report filed by the Complainant wherein it was stated that: "negotiations are at an impasse, and...this mater will probably have to proceed to hearing."

The Court is not overly impressed by the manner in which the Agency has prosecuted this case. Obviously, little or no in-depth research was instituted prior to the drafting and filing of the original Complaint. A quick title search would have revealed that Dana sold the facility to the Chaffees and that BRC was a lessor. A review of Agency files would have revealed that the Title 329 regulations had not been approved by EPA and thus could not form the basis for their enforcement by EPA. It goes on and on.

To allow EPA to attempt to enforce the new RCPP at this juncture is not only disallowed by their preamble, but would seriously prejudice the Respondents.

Accordingly, the motion to amend the Complaint by including newly calculated penalties is **DENIED**. The original penalties will stand.

The Second Amended Complaint may issue, as amended by the Court and the Respondents shall file their answers thereto as provided by the Rules of Practice.

In view of this ruling, the Court will defer an examination and decision as to the cross-motions for accelerated decision previously filed.

Dated: 9/10/91

T. B. Yost

Thomas B. Yost
Administrative Law Judge

CERTIFICATION OF SERVICE

I hereby certify that the original of the foregoing was served on the Regional Hearing Clerk, EPA Region V (service by first class U.S. mail); and the following parties were served a copy by certified mail, return-receipt requested. Dated in Atlanta, Georgia this 10th day of September, 1991.

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