

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of: )  
)  
Motiva Enterprises LLC, ) Docket No. RCRA-3-2000-0004  
)  
Respondent )

Order on Complainant's Motions

In this proceeding under Sections 3008(a)(1) and (g) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928(a)(1) and (g). and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Rules of Practice"), 40 C.F.R. Part 22, Complainant, EPA, has filed a Motion to Supplement the Initial Prehearing Exchange and a Motion in Limine.

The Motion to Supplement may be disposed of summarily. EPA seeks to add certain identified exhibits that were not included in the initial prehearing exchange. EPA relates that each of the documents were produced or generated by the Respondent. No opposition was filed by the Respondent. In these circumstances, Respondent suffers no disadvantage from the inclusion of the documents within the prehearing exchange. a conclusion to which Respondent has tacitly agreed. Therefore, the documents are allowed as part of the prehearing exchange.<sup>1</sup>

The Motion in Limine seeks to preclude the testimony of Respondent's witness, Matthew Strauss and to bar the introduction of Respondent's proposed exhibits 1 and 2. EPA objects to Mr. Strauss' testimony on the basis that he is being presented as an expert in policy and regulatory issues regarding solid and hazardous waste and his expected opinion testimony that the Respondent operates a recycling process at its facility. Experts, EPA notes, may not testify as to legal conclusions arrived at by applying the law to facts, as that is within the province of the Court. As the subject of this testimony involves a matter of law. EPA argues it should be precluded.

Regarding the proposed exhibits, they involve letters from two state agencies concerning

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<sup>1</sup>The prehearing exchange is just that. Neither side should blur the distinction between documents exchanged in that process from the very separate matter of their admissibility into the record at hearing.


“Scaltech operations” in those states. The letters. EPA urges. should be precluded from being introduced on the basis that they are irrelevant. Though asserting that the operations in those states are distinct from the Respondent’s, and therefore should be precluded as irrelevant on that basis alone. EPA also contends that, even if shown to be similar, Respondent’s activities involving the placement of hazardous waste on the land sufficiently distinguishes the situations. Last, EPA asserts that any state agency legal opinions are nonbinding in any event and therefore, as with the testimony of Mr. Strauss, should be precluded from the record on that basis as well.

In response, Motiva contends that EPA’s objection is premature. It submits that the Court should postpone such a ruling on admissibility until it is presented in context during the hearing. Consistent with this approach, Respondent maintains that Mr. Strauss’ testimony will indeed concern issues of fact. In addition, Motiva takes issue with EPA’s assertion that an expert may not testify as to whether a particular activity is covered under law, as such conclusions belong to the Court. Citing *In re General Electric Co.*, 1994 EPA ALJ LEXIS 19. at \* 3-4, Motiva notes that the test for admitting expert testimony is whether it will assist the trier of fact and that such determination is within the discretion of the judge. Facing EPA’s more pointed assertion, that experts may not testify on subjects embracing an ultimate issue of law Motiva notes that experts do testify on issues regarding the applicability of law to certain facts. The Court agrees. It has been observed that a “true expert witness can often provide valuable assistance to the finder of fact, even if the expert’s ultimate conclusion is rejected or the party who offered the expert’s testimony does not prevail.” *Ruckelshaus, Administrator, Environmental Protection Agency v. Sierra Club et al.* 463 U.S. 680, \* 708. The fact that a tribunal may hear and consider expert opinion on such matters does not operate to supplant its role in ultimately deciding those issues.

Motiva makes similar arguments regarding the state agency letters, by reasserting that such motions for exclusion are disfavored and that, in any event. they cannot be barred merely because they go to the ultimate issue of whether a permit is required. In making this argument. Respondent acknowledges that it must overcome foundational objections and show that there is an identity between the operations. The Court agrees with Motiva on this issue as well. Further, even if it is decided that such evidence has no bearing on liability, it is plausible that it may be pertinent on penalty issues, if such issues are reached.

Therefore, EPA’s Motion in Limine is DENIED.

**So Ordered.**

  
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William B. Moran  
United States Administrative Law Judge

Dated: October 10, 2001

In the Matter of Motiva Enterprises LLC.

Respondent

Docket No. RCRA-3-2000-0004

CERTIFICATE OF SERVICE

I certify, that the foregoing **Order on Complainant's Motions**, dated October 10, 2001, was sent this day in the following manner to the addressees listed below:


**Original + 1 copy by Pouch Mail to:**

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\_\_\_\_\_  
Rachele D. Jackson  
Legal Staff Assistant

Dated: October 10, 2001