10-89

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
HALL-KIMBRELL ENVIRONMENTAL SERVICES, INC.	)	Docket Nos. TSCA II-ASB-92-0235, TSCA VII-90-T-363A, VII-91-T-414, 424, 425, 447 and 570A, VII-92-T-557; TSCA-(ASB)-VIII-90-26 and 30-39; and TSCA-09-91-0024
	)	
Respondent	)	

ORDER DISPOSING OF OUTSTANDING MOTIONS AND SETTING FURTHER PROCEDURES

There are currently pending a variety of motions that are ripe for disposition. These motions will be ruled on in this Order, which will also set further procedures governing the proceedings.[1] The arguments of the parties relative to these motions are thoroughly set out in the pleadings and will not be summarized herein, except as necessary to support or clarify the rulings made in this Order. Any argument not referred to specifically or by inference is rejected as not being supported in law or fact, or as not being sufficiently persuasive as to merit comment.

I. DISCOVERY

Two discovery requests made by the Respondent are currently pending. The first is a motion in the Region VIII cases seeking discovery of a draft document prepared by Ms. Betty Weiner and

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[1] All of the proceedings are not consolidated, particularly the ones in different EPA Regions. However, since many of the issues decided herein are applicable to all the cases, this Order is being entered jointly in all the proceedings.

documents relating to the development of the Agency Penalty Policy at issue. Alternatively, the Respondent moves that four witnesses listed by the Complainant to give opinion testimony be stricken in light of the Complainant's argument regarding the Weiner document and that Ms. Janet Brearden be stricken as a witness since she was projected to testify as to the development of the Penalty Policy. The Complainant has supplied the Respondent with the Weiner document and has assented to having Ms. Brearden stricken as a witness. Under the circumstances, Ms. Brearden will be stricken as a witness. This, together with release of the Weiner document, makes the Respondent's motions moot and they are hereby denied as such. Also, Complainant in the Region VII cases has filed a motion to withdraw Ms. Brearden as a witness. This motion to withdraw is unopposed and is granted. In addition, Respondent had requested a deferral of disposal of the motion for discovery and the motion to strike pending a position on Ms. Brearden being taken by Complainant in the Region V and Region VII cases. As noted above, Ms. Brearden has been withdrawn as a witness in Region VII and the Region V proceeding has now been settled, so there is no reason to defer the rulings being made herein on these motions.

The second motion for discovery was also made by the Respondent in the Region VIII cases. It seeks a June 14, 1990 memo from Mr. Wolfgang Brandner and documents relating to any evaluation of the Respondent's training materials conducted by Mr. Brandner or anyone under his direction. Alternatively, the

motion requests permission to take Mr. Brandner's deposition. Complainant opposes this motion on the basis that the June 1990 memo is protected by attorney work product privilege and on the grounds: that the discovery will cause unreasonable delay; that the documents lack sufficient probative value; and that the documents are otherwise available. Respondent in its reply effectively counters the unreasonable delay, probative value and availability arguments and asserts that the privilege claim is untimely and the objection to the deposition is premature. Respondent avers that it can only determine whether a deposition is necessary after it reviews the documents at issue.

On analysis, the Complainant's position on privilege of the 1990 memo is well taken. That document is covered by the attorney work product doctrine and is not subject to discovery since the Respondent has not made the requisite showing of undue hardship to obtain the substantial equivalent thereof. With regard to the other documents, the Respondent's arguments are more persuasive and these documents must be produced. An evaluation of the positions taken by the parties indicated that there will not be unreasonable delay involved with this discovery, that the documents have sufficient probative value and that they are not reasonably obtainable elsewhere. Therefore, the motion for discovery is granted as to those documents and they shall be produced for the Respondent to inspect and/or copy within 15 days of the issuance date of this Order. The Respondent's request to take Mr. Brandner's deposition is denied

at this time. The Respondent may renew this request if it considers it necessary after review of the documents produced but it is inappropriate to grant an open-ended deposition authorization when such discovery may be unneeded and/or unwarranted.

II. CONSOLIDATION

The Complainant in the Region VII cases has filed a motion to consolidate TSCA Docket No. VII-92-T-557 with the other seven dockets in that Region. The Respondent filed a response in which it did not oppose consolidation as long as it was on the same basis as the previous consolidation of Region VII cases set out in the February 20, 1992 Order Disposing of Outstanding Issues. Accordingly, the motion to consolidate is granted on the same basis as the previous consolidation approved in the February 20, 1992 Order issued herein.

III. PREHEARING EXCHANGE SUPPLEMENTATION

Complainant has filed a motion to supplement its Exhibit 16 in the Region VIII cases. This motion is unopposed and is granted.

IV. MOTION FOR SANCTIONS

The Respondent has filed separate motions for sanctions in all five Regions and the grounds therefor are identical in all the motions. As a result, these motions will be handled on a unified basis since the same analysis and rationale for disposition applies to all the motions, with the exception of the motion filed in Region V. As to the Region V motion, it is

hereby denied as moot since that proceeding has now been settled and a Consent Agreement and Final Order was filed therein on September 30, 1992. The remaining motions are discussed and disposed of below.

The motions seek dismissal of all cases against the Respondent with prejudice, they ask for the award of costs and attorneys' fees and request such other sanctions as may be deemed appropriate. The motions are grounded on alleged admissions and additional evidence that purportedly show that the Complainant engaged in bad faith or unconscionable conduct sufficient to warrant the requested sanctions. The alleged admissions came in pleadings filed by the Complainant in connection with Respondent's motion to add affirmative defenses, including the defense of unclean hands. That defense and the motions for sanctions focus on an August 21, 1991 letter (LEA letter) sent by Complainant to 6500 local educational agencies (LEAs) nationwide who did business with the Respondent. The motions define the issue as whether, by sending the LEA letter, the Complainant engaged in bad faith or unconscionable conduct, or whether it acted in good faith to fulfill a Congressional mandate. The motions also make extensive reference to a previous Fact Sheet sent to the LEAs and to Agency testimony regarding these matters before a Congressional hearing.

The Complainant filed a motion to strike the motions for sanctions in which it relies on the claim of sovereign immunity with regard to the request for costs and attorneys' fees, and in

which Complainant asserts that the motions are merely a repetition of the arguments the Respondent raised in support of its unclean hands affirmative defense. The Respondent attacks the motion to strike as being an untimely answer to the motions for sanctions and relies on the contention that there is an inherent power in this forum to award sanctions in the form of attorneys' fees and costs. In reply, Complainant asks that its motion to strike be considered its answer in opposition to the motions for sanctions.

On analysis, the motions for sanctions must be considered as motions for dismissal under Section 22.20(a) of the EPA Rules of Practice (Rules), 40 C.F.R. §22.20(a), which provides that a proceeding may be dismissed on grounds that there has been a failure to establish a prima facie case by the Complainant or on other grounds which show no right to relief on the part of the Complainant. With regard to the present motions, since no prima facie case issue is involved, this Rule must be interpreted as requiring, from the other grounds showing no right to relief standpoint, that the Respondent establish that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. Since there are clearly different factual interpretations relating to the Complainant's alleged bad faith and unconscionable conduct, as well as substantial legal issues regarding the proper resolution of this matter, it is inappropriate to grant the motions for sanctions and dismiss the proceedings until these issues have been adequately aired at

hearing and all the facts with regard thereto explored. Accordingly, the motions for sanctions must be, and hereby are, denied. In light of this, the motion to strike the motions for sanctions is also denied.

V. MOTION TO AMEND AND MOTION FOR ACCELERATED DECISION

Respondent has filed a motion to amend its answers in the Regions VIII cases to deny that it is an Accredited Asbestos Contractor as defined in Section 202(1) of the Toxic Substances Control Act (TSCA), 15 U.S.C. §2642(1). The motion to amend also seeks to add 10 affirmative defenses to conform the answers at issue to other answers filed in the companion cases. This motion was vigorously opposed by the Complainant, which also moved to strike existing affirmative defenses in certain of the Region VIII cases. The Complainant further took the position that, if the affirmative defenses are allowed, it would forthwith move to strike them. It is warranted, therefore, to consider the affirmative defenses in the context of a motion to strike.

Moreover, the Respondent submitted, pursuant to Section 22.20(a) of the Rules, a motion for accelerated decision in which it asks for judgment in its favor on all claims. This motion relies on the argument that the Respondent is not an Accredited Asbestos Contractor subject to liability under TSCA, the same issue raised in the first part of the Respondent's motion to amend. The motion for accelerated decision was also aggressively opposed by the Complainant on the basis of its interpretation of TSCA and on the rationale that the doctrine of Respondeat

Superior would make the Respondent liable for the violations alleged in these cases.

A review of the prolix pleadings relating to the above described motions indicates that the following resolution thereof is necessary. The Complainant's position that the Respondent can be considered a Certified Asbestos Contractor since the Respondent is a person as defined under TSCA, is persuasive, as is its alternate argument of responsibility attaching to the Respondent under the doctrine of Respondeat Superior. The Respondent's position that it is a "person" under TSCA but not a person liable as an Accredited Asbestos Contractor under the statute, would emasculate a substantial enforcement portion of the statute, a result that Congress certainly did not intend when it enacted the legislation. The Respondent is the contractor with the LEAs for the schools involved and it cannot insulate itself from liability for alleged violations of TSCA by an overly technical statutory interpretation that would eliminate its responsibility. The Respondent is the main entity involved in the inspection, sampling and management planning for the LEAs and the primary person profiting from such activities. The Respondent's position would clearly frustrate the Congressional purpose in passing the enforcement provisions of TSCA. Therefore, the Respondent's motion for accelerated decision is denied, as is its motion to amend insofar as the amendment seeks to deny that the Respondent qualifies as an Accredited Asbestos Contractor under TSCA.

With regard to the affirmative defenses, the following rationale relating to motions to strike is pertinent. It is well established that motions to strike are not favored. The standards to be applied to motions to strike are stringent and a matter will not be stricken from a pleading unless it is clear that it can have no possible bearing upon the subject matter of the litigation, 2A Moore's Federal Practice, §12.21 at 175-76 (2nd ed. 1978). A second criteria for granting motions to strike is that permitting the defense to stand would prejudice the party bringing the action, Shell Oil Co. v U.S. Equal Employment Opportunity Comm., 523 F. Supp. 79, 83 (E.D. Mo. 1981); Oliner v. McBride's Industries, Inc., 106 F.R.D. 14, 17. (S.D. N.Y. 1985). And, a motion to strike will be denied unless the legal insufficiency of the defense is clearly apparent, with the rationale for this based on a concern that a court should restrain from evaluating the merits of a defense where the factual background of the action is largely undeveloped, Cipollone v. Liggett Group, Inc., 789 F.2d 181, 188 (3rd Cir. 1986), on remand, 644 F. Supp. 283, motion denied, 802 F.2d 658, on remand, 649 F. Supp. 664, cert. denied, 107 S.Ct. 907. See also 3M Company, Docket No. TSCA-88-H-06, Order issued August 7, 1989 at 6-7. If the sufficiency of the defense depends upon disputed questions of law or fact, then a motion to strike will be denied, Oliner v. McBride's Industries, Inc. supra, at 17. In the present case, it is reasonable to conclude that the Complainant's Motion to Strike must be denied unless the

Presiding Judge is convinced that there are no questions of fact, and that any questions of law are clear and not in dispute. See Lunsford v. United States, 418 F. Supp. 1045, 1051 (D.C.S.D. 1976), aff'd, 570 F.2d 221, 229 (8th Cir. 1977); 3M Company, supra at 7; and Eastman Chemicals Division, Eastman Kodak Company, Docket No. TSCA-88-H-07, Order issued September 14, 1989 at 18. With these principles in mind, an evaluation can be made regarding whether the affirmative defenses at issue should be stricken.

A review of the ten affirmative defenses raised in the motion to amend and the other affirmative defenses challenged in the Complainant's motion to strike, indicates that all either raise questions of fact or of law that are appropriate for hearing, either in the context of presenting a bar to liability or as having a bearing on the amount of any penalty that might be warranted. As a result, the motion to amend is granted and the affirmative defenses raised therein will be considered at hearing. Therefore, the amended answers are accepted for filing, as modified by the rulings made in this Order. Based on the same reasoning, the Complainant's motion to strike affirmative defenses is denied.

VI. FURTHER PROCEDURES

The parties have submitted their views on further procedures but they will have to be modified because of the settlement of the Region V case. As to scheduling, Complainant states that it intends to file a motion for accelerated decision regarding

whether drywall and hard plaster should be considered suspect materials under the Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. §2641 et seq., which is Title II of TSCA. Complainant proposes to file this motion by October 16, 1992, making the opposition due November 2, 1992 and the reply to the opposition due November 17, 1992. Complainant also requests oral argument on this motion be set for December 3, 1992 in Washington, D.C. Since this motion raises an extremely important and potentially dispositive issue, the procedures suggested by the Complainant are reasonable and are hereby adopted. A separate notice scheduling a prehearing conference for the purpose of oral argument will be issued later.

As to the scheduling of hearings, the settlement of the Region V case puts a new light on matters. Arguments on the dates and order of the hearings in the various Regions will also be entertained at the prehearing conference on December 3, 1992, and the parties should expect to go to hearing after January 1993, since prior scheduling will not permit these cases to come to trial before then.

SO ORDERED.

Daniel M. Head
Administrative Law Judge

Dated: October 8, 1992
Washington, DC

IN THE MATTER OF HALL-KIMBRELL ENVIRONMENTAL SERVICES, INC.
Respondent, Docket Nos. TSCA-II-ASB-92-0235; TSCA-VII-90-T-363A, VII-91-414, 424, 425, 447, 450 and 570A, VII-92-T-557; TSCA-(ASB)-VIII-90-26, 90-30 through 39; and TSCA-09-91-0024.

CERTIFICATE OF SERVICE

I certify that the foregoing Order Disposing of Outstanding Motions and Setting Further Procedures, dated October 8, 1992, was sent in the following manner to the addressees listed below:

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Secretary, Office of
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Dated: October 8, 1992
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