6/10/97

UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
ALLEN TRANSFORMER CO.	)	Docket No. TSCA VI-680C(P)
	)	
Respondent	)	

ORDER DENYING RESPONDENT'S MOTIONS TO WITHDRAW, GRANTING RESPONDENT'S REQUEST FOR ADMISSIONS, AND ESTABLISHING PROCEDURES

The undersigned has been designated to preside in this proceeding pursuant to Section 22.21(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (Rules) (40 C.F.R. § 22.21(a)). This is a proceeding under Section 16(a) of the Toxic Substances Control Act of 1986, 15 U.S.C. Section 2615(a).

Respondent's Motions to Withdraw

By three separate motions filed on May 6, 1997, Respondent moves, respectively, for withdrawal of Counts I, II, and III of the Complaint. On May 8, 1997, Complainant filed a response opposing Respondent's requests. On May 20, 1997, Respondent filed an answer to Complainant's response insofar as Count II is concerned. Upon review of all of the pleadings, including the original complaint and answer, it is determined that these matters are best addressed in an evidentiary proceeding. Respondent's three motions are **denied**.

Respondent's Request for Admissions

By pleading dated May 19, 1997, Respondent requested five admissions of Complainant. By response filed May 28, 1997, Complainant asserts that Respondent's request "is premature and inappropriate at this time." Complainant states that pursuant to 40 C.F.R. § 22.19(a)(4), a prehearing exchange is the appropriate time for the exchange of admissions or stipulation of fact. Further, Complainant argues that, pursuant to 40 C.F.R. § 22.19(f), further discovery may only be permitted by the Presiding Officer. Therefore, Complainant states the Respondent is required, pursuant to 40 C.F.R. § 22.19(f)(3), to file a motion for leave of the court to request alteration of the discovery schedule established by the court. In fact, Complainant notes that, at the present time, no dates have been set by the undersigned. Therefore, Complainant requests that the

undersigned deny Respondent's Request for Admissions "as outside of Part 22-- Consolidated rules of Practice Governing Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits."

The crux of Complainant's argument appears to be that the time of the prehearing exchange, as contemplated by 40 C.F.R. § 22.19(a)(4), is the time that admissions, among other things, may be exchanged among the parties "which will avoid unnecessary proof." This is the one place in the Rules where the issue of admissions is clearly discussed. Accordingly, as part of its prehearing exchange due on July 15, 1997, Complainant shall admit, deny, or otherwise respond to each of the five requests for admission submitted by Respondent in order to "avoid unnecessary proof," as contemplated by 40 C.F.R. § 22.19(a)(4).

Procedures

To allow for a more focused presentation of the issues, the following schedule shall provide for the filing of prehearing exchanges[1] in seriatim fashion:

July 15, 1997 - Complainant's Initial Prehearing Exchange

August 15, 1997 - Respondents' Answering (Direct and Rebuttal) Prehearing Exchange

September 4, 1997 - Complainant's Rebuttal Prehearing Exchange (if necessary).

In the prehearing exchange each party shall submit the names of the expert and other witnesses intended to be called at the hearing with a brief narrative summary of their expected testimony, and copies of all documents and exhibits intended to be introduced into evidence. See Section 22.19(b) of the Rules. Each party shall submit its views as to the place of hearing. See Sections 22.21(d) and 22.19(d) of the Rules. Failure of the Complainant to meet the deadline for the initial prehearing exchange shall result in a dismissal of the case for failure to prosecute.

An extension of time will not be granted absent a showing of good cause. **The desire to continue settlement discussions or an averment that a settlement in principle has been reached will not constitute good cause.**

---

[1] See generally Section 22.19(b) of the Rules.

Some words of caution to the parties--every motion filed in this proceeding must be served in sufficient time to permit a response by opposing counsel and to permit the issuance of an order before the deadlines set by this order or any subsequent order. EPA rule 22.16(b), 40 C.F.R. Section 22.16(b) allows a ten-day response period for answers to motions. Rule 22.07(c), 40 C.F.R. Section 22.07(c), further provides that where a pleading or document is served by mail, an additional five days is added to the ten-day period.

The original of all pleadings, statements and documents (with any attachments) required or permitted to be filed in this order (including a ratified Consent Agreement and Final Order) shall be sent to the Regional Hearing Clerk and copies (with any attachments) shall be sent to the undersigned.

In its Answer to the Complaint, the Respondent exercised its right to request a hearing in accordance with section 554 of the Administrative Procedure Act (APA). 5 U.S.C. § 554. See also 42 U.S.C. § 7413(d)(1). If the parties cannot settle, APA § 554(c)(2) calls for a hearing under APA § 556. "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556(d). Thus, the Respondent has the right to defend itself against the EPA's charges by way of direct evidence, rebuttal evidence or through cross-examination of the EPA's witnesses. It is entitled to elect any or all three means to pursue its defense. If the Respondent elects to conduct cross-examination of EPA witnesses and to forgo the presentation of answering evidence, it shall serve a statement to that effect on **August 15, 1997.**

Charles E. Bullock
Administrative Law Judge

Dated: June 10, 1997
Washington, D.C.

IN THE MATTER OF ALLEN TRANSFORMER COMPANY, Respondent
Docket No. TSCA VI-680C(P)

CERTIFICATE OF SERVICE

I certify that the foregoing Order, dated June 10, 1997, was sent in the following manner to the addressees listed below:

Original by Regular Mail to: Ms. Monica Frazier
Acting Regional Hearing Clerk
U.S. Environmental Protection Agency, Region VI
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

Copies by Regular Mail to:

Counsel for Complainant: Earle A. "Rusty" Herbert, Esquire
Enforcement Counsel (6EN-LA)
U.S. Environmental Protection Agency, Region VI
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

Respondent: Mr. Jack Allen
President
Allen Transformer Company
6107 South Zero Street
Fort Smith, AR 72903

Marion Walzel
Marion Walzel
Legal Assistant

Dated: June 10, 1997
Washington, D.C.