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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
1833 Nostrand Avenue) Docket Nos.
Corporation) [UST] II-RCRA-0205, et al.
Respondent)

PREHEARING ORDER

In these consolidated proceedings, the Region 2 staff of the United States Environmental Protection Agency (the "Region") has filed complaints charging the Respondent 1833 Nostrand Avenue Corporation with a series of violations of the Solid Waste Disposal Act ("SWDA") §9006, 42 U.S.C. §6991e, and its implementing regulations, 40 C.F.R. Part 280, concerning the underground storage tank ("UST") systems at five gasoline service stations owned by Respondent. Respondent is charged with failing to provide a method or combination of methods for release detection for petroleum UST systems in violation of 40 C.F.R. §§280.40 and 280.41; failure to maintain release detection and tank tightness testing records as required by 40 C.F.R. §§280.34 and 280.45; and, for one station, failing to properly close the UST systems as required by 40 C.F.R. §280.70.

On December 15, 1995, this proceeding was redesignated to the undersigned Administrative Law Judge. This Prehearing Order will address lingering discovery, procedural and scheduling matters.

Deposition of John Hansen

Complainant's Status Report of December 5, 1995 states that the parties deposed John Hansen on November 29-30, 1995. The Status Report also states the parties agreed to a stipulated schedule for filing any objections and responses regarding testimony in the executed transcript. The responses were to have been filed by January 26, 1996, but I have not received a copy of the transcript or any filed objections or responses. However, if this process was delayed by the federal government shutdown that affected EPA, the schedule can be extended. This will be discussed at a conference call to be held shortly, as further directed below in this Order.

Further Discovery

Complainant appears to be seeking further discovery from Respondent in three areas: transactions among Respondent and interlocking entities; underground storage tank ("UST") measurement

records for the Penn Flat station; and Respondent's current compliance.

- Related Business Entities

Respondent seeks discovery concerning transactions and business relationships among Respondent and interlocking entities -- Jesse Halperin, Lou Hal Properties, Inc., and Lou Halperin's Stations, Inc. This inquiry relates to Respondent's ability to pay the requested penalty in combination with the related companies. This issue was addressed by Judge Harwood in his Prehearing Order of November 21, 1995, which established a procedure for completing such discovery. That Order remains in effect and such discovery should be completed according to the directives in paragraphs 4 and 5 of the Order. If there are any problems in this regard, they may be discussed in the forthcoming conference call.

- Penn Flat UST Records

Complainant has filed a Motion for an Adverse Inference and to Preclude, dated November 13, 1995, based on Respondent's failure to provide the UST measurement evidence for the Penn Flat station. In a responsive affidavit dated November 27, 1995, Respondent questions whether it was required to produce such records by Judge Harwood's order, and further asserts it has been unable to locate the UST records. The UST records for the Penn Flat station are discoverable as relevant to Respondent's defense that the tanks were empty at the relevant times.

It would be premature at this time to grant Complainant's motion to draw an adverse inference or to preclude the introduction of such evidence. I have no basis to question Respondent's good faith in attempting to locate the records, and assume Respondent will disclose them immediately if they are found before the hearing. Whether they are found or not, the facts and circumstances surrounding the Penn Flat UST records may be more fully explored at the hearing itself. Any decision to preclude the introduction of evidence or to draw an adverse inference will await development of the record at the hearing.

- Current Compliance

Complainant seeks discovery of records documenting Respondent's current compliance with the UST regulatory requirements at its five gasoline service stations. This discovery is asserted to be relevant to Respondent's defense that it has undertaken good faith efforts to come into compliance. Respondent apparently objects to this avenue of discovery as seeking evidence too remote from the 1992 dates of the violations alleged in the Complaints, characterizing it as evidence of an "on-going pattern of harassment." Although the record before me does not consist of a proper motion for further discovery pursuant to 40 C.F.R.

§22.19(f)¹, I will dispose of this issue here in the interest of efficiency.

Complainant's request for further discovery of Respondent's records concerning its "current compliance" is denied for several reasons. Initially, the meaning of "current" compliance is vague and, on its face, seems more directed toward investigating Respondent for additional violations than ascertaining liability for the violations alleged in this proceeding to have occurred in 1992. The time line has to be drawn somewhere. In addition, the request does not specify the particular documents or types of documents sought.

To the extent Respondent is raising the affirmative defense, in mitigation of any penalty, that it has undertaken good faith efforts to come into compliance after the period of the alleged violations, it must sustain its burden of proof by producing evidence of its compliance actions following the alleged violations. There is no reason, however, that this evidence need extend to the present. The most probative evidence will be that limited to the time between the violations alleged in the Complaint and the time Respondent first actually came into compliance at each service station. A perusal of Respondent's Prehearing Exchanges indicates that it has produced such UST compliance records for the period generally from 1992 to the 1994 dates of the Prehearing Exchanges. Evidence of continuing compliance beyond those dates would be of little probative value. It need not be disclosed unless Respondent elects to introduce such evidence for some specific purpose, such as to buttress its case or to show the lack of need for any compliance order. In that case, the disclosure should be part of a supplemental Prehearing Exchange.

Although not specifically cited in the record before me, Respondent's current UST records could be relevant to the need for issuance of compliance orders. In the Complaints, the Region issued Compliance Orders pursuant to Section 9006 of RCRA, 42 U.S.C. §6991e, which were placed in issue by Respondent's Answer and request for a hearing. Such orders, however, would appear to be unnecessary, if not completely superfluous, as they only require Respondent to comply with the existing regulations. They do not require any special compliance, such as remediation of a leaking tank. In addition, Judge Harwood found in his Order Denying Partial Accelerated Decision and Compliance Order that Complainant

¹ That Complainant is seeking further discovery of Respondent's current compliance records is revealed only in passing in a letter from Complainant's counsel to Chief Administrative Law Judge Jon G. Lotis dated November 14, 1995; a letter to Judge Harwood dated December 1, 1995; and the Status Report dated December 5, 1995. Respondent objects to this discovery in a letter to Judge Harwood dated November 15, 1995.

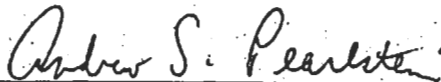
had not shown factually that a compliance order was necessary (Order, August 10, 1995, p. 15).

Complainant may believe that Respondent remains in non-compliance with the UST regulations at some or all of the five service stations. However the Region has not filed amended or new complaints alleging continuing or additional violations. It could unduly expand the issues in this proceeding, and delay their consideration, to allow an unfettered inquiry into Respondent's current compliance. The Region has the statutory authority to inspect those records as part of its normal enforcement duties under RCRA §9005, 42 U.S.C. §6991d. One would expect such inspection to take place on a cooperative basis outside the procedures for this hearing. Respondent remains bound to comply with all applicable UST regulations regardless of the issuance of any compliance order in this proceeding.

Thus, while the need for a compliance order remains technically at issue in this proceeding, its scope will be limited to the violations alleged in the Complaints in relation to the subsequent actions undertaken by Respondent to comply. Respondent has the burden to support its defense by demonstrating its subsequent compliance. This should be done by the normal means of submitting prehearing exchange documents. No further special discovery will be directed.

Schedule for Hearing

The remaining discovery need not delay the hearing in this matter. Counsel for Complainant is directed to arrange a telephone conference call with Respondent's counsel and the undersigned within a week after receipt of this Order. Arrangements should be made with my Legal Assistant, Maria Whiting (202-260-8810), on at least one day's advance notice. The purpose of the conference call will be to set a schedule for completing discovery, if necessary, and to set the schedule for the evidentiary hearing.



Andrew S. Pearlstein
Administrative Law Judge

Dated: February 6, 1996
Washington, D.C.