

10/24/95

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In The Matter Of)
)
PECO Foods of Mississippi, Inc.) Docket No. EPCRA-IV-93-234
)
Respondent)

ORDER DISMISSING COMPLAINT, WITHOUT PREJUDICE

This proceeding was initiated by the United States Environmental Protection Agency ("EPA") against PECO Foods of Mississippi, Inc. ("PECO") pursuant to Section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. §9609, and Section 325 of the Emergency Planning and Community Right To Know Act ("EPCRA"), 42 U.S.C. §11045. The EPA charges PECO with seven violations of CERCLA and EPCRA for PECO's alleged failure to timely report releases of anhydrous ammonia in an amount greater than the reportable quantity for that chemical.

Subsequent to EPA's filing a complaint in this case, PECO filed a Motion For Judgment As A Matter Of Law in part requesting that the administrative complaint be dismissed because of improper service.¹ PECO argues that service in this case was improper because the complaint was served upon its counsel and not upon "an officer, partner, a managing or general agent, or ... any other person authorized by appointment or by federal or state law to receive service of process", as required by 40 C.F.R. 22.05(b)(1)(ii). See Answer at 18. PECO further argues that its legal counsel falls into none of the categories for receipt of service listed in Section 22.05(b)(1)(ii) of the Consolidated Rules of Practice, and that at no time did it waive the service requirements of that section.

It is undisputed that the complaint in this matter was served by EPA solely upon Respondent's counsel on August 2, 1995. The complaint cited violations of CERCLA and EPCRA which allegedly occurred on April 7, 1991, March 12, 1992, and August 19, 1993. Communications regarding these cited violations took place between EPA and PECO before the administrative

¹ In its motion, PECO also asserted that the EPA complaint was defective because it failed to allege facts sufficient to establish violations of either CERCLA or EPCRA. PECO additionally filed a Motion For Discovery and a Motion to Strike the EPA's responses in opposition to its motions. This Order addresses PECO's improper service argument only. The EPA's response to that argument has been considered.

complaint was filed in this case. Those communications are generally set forth in a letter written by PECO's counsel to counsel for EPA. This letter, dated October 12, 1994, in part states:

Pursuant to our discussion today, I represent PECO Foods of Mississippi ("PECO") in this matter. Unfortunately, I was not copied with the September 12, 1994, letter, so I just learned of it today, and the date of October 21, 1994, is not a convenient date for our side because PECO's environmental consultant is unavailable.... Because I represent PECO in this matter, I would appreciate your instructing your client that all future communications in this matter should be directed to me.

Compl. Mem. in Opp. to Mot. for Judg. (Ex. 1) (emphasis added).

EPA argues that through counsel's letter of October 12, 1994, Respondent waived any service objections that it otherwise might have had and effectively consented to service upon its counsel. Compl. Mem. in Opp. to Mot. for Judg. at 4. While this argument has a certain practical appeal, service upon counsel pursuant to the ambiguously worded letter of October 12 simply does not satisfy the specific requirements of 40 C.F.R. 22.05(b)(1)(ii) for service upon a domestic corporation. In that regard, despite its counsel's direction regarding "all future communications in this matter", PECO asserts that counsel was not authorized to accept service on behalf of the corporation. Resp. to Compl. Mem. in Opp. to Mot. for Judg. at 3. This assertion by Respondent carries significant weight. Accordingly, EPA's service of the complaint upon Respondent's counsel constitutes inadequate service.

Nonetheless, the EPA alternatively submits, "if the Court finds service to be improper, Complainant would consent to the dismissal of the Complaint, without prejudice, refile it and serve it pursuant to 40 C.F.R. §22.05(b)(1)(ii)." Compl. Mem. in Opp. to Mot. for Judg. at 4. Given the fact that there has been no showing of prejudice by PECO as a result of the improper service, nor even the assertion of such prejudice, the EPA's alternative argument is found to have considerable merit.

Accordingly, for the foregoing reasons, the Motion for Judgment as a Matter of Law filed by PECO Foods of Mississippi, Inc., is granted insofar as this case is dismissed due to improper service of the administrative complaint. The complaint is dismissed without prejudice, and may be refiled by the United States Environmental Protection Agency and served pursuant to 40 C.F.R. 22.05(b)(1)(ii).

Carl C. Charneski
Carl C. Charneski
Administrative Law Judge

Dated: October 24, 1995
Washington, D.C.

In the Matter of Peco Foods of Mississippi, Inc., Respondent
Docket No. EPCRA-IV-93-234

Certificate of Service

I certify that the foregoing **Order Dismissing Complaint Without Prejudice**, dated October 24, 1995, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

Julia P. Mooney
Regional Hearing Clerk
U.S. EPA
345 Courtland Street, NE
Atlanta, GA 30365

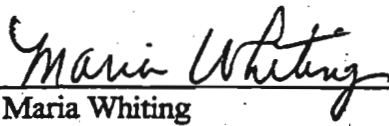
Copy by Regular Mail to:

Attorney for Complainant:

Kathy Urbach, Esquire
Assistant Regional Counsel
U.S. EPA
345 Courtland Street, NE
Atlanta, GA 30365

Attorney for Respondent:

Thomas H. Brown, Esquire
Harris & Brown, P.C.
2000A SouthBridge Parkway
Suite 520
P.O. Box 59329
Birmingham, AL 35209



Maria Whiting
Legal Staff Assistant

Dated: October 24, 1995