

In re Palimere

No. RCRA-III-9006-050 (Aug. 9, 1999)

An administrative law judge (ALJ) grants the U.S. Environmental Protection Agency's (EPA's) motion to add two parties as respondents in its complaint against a gas and tire company for underground storage tank (UST) violations. EPA sought to include the two parties in its complaint because they have been an owner and an operator, respectively, of the USTs during the time period involved in EPA's complaint. The ALJ holds that the parties that EPA seeks to include in the complaint are appropriate to include at this juncture. The ALJ further holds that the resolution of owner and operator status, as well as the characterization of the USTs, are factual and legal issues that should be resolved after discovery and a hearing.

Moran, J.:

Order on Motion to Amend Complaint

On April 1, 1999 EPA filed a Motion to Amend Complaint in this proceeding under Section 9006 of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, 42 U.S.C. Section 6928 *et seq.* ("RCRA").¹ In the Motion EPA relates the difficulties it has experienced in ascertaining the owner(s) of the underground storage tanks (USTs) and the business(es) which are the subject of the Complaint. As a consequence of this endeavor EPA seeks to amend the Complaint to add "R & E Properties Inc." and "Market & Lea Mobil Service Center, Inc." as Respondents, because they have been an owner and operator, respectively, of the USTs during the time period involved in the Complaint.²

1. The Court's Prehearing Order, issued February 18, 1999, incorrectly listed the case caption as "Ron's Discount Gas & Tire Center," following the description set forth in the Regional Hearing Clerk's October 29, 1998 transmittal, forwarding the case to the Office of Administrative Law Judges. On April 1, 1999 EPA Counsel sent a "Notice of Clarification" noting the incomplete description listed in the Prehearing Order.

2. The proposed First Amended Complaint also removes the injunctive relief sought in the original Complaint (as the tanks have been removed), corrects the capacity listed for one of the USTs, makes adjustments to the penalty sought as to Count VI, resulting in a slightly lower proposed penalty, and amends the history of noncompliance factor. Of course, should this matter not settle, and the violations established, it will be for *the Court* to sort out liability and decide the appropriate penalty.

Respondent, Ronald C. Palimere, as President of Ron's Discount Gas and Tire Center, filed an opposition to the Complaint, objecting to EPA's nine month delay in seeking the amendment, particularly where the information necessary to identify all Respondents was publicly available. Respondent also argues that EPA would not be disadvantaged by denying the Motion, as the statute's reach extends to those who operate *or* own the USTs and, as the operator has already been named, there is no need to add the owner. Respondent also maintains that adding a new party "introduces an entirely new and complex litigable issue" as to whether the landlord or the tenant owns the USTs. Opposition at 3. Inferentially raising an "ability to pay" aspect, the Respondent suggests that by adding R & E Properties the new Respondent will be required to expend resources on litigation rather than *possibly* spending such funds on remediation or paying a fair administrative penalty. *Id.* at 3-4.

In Response, EPA argues that the determination of the owner(s) of the USTs, which may involve resolution of state law interpretations of trade fixtures, should await judicial determination after the underlying facts are fully developed. EPA intends to conduct additional discovery on these issues.

The determination of the proper parties to include in litigation is not a shell game. The parties EPA seeks to include in the Complaint are appropriate to include at this juncture and the Court agrees with EPA that the resolution of owner and operator status as well as the characterization of the USTs, are factual/legal issues that should be resolved after discovery³ and a hearing.⁴

Accordingly, for the reasons stated, EPA's Motion is GRANTED. Future captions shall include "R & E Properties, Inc." and "Market and Lea Mobil Service Center, Inc." as Respondents. Complainant is allowed thirty (30) days from the date of issuance of this Order to file the proposed First Amended Administrative Complaint.

So Ordered.

3. In its Response to Respondent's Opposition, EPA discloses its intention to conduct additional discovery to aid in the resolution of the ownership issues and the status of the USTs. Inferentially, EPA is seeking additional discovery beyond the Prehearing Exchange. The Consolidated Rules, at Section 22.19(f) provide for "Other discovery," a step which requires the Court's permission. By this Order, the Court approves further discovery, short of depositions upon oral questions, as to the items listed in the EPA Response. Should the further discovery be inadequate, the Court will entertain a separate Motion seeking depositions and any opposition which may be filed, at that time.

4. The Court will be initiating a conference call to establish a hearing date shortly.