



United States has also filed a motion for summary judgment on "Phase 2" matters (Docket No. 87). Ehrlich has filed a response in opposition to this motion (Docket No. 90).

Ehrlich has moved to strike the affidavit of Harry R. Steinmetz in the United States' motion for summary judgment on "Phase 2" matters (Docket No. 92).

Finally, United States has filed a supplemental motion for summary judgment (Docket No. 95), to which Ehrlich has filed a response.

## **II. DISCUSSION**

Initially, the motion of Ehrlich to strike the Steinmetz affidavit, referred to at least twice in Ehrlich's brief in opposition to the United States' motion for partial summary judgment, is denied. Ehrlich offers no explanation as to why such an affidavit is improper under Federal Rule of Civil Procedure 56. Moreover, he has neither filed or requested leave to file an affidavit in opposition. Secondly, the motion of the United States for summary judgment on "Phase 2" matters will be granted.

Ehrlich concedes that the applicable law (Section 104(e)(2) of CERCLA, 42 U.S.C. § 9604(e)(2)) permits the United States to use its investigative authority to determine if a PRP has the ability to pay for response costs at CERCLA sites and

that this need to assess a person's ability to pay is an important part of the CERCLA scheme.

Thus, Ehrlich is not challenging the general authority to gather ability to pay information. As stated in his brief in opposition at p. 8, "he vigorously contests the manner in which the agency chose to exercise its enforcement discretion as to him."

The manner in which the United States wielded its enforcement discretion, Ehrlich contends, unreasonably infringed on his rights to privacy and equal protection.

From Ehrlich's brief, the foregoing conclusion seems to be based upon the following:

(1) the allegation that the United States' ability to pay analysis for Ehrlich involved an extensive, intrusive financial investigation, while the very same "ability to pay" investigation of virtually every other PRP, involved no such questions or document production demands<sup>2</sup>;

(2) The Steinmetz affidavit and the testimony of Ms. Martin-Banks, the agency's 30(b)(6) deponent, that for corporate PRPs, the United States simply ordered "Dun & Bradstreet" reports and in some cases where the D&B did not contain a net worth

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2. Of some note, with respect to this argument is that Ehrlich was not the only PRP in this investigation to receive the financial demands of which he complains. (See p. 8 of Steinmetz affidavit).

statement, simply called the corporation and asked for an annual report;

(3) The testimony of Ms. Martin-Banks that she does not believe ever question in the financial 104(e) needs to be answered and that in essence the form used by investigators is one prepared by the Department of Justice which investigators must simply use to collect financial information without any discretion to change the form; and

(4) the allegation that the financial demand letter sent to Ehrlich was a bureaucratic convenience that bore no relationship to the financial information the agency really needed to complete its investigation.

The question, Ehrlich concludes, is whether the government's need for the ability to pay information is outweighed by his right and expectation that the information be kept private and not disclosed.

As previously stated, Ehrlich concedes in his brief that there is no question as to the government's need to be able to assess a person's ability to pay. His complaint is the manner in which the government seeks information in this case, as applied to him, is unconstitutional.

The manner in which the government sought information with regard to Ehrlich is not in dispute. Exhibit "A" of the

government's brief is a copy of the information requests served upon Ehrlich in March of 1992.

As to the expectation of privacy in general in one's personal financial affairs, Judge Shapiro has already applied the balancing test with regard to this section of CERCLA and her conclusion in that regard remains the law of this case.<sup>3</sup>

I have reviewed the specific information requested as applied to Ehrlich's potential ability to pay. I find it to be highly relevant. Given the acknowledged need for such information, the manner in which the United States has sought to fulfill that need is reasonable. Ehrlich has failed to cite any legal authority in support of his theory that his privacy has been unreasonably infringed and equal protection denied him by the manner in which the United States has proceeded against him.

Finally, while I can for purposes of argument conjure up a constitutional violation arising from Ehrlich's argument that only 4 out of 200 PRP's received the same type of information request as he did, that corporations are treated differently and that investigators have no discretion in their

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3. In her order of November 24, 1994, Judge Shapiro held that: the government's interest in abating an imminent and highly dangerous threat to public health and the environment and assuring that a person responsible does not evade the legal duty to reimburse the government outweighs the citizen's right to privacy and freedom from government intrusion in this instance.

use of forms designed for bureaucratic convenience only,<sup>4</sup> it is clear from the Exhibit "A" itself that the information requested in light of the government's interest in assuring that a potentially responsible person does not evade his legal duty is neither arbitrary nor unreasonable where, as here, the record provides a reasonable basis to conclude that Ehrlich was a past operator of the landfill in question.<sup>5</sup>

The motions filed by each party regarding the claim for penalties will be denied. A hearing will be held as scheduled by this order to enable each side to orally argue and to present evidence, if deemed appropriate, whether penalties should be imposed under 42 § 9604(e)(5)(B)(ii), and if so, in what amount.

Finally, the United States' supplemental motion for summary judgment regarding Ehrlich's potential assertion of the Fifth Amendment privilege is denied without prejudice as the government acknowledges that what it seeks is that this court should reject a defense that is not even pending before it.

An order follows.

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4. The contours of Ehrlich's equal protection argument are not set forth in his brief, but one could argue, I suppose, that a substantive Fifth Amendment due process violation arises from some notion of an unreasonable classification or arbitrary proceeding.

5. See my order of August 19, 1997 (Docket No. 77).

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	CIVIL ACTION
Plaintiff,	:	
	:	NO. 95-661
v.	:	
	:	
DAVID EHRLICH,	:	
Defendant.	:	

O R D E R

AND NOW, this 7th day of April, 1998, it is hereby  
ORDERED as follows:

(1) the motion of the United States of America for  
Summary Judgment on "Phase 2" (Docket No. 87) is GRANTED, this  
court specifically finding that CERCLA is not unconstitutional as  
applied to the defendant, David Ehrlich.<sup>6</sup>

(2) the motion of defendant for partial summary  
judgment considering the United States' request for imposition of  
penalties (Docket No. 80) is DENIED.

(3) the cross-motion of the United States for summary  
judgment as to penalties (Docket No. 85) is DENIED.

(4) The motion of defendant to strike the affidavit of  
Harry R. Steinmetz (Docket No. 92) is DENIED.

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6. The United States may submit a proposed order implementing the granting of  
this motion.

(5) The supplemental motion of the United States of America for summary judgment (Docket No. 95) is DENIED without prejudice.

A **HEARING** is scheduled for **Thursday, May 14, 1998 at 1:30 P.M. in Courtroom 14A** in accordance with this memorandum.

BY THE COURT:

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RONALD L. BUCKWALTER, J.