IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CR-0002-2014**
	:	
vs.	:	
	:	
	:	
XTO ENERGY, INC.,	:	
Defendant	:	

OPINION AND ORDER

This matter came before the court on February 24, 2014 for a hearing and argument on Defendant's motion to compel a response to its request for a bill of particulars. Following the argument, the parties requested an opportunity to file briefs. Defendant's brief was due within two weeks and the Commonwealth's brief was due one week thereafter.[1] The relevant facts, as taken from the grand jury presentment attached to the criminal complaint, follow.

XTO Energy Inc. (XTO) owns the Marquardt well site in Penn Township, Lycoming County, Pennsylvania. There are two natural gas wells on the site. During natural gas production, these wells release waste water containing toxic substances, such as chlorides, barium, strontium, and aluminum. This waste water is collected and must be treated or disposed of in accordance with the Solid Waste Management Act (SWMA), the Clean Streams Law (CSL) and Pennsylvania Department of Environmental Protection (DEP) regulations.

Located on the Marquardt site on November 16, 2010 were 49 mobile tanks

[1] Although the briefing schedule did not provide for any other briefs, Defendant filed a reply brief on March 19, 2014.

used to store waste water. Valves located on the front and back of the tank can be opened to allow water to be pumped into or out of the tank using a hose. The valve on the rear of a storage tank is primarily used for emptying the tank and is typically fitted with a four-inch threaded plug. The plug is installed and removed with a wrench. In order to empty a storage tank using the rear valve, the plug must first be removed and the valve opened. Although the rear valves on the waste water storage tanks could be locked, none of the valves were equipped with a lock or any other device to prevent authorized use.

Neither XTO nor anyone acting on its behalf conducted inspections of the waste water storage tanks at the Marquardt well site. There was no fence or barrier around the Marquardt site to keep unauthorized individuals from entering the site. The site was unguarded and there were no alarms, surveillance cameras, or other security measures in place.

XTO leased the storage tanks and controlled the transportation of waste water to them. Additionally, XTO was responsible for determining whether to place secondary containment, i.e., a liner that captures liquids in the event of a spill, under the waste water storage tanks. None of the waste water storage tanks were placed on secondary containment.

In October 2010, XTO began to store waste water at the Marquardt site from the two wells on the site and three other nearby well sites. XTO utilized Clark Trucking to transport waste water to the storage tanks at the Marquardt site and hired Bosque Disposal Systems, LLC (Bosque) to process water at the site until construction of a central waste water processing facility could be completed.

As of November 16, 2010, a group of six storage tanks (Tank 18174, Tank

18153, Tank 18152, Tank 18165, Tank 18162 and Tank 27943) were connected by a manifold system installed on the front of the tanks. The manifold system allowed waste water to flow freely between the tanks, turning the tanks into one large reservoir.

In the early afternoon on November 16, 2010, a DEP inspector conducted an unannounced inspection at the Marquardt site. No one else was present at the site when he arrived. Although it was raining steadily when the inspector arrived, he heard the sound of running water coming from the rear of a waste water storage tank. Upon closer inspection, he noticed that the drain plug had been removed from the rear valve on Tank 18174 and the valve was partially open. Waste water was flowing out of the valve and onto the ground behind the tank. The inspector traced the flow of the discharged waste water to an unnamed tributary of Sugar Run.

The inspector also observed that the rear drain plugs on Tanks 18153, 18152, 18165, 18162 and 28943 had been removed and were lying on the ground below the tanks. The rear valves on all five tanks were closed, but liquid and sand were present in the rear valves on the tanks. The inspector also noted sand and displaced gravel on the ground underneath the rear valve on Tank 27943. The inspector's observations are consistent with prior discharges of gas well waste water from these five storage tanks. The inspector also noticed that drain plugs had been removed or were missing from the rear valves on numerous other storage tanks at the Marquardt site.

Shortly after the inspector discovered waste water discharging from Tank 18174, Michael Hahn, XTO's Operations Supervisor arrived at the site. Hahn told the inspector he believed the discharge was the result of vandalism; however, there is no record

of XTO ever reporting an incident of vandalism at the Marquardt site to the police.

The inspector returned the next day and observed dead vegetation behind Tank 18174. The vegetation was likely killed by chlorides in the discharged waste water. The inspector also noticed dead vegetation and displaced gravel on the ground behind a storage tank located nine tanks south of Tank 18174. The inspector did not recall seeing any dead vegetation behind this tank when he inspected the site in October 2010. The rear valve on this tank was closed and there was a pool of water on the ground under the tank. Samples of the water were collected and analyzed, revealing high levels of chlorides, barium, strontium, and dissolved solids. These findings were consistent with a prior discharge of waste water from this storage tank as well.

Shortly after November 16, 2010, samples of the unnamed tributary to Sugar Run were collected and analyzed, which confirmed the water was polluted by elevated levels of chlorides, aluminum, barium, and dissolved solids. The discharge of waste water also necessitated the excavation and removal of contaminated soil.

On September 10, 2013, the Attorney General's office charged XTO with three violations of the SWMA, 35 P.S. §6018.610(a)(1), (2), (4), and five violations of the CLS, 35 P.S. §691.611. In Count 1, the Commonwealth alleged that XTO, by its own conduct or the conduct of another, dumped, deposited or permitted the dumping or depositing of a solid waste onto the ground and into an unnamed tributary of Sugar Run on one or more occasions from October 1, 2010 through November 16, 2010 without obtaining a permit. In Count 2, the Commonwealth asserted that XTO, by its own conduct or the conduct of another, operated or utilized a solid waste disposal facility by discharging or permitting the

discharge of gas well waste water onto the ground without first obtaining a permit from DEP. In Count 3, the Commonwealth contended that XTO, by its own conduct or the conduct of another, stored or disposed of or assisted in the storage and disposal of solid waste contrary to the rules and regulations under the SWMA and/or contrary to the terms and conditions of its permit and/or in a manner that created a public nuisance or adversely affected the public health, safety and welfare. The Commonwealth averred in Count 4 that XTO, by its own conduct or the conduct of another, negligently discharged or permitted the discharged of waste water into an unnamed tributary of Sugar Run without first obtaining a permit in violation of section 691.307a of the CSL. Count 5 sets forth allegations that XTO, by its own conduct or the conduct of another, negligently discharged or permitted the discharge of waste water into an unnamed tributary of Sugar Run without first obtaining a permit from DEP in violation of 25 Pa. Code § 92a.1 et seq. In Count 6, the Commonwealth asserted that XTO, by its own conduct or the conduct of another, negligently failed to notify DEP of one or more discharges of waste water in violation of 25 Pa. Code § 91.33(a). The Commonwealth claimed in Count 7 that XTO, by its own conduct or the conduct of another, failed to take necessary measures at the Marquardt well site to prevent waste water from directly or indirectly reaching an unnamed tributary of Sugar Run through accident, carelessness, maliciousness, hazards of weather or from another cause in violation of 25 Pa. Code § 91.34(a). Count 8 sets forth averments that XTO, by its own conduct or the conduct of another, negligently discharged or permitted the discharge of waste water into an unnamed tributary of Sugar Run and thereby caused pollution to the waterway.

Following a preliminary hearing, all charges were held for court.

On January 21, 2014, XTO filed a request for bill of particulars. The Commonwealth failed to answer this request within 7 days and, on January 29, 2014, XTO filed a motion to compel a response to its request for a bill of particulars.

Discussion

A bill of particulars, an anachronism of past procedural rules, serves a narrow purpose. ***Commonwealth v. Champney***, 832 A.2d 403, 412 (Pa. 2003). It is 'intended to give notice to the accused of the offenses charged in the indictment so that he may prepare a defense, avoid surprise, or intelligently raise pleas of double jeopardy and the statute of limitations." ***Commonwealth v. Dreibelbis***, 426 A.2d 1111, 1114 (Pa. 1981). "It is not a substitute for discovery and the Commonwealth's evidence is not a proper subject to which a bill of particulars may be directed." ***Commonwealth v. Chambers***, 599 A.2d 630, 641 (Pa. 1991)(citations omitted).

The Pennsylvania Rules of Criminal Procedure state that a request for a bill of particulars "shall set forth the specific particulars sought by the defendant, and the reasons why the particulars are requested." Pa.R.Crim.P. 572 (B). "When a motion for relief is made, the court may make such order as it deems necessary in the interests of justice." Pa.R.Crim.P. 572(D).

Issues that arise out of requests for a bill of particulars are generally either about whether the defendant properly requested a bill of particulars or whether the Commonwealth provided adequate information to the defendant.

In ***Commonwealth v. Gee***, 458 A.2d 263 (Pa. Super. 1983), the appellant alleged that his counsel was ineffective for failing to request a bill of particulars when he was

charged with receiving "assorted jewelry." In rejecting this argument, the Superior Court noted that the criminal complaint had specific information about the jewelry. In addition, the search warrant and an inventory receipt of items recovered had adequate information for the appellant to prepare a defense.

In ***Commonwealth v. Judd***, 897 A.2d 1224 (Pa. Super. 2006), a defendant requested a bill of particulars for the specific dates of his offenses, arguing that not having such information denied him a chance to prepare a proper defense. The Superior Court applied Rule 572(B) and found that the defendant did not explain how the lack of information hampered his defense; therefore, the issue was without merit.

The Commonwealth argues that XTO's request is merely an attempt to discover in detail what testimony and evidence the Commonwealth will present at trial and what arguments it will put forth in connection therewith. It further contends that XTO has received sufficient notice of the charges in order to prepare a defense. The Court agrees.

XTO's request for a bill of particulars is 17 pages long and contains approximately 96 parts and subparts. It reads more like a discovery request in a civil case than a request for a bill of particulars. The Commonwealth has provided XTO with ample notice of the charges against it, and XTO has sufficient information to prepare a defense. In addition to the allegations set forth in the Information and the grand jury presentment attached to the criminal complaint, the Commonwealth has provided XTO with transcripts of the grand jury testimony of numerous witnesses and thousands of pages of discovery. Numerous witnesses also testified at the preliminary hearing in this case and were subject to cross examination by XTO's lawyers.

Although the Commonwealth has not provided an exact date for every charge, the Commonwealth does not always need to prove a single specific date of an alleged crime. If the precise date of an offense is not known, an allegation that the offense was committed on or about any date within the period fixed by the statute of limitations is sufficient. Pa.R.Crim.P. 560(B)(3). The Commonwealth has complied with Rule 560(B)(3). With respect to Counts 4, 5 and 8, the Commonwealth alleged that the offenses occurred on November 16, 2010. With respect to Counts 1, 2, 3, 6, and 7, the Commonwealth alleged that these crimes occurred on one or more occasions between October 1, 2010 and November 16, 2010. The Commonwealth is unable to be more specific than that, and the Court will not direct the Commonwealth to do that which is impossible.

Furthermore, while environmental cases can sometimes be complex, several aspects of this case are not as complicated as XTO is making them seem. For example, with respect to Counts 7, the Commonwealth is asserting that XTO failed to take any measures at all. According to the Commonwealth, there was no fence surrounding the site, no locks on the valves and no other security measure to prevent vandalism. It also asserts that no measures were taken to prevent waste water from reaching the unnamed tributary in the event of a spill or discharge, whether the spill or discharge was the result of vandalism, an accident, the carelessness of XTO's employees or agents, hazards of weather or some other cause. It is not a situation where there was a secondary containment system that failed because it was constructed in a manner that violated a code, regulation or industry standard.

Accordingly, the following order is entered:

ORDER

AND NOW, this ___ day of April 2014, the Court DENIES XTO's motion to compel a response to its request for a bill of particulars.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Linda Dale Hoffa, Esquire
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