

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)	
)	
INTERNATIONAL PAPER COMPANY, MANSFIELD, LA MILL)	Docket No. CAA-R6-P-9-LA-98030
)	
Respondent)	

Order on Motions for Discovery and Supplemental Prehearing Exchange

Under consideration are Respondent's¹ and Complainant's motions for discovery. In anticipation of the hearing scheduled in this matter for March 3, 1999, Respondent filed a request for production of documents on January 7, 1999; Complainant filed an opposition² to Respondent's motion on January 14, 1999, and on the same date filed a motion for discovery of its own, seeking production of documents and answers to interrogatories. Respondent has not filed a reply to Complainant's discovery motion.

Consolidated Rule of Practice 22.19(f), provides for "other discovery," that is discovery other than that provided for in the prehearing exchange, only upon determination by the Presiding Officer:

- (i) That such discovery will not in any way unreasonably delay the proceeding;

¹Respondent describes its motion as a "Request for Production of Documents." Because this is the equivalent of a motion for discovery it will be treated as such.

²In addition to its substantive objections to Respondent's request for production, Complainant also argued that Respondent's request was not submitted in the form of a motion and did not state grounds on which the Presiding Officer could grant the motion as required under the Consolidated Rules of Procedure. Complainant waived these objections orally in a conference call on January 21, 1999. Accordingly, they will not be addressed in this order.

- (ii) That the information to be obtained is not otherwise obtainable; and
- (iii) That such information has significant probative value.

40 C.F.R. § 22.19(f)(1).

Respondent's Motion

Respondent's motion consists of seven requests for production of documents. The first four of these requests involve documents related primarily to the penalty issue in this case. Specifically, Respondent requests: 1.) production of all penalty assessments for violations of the New Source Performance Standards ("NSPS") notice requirements issued by EPA and/or the Louisiana Department of Environmental Quality ("LDEQ") in the past three years; 2.) all notes, letters, reports and other written material prepared by EPA that relate to the violations charged, and in particular to the calculation of the penalty in this case; and 3.) any current penalty guidance documents, as well as penalty documents in effect in 1995, used to determine penalties under the NSPS rules.

Respondent's request for copies of all penalty assessments issued under the NSPS rules will be denied. Respondent has not shown that information concerning penalties assessed in other cases satisfies the "significant probative value" element of 40 C.F.R. 22.19(f)(1)(iii). Probative value "denotes the tendency of a piece of evidence to prove a fact that is of consequence to the case." Chautauqua Hardware Corporation, EPCRA Appeal No. 91-1, 3 E.A.D. 616, 622, 1991 EPCRA Lexis 2 (CJO, Order on Interlocutory Review, June 24, 1991). The penalties assessed in other cases "can have no bearing on any factual issues in this case" and thus, do not have "significant probative value," within the meaning of Section 22.19(f)(1)(iii)." Id. at 627.³

³It is also noted that the Respondent has not shown that the documents requested are not otherwise obtainable. EPA penalty assessments are available from a variety of database sources,

Respondent's request for all written material relating to the violations charged, and to the calculation of the penalty in this matter, will be granted in part and denied in part. Any inspection report produced by Inspector Whitney consequent to his inspection of Respondent's facility will be supplied to Respondent. Assuming such a report exists,⁴ producing it should not unreasonably delay this proceeding. Moreover, it may be significantly probative of the violations charged and, while this report may be obtainable through a Freedom of Information Act request, it is reasonable to require Complainant to produce this document.

As to the request for additional information bearing on the penalty calculation, Respondent's request will be denied. Complainant asserts that it has supplied Respondent with all written records relating to the proposed penalty and Respondent has offered no reason to doubt this. The penalty calculation worksheet and memorandum explaining the penalty calculation already supplied to Respondent provide a sufficient explanation of the penalty proposed by Complainant for Respondent to prepare for its defense at hearing. If Respondent wishes to dispute elements of the penalty calculation worksheet and/or to challenge the explanation of the proposed penalty provided in Mr. Jones' memorandum, it may do so through its own witnesses or through cross examination of Complainant's witnesses at hearing.

Similarly, Respondent's requests for penalty guidance documents and other materials relied upon by Complainant currently, and in 1995, to determine penalties will be denied.

including EPA web sites and Lexis. Penalties assessed by LDEQ are presumably available from LDEQ.

⁴Complainant did not respond directly to the Respondent's request for any inspection reports produced in this matter. If none exists, Complainant must make this clear and explain why no report was produced.

Complainant has given Respondent a copy of the penalty policy used to calculate the penalty in this case. This penalty policy was in effect in 1995. Respondent has not shown how “other materials” promulgated to determine penalty assessments for NSPS violations, if there are any such materials, have significant probative value, or why they are not otherwise obtainable. Respondent “may not use the discovery provisions of the Consolidated Rules to do research for its legal or policy arguments.” Chautauqua, at 623.

Through its fifth and sixth requests Respondent seeks all required notifications submitted by other facilities to EPA and LDEQ under the NSPS regulations and any notification forms EPA or LDEQ require in the submittal of notifications under the NSPS regulations.

Respondent’s request for all notifications required by NSPS regulations and submitted by other affected facilities will be denied. Not only might the breadth of this request result in an unreasonable delay in this proceeding, Respondent has not shown how notifications submitted by other facilities would tend to prove any fact bearing on the violations charged in the instant case.

Respondent’s request for notification forms that EPA or LDEQ require to be submitted will also be denied. Respondent has not explained why such forms are not otherwise obtainable. Any such required forms should be readily available from the appropriate divisions of either EPA or LDEQ.

Respondent’s final request is for any documents Complainant intends to rely on at hearing that were not included in Complainant’s prehearing exchange. This request is denied as moot at this time. Rule 22.19(b), which provides for the exchange of witness lists, documents and exhibits prior to hearing, also provides that documents not exchanged shall not be allowed into evidence without the permission of the Presiding Officer. Should Complainant seek to introduce

documents at hearing not included in the prehearing exchange, Respondent may move to strike those documents at that time.

Complainant's Motion

Through its motion Complainant seeks from Respondent both answers to interrogatories and production of documents. Complainant's specific requests are described in a set of interrogatories and a set of document requests that accompanied its motion.

Complainant maintains that interrogatories are warranted in the instant case on two grounds. First, they will not unreasonably delay this proceeding. Second, answers to the questions posed will facilitate a deeper understanding of the factual and terminological issues in this case and thereby help to limit the number of issues presented at hearing.

While Complainant's desire to clarify the meaning of terms and factual issues is well taken, Complainant's request for interrogatories will be denied. Allowing Respondent sufficient time to respond to these interrogatories may necessitate a postponement, a result the Complainant expressed a desire to avoid in its motion. Moreover, this information is "otherwise obtainable" as Complainant will have ample opportunity to explore these questions through cross examination of Respondent's witnesses at hearing. While Complainant's request for interrogatories is denied, the parties are urged to work out a set of stipulated facts prior to the hearing.

Complainant's requests for documents from Respondent will be granted in part and denied in part. Complainant's first request, for copies of all documents related to the fabrication, erection, or installation of the HRSG/turbine combination at Respondent's Mansfield, Louisiana facility will be denied. This request is overly broad and may cause an unreasonable delay in this proceeding; Complainant's second and third requests, which are granted below, should supply

Complainant with all relevant information that might have been included in response to document request number one.

Complainant's second, third and fourth requests for documents, which address the construction commencement date and initial startup date of the HRSG/turbine combination at Respondent's mill, and the meaning of the statement "began site work" satisfy the requirements of 40 C.F.R. § 22.19(f)(1) and will be granted. Producing the requested documents should not cause an unreasonable delay and the documents are not otherwise obtainable by Complainant. Further, documents relating to the construction commencement date, initial startup date and the meaning of "began site work" have a bearing on the central factual issues presented in this case and therefore have significant probative value.

Last, EPA has submitted a Motion for additional witnesses and a Supplement to its Prehearing Exchange. This Motion, which was filed on January 14, 1999, seeks to add two witnesses and their resumes. For good reason, it is unopposed. The Motion is granted.

The Hearing remains scheduled to commence on March 3, 1999 in Shreveport, Louisiana.

So Ordered.

William B. Moran
United States Administrative Law Judge

Date: January 26, 1999