2/13/96

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Neoplan USA Corporation,	)	Docket No. EPCRA-VIII-94-04
	)	
Respondent	)	

ORDER GRANTING MOTION TO AMEND COMPLAINT

This proceeding under Section 325(c) of the Emergency Planning and Community Right-To-Know Act (EPCRA), 42 U.S.C. § 11045(c), was commenced on April 15, 1994, by the issuance of a complaint charging Respondent, Neoplan USA Corporation (Neoplan), with violations of the Act and applicable regulations. Specifically, Neoplan was charged with failing to file "Form R" showing quantities of acetone "otherwise used" at its facility during the calendar year 1990 on or before July 1, 1991, as required by EPCRA § 313. Count II alleged that the "Form R", filed by Neoplan reporting the quantity of acetone "otherwise used" for the calendar year 1991, was inaccurate in that air emissions were designated as "N/A". For these alleged violations, it was proposed to assess Neoplan a penalty of $17,000 for Count I and $10,000 for Count II for a total of $27,000.

Neoplan answered, admitting that it failed to file "Form R", showing quantities of acetone "otherwise used" at its facility during the calendar year 1990, with EPA or the State of Colorado on or before July 1, 1991. Neoplan also admitted that its "Form R"

for the calendar year 1991 initially reported acetone air emissions as "N/A". Neoplan denied that the reporting requirements at issue applied to it, asserted that if it were liable for the alleged violations, the proposed penalty was excessive, and requested a hearing.

The parties have exchanged pre-hearing information in accordance with an order of the ALJ. Neoplan's contention that the reporting requirements identified in the complaint are not applicable is based upon the assertion that the 25,000 pound threshold for "processing" applies rather than the 10,000 pound threshold for chemicals "otherwise used" (EPCRA § 313(f)), and that, even if the latter lower limit applied, the amount of acetone processed [or used] for one or both of the years in question was below that limit. Neoplan alleges that EPA has failed to comply with the Paperwork Reduction Act in promulgating the regulations at issue and points out that EPA has delisted, or is in the process of delisting, acetone from the list of chemicals subject to reporting.[1/]

[1/] Acetone was deleted from the list of chemicals subject to EPCRA § 313 reporting effective June 16, 1995 (60 Fed. Reg. 31643, June 16, 1995).

Under date of December 4, 1995, Complainant filed a motion to amend the complaint so as to add Counts III, IV and V, alleging that Neoplan "otherwise used" quantities of toluene in excess of the 10,000-pound threshold during the calendar years 1990, 1992 and 1993 and failed to submit Form Rs to the Administrator or to the State of Colorado on or before July 1, 1991, July 1, 1993, and July 1, 1994, respectively. For these alleged violations, it was proposed to increase the penalty sought by $42,410.96 to $69,410.96.

In a memorandum in support of the motion, Complainant alleged that the motion was based upon information received from Neoplan after the complaint was filed and upon a report by an expert, Dr. Douglas Kendall, to the effect that toluene was not significantly incorporated during application of the paints and thinners used at Neoplan's facility and that, therefore, toluene was "otherwise used" at the facility within the meaning of EPCRA § 313(f). Complainant cited cases to the effect that " 'administrative pleadings' are liberally construed and easily amended and that permission to amend a complaint will ordinarily be freely granted", e.g., In re Port of Oakland and Great Lakes Dredge and Dock Company, MPRSA Appeal No. 91-1, 4 EAB 170-209 at 205 (EAB, August 5, 1992). See also, In re San Antonio Shoe, Inc., EPCRA Docket No. VI-501-S (Order Granting Motion To Amend Complaint, April 2, 1992) and In re Spang & Company, Inc., Docket Nos. EPCRA-III-037 & 048 (Order Granting Motion to Amend Complaint, April 9, 1992) (prejudice sufficient to warrant denial of motion to amend

means more than mere inconvenience or added expense). Complainant cited the rule from the foregoing cases that mere delay is seldom, if ever, a sufficient reason to warrant denial of a motion to amend, asserted that the proposed amendment would not substantially expand the scope of the trial or alter the nature of defenses, pointed out that no hearing date had been set, argued that Neoplan would be unable to show prejudice within the meaning of the mentioned rule so as to justify denial of the motion and urged that its motion to amend the complaint be granted.

Neoplan filed a "brief" in opposition to the motion on December 18, 1995. Neoplan pointed out that, although acetone had been deleted from the list of toxic chemicals which were required to be reported, Complainant has not moved to reduce the penalty claimed for these alleged violations by 25% in accordance with the Enforcement Response Policy for Section 313 of EPCRA. Neoplan asserts that the Agency seeks to punish it for challenging the initial penalty assessment by seeking additional penalties. Further, according to Neoplan, EPA's motion to amend is being made under the pretext that the Agency only recently became aware that toluene is not significantly incorporated during applications of paints and thinners at Neoplan's facility. Neoplan alleges, however, that it has long been EPA's position in this and other cases that solvents, such as toluene, evaporate during the

application process. As support for this assertion, Neoplan cites a letter from counsel for Complainant, dated June 13, 1994, which enclosed a declaration of Dr. Kendall, dated December 16, 1991. Therefore, Neoplan argues that the Agency has been unreasonably dilatory in seeking to add the additional counts.

Neoplan also argues that it will be prejudiced, if Complainant is allowed to add the new counts. Neoplan points out that this proceeding has been pending for approximately 20 months, that the initial complaint involves a substance, "acetone", which the Agency admits does not meet the toxicity criteria of EPCRA, and alleges that it has spent considerable time and expense investigating this matter. Neoplan emphasizes that Complainant seeks to add counts involving an entirely different substance and to almost triple the penalty claimed. According to Neoplan, these new allegations will require substantial additional effort to investigate, identify witnesses and exhibits and to prepare for trial and it will be at an unfair advantage, if Complainant is allowed to assert the additional claims herein. Neoplan points out that denying the motion is within the ALJ's discretion, asserts that motions to amend should not automatically be granted, but should be evaluated under all of the relevant circumstances, and argues that, because the Agency has been dilatory and Neoplan will be prejudiced in its [trial] preparation, if EPA is allowed to assert the new allegations, the motion to amend should be denied.

DISCUSSION

If, as Neoplan alleges, Complainant seeks to amend the complaint to punish Neoplan for exercising its right to contest the initial penalty assessment, the motion to amend would justifiably be denied as having been made in "bad faith". See, e.g., In re Nassau County Department of Public Works, et al., Docket No. MPRSA-II-92-02, and cases cited (Order Granting Motion To Amend Complaint, September 11, 1992) ("bad faith" defense to motion recognized, but allegation that motion was made in retaliation for respondents' refusal to settle on complainant's terms, held not established). The same ruling is applicable here as Neoplan hasn't proved its assertion that the amendment is sought to punish it for exercising its right to challenge the initial penalty assessment.

The facts in this matter are quite similar to those in Spang & Company, supra. There, as here, the proceeding had been pending for over a year, prehearing information had been exchanged, respondent alleged that it had expended a great deal of time effort and incurred considerable expense in preparing for trial and that it would be grossly unfair to allow complainant to allege a completely new claim at this late date. A hearing date had not been scheduled, however, and, inasmuch as respondent would be allowed ample time to prepare its defense, the additional inconvenience and expense of doing so did not amount to prejudice such as to warrant denial of the motion. This ruling is fully

applicable here. Additionally, the ends of justice are served by amendments which present the real issues in a case and judicial economy would not be served by requiring Complainant to bring the additional counts in a separate action.[2]

Neoplan cites Ynclan v. Department of Air Force, 943 F.2d 1388 (5th Cir. 1991), for the proposition that "leave to amend should not be given automatically". While the decision contains the quoted statement, it also recognizes that the circumstances under which leave to amend may be denied are limited. The decision involves a mistake in the party to be sued and whether this mistake may be corrected under the "relation back" doctrine even after the statute of limitations has expired. Accordingly, the decision is clearly distinguishable from the factual situation here. In any event, the discussion above indicates that Complainant's motion and Neoplan's objections have been fully and carefully considered and belie any notion that leave to amend is being "automatically granted." No proper basis for denying the motion has been shown and it will be granted.

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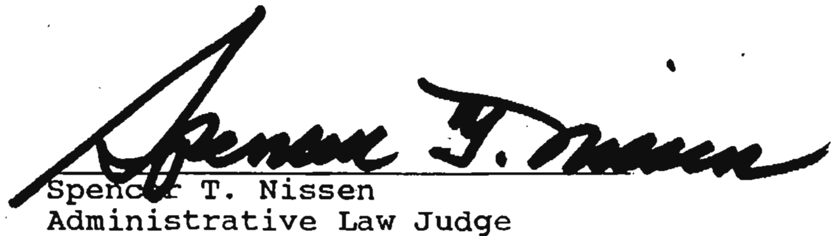
[2] It is not apparent that being required to defend a separate action would benefit Neoplan in any manner. See San Antonio Shoe, supra.

Order

Complainant's motion to amend the complaint is granted. Neoplan shall file its answer to the additional counts within 20 days of receipt of this order.

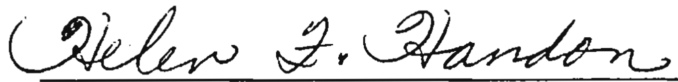
Dated this 13th day of February 1996.



Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER GRANTING MOTION TO AMEND COMPLAINT**, dated February 13, 1996, in re: Neoplan USA Corporation, Dkt. No. EPCRA-VIII-94-04, was mailed to the Regional Hearing Clerk, Reg. VIII, and a copy was mailed to Respondent and Complainant (see list of addressees).



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DATE: February 13, 1996

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