UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
STANCHEM, INC.,	)	Docket No. CWA-2-I-95-1040
	)	
	)	
RESPONDENT	)	

ORDER ON MOTIONS TO COMPEL AND FOR DISCOVERY

By contemporaneous orders, dated September 26, 1997, the parties' cross-motions for accelerated decision were denied, StanChem's motion for discovery was granted in part, and the parties were directed to exchange specified prehearing information on or before November 14, 1997. Each party has made a prehearing submission by the mentioned date.

By a motion, dated November 24, 1997, Complainant objected to StanChem's prehearing exchange for the reason that it did not comply with the ALJ's order requiring the submission of a summary of the expected testimony of its witnesses and a copy of any documents or exhibits intended to be offered at the hearing. The motion pointed out that the purported summaries submitted by StanChem consisted of three short sentences identifying the area of expected testimony to be given by each of its three witnesses and asserted that these were not summaries. Additionally, while Complainant says that it does not object in principle to StanChem's request that the ALJ take official notice of Federal Register notices and other [widely available reference] materials [such as The Merck Index], it argues that it is entitled to notice of the particular materials upon which StanChem intends to rely. Therefore, Complainant moves that StanChem be directed to submit a supplemental prehearing exchange containing a summary, in reasonable detail, of the expected testimony of each witness on each matter concerning which the witness is expected to testify and a list of cites to the Federal Register to which StanChem expects to refer at the hearing.

On November 26, 1997, Complainant filed a motion for an order of discovery. The motion recited that it seeks discovery in three principal areas: the economic benefit derived by StanChem from its violations of the OCPSF rule at issue here, the applicability of the rule to StanChem's facility, and the timing of StanChem's

knowledge that it was subject to the rule. Discovery in these areas is allegedly necessary to enable Complainant to present to the ALJ all information necessary for an informed decision on issues determined to be factual in the order, dated September 26, 1997, which denied the parties cross-motions for accelerated decision. Discovery was also allegedly necessary in order to demonstrate that the penalty claimed by Complainant was appropriate.

Under date of December 12, 1997, StanChem filed an objection to Complainant's motion for an order of discovery, a motion to bifurcate the hearing and to compel discovery, a response to Complainant's objection to prehearing exchange, an objection to Complainant's motion to compel, a motion to compel and a First Amended Prehearing Exchange. Attached to StanChem's objection to Complainant's motion for an order of discovery was a copy of a letter, dated October 25, 1995, from counsel for Complainant to counsel for StanChem referring to settlement negotiations and which stated, inter alia, that Complainant was withdrawing its previous offer to settle this matter for a stated sum. The letter referred to, but did not describe, a methodology for determining economic benefit [from noncompliance]. By an order, dated February 9, 1998, Complainant's motion to strike the mentioned letter was granted for the reason that the letter was not admissible under Consolidated Rule 22.22 which incorporates Federal Evidence Rule 408.

The First Amended Prehearing Exchange submitted by StanChem expands on the list of topics expected to be covered by the testimony of each of its three witnesses. Although these are not summaries in any true sense of the term, the statements serve the essential purpose of a summary, i.e., providing notice of the anticipated subject matter of a witness's testimony and preventing surprise. It should be noted that Complainant is not free from fault in this regard as it has not even arguably submitted a summary of the expected testimony of its third witness, Ms. Gail B. Coad.

StanChem reiterated that it may request that official notice be taken of: The Merck Index:An Encyclopedia of Chemicals, Drugs and Biologicals, Merck & Co., Inc., Rahway, N.J. (1989); Standard Industrial Classification Manual, Executive Office of the President, Office of Management and Budget (1987); and Federal Register notices, proposed and final rules and other entries (First Amended Prehearing Exchange at 4). This identification is sufficiently specific, except for the "other [Federal Register] entries" and StanChem will be directed to identify the other Federal Register entries to which it expects to refer or upon which it intends to rely.

Complainant's Motion for an Order of Discovery

Included with the motion is a proposed order, paras. 1 through 16 of which seek information assertedly necessary to enable Complainant to calculate with more precision alleged economic benefits from StanChem's noncompliance with the OCPSF rule, paras. 17 through 26 of which seek information which will assertedly enable determination of the appropriate SIC code into which StanChem's production activities should be placed, and paras. 27 through 29 of which seek information relating to when StanChem should have been aware that the OCPSF rule applied to its operations. Complainant asserts, inter alia, that discovery on these matters is necessary to demonstrate that the proposed penalty is appropriate. The motion recites that it satisfies the conditions for an order of discovery set forth in the Rules of Practice, § 22.19(f)(1), i.e., the information has significant probative value, the information is not otherwise obtainable and granting the request will not [unreasonably] delay the proceeding.

In support of the motion, Complainant alleges that the economic benefit [from noncompliance] comprises a large portion of the proposed penalty and points out that StanChem has been operating its [improved] wastewater treatment system for some months and can provide accurate information as to the costs of operation. Additionally, Complainant seeks information on the cost of construction [of the improvements] and operation of the compliance measures StanChem delayed implementing, including the after-tax cost of the measures, the date the [improved] system began operating and StanChem's cost of borrowing. Other information sought by Complainant seeks to resolve alleged inconsistencies between the SIC code or

codes StanChem reported as applicable to its facility and to ascertain when StanChem had actual knowledge that its operations were subject to the OCPSF rule.

StanChem has objected to Complainant's motion for the reason that the information sought is not relevant unless and until StanChem is found liable for the alleged violations. StanChem asserts that Complainant is seeking new information which it hopes will enable it to develop a new rationale for the proposed penalty. StanChem alleges that this information is not relevant in view of the ALJ's prehearing order directing Complainant to produce certain documents [a copy of civil penalty computation worksheets] and a statement explaining the reasoning behind the proposed penalty. StanChem states that under separate cover, it is filing a motion to bifurcate the hearing so that issues relevant to liability may be decided first and, only if liability is found, to determine the damages (penalty), if any.

Turning to the specifics of Complainant's motion for discovery, StanChem alleges that the burden in attempting to identify, and, in some cases, to create the records described in paras. 1 through 16 of the proposed order of discovery is unreasonable (Objection at 2). Additionally, because of outstanding questions relevant to liability, StanChem argues that the discovery is unwarranted and does not seek information that currently has probative value. StanChem points out that Complainant is seeking a penalty of $125,000 and that it presumably possessed sufficient information to support that penalty [when the complaint was issued]. StanChem further points out that Complainant affirmed that it was seeking a [maximum] penalty of $125,000 after reviewing StanChem's voluminous response to the Agency's Section 308 information request (Objection at 3).

StanChem derides the notion that the ALJ's order of September 26 asked Complainant to "develop" information and "refine" its reasoning to support the proposed penalty rather than to "disclose" the documents, information, and reasoning, including alleged economic benefit, which led to the penalty proposed. StanChem asserts that Complainant calculated or should have calculated the proposed penalty based on information previously furnished by StanChem or developed on Complainant's own initiative (Objection at 4). The matter of Complainant's compliance with the prehearing order is addressed below.

DISCUSSION and RULINGS

At the outset, it should be noted that Agency penalty policies under other environmental statutes, e.g., FIFRA and TSCA, provide, for example, that "ability to pay" may be presumed at the time a complaint is issued if information regarding this factor is not readily available.[(1)] While this will not satisfy the Agency's obligation to consider "ability to pay", where the statute so requires, and it is clear that no presumption of ability to pay applies at the hearing stage,[(2)] it is proper for the Agency to use discovery or other means to obtain information concerning a respondent's financial condition after a complaint is issued. The same rational is applicable to the alleged economic benefit or savings from the violations or noncompliance at issue here. Moreover, there can be no question that, if the right to a hearing is to have any meaning, factors which the statute requires be considered in determining a penalty must be addressed based upon the record developed at a hearing.

StanChem's objection that Complainant's requests places an unreasonable burden on StanChem to identify documents and records sought is rejected. While it is recognized that the information sought is detailed and may be voluminous, Section 309(g)(3) provides that among factors to be taken into account in determining the amount of any penalty is "...the economic benefit or savings (if any) resulting from the violation..." [(3)] It is therefore clear that avoided or delayed costs of installing and operating equipment necessary to comply with the OCPSF rule are relevant to the determination of an appropriate penalty. It is, of course, true that the amount of any penalty will be reached only if the OCPSF rule is determined to be applicable to StanChem and StanChem is found to be in violation thereof. StanChem's motion that the hearing be bifurcated so that the amount of an appropriate penalty, if any, will be determined separately will be denied for reasons set forth below. StanChem is, however, not obligated to create records to

satisfy Complainant's discovery requests. In the absence of records, estimates or approximations of applicable costs and an explanation of the basis therefor will suffice.

With these caveats and preliminary rulings in mind, StanChem will be directed to comply with or respond to paras. 1 through 14 of Complainant's proposed order on discovery.

Paragraph 15 asks for copies of state and federal tax returns for the tax years 1990 through 1997 to document the marginal state and federal tax rates paid by StanChem for those years. StanChem has objected to the request for its state and federal tax returns, because there is no reason to believe that these returns will contain any information of probative value that has not been or could not reliably be obtained by other measures (Objection at 4). Moreover, StanChem points out that Complainant has not cited any statutory or other authority for ordering it to produce its confidential tax returns.

The rule followed under the Federal Rules of Civil Procedure, which may appropriately be used as a guide here, is that ordering the production of tax returns is disfavored, such documents having a "qualified privilege" against disclosure. This qualified privilege disappears, however, once it is shown that information sought from the returns has some relevance to the subject matter of the litigation and that the information is not readily obtainable from other sources. After the party seeking production has made the required showing of relevance, the burden is on the party opposing production to show that other sources exist from which the information sought is readily obtainable. See, e.g., Eastern Auto Distributors v. Peugot Motors of America, Inc., 96 F.R.D. 147 (E.D. Va. 1982). Accord: Terwillinger v. York International Corporation, 1997 U.S.Dist LEXIS 15117 (W.D.Va. 1997). Information in the tax returns is relevant to StanChem's marginal state and federal tax rate which in turn is relevant to the economic benefit StanChem allegedly enjoyed by its noncompliance or delayed compliance with the OCPSF rule. StanChem will be ordered to produce its tax returns unless it demonstrates an alternate source or sources for the information.[(4)]

Except for its general objection that the discovery sought by Complainant is burdensome and unreasonable, which has been rejected above, StanChem has not specifically objected to paras. 16 through 25 of the proposed discovery order and StanChem will be ordered to comply with these requests. StanChem has objected to para. 26 of the proposed discovery order because it calls for "legal analysis and conclusion" and because ".. the request is too vague to be understood or complied with." (Objection at 5).

Paragraph 26 is as follows: Provide an index of all materials that Respondent has manufactured since November 5, 1990 that would be OCPSF products if they were manufactured as OCPSF products at OCPSF establishments and identify which SIC code would describe those materials if they were products manufactured at an OCPSF establishment.

StanChem's objection to this request is sustained because it presupposes that StanChem possesses a thorough knowledge of the scope and application of the OCPSF rule, because it requires speculation by StanChem as to applicable SIC codes under hypothetical circumstances and because it appears to be an attempt by Complainant to assign StanChem tasks appropriate to Complainant's own case preparation.

Paragraph 27 of the proposed discovery order asks for copies of all correspondence between StanChem and all technical consultants and other third parties regarding whether StanChem is subject to 40 CFR Part 414; para. 28 asks for copies of all internal documents, including memoranda, meeting minutes, and other documents relevant to the applicability of 40 CFR Part 414 to StanChem's wastewater; and para. 29 asks for the identification of any trade, lobbying or similar business organization to which StanChem or any of its officers or management have belonged or been a member of since November 5, 1987; for the identification of the dates of such membership; and for a copy of any materials received by StanChem, its officers or management officials from such organizations since November 5, 1987.

StanChem has objected to these requests, asserting that the requests will not lead to the discovery of information having probative value because the requests incorrectly presume that StanChem is subject to the OCPSF rule and that StanChem had knowledge thereof and, inasmuch as Complainant has argued that StanChem's lack of knowledge of the applicability of the OCPSF rule is not a defense, the requests are irrelevant (Objection at 5). StanChem has also objected to these requests as unduly burdensome (Objection at 6).

The Clean Water Act is a strict liablility statute and lack of knowledge of its provisions or of regulations issued thereunder is not a defense to liability for violations thereof. Such knowledge or the lack thereof is or may, however, be relevant to penalty mitigation. It follows that paras. 27 through 29 of the proposed discovery order will be granted except that documents and materials, if any, StanChem is required to furnish in response to para. 29 are limited to those pertaining to the applicability or potential applicability of the OCPSF rule to StanChem's operations.

StanChem's Motion To Bifurcate The Hearing
And Motion To Compel Discovery

StanChem's motion to bifurcate the hearing is based upon the contention that the parties should not be required to spend time and effort on issues relevant only to damages (penalty) unless and until liability is found (Motion, dated December 12, 1997, at 1). This motion will be denied because it has the potential for prolonging a proceeding presently in an extended pretrial stage, the complaint having been issued on May 1, 1995. Moreover, issues of liability and penalty or penalty mitigation may readily be presented together and the expense and inconvenience of a second hearing outweigh the burden of any prehearing preparation that may ultimately prove to be unnecessary.

Paragraph 6 of the ALJ's order, dated September 26, 1997, which directed the parties to exchange specified prehearing information, required Complainant to submit a copy of civil penalty computation worksheets and a statement, conforming to Rule 22.14(a)(5), explaining the reasoning behind the proposed penalty. Responding, Complainant states that the Agency has not developed an enforcement response policy (ERP), or other policy, for CWA cases.[(5)] Therefore, Complainant says that there are no penalty computation worksheets associated with this action.

Complainant contends, however, that the proposed penalty of $125,000 is fully warranted, pointing to the number, frequency, and magnitude of the alleged violations; that there is no evidence of StanChem's inability to pay the proposed penalty; that in addition to the violations at issue here, StanChem has also violated lead limits in its state-issued permit; that StanChem should be considered highly culpable for the violations, because with proper attention to its regulatory responsibilities it could have installed equipment necessary to meet the November 5, 1990 compliance deadline; and that the economic benefit of noncompliance is currently calculated at approximately $96,000.

Complainant's prehearing Exhibit 29 assertedly contains a preliminary economic benefit calculation based on estimates of costs associated with control equipment typically used to comply with the OCPSF PSES. This exhibit reflects that "the economic benefit of a 59 month delay date, 90 months after noncompliance" is $96,818.

In its motion to compel, StanChem asserts that Complainant declined to submit the worksheets, statements, and explanations specifically required by the ALJ's order (Motion at 2). StanChem alludes to the new calculation of economic benefit of approximately $96,000 included with Complainant's prehearing exchange described above and points out that other than its proposed Exhibit 29, Complainant has provided no other information or reasoning explaining this new calculation or the estimates and assumptions upon which it is based. StanChem therefore moves for an order compelling Complainant to fully comply with the previous order and ordering Complainant to disclose: all of its current or previous calculations of the economic benefit allegedly derived by StanChem as a result of the alleged violations; all documents, information, and assumptions relied upon for such

calculations, and the reasoning behind such estimates, information, documents and assumptions (Motion at 3, 4).

Complainant has denied that any civil penalty computation worksheets within the purview of the ALJ's order of September 26, 1997, exist. This denial appears unrelated to the Agency's position that penalty policies under the CWA are solely for the purpose of determining EPA's "bottom line" in settlement negotiations which is not subject to discovery. Be that as it may, the record reflects that over 75 percent of the proposed penalty is attributable to alleged economic benefit or savings enjoyed by StanChem as a result of the violations.

Although Complainant may not be compelled to produce that which it denies exists, Rule 22.14(a)(5) (40 CFR Part 22) requires that a complaint contain a statement of the "reasoning behind the proposed penalty." Agency guidance on negotiating and litigating under the CWA states that this requirement may be fulfilled by reciting the factors the statute requires be considered in penalty determination.[(6)] The notion that the rote recitation of the statutory penalty factors constitutes compliance with the requirements of the rule for a statement of the reasoning behind the proposed penalty renders the rule requirement meaningless and is rejected. This is especially true as to fact intensive matters such as alleged economic benefit resulting from the violations. It is concluded that the rule requirement for a statement of the reasoning behind the proposed penalty includes all previous and present calculations of economic benefit resulting from the violations as well as the information, estimates and assumptions upon which these calculations are based. Complainant may not refuse to produce such information on the ground that it was allegedly compiled for settlement purposes. It follows that StanChem's motion to compel with the exception of the penalty computation worksheets, which Complainant says do not exist, will be granted.

ORDER

1. StanChem's First Amended Prehearing Exchange sets forth the general subject matter of the anticipated testimony of its witnesses and Complainant's motion that StanChem be directed to submit expanded summaries of such testimony is denied.

2. Complainant is directed to submit a summary of the expected testimony of its witness, Ms. Gail B. Coad.

3. StanChem is directed to furnish a list of citations to the Federal Register upon which it expects to refer or rely.

4. Complainant's motion for an order of discovery is granted in part and denied in part as indicated above.

5. StanChem's motion to bifurcate the hearing is denied.

6. StanChem's motion to compel is granted in part as indicated above.

The parties shall comply with this order on or before March 27, 1998.

Dated this 13th day of February 1998.

Original signed by undersigned

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Spencer T. Nissen
Administrative Law Judge

1. Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (July 2, 1990) at 24; Polychlorinated Biphenyls (PCB) Penalty Policy (April 9, 1990) at 16, 17.

2. Under the Rule 22.24 of the Rules of Practice (40 CFR Part 22), Complainant has the burden of establishing the violation alleged in the complaint and the appropriateness of the penalty.

3. It should be noted that a part from specific statutory provisions, it has long been the Agency's policy that penalties include any benefits resulting from noncompliance. See, e.g. "Policy On Civil Penalties - General Enforcement Policy" (GM-21, February 16, 1984) which provides ".. that penalties should as a minimum remove any significant economic benefit resulting from failure to comply with the law." (Id.3)

4. If copies of the tax returns are produced, StanChem may utilize procedures prescribed in 40 CFR § 2.201 et seq. to prevent public disclosure.

5. Prehearing Exchange, dated November 14, 1997, ¶ 6. This statement is not literally accurate, because EPA has issued various penalty policies under the CWA since 1980. These policies are, however, intended for use in determining the Agency's "bottom line" for settlements first, in judicial, and, after enactment of the Water Quality Act of 1987, in administrative litigation. This practice is continued in the most recent version, Interim Clean Water Act Settlement Penalty Policy (March 1, 1995).

6. Guidance on the Distinctions Among Pleading, Negotiating, and Litigating Civil Penalties for Enforcement Cases Under the Clean Water Act, January 19, 1989, at 4.