UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**
	)
PALM HARBOR HOMES, INC.,	**) Docket No. EPCRA-4-99-54**
	)
Respondent.	**)**

ORDER DENYING RESPONDENT'S MOTION FOR ADDITIONAL DISCOVERY

I. Background

On September 27, 1999, the Environmental Protection Agency, Region 4 (Complainant), initiated this action pursuant to section 325 of the Emergency Planning and Community Right-To-Know Act (EPCRA), 42 U.S.C. § 11045. The Complaint, as amended, charges Palm Harbor Homes, Inc. (Respondent) in 19 counts with violating EPCRA section 313 by failing to submit a toxic chemical release form (Form R) for diisocyanates, namely methylenebis (phenylisocyanate) ("MDI") and polymeric diphenylmethane diisocyanate ("PDD"), processed at ten of its facilities for calendar years 1994, 1995 and 1996. The Amended Complaint proposes a penalty of $17,000 or $18,000 for each count, resulting in a total proposed penalty of $340,000.

By Order dated October 3, 2000, Complainant's Motion for Accelerated Decision on Liability was granted and Respondent was found liable for each of the 19 violations alleged in the Complaint. Thus, the issue remaining in this action is the amount of the appropriate penalty to be imposed for those EPCRA violations.

In determining the appropriate penalty to be imposed, the Consolidated Rules of Practice, 40 C.F.R. part 22, provide that the Presiding Office shall consider any criteria set forth in the Act relating to the proper amount of a civil penalty, *and* any civil penalty guidelines issued under the Act. 40 C.F.R. §22.27(b).

EPCRA provides that any person violating Section 313 (42 U.S.C. §11023), the filing requirements at issue in this case, "shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation," but does not provide any guidance on determining the appropriate penalty to be applied in any particular case. *See*, 42 U.S.C. §11045(c). However, EPA has issued an Enforcement Response Policy (ERP) to guide the administrative assessment of civil

penalties for violations of EPCRA Section 313.

The EPCRA ERP utilizes a matrix and/or a per-day formula to determine a "gravity-based" penalty accounting for the circumstance level and extent level of the violation. Once this gravity-based penalty is determined, the ERP provides that upward or downward adjustments to that penalty may be made in consideration of other factors such as voluntary disclosure, history of prior violations, delisted chemicals, attitude, ability to pay and "other factors as justice may require."

Respondent submitted a Motion for Additional Discovery and memorandum of law in support (Motion), pursuant to 40 C.F.R. § 22.19(e), on November 30, 2000. Complainant submitted a written objection thereto on December 12, 2000 (Objection).

II. Standard for "Other Discovery"

Rule 22.19(e) of the Consolidated Rules of Practice, 40 C.F.R. 22.19(e), provides for "other discovery," that is, discovery other than that provided for in the prehearing exchange, only upon determination by the Presiding Officer that it:

> (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
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> (ii) Seeks information that is most reasonably obtained from the non-moving party, which the non-moving party has refused to provide voluntarily; and
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> (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

The term "significant probative value" denotes the "tendency of a piece of information to prove a fact that is of consequence in the case." *Chautauqua Hardware Corp.*, EPCRA Appeal No. 91-1, 3 E.A.D. 616, 622, 1991 EPCRA Lexis 2 (CJO, Order on Interlocutory Review, June 24, 1991).

III. Respondent's Discovery Requests

In its Motion, Respondent seeks four sets of documents from the Complainant.[1] The first two

[1] Respondent has requested Complainant to produce the documents voluntarily, and (continued...)

sets of documents sought are those concerning or relating to "any EPCRA § 313 enforcement actions undertaken by EPA Region 4 against any party for failure to report diisocyanates" or to "Region 4's EPCRA Enforcement Initiative Centered on Mobile Homes." Respondent asserts that these requests are significantly probative on its Fourth Affirmative Defense as well as on the Agency's penalty calculations.

Respondent's Fourth Affirmative Defense asserts that the penalty in this case should be reduced or eliminated "because EPA failed to notify Palm Harbor of the EPCRA Reporting Requirements and of their applicability to Palm Harbor." Respondent's Amended Answer and Defenses to Amended Complaint.

The documents requested by Respondent relate to the fair notice issue only with respect to Respondent's arguments that other parties failed to report diisocyanates and that EPA was apparently unaware of the listing of the diisocyanates category until 1995, which, Respondent asserted in opposition to Complainant's Motion for Accelerated Decision, evidence that the diisocyanate reporting requirements were unclear. However, documents relating to EPA's enforcement actions against other parties for failure to report diisocyanates does not have "significant probative value" on the issue of whether Respondent had fair notice of the reporting requirements. Moreover, the fair notice issue was already analyzed and ruled upon in regard to liability in the Order on Motion For Accelerated Decision issued October 3, 2000.

As to the penalty, and the issue of culpability, while "in some situations a person's lack of actual knowledge of a regulatory requirement might appropriately be considered in mitigation of a penalty," the ERP applicable here states that lack of knowledge does not reduce the penalty, because the ERP assumes as a baseline a lack of knowledge, allowing per day penalties or other enforcement actions in the event the violation was knowing or willful. *Catalina Yachts, Inc.*, EPCRA Appeal Nos. 98-2 & 98-5 (EAB, March 24, 1999), slip op. at 16-17. In the instant action, Complainant has not increased the penalty based upon an assertion that the violations were knowing or willful. *See*, Complainant's Initial Prehearing Exchange, Appendix A. Therefore, information as to Respondent's lack of knowledge and documents related thereto is not a matter of significant probative value on a disputed material issue.

As to the penalty calculation in general, information as to EPA's enforcement against other parties cannot be used to prove a fact bearing on the issue of the appropriateness of the proposed penalty. *Chautauqua Hardware Corp.*, slip op. at 17.

The second two sets of documents requested by Respondent concern communications which occurred between the Regions and which led to the initiation of this action by Region 4. Specifically,

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[1](...continued)
Complainant has refused to do so. Motion, Exhibits A and B.

Respondent seeks "[a]ll documents sent by Region 4 to Regions 6, 9 and/or 10 concerning or relating to the filing of Complainant's Complaint" and "[a]ll documents considered or relied upon by Regions 6, 9, and/or 10 in reaching their decision to allow Region 4 to file this action." Respondent alleges that these documents "may contain information that is directly related and relevant to Palm Harbor's Fifth, Sixth and Seventh Affirmative Defenses." Motion at 3. Respondent's Fifth Affirmative Defense is that the penalty should be eliminated or reduced because "all but one of the violations alleged were discovered and voluntarily self corrected by Palm Harbor." The Sixth and Seventh defenses assert, respectively, that Counts X through XIX of the Complaint should be dismissed because Region 4 does not have authority to bring EPCRA on behalf of other Regions, and that Regions 6, 9 and 10 improperly delegated their authority to Region 4 to bring the claims. Respondent's Amended Answer and Defenses to Amended Complaint.

Respondent refers to the Agency's Self-Disclosure Policy ("Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," 65 Fed. Reg. 19618 (April 11, 2000)), in asserting that a multi-facility company that self discloses violations at other facilities can receive penalty waivers or reductions for the disclosures even if one facility is already under investigation.[2] Complainant did not reduce the proposed penalty for self-disclosure because Respondent filed the Section 313 reports for all of the facilities only after EPA issued a Notice of Violation for Respondent's Boaz facility. Respondent asserts that the documents sought will reveal whether Regions 6, 9 and 10 had already identified the violations that Respondent believes it self-disclosed. However, Complainant correctly points out that such Self-Disclosure Policy, and its 1996 predecessor (60 Fed. Reg. 66706), do not apply to litigated penalty assessments. *Bollman Hat Company*, EPCRA Appeal No. 98-4 (EAB, February 11, 1999). Thus, the terms in those policies for reducing a penalty in settlement are not relevant here.

Further, although Complainant issued the Notice of Violation for the Boaz facility on May 15, 1998, Complainant concedes that it learned about the violations at Respondent's other facilities only

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[2] The ERP is not clear as to whether a company's receipt of notice of a violation at one of its facilities prevents the company from obtaining a reduction for self-disclosure as to any of its other facilities. The ERP provides that:

> The Agency will not consider a *facility* to be eligible for any voluntary disclosure reductions if *the company* has been notified of a scheduled inspection . . . or the *facility* has been contacted by U.S. EPA for the purpose of determining compliance with EPCRA § 313. (Emphasis added).

Complainant's Prehearing Exchange Exhibit 3, p.14.

after Respondent filed its Section 313 reports for all of its facilities on or about June 11, 1998. Opposition at 7. There is no dispute that Complainant had not identified the violations at the other facilities until after Respondent disclosed them by filing its Section 313 reports. Therefore, correspondence among the Regions relating to the Complaint does not have probative value on a disputed issue of material fact.

Respondent baldly asserts that the third and fourth sets of documents "may contain information that is directly related and relevant to" its Sixth and Seventh Affirmative Defenses, without any supporting argument. These defenses, challenging the lawfulness of Region 4's initiation of this action, were resolved in the Order on Motion for Accelerated Decision, wherein it was held that the Region was authorized to institute this action for violations which occurred outside of the Region, and the fact that Region 4 did so was not a bar to liability. This is now the law of the case. Respondent has not alleged nor is it evident how this issue of delegated authority would pertain to the appropriate penalty to be calculated in this case. Therefore, discovery directed to the issue would not have significant probative value on a material issue in dispute.

It is concluded that Respondent's request for additional discovery does not meet the requirements of 40 C.F.R. § 22.19(e).

ORDER

Accordingly, Respondent's Motion for Additional Discovery is hereby **DENIED**.

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Susan L. Biro
Chief Administrative Law Judge

Dated: December 22, 2000
Washington, D.C.