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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)	
)	
PERMA-GUARD, INC.,)	IF&R Docket No.
VIII-97-02)	
)	
Respondent)	

ORDER GRANTING COMPLAINANT'S MOTIONS
TO AMEND PREHEARING EXCHANGE
AND FOR LEAVE TO POSE FIRST SET OF INTERROGATORIES
AND REQUEST FOR PRODUCTION

I. Summary

Complainant filed a motion for leave to impose on Respondent interrogatories and a request for production of documents in regard to Respondent's ability to pay the proposed penalty. Complainant also moved to amend its prehearing exchange to add an expert witness. Respondent did not respond to the motions. Complainant's motions are granted as stated below.

II. Background

On September 25, 1997, the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, U. S. Environmental Protection Agency Region VIII (Complainant) issued the Complaint initiating this proceeding against Respondents, Perma-Guard, Inc. and Universal Diatoms, Inc., under Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 1361 (a). The Complaint alleged three counts of selling or distributing pesticides which were unregistered, unauthorized or misbranded, in violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E). Complainant proposed a penalty of \$5,000 for each violation, for a total proposed penalty of \$15,000.

In response to the Complaint, Respondent Perma-Guard Inc. (Perma-Guard), appearing *pro se*, submitted letters, dated October 17, 1997, February 27, 1998 and March 27,

2998 responding to the Complaint, asserting some defenses and requesting a hearing. By Order dated October 27, 1998, the Complaint was dismissed against Respondent Universal Diatoms. Pursuant to a Prehearing Order to file a prehearing exchange by August 21, 1998, and an Order to Show Cause, Perma-Guard filed a prehearing exchange on September 29, 1998, not listing any witnesses, and stating, *inter alia*, "Expert witnesses - None" and "Submission of Evidence - None." Perma-Guard also stated therein that the proposed penalty will adversely affect its financial condition, that its annual gross sales have never exceeded \$399,237, that it has never made a profit, and that it "has no additional documents to submit." It is noted that, on March 27, 1998, Perma-Guard submitted financial information, including balance sheets and income statements for 1993 through 1997, Federal income tax returns for 1994, 1996 and 1997, and other federal tax documents.

In the November 4, 1998 Order Scheduling Hearing, Perma-Guard was explicitly advised that if it wished to call any witnesses at the hearing or to rely on any documents for its defense, it must file an Amended Prehearing Exchange on or before November 30, 1998. No such document has been filed to date. Therefore, Perma-Guard will not be permitted to call any witnesses or introduce any documents into evidence at the hearing of this case now scheduled for February 9, 1999.

However, on December 29, 1998, Complainant moved to amend its prehearing exchange to add an expert witness, Mark Ewen, of Industrial Economics, Inc., Cambridge, Massachusetts, to its list of proposed witnesses to testify at the hearing. Complainant indicated Mr. Ewen would testify regarding the financial condition of Perma-Guard and its ability to pay a penalty.

Pursuant to 40 C.F.R. § 22.19(f), Complainant filed on December 31, 1998 a "Motion To For (sic) Leave to Pose First Set of Interrogatories and Request for Production of Documents" (Motion) along with a set of interrogatories (Interrogatories) and a document production request. Grounds for the Motion are that Complainant needs more information to conduct a comprehensive financial analysis of Perma-Guard's ability to pay, and information as to the relationship between Perma-Guard and Universal Diatoms, Inc. Complainant alternatively requests Respondent to answer any of the requests for information deemed fair and reasonable by the undersigned.

III. Discussion

Complainant seeks to amend its prehearing exchange to add an expert witness to testify as to Perma-Guard's financial condition "to enable EPA to meet its burden of reasonably and diligently evaluating Respondent's ability to pay the proposed penalty." The Order Scheduling Hearing allowed motions in this proceeding to be filed until December 31, 1998, and thus the motion to amend is timely. No reason is provided as to why Complainant did not list a witness to testify as to ability to pay in its initial prehearing exchange, as Perma-Guard raised the issue of inability to pay the proposed penalty in its letter dated October 27, 1997. Nevertheless, I find no reason to deny Complainant's motion to amend the prehearing exchange.

As to the motion to pose interrogatories and request for production, the Rules of Practice authorize discovery beyond that provided in the prehearing exchange, where the presiding officer determines:

- (i) That such discovery will not in any way unreasonably delay the proceeding,
- (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). A motion for such discovery must set forth the circumstances warranting the taking of discovery, the nature of the information to be discovered, and the proposed time and place where it will be taken. 40 C.F.R. § 22.19(f)(3).

Complainant alleges that the proceeding will not be delayed unreasonably, as the hearing is scheduled six weeks from the date of Complainant's request. Complainant further alleges that the information it seeks is not otherwise obtainable, noting

the lack of authority under FIFRA for subpoenas, and that the information has significant probative value on the issue of Perma-Guard's financial condition. Complainant states that it seeks information as to potential affiliates of Perma-Guard, noting that Respondent has claimed it has not made a profit or paid its directors, officers and shareholders in the past five years. Complainant suggests that no business can do that standing alone; it must be receiving funding from other sources.

In the Interrogatories, Complainant requests, *inter alia*, information as to business facilities, business locations, ownership, and operations of Perma-Guard and Universal Diatoms, Inc.; information as to which companies Perma-Guard employs for shipping services and from whom it obtains raw materials; employment, perquisites and compensation information as to Perma-Guard's employees, officers, directors and shareholders; a description of Perma-Guard's bank accounts, investments, property and assets and likely future performance; and information as to stock, stockholders, and dissolution of Universal Diatoms, Inc. These requests appear to be reasonable, would not unduly delay the proceeding, and the information requested appears to be of significant probative value as to Respondent's financial condition. This information should be in the possession of Perma-Guard, and is not "otherwise obtainable."⁽¹⁾

Complainant also requests in Paragraph 10 of the Interrogatories, information as to "all other entities, companies and individuals in which Perma-Guard, and/or the shareholders of Perma-Guard, have an ownership share, association, affiliation or other connection, if any, including, but not limited to" a list of 30 individuals and business entities. Complainant requests further, in Paragraph 14 of the Interrogatories, a "narrative description of the ownership structure, operating characteristics, and exchange of goods and services of Perma-Guard, Universal Diatoms and any other affiliated, associated or connected companies or individuals at all times during the last ten years."

The requests in Paragraphs 10 and 14 of the Interrogatories are very broad and Perma-Guard may not be able to submit all such information within a reasonable period of time prior to the hearing, which may unduly delay this proceeding. The language "all other entities, companies and individuals in which Perma-Guard, and/or the shareholders of Perma-Guard, have . . . any other connection" and "any . . . connected companies or individuals" is extremely broad. The terms "connected" and "connection" are defined as "joined," "to place or establish in a relationship," "a social, professional or commercial relationship, and "a person connected with others esp. by marriage, kinship or common interest." Webster's Ninth New Collegiate Dictionary p. 278. Thus, Complainant's request would encompass information irrelevant to this proceeding, such as social and marital relationships of Perma-Guard's shareholders. Companies or individuals who are "connected" or have a "connection" with Perma-Guard or Universal Diatoms may include commercial relationships irrelevant to this proceeding, such as building repair, maintenance, or vending machine services. Paragraph 14 requests information going back ten years. Such historical information does not have significant probative value as to Perma-Guard's current ability to pay a penalty.

Thus, Complainant's request must be narrowed to information that is of significant probative value as to the issue of Respondent's ability to pay a penalty. In Paragraph 10 of the Interrogatories, the term "or other connection" should be deleted to preclude irrelevant information. Regarding Paragraphs 10 and 14, information as to companies, individuals or entities which have a business association or affiliation with Perma-Guard may be significantly probative of Perma-Guard's ability to pay, but not other "connected" companies, entities and individuals. Only descriptions of companies and individuals affiliated or associated with Perma-Guard within the last three years should be requested.⁽²⁾

As to production of documents, Complainant requests "For the past five year period . . . all loan applications, loan or financing agreements, and security agreements involving Perma-Guard," and "any such applications or agreements made by or agreed to by Perma-Guard stockholders." Complainant requests description of funds loaned, repayment schedules and other information related to any such loans. This request

is consistent with EPA Guidance on Determining a Violator's Ability to Pay a Civil Penalty, dated December 16, 1986. (3) The information requested is not otherwise obtainable, and should not unduly delay the proceeding.

Order

1. Complainant's Motion for Leave to Pose First Set of Interrogatories and Request for Production of Documents is GRANTED, and Respondent Perma-Guard shall respond to those discovery requests as proposed, except that the first clause of Paragraph 10 shall be amended as follows:

"10. List all other entities, companies or individuals as to which Perma-Guard, and/or the shareholders of Perma-Guard, have an ownership share, business association or affiliation, including, but not limited to:"

"14. Please provide a narrative description of the ownership structure, operating characteristics, and exchange of goods and services of Perma-Guard, Universal Diatoms and any other companies or individuals which have been affiliated or associated with Perma-Guard during the past three years."

2. Respondent shall submit to Complainant its responses to the First Set of Interrogatories and request for Production of Documents **on or before January 31, 1999**.

3. Complainant's Motion to Amend Prehearing Exchange, dated December 29, 1998, is GRANTED.

Susan L. Biro
Chief Administrative Law Judge

Dated: January 15, 1999
Washington, D.C.

1. As referenced in the Order Dismissing Complaint Against Respondent Universal Diatoms, Inc. and the Order for Complainant to Show Cause as to Respondent Universal Diatoms, Inc., there are indications in documents submitted in this proceeding that Wallace Tharp, President of Perma-Guard, was the registered agent and president of Universal Diatoms, Inc., and that the two companies share a post office box address.

2. An EPA guidance document entitled "Guidance on Determining a Violator's Ability to pay a Civil Penalty," dated December 16, 1986 (GM-56), states as follows:

Financial information to request from for-profit entities may include the most recent three to five years of: . . . Statements of changes in financial position; . . . Statements of operations;. . . Loan applications, financing agreements, security agreements ****

When requesting information informally or through interrogatories or discovery, EPA should ask for three to five years of tax returns along with all other financial information that a violator regularly maintains as business records (emphasis added).

Thus, descriptions of companies and individuals affiliated or associated with Perma-Guard within the past three years is consistent with this guidance document.

3. See note 2.

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