2/23/94

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
GASETERIA OIL CORPORATION,	)	**Docket No. II RCRA-UST-92-0210**
	)	
Respondent	)	

ORDER DENYING MOTION FOR DISCOVERY

For the reasons stated in its motion served November 22, 1993, respondent seeks an order, pursuant to 40 C.F.R. § 22.19(f), to compel discovery of complainant. It requests that complainant, the U.S. Environmental Protection Agency (sometimes EPA), be required to submit documents and that it be permitted to depose certain employees of complainant. Pursuant to 40 C.F.R., § 22.19(f)(a), respondent also requests that sanctions be imposed against complainant for failure to comply with any discovery order. Complainant served a response to the motion on December 3, 1993. The parties are aware of their positions and arguments, and they will not be restated here except to the degree the Administrative Law Judge (ALJ) deems appropriate.

Some preliminary observations will be noted here. A large amount of discretion is accorded the ALJ in questions concerning discovery, and the resolutions of discovery issues perforce turn upon the facts of the individual case and the applicable law and regulations. Discovery can be salutary. Stated broadly, it may lead to admissible evidence; it may more precisely define and

narrow the issues; it may result in a more expedited hearing or the settlement of the matter. Notwithstanding these vaunted virtues, discovery as a litigation art may be put to inapposite uses to the disadvantage of justice. Therefore, let it be emphasized here that neither party will be permitted, under the guise of discovery, to engage in delaying, paper-producing, action-avoiding tactics. Further, discovery in an administrative hearing is different from federal civil proceedings. There is no basic constitutional right to pretrial discovery in administrative proceedings. Silverman v. Commodity Futures Trading Commission, 549 F.2d 28, 33 (7th Cir. 1977); 4 Stein, Mitchell, Mezines, Administrative Law, § 23.01[1]. However, "discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process." McClelland v. Andrus, 606 F.2d 1278, 1285 (D.C. Cir. 1979); quoted in, inter alia, Mister Discount Stockbrokers, Inc. v. SEC, 768 F.2d 875 (1985). The concept of "due process" is not immutable. Resolution of discovery issues turn upon the facts of each case and the applicable law and regulations. Under the Consolidated Rules of Practice, 40 C.F.R. Part 22, the parties are required only to exchange the names of the expert and other witnesses along with a "brief narrative" summary of their testimony, and documents which each party intends to introduce into evidence. 40 C.F.R. § 22.19(b). Beyond this, the parties are not obligated to complete any other discovery. Although voluntary discovery is strongly encouraged, it is not mandatory. After the prehearing exchanges, if the parties are not able to complete

discovery voluntarily, then they may motion for further discovery pursuant to 40 C.F.R. § 22.19(f). The section, in pertinent part, reads as follows:

> Other discovery. (1) Except as provided by paragraph (b) of this section, further discovery, under this section, shall be permitted only upon determination by the Presiding Officer:
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> (i) That such discovery will not in any way unreasonably delay the proceeding;
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> (ii) That the information to be obtained is not otherwise obtainable; and
>
> (iii) That such information has significant probative value.
>
> (2) The Presiding Officer shall order depositions upon oral questions only upon a showing of good cause and upon a finding that:
>
> (i) The information sought cannot be obtained by alternative methods; or
>
> (ii) There is substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

Respondent made discovery requests set out in 40 separate paragraphs, and EPA provided documents or referred to documents previously provided for seven of these, paragraph numbers 5, 11, 12, 14, 18, 19, and 37. Complainant declared that no documents were in its possession which were responsive to the requests in paragraphs 16, 22, 23, 26, 31, and 38. Respondent requests an order compelling complainant to respond to discovery requests in paragraph numbers 1-4, 6-10, 13, 15, 17, 20, 21, 23-25, 27-36, 39 and 40.

The requests will be divided into categories in the following discussion in the interest of simplicity.

Category I - Environmental Harm (paragraphs 17, 25, 32, 34, 40)

Respondent's requests for information concerning environmental harm are very broadly phrased and such information is "otherwise available" by requesting such public information from EPA's Office of Underground Storage Tanks (OUST). For example, Respondent requests "[e]ach document referring to" the threat to human health and/or the environment caused by Respondent's or any UST's alleged violations of 40 C.F.R. Part 280. (¶¶ 17, 25), and "[a]ll documents supporting EPA's contention . . . that the 'Potential for Harm' . . . . is 'major'" (¶ 40). Complainant points out that the proposed penalty is calculated according to the potential for harm, as described in the U.S. EPA Penalty Guidance for Violations of UST Regulations ("UST penalty guidance"), not actual harm. For these reasons, **IT IS ORDERED** that respondent's discovery requests in this category be **DENIED**.

Category II - Agency Interpretation of Regulations; practicality of enforcement (paragraphs 1-3, 24, 39)

Respondent requests EPA documents (directives, consent orders, decisions, etc.) interpreting the terms "operator," "UST Systems," and "Facility" in paragraphs 1-3. Such documents are "otherwise available" by standard legal research, such as LEXIS, and from OUST. Complainant also responds that it has searched EPA Region II

files and inquired from OUST and is unaware of the existence of any policy documents interpreting the term "operator." **IT IS ORDERED** that respondent's discovery requests in this category be **DENIED**.

Category III - EPA's Authority to Enforce Federal UST Regulations in City of New York (paragraphs 23, 34, 39)

Paragraph 23 requests documents relating to whether the New York City Fire Department is the appropriate agency to implement the UST regulatory program for the City. This is not a question of fact, but of law. EPA is the "implementing agency" unless the state has an approved program under RCRA (Resource Conservation and Recovery Act) section 9004 or a Memorandum of Agreement with the state. 40 C.F.R. § 280.12. Documents relating to such an issue have no "significant probative value" because, as that term is defined in Chautauqua Hardware Corp., EPCRA Appeal No. 91-1 at 10-11 (June 24, 1991), they do not tend "to prove a fact that is of consequence in the case."

Paragraphs 34 and 39 request "All documents pertaining to the manner in which 40 C.F.R. Part 280 should be enforced in New York City and other urban areas," and documents regarding "UST regulatory issues." Complainant points out that any such documents are "otherwise available" through OUST, and that they would bear on policy issues, which would not have "probative value" as defined in Chautauqua Hardware Corp., supra. **IT IS ORDERED** that respondent's discovery requests in this category be **DENIED**.

Category IV - Selective Enforcement

(paragraphs 15, 27, 28, 29, 30, 36)

Item 15 requests enforcement manuals pertaining to civil penalties under the Hazardous and Solid Waste Amendments of 1984. Complainant replies that it provided respondent with the only such manuals that it relied on for purposes of this proceeding, the UST penalty guidance and the UST/LUST Enforcement Procedure Guidance Manual. Any other such documents would have no significant probative value.

As to the other items, respondent seeks copies of all Information Request Letters regarding USTs from Region II, a list of all UST owners and operators in the State of New York, a list of all such owners and operators in full compliance with federal regulations, and copies of all consent orders, ALJ decisions and settlement documents under 40 C.F.R. Part 280. These documents are of no significant probative value.

As noted in Chautauqua Hardware Corp., "what has happened in other cases can have no bearing on any factual issues in this case." See also, Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187, rehearing denied, 412 U.S. 933 (1973) ("The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases."); In re Industrial Fuels and Resources, Inc., Docket No. V-W-91-R-17, at 5 (Order, May 13, 1992) ("[A]ny question about selectivity of EPA in prosecuting complaints under RCRA or in imposing penalties therefore . . . does

not have 'significant probative value'."); Falls v. Town of Dyer, Indiana, 875 F.2d 146, 148 (7th Cir. 1989) ("A government legitimately could enforce its law against a few persons (even just one) to establish a precedent, ultimately leading to widespread compliance . . . . Selectivity is not only inevitable but also desirable when it conserves resources.") **IT IS ORDERED** that respondent's discovery requests in this category be **DENIED**.

Category V - Penalties (paragraphs 13, 20, 21, 33, 35)

Paragraph 13 requests a photocopy of each and every imposition of penalties pursuant to the UST penalty guidance. This request has no significant probative value for the reason stated in Category IV, supra.

Paragraphs 20 and 21 demand copies of the RCRA penalty policy and an EPA guidance document for calculating economic benefit of non-compliance. These documents are otherwise obtainable through LEXIS and environmental law looseleaf services.

Items 33 and 35 are requests for documents relating to penalties under the Medical Waste Tracking Act. This Act does not pertain to UST systems. What penalties may have been assessed under that statute lacks probative value. **IT IS ORDERED** that respondent's requests in this category be **DENIED**.

Category VI - Sources of EPA Data (paragraphs 4, 6-10, 31)

In paragraph 4, respondent asks for documents substantiating EPA's allegation that respondent is the owner of 20 out-of-service

UST systems, as alleged in paragraph 4 of the complaint. Complainant argues that such allegation is based on documents generated and submitted by respondent to EPA or the State of New York, and in the possession of respondent. Respondent's May 28, 1992 response to complainant's information request letter (complainant's May 3, 1993 prehearing exchange, exhibit 5) is the source of information that the systems were out of service. Respondent has not responded to the contrary. For example, that it does not have such documents in its possession, and complainant's argument is therefore accepted.

Item 6 requests all documents in EPA's possession that refer to or relate to respondent and/or to the service stations listed in Table I of the complaint. Complainant responds that any such documents that were relied on to support its prima facie case have already been provided to respondent in the prehearing exchange. This request is also overly broad, and fails to delineate or specify what documents exist and whether they would prejudice respondent's defense.

Requests 7 through 10 ask for documents EPA relied on to support allegations in the complaint, and complainant responds that they have already been provided, in its prehearing exchange (exhibits 2, 4, 5, 6).

Paragraph 31 asks for all documents pertaining to respondent received from certain state and local government entities. Complainant asserts that to the extent any such documents have significant probative value, same was provided as exhibit 6 in its

prehearing exchange. Again, this request is overly broad and would require EPA to make decisions as to what information would "pertain to" respondent. See, Sims v. National Transportation Safety Board, 662 F.2d 668, 672 (10th Cir. 1981) ("Effective discovery requires preliminary inquiry in order to find out what is there. Thus the discovery should be pinpointed . . . therefore the requests were . . . inadequate . . . ."). **IT IS ORDERED** that respondent's discovery requests in this category be denied.

In sum, and in the interest of clarity, **IT IS ORDERED** that respondent's motion to compel discovery be **DENIED** in its entirety. Further, the ALJ concludes that respondent by this order is not prejudiced to the extent where there is the denial of due process.

Frank W. Vanderheyden
Administrative Law Judge

Date February 23, 1994

IN THE MATTER OF GASETERIA OIL CORPORATION, Respondent
Docket No. II RCRA-UST-92-0210

Certificate of Service

I certify that the foregoing Order, dated 2/23/94, was sent this day in the following manner to the below addressees:

Original by Regular Mail to:

Ms. Karen Maples
Regional Hearing Clerk
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Dated Feb. 23, 1994