UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
VEMCO, INC.,	)	**Docket No. CAA-05-2002-0012**
d/b/a VENTURE GRAND RAPIDS	)	
	)	
Respondent	)	

ORDER ON MOTIONS TO AMEND THE COMPLAINT AND FOR FURTHER DISCOVERY

On February 24, 2003, Complainant, the Director of the Air and Radiation Division of the United States Environmental Protection Agency Region 5, filed a Motion to Amend the Complaint Instanter (Motion to Amend). On March 5, 2003, Complainant filed a Motion for Further Discovery. Complainant contacted counsel for Respondent about the motions, and Respondent did not object to them. The Motions are granted for the reasons set forth below.

This proceeding was initiated by a Complaint filed on September 12, 2002, under the Clean Air Act (CAA), charging Respondent with four counts of violating the State Implementation Plan (SIP) for the State of Michigan. Respondent filed an Answer to the Complaint, requesting a hearing, and thereafter the parties filed prehearing exchanges. The hearing in this matter is scheduled to commence on May 13, 2003.

I. Motion to Amend the Complaint

Complainant seeks to make minor corrections to the Complaint, including correcting calculation errors, deleting certain references to the SIP, adding a few words, and deleting a few paragraphs. The Supreme Court set forth criteria in *Foman v. Davis*, 371 U.S. 178 (1962) for denying motions to amend pleadings, namely undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies, undue prejudice to the opposing party and futility of the amendments. None of these criteria are apparent in this case, and Respondent has not objected to the Motion.

Accordingly, Complainant's Motion to Amend the Complaint Instanter is **GRANTED.** The Amended Administrative Complaint, an unsigned copy of which was attached to the Motion, shall be signed and filed with the Regional Hearing Clerk and served on Respondent within 5 days of the date of this Order. It does not appear necessary for Respondent to file an Answer to the Amended Complaint, but in the event Respondent deems it necessary, such Answer shall be filed within 15 days of the date of this Order.

II. Motion for Further Discovery

In the Motion for Further Discovery, Complainant seeks issuance of an order directing Respondent to provide complete and preferably audited financial statements and all corporate minutes for the last three years for Respondent, Venture Industries Corporation, and Venture Holdings Co. LLC; Respondent's cumulative depreciation schedules for the last three years; and debt instruments supporting Respondent's intercompany payable debt for December 31, 2001 and December 31, 2002. Complainant states that it sent this list to counsel for Respondent, who sent it to his client, but Respondent's counsel did not inform Complainant whether or when Respondent would provide all the documents requested. Complainant filed the Motion for Further Discovery to ensure that Respondent will provide the information sought in sufficient time before the hearing to allow a thorough review and analysis of the information.

Complainant points out that Respondent raised in its Answer the issue of "financial impact of the penalty on the Grand Rapids facility." Respondent stated in its Prehearing Exchange statement (at 6) that it is a subsidiary of Venture Industries and that both "have been in extreme financial hardship over the last six months" and that "[n]egotiations are ongoing at this time to keep these entities out of bankruptcy." Respondent includes as prehearing exhibits its unaudited consolidated balance sheets, unaudited consolidated statements of income and of cash flow for 2000, 2001 and first nine months of 2002, and its tax returns as an S Corporation for 1999, 2000 and 2001. Based on the tax return documents, Complainant's financial analyst prepared a preliminary ability-to-pay analysis, finding that Respondent has the ability to pay the proposed penalty. Complainant seeks corporate minutes for stockholder meetings, directors' meetings, and other special meetings for the three companies, because they formally document corporate decisions regarding asset purchases, capital financing of operations, discretionary payments for bonuses, fringe benefits, dividend distributions, etc., and because they further document "what is ordinary and necessary in the recent operations of Vemco." Memorandum in Support of Motion for Further Discovery at 5. Complainant seeks Respondent's depreciation records for disclosure of recent purchase or transfer of assets and any unnecessary or luxury items. Debt records may disclose related party debt which may be renegotiable and may be a source of funds to pay a penalty.

The Consolidated Rules of Practice provide, at 40 C.F.R. § 22.19(e), that after the prehearing exchange, other discovery may be ordered "only of it: (i) will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party; (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and (iii) seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought." Because the hearing is scheduled to commence in about six weeks, the discovery request should not unreasonably delay the proceeding.

From Complainant's Motion, it is not clear that Respondent has refused to provide the information voluntarily. However, the Motion for Further Discovery was filed on March 5,

2003, and states therein that counsel for Respondent had informed Complainant that he provided the list of documents to Respondent, which list was sent by facsimile and by e-mail from Complainant's counsel to Respondent's counsel on February 20 and February 25, 2003, respectively. In light of the fact that over a month has elapsed since February 20, and that counsel for Complainant reported on March 27, 2003, upon telephone inquiry from the undersigned's office, that Complainant has not received any of the documents sought from Respondent, it is assumed that Respondent has not voluntarily complied with Complainant's discovery request.

The remaining questions are whether the discovery request will unreasonably burden the Respondent, and whether it seeks information that has significant probative value on a disputed issue of material fact relevant to the relief sought. Section 113(e) of the CAA provides that "the economic impact of the penalty on the business" is a factor in determining the amount of a penalty, and Respondent has raised this issue in its Answer.

The Environmental Appeals Board (EAB) has acknowledged that a determination of whether to grant a motion for other discovery involves the exercise of considerable discretion and a subjective judgment on the need for, and value of the additional discovery and possible delay and disruption it might entail. *Chempace Corp.*, 9 E.A.D. 119, 134 (EAB 2000). The EAB discussed the issue of discovery of financial documents in the context of the similar penalty determination factor "ability to pay" under the Toxic Substances Control Act, stating that "in any case when ability to pay is put in issue, the Region must be given access to the respondent's financial records before the start of such hearing." *New Waterbury, Ltd.,* 5 E.A.D. 529, 542 (EAB 1994). The EAB stated further that under the 1980 TSCA Penalty Policy, in determining whether to further reduce a penalty for inability to pay, after an initial four-percent-of-income rule is applied under the Policy, the Region should "examine whether the respondent is part of a complex arrangement of interrelated small companies" and to "examine those corporate relationships to establish the respondent's cash flow and likely future course, including the respondent's ability to obtain resources or borrow funds from those related companies." 5 E.A.D. at 547. In *Chempace*, the EAB found that an ALJ did not abuse his discretion in denying discovery of detailed financial information including cumulative depreciation schedules, corporate minutes, cost and value of assets, corporate tax returns of a subsidiary, and contracts between the respondent and its subsidiaries, after the respondent had already provided five years of tax returns and financial statements. However, the EAB noted that the detailed information "may have been useful for the Region to review," and that the EAB accords "considerable deference" to the ALJ's discovery ruling, particularly on the issue of the amount of penalty. 9 E.A.D. at 134-135.

The information requested appears to have some probative value on the disputed issue of the financial impact of a penalty on Respondent, which is material to the determination of the penalty. Whether all of it has *significant* probative value is not readily apparent. If Respondent produced financial documents on the eve of hearing, without providing Complainant with adequate time to analyze them and prepare for hearing, Complainant may be severely prejudiced in its attempt to rebut such evidence. However, this consideration must be balanced with the

burden on Respondent to compile and submit the requested information within a short period of time. Balancing these considerations, it is concluded that Respondent must submit the requested information by April 18, 2003, after which time any such information may not be admitted into the record unless Respondent shows good cause why it was not produced within the allotted time.[1] If any such information is significantly probative, and Respondent fails to provide it within the time provided, an inference may be drawn that the information would be adverse to Respondent, or the information may be excluded from evidence. 40 C.F.R. § 22.19(g).

Accordingly, Complainant's Motion for Further Discovery is **GRANTED.** Respondent shall file and serve the information requested by Complainant in the Motion, on or before **April 18, 2003.**

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Susan L. Biro
Chief Administrative Law Judge

Dated: March 28, 2003
Washington, D.C.

[1] The Rules provide at 40 C.F.R. § 22.22(a) a fifteen day period prior to hearing within which submission of additional information is subject to a higher standard of admission into the record: the party must show good cause for failing to exchange the information sooner, and have provided it to other parties as soon as the party had control of the information, or show good cause for not doing so. Due to the nature of the information requested by Complainant, a longer period than 15 days prior to hearing is deemed necessary for a higher standard to apply.