7/8/96

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
NEOPLAN USA CORPORATION,	)	DOCKET NO. EPCRA-VIII-94-04
	)	
	)	
RESPONDENT	)	

ORDER ON DISCOVERY

In this proceeding under Section 325(c) of the Emergency Planning and Community Right-To-Know Act (EPCRA), 42 U.S.C. § 11045(c), Respondent, Neoplan, has, concomitant with the filing of a supplemental prehearing exchange, filed a motion for discovery pursuant to Rule 22.19(f), 40 CFR Part 22 (Motion, dated May 13, 1996). The complaint, issued on April 15, 1994, charged Neoplan with failing to file "Form R" showing quantities of acetone "otherwise used" at its facility during the calendar year 1990 on or before July 1, 1991, as required by EPCRA § 313. Count II alleged that the "Form R" showing quantities of acetone "otherwise used" for the calendar year 1991, was inaccurate in that air emissions were designated as "N/A". Neoplan answered, admitting that it failed to file "Form R" showing quantities of acetone "otherwise used" for the calendar year 1990 as alleged in the complaint. Neoplan also admitted that its "Form R" for the calendar year 1991 initially reported acetone emissions as "N/A". Neoplan denied, however, that the reporting requirements at issue applied to it and requested a hearing.

Over Neoplan's opposition, Complainant was permitted to amend the complaint so as to add Counts III, IV, and V, alleging that Neoplan "otherwise used" quantities of toluene in excess of the 10,000-pound threshold during the calendar years 1990, 1992, and 1993 and failed to submit Form Rs to the Administrator or to the State of Colorado on or before July 1, 1991, July 1, 1993, or July 1, 1994, respectively (Order, dated February 13, 1996). Neoplan answered, reiterating its answer, summarized above, with respect to Counts I and II, admitting that it now appears that Neoplan used more than 10,000 pounds of toluene at its facility during the years 1990, 1992, and 1993, and admitting that it did not file "Form R" showing the quantity of toluene "otherwise used" with the Administrator or the State of Colorado on or before July 1, 1991, July 1, 1993, or July 1, 1994, respectively. Neoplan denied, however, that the reporting requirement at issue applied to it. Moreover, Neoplan alleged that it had been informed by EPA that Form R need not be filed. Neoplan contested the proposed penalty as excessive and requested a hearing.

Neoplan's contention that the reporting requirements of EPCRA § 313(f) are not applicable is based upon the assertion that the 25,000-pound threshold for chemicals "processed" applies rather than the 10,000-pound threshold for chemicals "otherwise used". Moreover, as to acetone, which has since been delisted (60 Fed. Reg. 31643, June 16, 1995), Neoplan alleges that even if the lower threshold applies, the amount used or processed during the years in question was, in fact, less than 10,000 pounds.

Included in Neoplan's supplemental prehearing exchange is a copy of a note assertedly written by Mr. Sonny Aguilera of Neoplan, which purports to summarize a telephone conversation with one "Jeff H" of EPA. The call, made to 1-703-412-9877, which apparently is or was EPA's hotline for EPCRA reporting information, was allegedly placed at approximately 11:00 am on September 6, 1994. The handwritten note provides: "@ 11:00 Talked to Jeff H - He told me the formula that we used for calculation seems to be the [right] one. Also don't have to report Toluene if not over threshold max. 25,000 lbs."[1/] Neoplan asserts that it has attempted to further identify "Jeff H", but has been unable to do so.

In its motion for discovery, Neoplan says that its difference with Complainant as to whether the 25,000-pound or the 10,000-pound reporting threshold applies relate to the evaporation of acetone and toluene in the paint products applied during bus manufacturing operations.[2/] Neoplan moves that it be permitted to depose "Jeff H" and a person designated by EPA to testify regarding the training, instructions, and advice given to those representatives of EPA who respond to inquiries of the regulated

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[1/] The note is beneath a note of another call apparently placed on Wednesday June 22 @ 10:50 am. Neither this note nor the one quoted above refer to the year in which the calls were made.

[2/] It should be noted that Complainant's motion to amend the complaint to include counts relating to toluene usage was based in part on a report by an expert, Dr. Douglas Kendall, to the effect that toluene was not significantly incorporated during application of paints and thinners at Neoplan's facility and therefore toluene was "otherwise used" at the facility.

community and the public regarding EPCRA reporting responsibilities and specifically regarding inquiries pertaining to the applicability of the 10,000-pound and 25,000-pound reporting thresholds. In its request for the production of documents, Neoplan asks that Complainant be directed to produce all documents pertaining to the applicability of the 10,000-pound and 25,000-pound reporting thresholds and all documents and recordings related to the conversation on September 6, 1994, between Sonny Aguilera and Jeff H.

COMPLAINANT's OPPOSITION

Opposing the motion, Complainant contends that the motion should be denied, because it does not comply with the standards for discovery in 40 CFR § 22.19(f)(1) & (2), and because Neoplan has failed to move for an order of discovery in accordance with § 22.19(f)(3) (Response, dated May 22, 1996). Additionally, Complainant says that it opposes the motion, because Neoplan has not attempted to obtain the information voluntarily. According to Complainant, it has been completely forthcoming with all information requested by Neoplan and a motion to compel the production of information is counter-productive to on-going efforts to settle this matter.

Complainant quotes the language of § 22.19(f) and emphasizes that the term "other discovery", i.e., in addition to prehearing exchange information, suggests that such "other" or additional discovery is an extraordinary measure requiring special

findings. Complainant asserts that Neoplan has not demonstrated the need for such discovery. Turning to the request to depose "Jeff H", Complainant says that he may have been an information specialist at EPA's EPCRA hotline and that it is conducting an investigation to further identify this individual and to ascertain the advice, if any, furnished Neoplan's representative. Complainant says that hotline representatives are only authorized to recite Agency policy and that, accordingly, any advice given by such a representative would not have probative value. Moreover, Complainant argues that there has been no showing that the information is not otherwise obtainable, i.e., by testimony at the hearing, by an interrogatory, or by an affidavit.

Complainant opposes Neoplan's request that it be permitted to depose an individual to be designated by EPA regarding the "training, instructions, and advice" given to representatives who are to respond to inquiries of the regulated community and the public regarding EPCRA reporting responsibilities and, in particular, to the applicability of the 10,000-pound and 25,000-pound reporting thresholds. Complainant argues that such information is simply too remote from any legitimate defense Neoplan may raise in this case and that, in any event, Neoplan hasn't demonstrated that the information isn't otherwise obtainable, i.e., by testimony at the hearing, by an interrogatory, or by affidavit.

Complainant objects to the request for the production of "all documents" pertaining to the applicability of the 10,000-pound

and 25,000-pound reporting thresholds as overly broad. Complainant states, however, that it does not oppose providing Neoplan with all policy documents in its possession, and of which it has knowledge, which pertain specifically to the application ot the 10,000-pound and 25,000-pound thresholds to facilities engaged in painting operations such as Neoplan's. Also, Complainant does not oppose the request for any documents in its poessession regarding the converstion on September 6, 1994, between "Jeff H" and Sonny Aguilera. Complainant says any such documents will be furnished when discovered.

DISCUSSION

Rule 22.19(f) (40 CFR Part 22) provides:

> (f) 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:
> (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 innformation 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 a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.
> (3) Any party to the proceeding desiring an order of discovery shall make a motion therefor. Such a motion shall set forth;
> (i) The circumstances warranting the taking of the discovery;
> (ii) The nature of the information expected to be discovered; and

> (iii) The proposed time and place where it will be taken. If the Presiding Officer determines that the motion should be granted, he shall issue an order for the taking of such discovery together with the conditions and terms thereof.
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> (4) When the information sought to be obtained is within the control of one of the parties, failure to comply with an order issued pursuant to this paragraph may lead to (i) the inference that the information to be discovered would be adverse to the party from whom the information was sought, or (ii) the issuance of a default order under § 22.17(a)

There is no doubt that the quoted rule is not hospitable to discovery by means of deposition, the rule requiring, in addition to findings required for "other discovery" generally, a finding that the information sought cannot be obtained by alternative methods. Because no hearing date has been set, there is no question but that the first requirement for other discovery, i.e., that such discovery will not unreasonably delay the proceeding in any way, has been met. Moreover, any delay caused by the requested discovery is dependent in part on the alacrity with which Complainant supplies the information required by this order and information it acknowledges being ready to furnish Neoplan, and is thus within Complainant's control.

As to the requirement that the information to be obtained is not otherwise obtainable, it is obvious that the identity of "Jeff H", his job title and functions, and advice, if any, given to Mr. Aguilera are matters within Complainant's knowledge and control. Although Complainant says that it is investigating to determine the identity of "Jeff H", there is no indication to date that his identity has been given to Neoplan. It is not difficult to dispense with Complainant's argument that the

information sought is lacking in probative value. Assuming that "Jeff H" is an EPA representative at the EPCRA hotline, the Agency simply may not establish a system where members of the regulated community are to direct inquiries as to EPCRA reporting requirements and then disclaim all responsibility for the accuracy of information furnished. Although it is unlikely that the Agency could be estopped from enforcing a statutory requirement, inaccurate advice from such an EPA representative would clearly be relevant and probative as to penalty mitigation.[3/] It is difficult to conclude that information may be obtained by alternative methods, if the identity of the individual to be deposed is not fully known. The deposition of the unknown "Jeff H", however, may not be ordered until he is fully identified. Complainant will be directed to ascertain the identity of "Jeff H" and to furnish that information to Neoplan along with a statement of the advice given to Mr. Aguilera in the telephone conversation on September 6, 1994, and his understanding of Neplan's operations upon which such advice was based. If Neoplan is dissatisfied with Complainant's response, it may renew its motion to depose "Jeff H".

Complainant's opposition to Neoplan's motion to depose an unnamed EPA employee relative to "instructions, training and advice" given to employees who are to respond to inquiries from the public and the regulated community concerning the applicability of

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[3/] The accuracy of the advice furnished by "Jeff H" is, of course, dependent on whether Neoplan's operations were correctly described in the phone conversation with Mr. Aguilera.

the 10,000-pound and 25,000-pound reporting thresholds focuses on "instructions and training" given to such employees and argues that such training is too remote to be relevant to any legitimate defense Neoplan may raise. It is concluded, however, that, if the "advice" given to such employees, differs from Complainant's position herein, then such advice would be relevant not only to the proper demarcation between the 10,000-pound and 25,000-pound reporting thresholds, but also to the consistency of the Agency's interpretation. Moreover, it might support Neoplan's position as to the advice rendered by "Jeff H". Complainant will be directed to explain whether the position taken in training sessions as to the applicability of the 10,000-pound and 25,000-pound reporting thresholds differs from its position herein and to explain in detail any differences. Complainant will also be directed to provide a copy of any instructional materials used in training employees relating to the mentioned thresholds.

Complainant has objected to Neopan's request for the production of "all documents" pertaining to the applicability of the 10,000-pound and 25,000-pound reporting thresholds as overly broad. Although this objection is valid, Complainant has indicated that it does not oppose the request for policy documents in its possession pertaining to the applicability of the 10,000-pound and 25,000-pound reporting thresholds to facilities engaged in painting operations similar to Neoplan's. Complainant will be ordered to provide a copy of all Q & A documents, policy statements, and explanatory memoranda in its possession and instructional and

guidance materials used or distributed at various seminars where the reporting requirements of EPCRA were explained to the public.

Complainant has not objected to furnishing any notes, memoranda, or recordings, when discovered, of the telephone conversation on September 6, 1994, between "Jeff H" and Mr. Aguilera and it will be ordered to produce any such documents forthwith if, and when, discovered.

ORDER

Complainant is directed to:

1. Identify "Jeff H" and to furnish his job, function and title as of September 6, 1994;
2. To provide an affidavit from "Jeff H" concerning the substance of his conversation with Mr. Aguilera of Neoplan on September 6, 1994, and his understanding of Neoplan's operations;
3. To provide a copy of any notes, memoranda, or recordings concerning his conversation with Mr. Aguilera on September 6, 1994;
4. To provide a copy of an instructional or explanatory materials used in training EPA personnel who are to man the EPCRA hotline;
5. To explain whether the position taken in training employees who are to man the EPCRA hotline as to the

applicability of the 10,000-pound and 25,000-pound reporting thresholds differs from the position adopted herein and to explain in detail any such differences; and

6. To provide a copy of any Q & A documents, explanatory memoranda, and policy statements and a copy of any instructional materials used or distributed at seminars where EPCRA reporting requirements were explained.

Complainant shall respond to this order on or before August 2, 1996. If Neoplan is dissatisfied with Complainant's response, it may again move for depositions.

Dated this 8th day of July 1996.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER ON DISCOVERY**, dated 7-8-96, in re: Neoplan USA Corporation, Dkt. No. EPCRA-VIII-94-04, was mailed to the Regional Hearing Clerk, Reg. VIII, and a copy was mailed to Respondent and Complainant (see list of addressees).

Maria Whiting for
Helen F. Haddon
Legal Staff Assistant

DATE: 7-9-96

ADDRESSEES:

Kevin M. Ward, Esq.
Harding, Shultz & Downs
1200 Seventeenth Stret, Suite 1950
Denver, CO 80202

Joseph M. Santarella Jr., Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, Reg. VIII
999 - 18th Street, Suite 500
Denver, CO 80202-2466

Ms. Tina Artemis
Regional Hearing Clerk
U.S. EPA, Region VIII
999 - 18th Street, Suite 500
Denver, CO 80202-2466