

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

Pekin Energy Company

Docket No. 5-EPCRA-95-043

Respondent

**ORDER REQUIRING SUPPLEMENTAL PREHEARING EXCHANGE
and
ORDER SCHEDULING HEARING**

The Pekin Energy Company ("Respondent" or "Pekin") has filed a motion, dated March 6, 1997, seeking discovery from the Region 5 Office of the United States Environmental Protection Agency (the "Complainant" or "Region"), or, in the alternative, a supplement to Complainant's prehearing exchange. As of this date, Complainant has not responded to the motion.

Respondent's basic point is well taken. Complainant's prehearing exchange is patently insufficient with respect to its descriptions of its proposed witnesses' expected testimony. The Prehearing Order issued by the undersigned, in accord with 40 CFR §22.19, required the parties to provide "a brief narrative summary of their expected testimony." The Region's summary of the expected testimony of its chief witness, Ken Glatz, is brief. It consists of one sentence. It does not, however, constitute a narrative summary of his expected testimony.

The Complaint in this proceeding charges Respondent with a series of violations of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), and of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), with respect to Respondent's alleged failure to timely notify the proper authorities of several releases of hazardous substances from its facility in Pekin, Illinois. The main charges are that Respondent failed to "immediately" notify the National Response Center "as soon as he ha[d] knowledge" of the release, as required by CERCLA §103(a), 42 U.S.C. §9603 (a); and failed to "immediately" notify the proper State and local emergency commissions as required by EPCRA §304 (a), 42 U.S.C. §11004 (a). Respondent is also charged with failing to provide a written followup notice to the State and

local authorities of the releases "as soon as practicable after [the] release" pursuant to EPCRA §304(c), 42 U.S.C. §11004(c). Respondent denied these charges in its Answer, alleging that the notices it provided were not untimely under the applicable law.

The key element in all these charges is the timeliness of the notice provided by Respondent to the federal, State, and local authorities. Yet, the entire description of Mr. Glatz' testimony in Complainant's prehearing exchange reads as follows: "Mr. Glatz will testify concerning Respondent's cyclohexane operations and the timeliness and reasonableness of their response to the July and October releases." Assuming that the Region intends to address the actual merits of the charges in the Complaint, the narrative summary of Mr. Glatz' testimony would necessarily have to address the reasons that the Region believes Pekin's notices were untimely and unreasonable under CERCLA and EPCRA. This will allow Respondent to better prepare its own evidence in response, and fulfill the purposes of discovery of preventing surprise and resulting inefficiency at the hearing.

Therefore, Complainant, will be directed to file a supplemental prehearing exchange in accord with the Prehearing Order consisting of a narrative summary of its witnesses' expected testimony, including a statement of the reasons the Complainant believes Respondent's notices of its releases were untimely under CERCLA and EPCRA. A more descriptive narrative summary of the expected testimony of the Complainant's other witness, Silvia Palomo, must also be filed. Respondent's alternative motions for the taking of depositions or serving interrogatories on the Region's witnesses are denied.

Respondent has also sought further discovery consisting of a list of articles authored by Ken Glatz and a list of proceedings in which he has testified, plus a summary of his testimony in those proceedings. The Prehearing Order required the parties to submit resumes or c.v.'s for its proposed expert witnesses. Although the Complainant included a rather lengthy employment history for Mr. Glatz, and a shorter one for Ms. Palomo, in its prehearing exchange, it did not submit c.v.'s. The Complainant will therefore be directed to include in its supplemental exchange a current c.v. for each of those witnesses that includes a list of their publications and list of proceedings in which they have testified.

Complainant will not be required to provide summaries of testimony of its witnesses in other proceedings, or any other material indicated in Respondent's proposed set of discovery requests to Complainant. The supplemental exchanges

required by this order should have been submitted as part of the ordinary prehearing exchange. Further discovery beyond the prehearing exchange is only available upon a showing that, among other things, it is not otherwise obtainable. 40 CFR §22.19(f). No additional discovery will be granted unless voluntary disclosure on a cooperative basis between the parties has been attempted first. In accord with the Prehearing Order, the parties may freely supplement and modify their prehearing exchanges up to 30 days before the hearing in any event.>

Order Requiring Supplemental Prehearing Exchange

Complainant is ordered to file a supplemental prehearing exchange, as directed above, consisting of narrative summaries of its proposed witnesses' expected testimony, and current c.v.'s for its witnesses, within 30 days of receipt of this Order.

Order Scheduling Hearing

The hearing in this matter will be held beginning at 9:30 A.M. on August 5, 1997, in Chicago, Illinois, continuing if necessary until August 8, 1997. The parties will be advised of the exact location and of other details pertinent to the hearing after the arrangements are made by the Regional Hearing Clerk.

Andrew S. Pearlstein

Administrative Law Judge

Dated: March 25, 1997

Washington, DC