

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
  
BEFORE THE ADMINISTRATOR

In the Matter of: )  
 )  
Motiva Enterprises LLC, ) Docket No. RCRA-3-2000-0004  
 )  
Respondent )

Order on Respondent Motiva Enterprises LLC's  
Motion for Limited Additional Discovery

This is a proceeding under Sections 3008(a)(1) and (g) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928(a)(1) and (g), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Rules of Practice"), 40 C.F.R. Part 22. On March 31, 2000, Complainant, the United States Environmental Protection Agency ("EPA"), filed a Complaint charging Respondent Motiva Enterprises, LLC ("Motiva") with five counts involving violations of RCRA and implementing state and federal regulations.<sup>1</sup> Respondent filed this Motion for Limited Additional Discovery ("Motion for Discovery") on May 8, 2001. Respondent's discovery effort seeks to have EPA respond to the set of interrogatories which accompanied the Motion.

I. Background

According to the Complaint, EPA and the Delaware Department of Natural Resources and Environmental Control conducted on August 25, 1999, a RCRA Compliance Evaluation Inspection ("CE Inspection") of the Facility, the Motiva Delaware City Refinery, located on 2000 Wrangle Hill Road in Delaware City, Delaware, which is owned and operated by Motiva. Complaint ¶¶ 5, 13. The Complaint alleges a number of statutory and regulatory violations

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<sup>1</sup> Texaco, Inc., Shell Oil Company, and Saudi Refining, Inc. were also originally named as respondents in the Complaint. These parties have been dismissed subsequent to this Court's order granting Respondent Motiva's Motion to Dismiss Texaco, Inc., Shell Oil Company, and Saudi Refining, Inc. as Improper Parties.

uncovered during this CE Inspection. For these alleged violations, EPA issued a Compliance Order pursuant to Section 3008(a) of RCRA 42 U.S.C. § 6928 (a) and is seeking a civil penalty of \$94,596.

Specifically, Count I charges that the Facility was operating equipment which allowed petroleum primary oil/water/solids separation sludge to overflow into an earthen ditch. Complaint ¶¶ 14-28. Count II alleges that two open metal baskets containing gloves and rainsuits covered with hazardous waste were located in the Facility and did not display hazardous waste labels. Complaint ¶¶ 29-36. Count III alleges that three containers bearing no hazardous warning labels were observed leaking hazardous/solid waste into the soil. Complaint ¶¶ 37-49. EPA maintains that the actions and omissions of Respondent referenced in Counts I - III constituted violations of RCRA Sections 3005(a) and (e), 42 U.S.C § 6925 (a) and (e), and DRGHW<sup>2</sup> Sections 122.1 and 122.70 (40 C.F.R. §§ 2701.1 and 270.70). Count IV alleges Respondent violated 40 C.F.R. §§ 268.2 by failing to determine if the hazardous waste described in Count III required treatment before being land disposed. Complaint ¶¶ 50-55. Count V alleges Respondent violated either DRGHW § 264.16 (d)(4) (40 C.F.R. § 264.16 (d)(4)) or DRGHW § 265.16 (d)(4) (40 C.F.R. § 265.16 (d)(4)) by failing to keep annual training records for at least four employees working at the Facility's hazardous waste unit. Complaint ¶¶ 56-60.

As mentioned, Respondent's Motion for Discovery is accompanied by sixteen interrogatories it seeks to have answered by EPA. Respondent argues the interrogatories should be allowed because they elicit information necessary for the clarification of EPA's allegations and for Respondent's preparation of an adequate defense. Motion for Discovery at 1. Respondent's Reply to Complainant's Memorandum of Law in Opposition to Motiva Enterprises LLC's Motion for Limited Additional Discovery at 2. Respondent maintains the proposed interrogatories conform to the requirements for additional discovery under Section 22.19(e)(1) of the Rules of Practice, 40 C.F.R. § 22.19(e)(1), because the information sought has significant probative value, the information was not provided in the Prehearing Exchange and Complainant is the only person from whom the information may be sought. Further, Respondent contends that allowing the interrogatories will neither unreasonably delay the proceeding nor unduly burden the Complainant. Motion for Discovery at 1-2.

EPA objects<sup>3</sup> to Respondent's Motion for Discovery, arguing Respondent failed to make the requisite showing for additional discovery under Section 22.19(e)(1) and that certain information sought is not discoverable because it is irrelevant or protected by the "deliberative process" privilege. Complainant's Memorandum of Law in Opposition to Motiva Enterprises LLC's Motion for Limited Additional Discovery at 1. Specifically, EPA argues additional

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<sup>2</sup>"DRGHW" refers to the Delaware Regulations Governing Hazardous Waste.

<sup>3</sup>EPA devotes over two of the six pages in its memorandum of law to matters that are not pertinent to the issue of Respondent's discovery request. Though apparently intended to show that the Respondent, through counsel, was strategizing regarding an EPA information request, the remarks are irrelevant to the Motion and accordingly are disregarded by the Court.

discovery should not be allowed because: Respondent failed to point to any facts or law to support its Motion for Discovery; the information sought is otherwise obtainable through examinations of witnesses at hearing; the information cannot be said to have been denied to Respondent by EPA because Respondent did not request the information in the Prehearing Exchange; and, in the case of Proposed Interrogatory No. 3, the information sought is irrelevant or protected by the deliberative process privilege. *Id.* at 3-6. EPA also contends that the Respondent is seeking a “detailed recitation of the testimony of Complainant’s witnesses” in spite of the fact that it has already been provided with a summary of the witnesses’ expected testimony and the documents such witnesses relied upon. *Id.* at 5.

## II. Discussion

Motiva’s Motion for Discovery is evaluated under the provisions of Section 22.19(e)(1) of the Rules of Practice which states:

After the information exchange provided for in paragraph (a) of this section, a party may move for additional discovery. The motion shall specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or discovery sought (and, where relevant, the proposed time and place where discovery would be conducted). The Presiding Officer may order such other discovery only if 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.

40 C.F.R. § 22.19 (e)(1)

The standard for discovery under the Rules of Practice is more restrictive than that under the Federal Rules of Civil Procedure. *Tennessee Valley Authority*, CAA Docket No. 00-6, 2000 EPA App. LEXIS 22, \*5 (EAB, June 29, 2000). In general, the information provided through the prehearing exchange and the ability to cross-examine witnesses at the hearing is sufficient in these proceedings. Despite, this more restrictive standard, courts applying the Rules of Practice have recognized that discovery will be granted if “a refusal to do so would so prejudice a party as to deny him due process.” *ICC Industries*, TSCA Appeal No. 91-4, 1991 EPA App. LEXIS 13, \*8 n.5 (EAB, Dec. 2, 1991, Interlocutory Order)(quoting *McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979)). Whether a refusal to grant additional discovery presents a due process problem depends on the particular situation of each case. *See McClelland* at 1286.

Upon review of the applicable standards and the arguments presented by each party,

Respondent's Motion for Limited Additional Discovery is GRANTED in part and DENIED in part, as set forth below. The Court makes the following specific determinations:

1. Proposed Interrogatory No. 1, which asks for the identity, of persons who provided the information used to answer the interrogatories. will be allowed *with respect to those interrogatories deemed allowable*. Within 14 days of the date of this Order. EPA will identify. to the extent it has not already done so in the Prehearing Exchange. each person who provided information used to respond to each permitted interrogatory and the interrogatories each person assisted in answering.
2. Proposed Interrogatory No. 2, which asks for any statements EPA obtained from any person referring or relating to any contention in the Complaint or any conduct. act or omission of any sort by the Respondent, is not permissible as it is overly broad. Respondent has not established that allowing this interrogatory will not unduly burden Complainant nor unreasonably delay this proceeding. Furthermore, Respondent has not established that such information would be of significant probative value. However. if they exist, EPA is directed to disclose. within 1-1 days of this order, any statements which are exculpatory or which would mitigate the penalty.
3. Proposed Interrogatory No. 3, which seeks the identity of each document transmitted between the EPA and any other governmental unit. including that of the state of Delaware, relating to the Complaint or to the CE Inspection, will not be allowed as the information sought lacks significant probative value.

Evidence has significant probative value when it goes to prove a fact of consequence in a case. *Chautauqua Hardware Corporation*, EPCRA Appeal No. 91-1, 3 E.A.D. 616, 622 (EAB, June 24, 1991, Interlocutory Order)(citing McCormick on Evidence § 185 at 542 (3<sup>rd</sup> ed. 1984)). Respondent has failed to show that the information sought by this Proposed Interrogatory will go to prove a fact of consequence to either the liability or penalty portion of this proceeding. As neither the fact nor substance of communications between the EPA and another governmental unit regarding the Complaint has probative value, as broadly framed by the Respondent, Proposed Interrogatory No. 3 is denied, except to the extent that those portions of such documents, if any, contain *exculpatory or penalty mitigating* information. Such information shall be provided within 14 days of this Order.

4. Proposed Interrogatory No. 4, which asks for all testing and/or sampling, environmental assessments, audits, soil samples, inspections, groundwater monitoring or environmental sampling, not already produced to Motiva in the Prehearing Exchange, *and which refer or relate to the time period and subject matter allegations in the Complaint*, is granted. Producing such information will not unduly burden Complainant or unreasonably delay

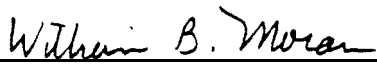
this proceeding. EPA is ordered to produce such information within 14 days from the date of this order. The parties are reminded that in accordance with Rule 22.22(a) documents not previously exchanged will not be allowed into evidence at hearing without the permission of the Court. 40 C.F.R. § 22.22(a). Attempts to introduce testing results, etc. at hearing that were not previously exchanged, will be denied upon objection by the disadvantaged party.

5. Proposed Interrogatories Nos. 5-12, which seek additional information dealing with the specific allegations of each count, are denied. The information sought by Respondent in these Proposed Interrogatories are elements of EPA's prima facie case. The information already exchanged is sufficient for Respondent to prepare an adequate defense and the additional information sought through these questions is most reasonably obtained at hearing during cross-examination. If Respondent wishes to challenge EPA's assertions or methodology it may do so at hearing through the testimony of its own witnesses and cross-examination of EPA's witnesses.
6. Proposed Interrogatory No. 13, which requests an "incident date" and related information for each separate instance of waste leakage, is of significant probative value only insofar as those allegations are issues at dispute in this case. Proposed Interrogatory No. 13 will be allowed *but only* to the extent that the EPA has evidence of repeated leaking that has not already been disclosed through the prehearing exchange. EPA is also to identify the extent, if any, that such instances of "repeated leaking" played a role in the calculation of the penalty. If such information exists, Complainant will, within 14 days of the date of this Order, exchange such additional information.
7. Proposed Interrogatory No. 14, which seeks more information regarding EPA's penalty assessment calculations, is denied as the information sought, beyond the penalty calculation documents already disclosed, is most reasonably obtained through Respondent's cross-examination of EPA's witness(es) at hearing.
8. Proposed Interrogatory No. 15 asks EPA to identify the other instance(s) which form the basis for the claim in its Initial Prehearing Exchange that "the violation . . . is not the first instance of land-disposal of wastes at the TDU roll-off container area." This request is granted, to the extent EPA relies upon such prior instances to demonstrate a history of violations or otherwise used such information in the calculation of the proposed penalty. As with each instance in this Order where additional discovery has been granted in part, EPA shall provide such information within 14 days of this Order.

9. Proposed Interrogatory No. 16, which seeks production of all non-privileged documents responsive to Interrogatories 3-15 has been addressed in the preceding rulings in this Order and is otherwise denied as it is overly broad. Respondent has failed to show that such production will not unreasonably delay the proceeding nor that it will not unduly burden Complainant. Further, Respondent has failed to demonstrate the documents are of significant probative value.

This case will now be set for hearing. No further motions may be filed after September 5, 2001.

So Ordered.

  
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William B. Moran  
United States Administrative Law Judge

Dated: August 17, 2001

In the Matter of Motiva Enterprises LLC.

Respondent

Docket No. RCRA-3-2000-0004

CERTIFICATE OF SERVICE

I certify that the foregoing Order on Respondent Motiva Enterprises LLC's Motion for Limited Additional Discovery, dated August 17, 2001, was sent this day in the following manner to the addressees listed below:

Original + 1 copy by Pouch Mail to:

Lydia A. Guy  
Regional Hearing Clerk  
U.S. EPA - Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

Copy by Regular Mail and Facsimile to:

Bernadette M. Rappold, Esq.,  
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Washington, DC 20007



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Rachele D. Jackson  
Legal Staff Assistant

Dated: August 17, 2001