UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
VIRGIN PETROLEUM - PRINCESS, INC., *ET AL.*,	)	**Docket No. RCRA-02-2002-7501**
	)	
Respondents	)	

ORDER ON RESPONDENT'S MOTION FOR PARTIAL RELIEF FROM PREHEARING ORDER

I. Background and Arguments of the Parties

This proceeding was initiated on September 27, 2002, by a Complaint issued by Region 2 of the U.S. Environmental Protection Agency (EPA) under Section 9006 of the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6901 *et seq*. (Act). The Complaint alleges ten counts of violation of the Act and regulations promulgated thereunder governing Underground Storage Tanks (USTs). The alleged violations include failure to comply with EPA's information requests; failure to have a required method of release detection for UST systems owned and/or operated by Respondents and to maintain records demonstrating compliance with release detection requirements, improper temporary closure of USTs; and failure to provide financial assurance required for UST systems under 40 C.F.R. § 280.93. Respondents filed an Answer to the Complaint, denying the alleged violations and requesting a hearing.

On December 12, 2002, a Prehearing Order was issued in this matter requiring that the parties submit prehearing exchange documents pursuant to 40 C.F.R. § 22.19(a). Subsequently, each party filed its prehearing exchange. However, along with their Prehearing Exchange, Respondents submitted on February 19, 2003, a "Motion for Partial Relief From Prehearing Order; Objection to *Sua Sponte* Discovery Order" (Motion). Complainant submitted a Response to the Motion on March 4, 2003.

The grounds stated in Respondents' Motion for the relief sought are that the request for information from them in the Prehearing Order is procedurally improper and an overwhelming burden that would require the reproduction and delivery of "many cartons of documents," that the interrogatory-style demands for information are unreasonable and beyond the presumptive limits of Fed Rule Civ. Proc. 33(a), and that substantial portions of the requested information are rendered irrelevant and unnecessary by a stipulation and admission of Respondents.

In particular, Respondents state that the Consolidated Rules of Practice (Rules), at 40 C.F.R. § 22.19(a), require for the prehearing exchange only a witness list, summary of testimony, and all documents and exhibits intended to be introduced into evidence. "Other discovery," under 40 C.F.R.

§ 22.19(e), is conducted only upon motion of a party. Complainant never filed a motion to conduct the discovery requested in the Prehearing Order, so there was no objection or ruling on the factor of § 22.19(e)((1)(i), whether the discovery would unreasonably burden the non-moving party.

In its Response, Complainant points out and encloses a broadened stipulation which the parties agreed on subsequent to the Motion, that addresses a subject of the Prehearing Order's requests for information. If this stipulation is accepted by the undersigned, Complainant asserts that it does not object to the Motion's request for relief from the requests of Paragraphs 3(C) through 3(J) of the Prehearing Order, to produce records of whatever informal inventory control methods Respondents employed. Complainant states that it leaves Respondents to their proofs as to the details and import of such informal methods.

II. Discussion

The Rules provide at 40 C.F.R. § 22.19(a), in pertinent part:

> (1) In accordance with an order issued by the Presiding Officer, each party shall file a prehearing information exchange. Except as provided in § 22.22(a), a document that has not been included in prehearing information exchange shall not be admitted into evidence . . . .
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> * * *
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> (2) Each party's prehearing exchange shall contain:
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> (i) The names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony . . .; and
>
> (ii) Copies of all documents and exhibits which it intends to introduce into evidence at the hearing.
>
> (3) . . . the respondent shall explain in its prehearing information exchange why the proposed penalty should be reduced or eliminated.

The Prehearing Order requires Respondents to submit, in addition to the items required by Section 22.19(a)(2) and (3), eleven items, designated as Paragraphs 3(A) through (K) in the Prehearing Order.

Under the Rules, the Presiding Judge has the obligation to "assure that the facts are fully elicited, adjudicate all issues, and avoid delay" and the authority to "[o]rder a party . . to produce documents . . . and failing the production thereof without good cause being shown, draw adverse inferences against that party," and to "[d]o all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings." 40 C.F.R. § 22.4(c)(5) and (10). The preamble to the 1999 amendments to Section 22.19 of the Rules states that "the Presiding Officer may require additional information from the parties as part of his or her prehearing scheduling order than is provided in § 22.19(a)." 64 Fed.

Reg. 40138, 40159 (July 23, 1999). The Administrative Conference of the United States' Manual for Administrative Law Judges (3rd ed. 1993)(Manual), states that a judge "may by written notice suggest the type of evidence needed." Manual at 26.

The purpose of requesting such additional information is to limit time-consuming litigation of discovery issues (*e.g.,* by reducing the number of motions to compel "other discovery" under § 22.19(e)), and thereby make administrative proceedings more efficient than Federal court proceedings. In requesting this information, the Presiding Judge has already contemplated that the requests will not unreasonably delay the proceeding or unreasonably burden the parties, and that the information requested has significant probative value on a disputed issue of material fact, without the delays inherent with the motions process. Such information could also reasonably be requested by the Presiding Judge in an order separate from the prehearing exchange, in a prehearing conference, or by order directing a prehearing brief. The Manual suggests that if a prehearing exchange of evidence "is preceded by an exchange of information, subsequent proceedings are easier and the duration of the hearing is reduced." Manual at 40. It states further that prehearing briefs "may present the results of research the judge has requested in legal or technical problems," and the judge "may direct interested persons to submit to him and to all known parties proposed statements of issues, . . . statements of position . . . and other informational material" in a prehearing notice or letter. Manual at 20, 47.

Therefore, it is concluded that the Prehearing Order is not procedurally improper under § 22.19.

Furthermore, the requests are not unreasonable, and some of them have been satisfied. In their Prehearing Exchange, Respondents provided some responses to Paragraphs 3(A) through (K) of the Prehearing Order. Specifically, Paragraph 3(A) requests a description of the legal relationship between and among the various corporate Respondents, and Paragraph 3(B) requests a copy of any and all responses to the information request letters referenced in the Complaint made by one or more of the Respondents. Respondents' Prehearing Exchange includes sufficient responses to Paragraphs 3(A) and (B) of the Prehearing Order.

Paragraph 3(K) requests "a detailed narrative statement, and a copy of any documents in support, explaining exactly what financial assurance each Respondent provided for the UST systems at issue in the Complaint, when and how such assurance was provided, and including a detailed description of the factual and legal basis for and purported significance of Respondents' assertion in their Answer that no such 'insurance' was available." This request was based upon Respondents' admission in their Answer that their response to EPA's information request noted a lack of financial assurance, their assertion that such insurance is not available in the Virgin Islands, but their denial of the allegation that they failed to provide financial assurance.

In response, Respondents simply assert that they "will adduce evidence that liability insurance is not available in the Virgin Islands to independent service station operators, and that a violation of the regulation "is or should be legally excused if performance is an impossibility." Respondents describe certain witnesses's testimony as including unavailability of liability insurance,

and state that their exhibits include a letter regarding unavailability of liability insurance. While Respondents' statement of the bases for and significance of their assertion that such insurance was not available is not "a detailed description," it is responsive to the request. Any lack of detail and supporting facts or argument is at Respondents' peril, as it is Respondents' burden of presenting any defense, and any response or evidence with respect to the appropriate relief. Pursuant to 40 C.F.R. § 22.19(a), such evidence must be included as an exhibit in the prehearing exchange in order to be admitted. From Respondents' lack of response to the Prehearing Order's request for a statement as to what financial assurance each Respondent provided for the UST systems, and any failure to produce in their Prehearing Exchange documents purporting to show compliance with financial assurance requirements, it may be inferred that Respondents never, in fact, provided financial assurance for the UST systems at issue. 40 C.F.R. § 22.19(g) ("When a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion (1) Infer that the information would be adverse to the party failing to provide it; [or] (2) Exclude the information from evidence.")

Paragraphs 3(C) through 3(J) of the Prehearing Order each request "a detailed narrative statement, and a copy of any documents in support, explaining the legal and/or factual bases for the Respondents' denials of the accuracy of the allegations made" concerning failure to provide release detection, "including a detailed description of the release detection methods employed" for certain UST systems during a specified period of time, "and records maintained thereof." In their Prehearing Exchange, Respondents state that they "do not presently deny that a violation of release detection record-standards occurred," but that "by way of mitigation, [Respondents] will seek to establish that they had an informal system of financial and inventory controls, that included tank measurements and reconciliation" and that "Respondents' noncompliance was with the form, and not the substance, of the recordkeeping violations." Respondents do not list or specify any exhibits as responsive to Paragraphs 3(C) through 3(J), but describe their exhibits as including, *inter alia,* "purchase, shipment, inventory, tank measurement and related records for arbitrarily-selected periods illustrating Respondents' methodology for fuel inventory control and further offered for the purpose of illustrating that any significant leakage . . . would be detectable."

The parties' stipulation, attached to Complainant Response, states as follows:

> Respondents did not do release detection as specified in the regulations, 40 C.F.R. Part 280 Subpart D, during the time periods relevant to the allegations in Counts 2 through 9 of EPA's Complaint, but did have an informal release detection method. Respondents did not during these relevant time periods compile and record information relating to release detection in the form and format required under the regulations.

This stipulation does not render the Prehearing Order requests for release detection records irrelevant and unnecessary; indeed, such records would be important to support Respondents' stated intent, for mitigation, to establish that they had a system of inventory control, and to defend against the allegation of failure to maintain release detection records. In their Prehearing Exchange, Respondents state that proposed witness Yusef Jaber will testify as to Respondents' inventory

control methodology, and indicate that some inventory records are included in their exhibits. Whether Respondents included in their Prehearing Exchange any or all such records that may be relevant and material to their case, and the necessity of producing "many cartons of documents," is for Respondents to determine at their own risk, as they have the burden to produce any evidence in support of their defenses and in mitigation of any penalty, and the obligation under the Rules to produce the evidence in their Prehearing Exchange. 40 C.F.R. §§ 22.19(a), 22.24.

Respondents did not provide "a detailed narrative statement, and a copy of any documents in support, explaining the legal and/or factual bases for the Respondents' denials of the accuracy of the allegations made" concerning failure to provide release detection with respect to each facility. Respondents also did not include "a detailed description of the release detection methods employed" as to each facility at issue. The stipulation leaves open the issues of whether and to what extent Respondents' "informal" inventory controls may mitigate any penalty. While Respondents state in their Prehearing Exchange that they do not presently deny a violation of release detection requirements, they must provide any documentary evidence to support mitigation of a penalty in their Prehearing Exchange. 40 C.F.R. §§ 22.19(a), 22.24. The Prehearing Order's request to provide the detailed descriptions is not onerous or unreasonable, and is consistent with the objectives and methods in administrative proceedings as described in the Manual, and with the criteria for discovery in 40 C.F.R. § 22.19(e)(1). If Respondents nevertheless choose not to provide such descriptions, Complainant is free to request such information under 40 C.F.R. § 22.19(e).

Accordingly, Respondents' Motion for Partial Relief from Prehearing Order and Objection to *Sua Sponte* Discovery Order is **DENIED**.

If Respondents wish to supplement their Prehearing Exchange with additional information and documents currently in their possession which are responsive to the Prehearing Order, they shall file a Motion to Supplement the Prehearing Exchange, with the supplemental information and/or documents, on or before **April 9, 2003.**

Susan L. Biro
Chief Administrative Law Judge

Dated: March 24, 2003
Washington, D.C.