12/6/91

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Safety-Kleen Corporation	)	Docket Nos. RCRA-1090-11-10-
(Auburn and Lynnwood, WA),	)	3008(a) & 11-11-3008(a)
	)	
Respondent	)	

ORDER ON DISCOVERY

On May 8, 1991, Complainant filed a motion to undertake discovery in these proceedings, which were consolidated by an order contained in the ALJ's letter to the parties, dated May 1, 1991.[1/] The motion serves interrogatories and requests for admission, asks for the production of documents and that Complainant be permitted to depose unnamed employees of Respondent. The motion recites that it is filed pursuant to 40 CFR § 22.19(f) and asserts that the discovery will not in any way unreasonably delay the proceeding, that the information is not otherwise obtainable and has significant probative value.

In support of the assertion that the discovery will not unreasonably delay the proceeding, Complainant says that information sought deals with basic operations of Respondent and should, therefore, be easily ascertainable and not unduly burdensome to produce. It is alleged that this basic operational

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1/ The motion as filed was premature, because it was filed prior to the June 21, 1991, date set by the mentioned letter for the exchange of prehearing information.

information is critical to developing a better understanding of the source[s] of contamination, will compliment information sought in the prehearing exchange and prevent the need for additional prehearing exchanges.

As to its contention that the information is not otherwise obtainable, Complainant says that the information is solely in the control and purview of Respondent and points out that it has been denied an opportunity to informally interview Respondent's employees to obtain information as to Respondent's basic operations.[2/] Concerning depositions, the motion states that depositions will reveal critical information regarding the source of soil contamination surrounding the relevant tanks and that this information can best be obtained through oral questioning, because of the need for expansive explanations.

Alleging that the information sought has significant probative value, Complainant says the information is relevant to the issues raised in the complaint and in the answer. The interrogatories, request for production of documents and requests for admission assertedly focus on critical information regarding operations and processes at Respondent's facilities, which is needed to rule out alternative sources of contamination. The depositions similarly

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[2/] Letter from Respondent's counsel, dated April 26, 1991, Exh B to the motion. While appearing to contemplate that depositions of named Safety-Kleen employees would be taken, the letter requests that Respondent's employees not be interviewed without counsel's consent and presence.

will focus on critical questions regarding the sources of contamination and actions taken by Respondent.

Respondent's Opposition

Opposing the motion, Respondent asserts that the requirements for "Other discovery" in section 22.19(f) have not been met and that EPA's arguments to the contrary lack factual support (Respondent's Opposition To Motion to Undertake Discovery, dated May 20, 1991). Moreover, Respondent alleges that EPA has not made any showing of good cause that depositions should be ordered. Respondent says that EPA appears to be seeking evidence to support the allegations of fact in the complaint and that such information should have been obtained prior to issuance of the complaint.

Pointing out the information sought in the interrogatories, request for production of documents and requests for admission is not limited to any relevant time frame, Respondent alleges that to provide that information would require it to review its records throughout its entire history of operation, a voluminous project (Opposition at 2). Additionally, Respondent emphasizes that Complainant has not identified the individuals it seeks to depose. Assuming, however, that the individuals are those named in counsel's letter of April 26, 1991 (supra note 2), Respondent says that these persons reside in Seattle, Los Angeles and Texas. It is contended that taking the depositions of the named persons will substantially and unreasonably delay these proceedings.

Respondent points out that it has filed Part A and Part B permit applications with EPA as well as an Underground Storage Tank

Integrity Assessment and asserts that the information sought, relevant to its facilities, operations, storage tanks and activities, is obtainable from documents in EPA's possession (Opposition at 3). Additionally, Respondent argues that requests for admission are beyond the scope of Rule 22.19(f). It points out that discovery is intended to reveal evidence or information reasonably calculated to lead to the discovery of admissible evidence, while requests for admission are designed to eliminate issues from contention. Respondent asserts that the substance of many of the requests for admission has been denied in its answer.

Amplifying its contention that Complainant has failed to make a showing of good cause for the taking of depositions, Respondent reiterates its assertion that information regarding its basic operations is contained in the documents available to EPA mentioned above (Opposition at 4). Additionally, Respondent points out that its operations have been observed by EPA inspectors who have visited its facilities. Regarding what EPA alleges is "critical information regarding the source of soil contamination surrounding the relevant tanks," Respondent says this information is available in the previously mentioned "Underground Storage Tank Integrity Assessment." Respondent further points out that EPA, in the complaint [Docket No. 1090-11-11-3008(a), para. 15], has alleged as a fact that the "assessment found total petroleum carbon levels in the soil surrounding the tank ranging from 1,750 ppm to 5,700 ppm. The complaint further alleged that "(s)ubsequent investigations and telephone conversations, including a telephone conversation with

Safety-Kleen representative Ann Lunt on December 26, 1990, have revealed that the soil contamination resulted from overfilling of the tanks and that this soil contamination has not been remediated."[3/] Although Respondent states that it disputes this allegation, it emphasizes that Complainant has made this allegation as a basis for its action and argues that the Agency is totally wanting in good cause to support an order for depositions.

Respondent disputes Complainant's contention that the information sought has significant probative value, alleging that the interrogatories are not limited to a relevant time period and do not relate to the specific incidents which are alleged in the complaint. Respondent contends that the simple allegation the requested discovery "focus[es] on critical information" is neither true nor a correct characterization of the request (Opposition at 5). As an example, Respondent points to Interrogatory No. 2, which asks when Safety began operations at the facilities located in Auburn, Washington, and states that [the answer to that question] is in no way critical to the complaint.

Respondent urges that the motion to undertake discovery be denied.

Complainant's Reply

In its reply to Respondent's opposition, Complainant makes no attempt to specify a time frame for information sought by the interrogatories or to identify Safety-Kleen employees it wishes to

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[3/] Opposition at 4. Similar allegations are made in para. 15 of the complaint in Docket No. 1090-11-10.

depose (Complainant's Reply To Opposition to Discovery, dated May 29, 1991). Complainant reiterates its contention that the requirements for discovery in Rule 22.19(f) have been met and alleges that the information sought focuses on the basis for Respondent's defense and will help to narrow disputed issues. Specifically, Complainant points to Respondent's denial that "it has information which indicates that the alleged presence of total hydrocarbons in soils resulted from overfilling of the tanks" (Answers, para. 15). Complainant says that this denial seemingly contradicts statements previously made by Respondent's personnel and that it seeks to clarify the apparent contradiction by obtaining information as to the operational aspects of Respondent's facilities which lead to spilling, leaking, and overfilling of the tanks. Complainant points out that the underground tank system(s) are not visible to the naked eye and were not included in the Part B permit application[s], because Respondent proposed to dismantle its existing systems.

Complainant quotes para. 45 of Respondent's answers which assert that "Safety-Kleen's review of the data indicating total petroleum hydrocarbon in soil suggests that the data is [sic] inconsistent with surface spillage or overfill problems at the site." Complainant says that this assertion appears to be the core of Respondent's defense and points out that information relating thereto was sought as Item 3 of information to be supplied by Respondent in the ALJ's letter to the parties, dated March 14, 1991. Complainant says this request was apparently inadvertently

omitted when the prehearing schedule was revised for the consolidated proceedings by the ALJ's letter, dated May 1, 1991.

D I S C U S S I O N

The first requirement for granting "Other discovery" pursuant to Rule 22.19(f) (40 CFR Part 22) is that "such discovery will not in any way unreasonably delay the proceeding." It should be emphasized that the rule does not prohibit delay attributable to discovery, but only "unreasonable delay" (emphasis supplied). Inasmuch as these proceedings have not been scheduled for hearing, it is highly unlikely that reasonable delay within the contemplation of the rule will result from the discovery sought by Complainant. Moreover, the sources of delay cited by Respondent, i.e., the fact that no time frame or limitation is specified for information sought by the interrogatories and delay attributable to deposing employees of Respondent, are substantially addressed by this order which limits the time frame for information called for by interrogatories and denies an order for depositions.

The second requirement of Rule 22.19(f) for "Other discovery" is that the information is not otherwise obtainable. While Respondent alleges that much of the information sought is in the Part A and Part B permit applications and in the Underground Storage Tank Integrity Assessment, which are available to Complainant, Complainant states that details of the underground tank systems were not supplied, because Respondent proposed dismantling these systems. If the information is, in fact, in the

mentioned documents, it will be little or no burden on Respondent to demonstrate that such is the case.

The final requirement for "Other discovery" in Rule 22.19(f) is that the information sought has "significant probative value." Although Respondent denies the relevance of the requested information, the information appears to relate to the crux of Respondent's defense.[4/] Notwithstanding Respondent's characterization of Interrogatory No. 2, i.e., when did Safety-Kleen commence operation at its Auburn, Washington facility, as an example of an irrelevant question, the answer to such a question would clearly be relevant, if Respondent were to contend the contamination existed prior to the time it commenced operations.

Respondent's contention that requests for admission are not a form of discovery available under Rule 22.19(f) is rejected. Although not specifically stated, Rule 22.19(f) was intended to incorporate discovery available under the Federal Rules of Civil Procedure.[5/] Decisions under the FRCP, although not binding, are

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[4/] "Probative value" denotes the tendency of a piece of information to prove a fact that is of consequence in the case (Chautauqua Hardware Corporation, EPCRA Appeal No. 91-1, Order On Interlocutory Review, June 24, 1991, at 10).

[5/] Rule 22.19(f) was lifted from the Administrative Procedures for Challenging Liability and Penalty Assessment under the Regulation Of Fuels And Fuel Additives Program, Clean Air Act, section 211 (40 CFR Part 80, Subpart D, 40 Fed. Reg. 39965 et seq., August 29, 1975). See the preamble to the Part 22 Consolidated Rules, 45 Fed. Reg. 24362, April 9, 1980. The discovery rule in the Fuels And Fuel Additives Program appears, in turn, to have been substantially copied from the "Other discovery" rule in the Rules of Practice Governing Hearings under section 6 of the Federal Insecticide, Fungicide and Rodenticide Act (40 CFR § 164.51, 1974). (continued...)

considered to be useful guides in interpreting the Part 22 Rules. While no real issue is taken with the assertion that requests for admission are designed to eliminate issues from contention,[6/] the fact remains that FRCP Rule 36, Requests for Admission, is in Part V of the FRCP, "Depositions and Discovery," and is thus considered a form of discovery.

Safety-Kleen will be ordered to respond to the interrogatories and requests for admission and to produce (or identify, if already available to Complainant) documents used in making such responses.

A different result is required as to Complainant's request to depose employees of Respondent. In addition to the findings required for discovery listed above, depositions upon oral questions require an additional finding, i.e., that the information sought cannot be obtained by alternative methods (22.19(f)(2)). Such a showing has not been made here. In fact, Complainant has failed to identify the individuals it wishes to depose. The motion to take depositions will be denied.[7/]

[5/](...continued)
The preamble to the mentioned rule specifically states that "discovery procedure was provided to incorporate the applicable Federal Rules of Civil Procedure" (38 Fed. Reg. 19371, July 20, 1973).

[6/] The Advisory Committee Notes on the FRCP state that Rule 36 serves two vital purposes, i.e., "(a)dmissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be."

[7/] Rule 22.19(f) is inhospitable to discovery by oral depositions and absent agreement of the parties, depositions under (continued...)

O R D E R

Safety-Kleen, Inc. will, on or before January 3, 1992, respond to the interrogatories, request for production of documents and requests for admission with respect to each facility. The relevant time period for information contemplated by the mentioned requests begins on the date Safety-Kleen filed Notices of Hazardous Waste Activity pursuant to RCRA section 3010 or on the date activities commenced at the facility--whichever is later. If the information is already in Complainant's possession, the document and page number or other reference need only be supplied. Respondent, of course, may not be compelled to admit what it has previously denied.

The motion for an order to take depositions is denied.[8/]

Dated this 6th day of December 1991.

Spencer T. Nissen
Administrative Law Judge

[7/](...continued)
the Rule are rare. See, e.g., Port of Oakland and Great Lakes Dredge & Dock Company, Docket No. MPRSA-IX-88-01, Order on Discovery, January 4, 1989.

[8/] The suggestion of Respondent's counsel that failing settlement these matters be set for hearing in February 1992 is acceptable to the ALJ. After the discovery contemplated by this order is completed, I will be in telephonic contact with counsel for the purpose of setting a mutually agreeable date for hearing in Seattle, Washington.

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER ON DISCOVERY**, dated December 6, 1991, in re: Safety-Kleen Corp. (Auburn and Lynnwood, WA), Dkt. Nos. RCRA-1090-11-10-3008(a) and 11-11-3008(a), was mailed to the Regional Hearing Clerk, Reg. X, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Secretary

DATE: December 6, 1991

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