UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
STANCHEM, INC.,	)	DOCKET NO. CWA-2-I-95-1040
	)	
	)	
RESPONDENT	)	

ORDER GRANTING IN PART RENEWED MOTION FOR DISCOVERY

The ALJ's order, dated September 26, 1997, directing the parties to exchange specified prehearing information had the effect of granting in part StanChem's motion for discovery, filed March 6, 1996, which, inter alia, sought an order directing Complainant and CTDEP to disclose the names, addresses, and phone numbers of all individuals with knowledge, information, or access to information related to StanChem's equitable estoppel and selective enforcement special defenses, including but not limited to review of StanChem's 1987 permit renewal application; [CTDEP's] referral of this enforcement action to Complainant; and CTDEP's assessment in 1989 that the OCPSF rule did not apply to StanChem and its subsequent change of position in that regard. StanChem proposed to depose the individuals so identified.

The mentioned order specifically directed Complainant to explain the circumstances under which 40 CFR Part 414, Subpart G, and not other Part 414 subparts, was forwarded to StanChem by CTDEP [on March 14, 1989]; to refer to StanChem's motion for discovery and to provide a copy of each document identified on page 2 of the motion and identify employees of EPA or CTDEP having relevant information as to the review of StanChem's permit application and CTDEP's apparent change of position as to the applicability of the OCPSF rule as described on pages 2 and 3 of the motion. It was pointed out, however, that the Part 22 discovery rule, Rule 22.19(f), was inhospitable to discovery by means of depositions, requiring in addition to a showing of good cause, a finding that the information cannot be obtained by alternate methods.(1). The order provided that StanChem could renew the motion, if considered necessary, after receipt of Complainant's prehearing exchange.

In its prehearing exchange, filed November 14, 1997, Complainant included as Attachments 1 through 8 what were indicated to be all available documents (2)

responsive to StanChem's discovery [document production] request . Complainant stated that it had contacted the individual at CTDEP who forwarded 40 CFR Part 414, Subpart G to StanChem. Complainant further stated that Virginia Lombardo had reviewed CTDEP files, which according to CTDEP, were relevant to this matter. Complainant stated that it was only able to report that Part 414, Subpart G was provided to StanChem in the context of discussions regarding StanChem's permit renewal application (Prehearing Exchange at 11-12). Complainant asserted that to date, it had been unable to discover other facts as to why [only] the mentioned portion of the OCPSF regulation had been sent to StanChem.

Complainant identified four employees of CTDEP having information relating to the review of StanChem's permit application and the applicability of the OCPSF rule to StanChem: Bob Kaliszewski, Ken Major, James Grier, and Charles Nezianya. Complainant stated that it had found no record that CTDEP had changed its position as to the applicability of the OCPSF rule to StanChem's facility (Prehearing Exchange at 12).

An order, dated February 13, 1998, granted in part Complainant's motion for discovery, StanChem's motion to compel discovery and denied StanChem's motion to bifurcate the hearing so that the penalty would be considered in a separate hearing only if StanChem were found liable for the alleged violations. Complainant's motion to compel based on the contention that StanChem had failed to comply with the February 13 discovery order insofar as it required the filing of economic benefit information was denied by an order, dated May 5, 1998.

Under date of April 7, 1998, StanChem filed a Motion Renewing and Amending Respondent's Motion for an Order of Discovery. The motion requests that StanChem be permitted to depose some 17 named individuals, three of which are employed by EPA and the remainder of whom are or were employed by CTDEP. The motion recites that on its own initiative, StanChem identified probative documents, individuals, and other information in CTDEP's files that Complainant failed to produce despite the ALJ's prehearing order. StanChem alleged that good cause exists to order the requested discovery, including discovery by deposition, based on the nature of the special defense information sought to be obtained, the demonstrated failure and inability of the Complainant to identify and provide the desired information through other methods of discovery, and the reasonable expectation that additional discovery will produce probative information (Motion at 3).

In a memorandum in support of the motion, StanChem alleges that the existence of significant and probative information that was missing in Complainant's prehearing exchange, but identified by StanChem through a review of CTDEP files suggests that additional discovery, through depositions and additional document production beyond CTDEP's public files, will likely produce probative information (Memorandum at 1-2). StanChem points out that its special defense of equitable estoppel is, by definition, a factual matter that involves the misconduct and abuse of discretion committed by both Complainant and its Pretreatment Control Authority, CTDEP. StanChem asserts that the motivations and other circumstances surrounding such misconduct, including the commencement of the enforcement action at hand, can be fully identified only by direct examination of the officials involved. StanChem points out that counsel for Complainant has confirmed interviewing certain employees of CTDEP and Complainant, alleges that Complainant's efforts failed to produce relevant information and documents even though certain of such information and documents were readily available to Complainant and CTDEP. To fully identify and present evidence probative of StanChem's equitable estoppel defense, StanChem says that it should also be afforded an opportunity to examine relevant representatives of Complainant and CTDEP.

StanChem points out that Complainant's only response to the prehearing order insofar as it directed that an explanation of the circumstances under which Part 414, Subpart G, and not other subparts, was forwarded to StanChem was that the mentioned subpart was provided StanChem in the context of discussions concerning StanChem's permit renewal application. StanChem emphasizes that Complainant did not identify the persons Complainant contacted at CTDEP and did not provide copies of, or a reference to, documents assertedly reviewed by Virginia Lombardo; [did not provide] any other information relevant to CTDEP's review of the OCPSF rule;

CTDEP's objectives in reviewing the OCPSF rule; and CTDEP's findings after completing this component of the permit renewal review (Memorandum at 5-6). Additionally, StanChem notes that Complainant identified only four employees of CTDEP as having knowledge relating to the review of StanChem's permit application and the applicability of the OCPSF rule to StanChem's facility.

StanChem says that on its own initiative it reviewed available CTDEP files and identified additional employees, documents, and information relevant [to the review of its permit renewal application] that Complainant failed to identify in its prehearing exchange (Memorandum at 6). For example, StanChem says that the records show that initial review of StanChem's application was supervised by Mr. Wesley L. Winterbottom, that a draft permit, dated July 20, 1988, imposing monitoring requirements for "Total Toxic Organics", as defined in EPA's pretreatment standards for the electroplating and metal finishing point source categories, 40 CFR §§ 413.02(i) and 433.11(e), was prepared by CTDEP engineer David Geller, and that Mr. Winterbottom directed another CTDEP engineer, Robert Kaliszewski, to review the draft permit with particular attention to "Total Toxic Organics". (StanChem Exh 13.3). A handwritten note, dated March 15, 1989, apparently in Mr. Kaliszewski's handwriting, states the need [for CTDEP] to make a determination as to whether the Org[anic] Chem[ical Reg[ulation]s apply and that StanChem was faxed a list of products, apparently Part 414, Subpart G, to check against actual production (StanChem Exh 16.4) The note further reflects that, if [StanChem's production] were not covered by the Organic Chemical Regulations, then CTDEP would issue the permit as drafted, apparently the July 20, 1988 permit, with the addition of monitoring for four organics for which monitoring was previously required.

StanChem points out that Complainant acknowledges that CTDEP reviewed the OCPSF rule as part of the permit renewal process, but that Complainant failed to disclose records which support StanChem's position that CTDEP directed StanChem to review only a portion of the OCPSF rule, excluding the portion of the rule which is the subject of the present action, and that CTDEP then proceeded to make a determination that the OCPSF rule did not apply to StanChem, because it did not manufacture any of the bulk organic chemicals listed in [Part 414, Subpart G] which had been sent to StanChem by CTDEP (Memorandum at 7-8). Additionally, StanChem alleges that the newly identified records, missing from Complainant's prehearing exchange, further document that CTDEP's demands [for information] during the permit renewal process never directed StanChem to reevaluate the applicability of the OCPSF rule, nor made any reference to the OCPSF rule until CTDEP changed its position by February of 1993.

StanChem also alleges that Complainant omitted from its prehearing exchange documents and information relating to other aspects of StanChem's equitable estoppel defense, i.e., the prolonged period of time, approximately eight years, StanChem's renewal application was under review and the fact that during this prolonged review period Complainant and CTDEP permitted StanChem to discharge in accordance with its existing permit (Memorandum at 10-11). StanChem says that its review of CTDEP files revealed other documents, e.g., inspection reports, and the names of numerous CTDEP inspectors who were cognizant of StanChem's status [operations] under its existing permit and the succession of CTDEP engineers, as well as Complainant's engineer, Virginia Lombardo, involved in review of StanChem's permit renewal application. Finally, StanChem asserts that Complainant failed to disclose, in its prehearing exchange, several other documents and employee identities relating to StanChem's special defense that Complainant and CTDEP decided to initiate an enforcement action against StanChem, under a cooperative enforcement pilot program developed by Complainant and CTDEP, in spite of StanChem's good faith reliance on CTDEP's and Complainant's determinations that allowed StanChem to continue to discharge under its existing permit, rather than a new permit incorporating limits consistent with the OCPSF rule (Memorandum at 12). StanChem alleges that it was not informed that it was not authorized to discharge under its existing permit until the issuance of the complaint on April 30, 1995 (Id. 18).

In summation, StanChem says that it seeks additional information and documents that the company reasonably expects will be in the possession of representatives of Complainant and CTDEP and which will allow StanChem to fully identify and present

evidence on its special defenses (Memorandum at 20). StanChem asserts that the additional information and documents it seeks will have significant probative value and, based upon the results of discovery to date, are not otherwise obtainable.

Complainant's Opposition

Opposing the motion, Complainant asserts that StanChem has failed to allege a basis upon which Complainant can be estopped from prosecuting this action, and has not alleged any facts which establish a basis for ordering discovery with respect to any "special defense" (Opposition, dated April 16, 1998, at 1). Complainant emphasizes that in order to be entitled to take depositions, there must be a showing that "good cause exists" and the ALJ must find that the information cannot be obtained by alternative methods; or there is a substantial reason to believe that relevant and probative evidence may not be preserved for presentation by a witness at the hearing.[(3)] Complainant argues that StanChem has not met this standard.

Alluding to StanChem's arguments that good cause exists "based on the nature of the special defense information sought" and the "demonstrated failure and inability" of EPA to identify and provide available information despite an order compelling disclosure, Complainant says that there is nothing extraordinary about the nature of StanChem's defenses that entitles it to depositions merely because it has raised these defenses (Opposition at 1-2). Moreover, Complainant asserts that StanChem is remarkably unspecific about the information Complainant failed to provide. According to Complainant, it identified individuals it believed had information relevant to the review of StanChem's permit application and CTDEP's decision regarding the applicability of the OCPSF rule to StanChem's facility. Additionally, Complainant alleges that, in accordance with the ALJ's order, it provided the documents identified on page two of StanChem's motion for discovery. Complainant argues that StanChem's multiple assertions that the order required more and that Complainant failed to comply with the order are without merit (Opposition at 2). For these reasons, Complainant contends that StanChem has entirely failed to establish a basis for ordering further discovery.

In addition to not meeting the standard for obtaining depositions, Complainant asserts that StanChem has not shown that it is entitled to any discovery, because the information sought has "no probative value" (Opposition at 3). Complainant says that the information sought has no probative value because the defenses for which the information is sought are legally meritless. Complainant emphasizes that in order for estop the government, StanChem must show "affirmative misconduct", and points out that the most StanChem can argue is that EPA was silent with regard to State conduct. Complainant says that any contention mere silence amounts to misconduct is contrary to the law. Complainant states that there was absolutely no contact between EPA and StanChem prior to the time CTDEP informed StanChem that it was subject to the OCPSF regulations and that, accordingly, EPA has not engaged in any activities that could be considered "affirmative misconduct" (Opposition at 4).

Regarding StanChem's recital of its relationship with CTDEP, Complainant asserts that the most that can be said [in StanChem's favor] is that CTDEP mislead StanChem into believing that it was in compliance with the Clean Water Act and that EPA did nothing to inform StanChem of its CWA obligations or to correct CTDEP's alleged misrepresentations. Because such inaction, even if shown, is not affirmative misconduct, Complainant says that EPA simply cannot be estopped from bringing this action. Therefore, Complainant argues that no amount of additional time-consuming discovery will produce evidence sufficient to estop EPA and EPA should not be required to spend more resources responding to discovery on this issue.

Complainant says that StanChem's "selective enforcement" argument is vague and unsupported and does not warrant additional discovery.[(4)]

StanChem's Reply

StanChem moved for and was granted an opportunity to file a reply. StanChem reiterates its contention that discovery should be granted based on StanChem's

special defenses and Complainant's demonstrated failure to provide available information (Reply at 1). Citing its memorandum in support of its motion, StanChem points out the inherent dependence of equitable estoppel on motivations and other factual circumstances concerning the government's [alleged] misconduct. Moreover, contrary to Complainant's assertions, StanChem emphasizes that it has specified in great detail the documents which Complainant failed to provide (Reply at 2). StanChem alleges that it has not been given access either by CTDEP or EPA to many documents which StanChem considers relevant. In addition to its efforts to obtain such documents, StanChem contends that it is entitled to pursue discovery for all types of evidence with probative value, including information known to individuals currently or formerly employed by CTDEP or Complainant that may not be recorded in documents released to StanChem.

StanChem asserts that Complainant's contention that discovery should not be granted because StanChem's defenses are legally meritless ignores the ALJ's prior rulings concerning liability and factual issues remaining in dispute (Reply at 2-3). StanChem points out that the ALJ denied Complainant's motion for an accelerated decision as to liability (Order Denying Cross Motions for Accelerated Decision and Granting in Part Motion For Discovery). StanChem alleges that the mentioned order held that StanChem properly raised a defense of estoppel, that StanChem had presented a prima facie case, that StanChem was entitled to discovery, as well as an opportunity to renew its motion for depositions after receipt of Complainant's prehearing exchange.[(5)] StanChem says that prior to the hearing, it should be given an opportunity to discover all forms of evidence probative of the factual issues remaining in dispute.[(6)]

Discussion

Complainant is correct that the requirements for discovery by means of depositions in the Part 22 Rules are stringent, providing that in addition to a showing of good cause, the ALJ must find that the information cannot be obtained by alternative methods (Rule 22.19(f)(2)). It is also true that the showing required to invoke estoppel against the government, including, inter alia, "affirmative misconduct", makes it unlikely that StanChem will be successful in this regard. Nevertheless, it is concluded that under the circumstances, StanChem should be given every opportunity to make its case. Moreover, Complainant's contention that the evidence sought by StanChem is relevant only to the claim of estoppel overlooks the likelihood that evidence falling short of that required to establish estoppel may nevertheless be relevant to penalty mitigation. Complainant's efforts to produce documents from CTDEP files within the scope of the discovery order appear to have been perfunctory at best. For example, documents relating to the draft permit were not produced and, although Mr. Robert Kaliszewski is identified as a CTDEP employee having knowledge of the review of StanChem's permit, documents apparently in his handwriting which appear to indicate that Mr. Kaliszewski considered that only Subpart G "Bulk Organic Chemicals" of Part 414 was potentially applicable to StanChem were not provided. Complainant appears unwilling to acknowledge that CTDEP ever concluded that the OCPSF rule was not applicable to StanChem. Under these circumstances, Complainant is not in a position to complain of the burdens imposed by additional discovery. It is concluded that good cause has been shown, that there are sound reasons for concluding that probative information relevant as a minimum to penalty mitigation will be obtained by additional discovery and that this information may not be produced by alternative methods.

StanChem has not, however, shown the necessity of deposing the 17 individuals identified in its motion. For example, StanChem wishes to depose Virginia Lombardo, an EPA Region I environmental engineer, who was listed as the contact person on the Agency's July 14, 1994 request for information under Section 308 of the CWA. Ms. Lombardo is shown to have corresponded with CTDEP concerning the terms of the permit to be issued to StanChem. Additionally, she executed affidavits in support of Complainant's motion for an accelerated decision and is listed as a witness for Complainant at the hearing. Ms. Lombardo's involvement in this matter appears limited to the period after CTDEP determined in February 1993 that the OCPSF rule applied to StanChem and it is concluded that it is unlikely that she would provide information probative of StanChem's estoppel claim or useful in mitigation of the

penalty. In any event, she is scheduled to be a witness at the hearing. Permission to depose Ms. Lombardo will be denied.

StanChem also wishes to depose Mr. David A. Fierra, who is the Director of the Water Management Division, EPA Region I. Mr. Fierra signed the July 14, 1994 request for information under Section 308 of the CWA and apparently signed the cover letter forwarding the complaint herein, which had been signed by the Regional Administrator, to StanChem. It is unlikely, however, that Mr. Fierra has any personal knowledge of relevant facts or possesses information probative of StanChem's defenses. Moreover, there is a presumption that agency heads and other high level government officials are immune from deposition.[7] StanChem hasn't overcome this presumption and permission to depose Mr. Fierra will be denied.

Mr. Michael Fedak is an EPA Region I engineer who is identified in CTDEP records as the contact person for EPA involvement in the application of the OCPSF rule to StanChem's facility and in the permitting of the StanChem facility. Additionally, he is listed as a recipient of copies of correspondence from CTDEP to StanChem concerning alleged permit exceedances. As a minimum, he may be in possession of information that EPA was well aware of StanChem's discharges and thus knew, or should have known, of the applicability or potential applicability of the OCPSF rule to StanChem. Permission to depose Mr. Fedak will be granted.

Messrs. Wesley L. Winterbottom, David A. Geller, Robert E. Kaliszewski, Charles Nezianya, Kenneth Major, Richard Mason, James F. Grier, Michele DiNoia, and Joseph Mills are listed as a succession of CTDEP engineers and supervisors involved in the lengthy review of StanChem's application for renewal of its permit. StanChem has shown good cause for deposing some, but not all of the named individuals. Deposing all of these individuals would almost certainly involve duplicative testimony and StanChem will be permitted to depose no more than four of these persons of its choosing.

The remainder of the CTDEP employees StanChem desires to depose, namely Edward Finger, Colette Ready, Marshal A. Hoover, Christopher Gerke and Alan Ladotski, are identified as inspectors who inspected StanChem's facility during the period of the review of its permit application. Presumably, the purpose is to show CTDEP awareness of StanChem's operations and the nature of its discharges. There is no evidence that the nature of StanChem's discharges changed in any significant way during the period of permit review and StanChem hasn't shown the necessity of deposing more than one of these individuals. StanChem will be permitted to depose no more than one of the named individuals of its choosing.

Order

StanChem's motion for renewed discovery is granted in part as indicated above. In order to avoid a further continuance of the hearing, depositions authorized by this order are to be completed not later than December 4, 1998. Upon StanChem's motion, subpoenas will be issued to compel the attendance of those to be deposed.

Dated this 14th day of October 1998.

Original signed by undersigned

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Spencer T. Nissen
Administrative Law Judge

1. Rule 22.19(f)(2)(i). Order Denying Cross-Motions For Accelerated Decision and Granting in Part Motion for Discovery, dated September 26, 1997, at 28.

2. Complainant's Prehearing Exchange, dated November 14, 1997, at 12. StanChem's request for documents primarily concerned Executive Summaries of the Agency's Mid-Year Reviews of CTDEP for various years during which StanChem's permit renewal application was pending and inspection reports for specific dates upon which StanChem alleged that it had been inspected by CTDEP. Among other things, the Executive Summaries reveal that CTDEP had a backlog of permit renewal applications from significant industrial users whose permits had expired.

3. 40 CFR § 22.19(f)(2). StanChem has not alleged preservation of witness testimony as a basis for taking depositions.

4. Opposition at 4-5. StanChem has presented no evidence supporting its selective enforcement defense and this defense is deemed to have been abandoned.

5. The order actually stated that "[StanChem] has, however, presented a compelling case that a penalty of the magnitude sought by Complainant was not justified." Order denying Cross-Motions for Accelerated Decision and Granting in Part Motion for Discovery, dated September 26, 1997, at 27.

6. These include the propriety of the proposed penalty. The hearing initially scheduled for May of 1988 was continued until January 1999, because of the unavailability of a principal witness for Complainant and StanChem agreed that the ALJ could defer ruling on its motion for depositions pending returns on its state and federal FOIA requests (Reply at 3). Although information garnered in response to these requests has not been disclosed, StanChem has indicated informally that it expects a ruling on its motion.

7. See United States v. Morgan, 313 U.S. 421 (1941); United States of America v. Wheeling-Pittsburgh Steel Corporation, Civil No. 79-1194 (D.C.W.D. Pa, November 8, 1984) (prohibiting deposition of Regional Administrator because discoverable information was available by other means); United States of America v. Tenneco Chemicals, Inc., Civil No. 80-4141 (D. NJ 1981) (refusal to permit deposition of Chief of EPA Enforcement Division).