UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
E.I. DU PONT DE NEMOURS & CO., INC.	)	**DOCKET NO. FIFRA-95-H-02**
	)	
Respondent	)	

ORDER GRANTING MOTION FOR DISCOVERY

Under consideration is complainant's motion for discovery of production cost and pricing information relating to the four DuPont products that are the subject of the complaint. Complainant initiated this action on October 10, 1994, charging respondent with selling and distributing misbranded pesticides in violation of Section 12 of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §136(j).

Complainant requests data concerning 1) the price charged by respondent for the first ten shipments of each of the four herbicides -- Bladex 4L, Bladex 90DF, Extrazine II 4L, and Extrazine II DF -- named in the complaint and 2) the per-gallon costs, itemized, of producing Bladex 4L and Extrazine II 4L and the per pound costs, itemized, of producing Bladex 90 DF and Extrazine II DF. [(1)]

Complainant moves for discovery pursuant to Section 22.19(f)(1) of the Consolidated Rules, 40 C.F.R. § 22.19(f)(1) which allows discovery upon a determination by the Presiding Officer:

(i) That such discovery will not in any way unreasonably delay the proceeding;

(ii) That the information to be obtained is not otherwise obtainable; and

(iii) That such information has significant probative value.

Complainant argues that its request satisfies the grounds established under the discovery rule because it is a limited request that will not cause any undue delay in the proceeding, complainant has sought unsuccessfully to obtain the information voluntarily from respondent and it is unobtainable from any other source, and it has significant probative value in the determination of an appropriate penalty.

Respondent opposes complainant's discovery motion on several grounds. [(2)] First, respondent argues that complainant's request "is not timely and is likely to prejudice Respondent and delay the proceeding." Respondent's Opposition to Complainant's Motion for Discovery at 4. Respondent urges that complainant's discovery request at this stage in the proceeding is untimely because complainant initiated this action three years ago. Further, respondent argues that because the hearing date is less than two months away and preparation for the hearing places great demands on respondent's counsel, and because the information requested by complainant is not readily available to respondent, complainant's request places an undue burden on respondent and prejudices respondent's efforts to prepare for trial.

Complainant responds that the passage of time since commencement of an enforcement action is not relevant in determining the timeliness of a discovery request, citing In the Matter of Agri-Fine Corporation, Docket No. EPCRA-V-019-92, Order on Discovery (Sept. 9, 1995). Further, complainant argues that a motion for discovery is timely only after prehearing exchanges have been completed, citing In the Matter of Ensco, Inc., Docket No. TSCA-VI-532C, Orders (March 7, 1992). Finally, complainant urges that respondent has adequate time and resources to respond to the complainant's modified discovery requests and will suffer no prejudice as a result.

On the related issues of timeliness, delay and prejudice complainant's arguments are persuasive. Respondent offers few case citations in support of its position that complainant's motion would result in unreasonable delay and the cases respondent does cite are unpersuasive. Moreover, respondent has made no specific showing that it will be unfairly prejudiced or burdened by providing the information requested by complainant. To say that it will be "arduous and time consuming," Respondent's Opposition at 5, is too vague to resist a request for discovery of relevant information. Finally, respondent's contention that complainant will have no comparable burden is without merit; complainant has the burden of analyzing the

information respondent provides, a task that must also be completed before the hearing date.

Respondent also opposes complainant's motion on grounds that the information sought has no significant probative value. In essence, respondent argues that any calculation of avoided costs will be too speculative to have probative value. Such calculation would be too speculative because, respondent maintains, it does not keep the requested cost and pricing information, and, even if the cost and pricing information could be estimated, the sophisticated rebate plan respondent had in effect in 1994 would make any estimates unreliable. Consequently, respondent contends, compelling it to produce such information would constitute a "fruitless and empty effort which would result in no information of value." Respondent's Opposition at 10.

Complainant responds by doubting respondent's claim that it keeps no such records. Complainant's Reply at 3. Assuming for the sake of argument that complainant's doubts are unfounded, whether the requested information is ultimately produced in a form that is too speculative to be used in calculating respondent's avoided costs and/or penalty is an issue to be decided in assessing the showing after its introduction. For purposes of a discovery motion, the Environmental Appeals Board has held that the central inquiry is whether the requested information is "relevant" to the proceeding as that term is used in the Federal Rules of Civil Procedure and the Federal Rules of Evidence. See In the Matter of Chautauqua Hardware Corp., EPCRA Appeal No. 91-1, 3 E.A.D. 616, Order on Interlocutory Review (June 24, 1991), at 622 n.10 (deriving meaning of "significant probative value" from Federal Rule of Civil Procedure 26(b) and Federal Rule of Evidence 401). The requested information, sought for purposes of determining respondent's avoided costs, is relevant to a determination of the appropriate penalty in this action. [(3)]

ACCORDINGLY, IT IS ORDERED that complainant's motion for discovery **IS GRANTED** and respondent will provide complainant with the cost and pricing information requested in items one through eight of complainant's discovery request, as amended by Complainant's Reply to Respondent's Opposition.

IT IS FURTHER ORDERED that respondent has until July 24, 1997 to produce the requested information.

IT IS FURTHER ORDERED that respondent's motion to file reply **IS DENIED.**

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Edward J. Kuhlmann

Administrative Law Judge

July 3, 1997

Washington, D.C.

1. The cost and pricing information comprises requests one through eight of complainant's original discovery request. Complainant has modified its request for this information in the interest of reducing the burden on respondent. Specifically, complainant now requests cost and pricing information for only the first ten shipments of each product at issue, limiting the number of shipments for which respondent must provide this information from the full three hundred seventy-nine shipments at issue in the complaint, to a total of forty shipments. See Complainant's Reply to Respondent's Opposition to Complainant's Motion for Discovery at 3.

Complainant's original discovery motion also requested "[c]opies of all toll or other contractual manufacturing agreements" for the production of the herbicides at issue; the itemized costs to respondent "of relabeling the allegedly misbranded products prior to distribution"; the itemized costs to respondent "of shipping substitute herbicides"; and the itemized costs to respondent "of not shipping the allegedly misbranded products." These were items nine through twelve, respectively, of complainant's original discovery request. As a consequence of pleadings filed by both sides subsequent to complainant's discovery motion, only items one through eight remain at issue. Complainant has accepted respondent's reply to item nine that it had no toll or other manufacturing agreements relating to the production of the herbicides at issue, and to item ten that it had no substitute herbicides available to ship in place of the products at issue in the complaint. Id. at 4 n.4. Further, complainant has accepted respondent's offer to provide the information requested in item ten, the costs of relabeling the allegedly misbranded products. Id. Finally, complainant has withdrawn its request for the information in item twelve in the interests of minimizing the burden on respondent. Id. at 3.

2. Respondent raises several arguments that are not responsive to the issues raised by a discovery motion and will not be addressed in this order. Moreover, some of the arguments raised by respondent have been previously rejected in the ruling on respondent's motion to dismiss. Those rulings will govern the introduction of evidence at the hearing and should be adhered to in the preparation of evidence for the hearing.

3. Respondent also opposes complainant's discovery motion on grounds that it is inappropriate to use avoided costs to determine the appropriate penalty in a FIFRA enforcement action. Complainant correctly argues that such an inquiry is part of the agency's civil penalty program. See B. J. Carney Industries, Inc., CWA Appeal No. 96-2, Remand Order, slip op. at 54 (June 9, 1997). It is therefore relevant to an analysis of the penalty issue in this case. The implication of respondent's arguments on this matter appears to be that the liability issue will be heard separately from the penalty issue. That is not the case. The hearing will be continuous.