UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
AGRI-FINE CORPORATION,	)	DOCKET NO. EPCRA-V-019-92
	)	
RESPONDENT	)	

ORDER ON DISCOVERY

This is a proceeding under Section 325 of the Emergency Planning and Community Right-To-Know Act (EPCRA), 42 U.S.C. § 11001 et seq. Respondent, Agri-Fine Corporation, is charged in three counts with failing to file "Form Rs", showing quantities of sulfuric acid processed during the calendar years 1987, 1988, and 1989, with the Administrator and the State of Illinois by July 1 of the year following as required by EPCRA § 313. Complainant's motion for an accelerated decision as to liability was granted by an order, dated August 31, 1995, and the only issue remaining is the amount of an appropriate penalty. Although Complainant initially demanded a penalty of $17,000 for each count, it has filed an amended complaint, reducing the penalty sought to $42,532 based on application of the "Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-To-Know Act and Section 6607 of the Pollution Prevention Act" (ERP) (August 10, 1992). Facts of the matter are set forth in the mentioned order and will be repeated here only insofar as necessary to explain rulings made.

On November 12, 1993, Respondent filed a motion for discovery pursuant to Rule 22.19(f) (40 CFR Part 22). In support of the motion, Agri-Fine alleged that there were material issues of fact: (1) pertaining to the status of the delisting of liquid sulfuric acid from EPCRA § 313 reporting requirements; (2) pertaining to the potential for harm to the environment and the community from the failure to report threshold levels of liquid sulfuric acid to the EPA; (3) pertaining to the classification of Respondent's facility under SIC Code 2076; (4) pertaining to the status of the delisting of facilities classified under SIC Code 2048 from EPCRA § 313 reporting requirements; (5) pertaining to the potential for harm to the environment and the community resulting from the failure to report to the U.S. EPA de minimis releases of liquid sulfuric acid from a facility classified under SIC Code 2048; (6) pertaining to the timing of the U.S. EPA inspection of September 5, 1990, at Respondent's facility; (7) pertaining to Respondent's level of cooperation during the September 5 inspection; (8) pertaining to the availability of the TRI database information from other sources; (9) pertaining to the calculation of the proposed penalty pursuant to the 1988 and\or 1992 Enforcement Response Policies; (10) pertaining to the arbitrary nature of the penalty matrix towards "small businesses"; and (11) pertaining to the reasonableness of the proposed penalty.

For the above reasons, Agri-Fine moved that it be permitted to serve the attached interrogatories and request for the production of documents. The interrogatories asked Complainant,

inter alia, (1) to identify all persons with knowledge of the facts relating to this case; (2) to identify all expert witnesses who have been consulted, or will be relied upon, by Complainant in this matter; (3) to state the qualifications and conclusions of each expert; (4) to identify any and all tests, scientific analysis, or professional evaluation done in relation to the particulars of this case; (5) to identify any and all persons having knowledge of the particulars of issues relating to this case; (6) to identify all documents which relate to the particulars of this case; (7) to identify the factual basis for all claims made against Agri-Fine in this action; (8) to state the status of the delisting of liquid sulfuric acid from EPCRA § 313 reporting requirements, beyond that which is available in the Federal Register; (9) to state the Agency's position on the potential for harm to the environment and the community resulting from the failure to report threshold levels of liquid sulfuric acid; (10) to state the reason Respondent's facility was classified under SIC Code 2046 [2076] in the complaint; (11) to state the status of the delisting of facilities classified under SIC Code 2048 from EPCRA § 313 reporting requirements, beyond that which is available in the Federal Register; (12) to state the Agency's position on the potential for harm to the environment and the community resulting from the failure to report under EPCRA § 313 de minimis releases of liquid sulfuric acid from a facility classified under SIC Code 2048; (13) to state the date EPA first became aware there was a potential violation of EPCRA § 313 reporting requirements by Respondent's

facility; (14) to state how EPA first became aware there was a potential violation of EPCRA § 313 reporting requirements at Respondent's facility; (15) to state whether Respondent's employees were respectful, cordial, courteous, and\or helpful during the inspection on September 5, 1990; (16) to state whether Respondent at the September 5 inspection had available all documentation which had been previously telephonically requested; (17) to state whether the information for the years 1991 and 1992 which has been reported [by Respondent] on Form Rs is available on the TRI database, and, if not, the dates when such information is reasonably expected to be available; and (18) to state whether it is more advantageous to Respondent to have the penalty herein, if it is liable, calculated under the 1988 or the 1992 ERP. Documents requested include complete, unedited, and unabridged copies of any and all reports, including but not limited to the inspection report of September 5, 1990, prepared in conjunction with the occurrence set forth in the amended complaint and any and all reports, memoranda, correspondence, or other documents of any kind or type, from any person, partnership, corporation, government or other entity pertaining to the impact a zero\de minimis reporting facility has on the overall effectiveness of the TRI database.

Complainant filed an objection to Agri-Fine's motion for discovery on November 24, 1993, alleging that Respondent hasn't shown that it has met the criteria for discovery set forth by Rule 22.19(f)(1). Complainant points to the length of time since this proceeding was instituted and avers that the requested discovery

will unreasonably delay the proceeding. Complainant cites In re Chataugua Hardware Corporation, EPCRA Appeal No. 91-1, 3 EAD 616 (CJO, June 24, 1991), and alleges that the information sought does not have "significant probative value" within the meaning of the discovery rule, but rather Respondent seeks information to support legal or policy arguments. Moreover, Complainant says that some of the documents sought and answers to some of the interrogatories are contained in its prehearing exchange. Accordingly, Complainant argues that the motion for discovery should be denied.

DISCUSSION

Although this matter has been pending far too long, I reject out of hand Complainant's contention that granting any discovery will unreasonably delay the proceeding within the meaning of Rule 22.19(f). To the extent it has not previously supplied the information, Complainant will be directed to answer Interrogatory Nos. 1, 2, 3, 5, 6, 7, 10, 13, 15 through 17, and to furnish Respondent documents listed in Request for Production Nos. 2, 3, 5, 6, and 13, insofar as it concerns the application of the ABEL program to Respondent. Complainant claims to have supplied the information requested in Interrogatory Nos. 1 through 3 and 5 through 7, objects to No. 4 as being vague, overbroad and lacking in significant probative value, objects to Nos. 8 through 17 as being not discoverable under Chataugua, and asserts that No. 18 has been answered in the motion to amend and in the amended complaint.

If the information has been previously supplied,

Complainant need only furnish references to support such assertion and, if accurate, affirm that no additional information is available. Because the only remaining issue is the amount of an appropriate penalty, I agree with Complainant that Interrogatory No. 4 is overbroad and lacking in significant probative value. Because only the fact of delisting is relevant, the status of the proposed delisting of sulfuric acid (Interrogatory No. 8) and of facilities classified under SIC Code 2048 (Interrogatory No. 11) is not probative. Contrary to Complainant's assertion, the reason Respondent's facility was classified under SIC Code 2076 is a factual matter and not merely policy.

I agree, however, with Complainant's assertions that the Agency's position on the potential for harm to the environment and the community resulting from the failure to report threshold levels of, and de minimis releases of, sulfuric acid (Interrogatory Nos. 9 and 12) relate to matters of policy and, hence, are not discoverable. The policy in this respect was set by Congress when it enacted the statute and it may not be questioned herein.[1/] Moreover, the answers to these interrogatories are at least discernable from either or both the 1988 or 1990 ERPs, which

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[1/] See, e.g., In re Briggs & Stratton Corporation, TSCA Appeal No. 81-1 (CJO, February 4, 1981) (improper to admit evidence as to hazardous nature of PCBs, because Congress had determined that PCBs should be regulated under the Act). See also In re Port of Oakland and Great Lakes Dredge and Dock Company, MPRSA Appeal No. 91-1 (EAB, August 5, 1992) (Regional Administrator's determination that certain sediments were not suitable for ocean disposal not subject to question in civil penalty enforcement proceeding even though gravity of violation was a statutory factor in determining amount of penalty).

contain adjustment or extent levels based in part on whether the quantity of chemicals exceeds ten times the statutory threshold.

Although Complainant is correct that Chatauqua appears to preclude discovery relating to when the Agency first became aware of a potential violation of EPCRA reporting requirements, the 1988 and 1992 ERPs make it clear that the amount of the penalty, and, indeed, whether any penalty is assessed, is largely a function of the number of days beyond the statutory due date the required forms were submitted. Accordingly, the Agency, under circumstances such as here where Respondent was unaware of the requirement, may not assess penalties beyond a reasonable time after it became aware of the violation and failed to inform Respondent thereof. When the Agency became aware of the violation is, therefore, probative under Chatauqua's definition of the term and a discoverable fact. Complainant will be ordered to answer Interrogatory No. 13. How the Agency became aware of the violation or potential violation is, however, not relevant and not discoverable.

Although Complainant asserts that the answers to Interrogatory Nos. 15 and 16 are obtainable from Respondent's own employees, Respondent is entitled to know whether Complainant has any information to dispute Agri-Fine's position that its employees were cooperative and had readily available documents previously requested. Both the 1988 and the 1992 ERPs emphasize a purpose of EPCRA as to make available to the public information concerning toxic chemical releases and the importance of timely reporting so that the information may be entered in the TRI database. See also

"Notice Regarding Revisions to Toxic Chemical Release Inventory Reporting Forms under Section 313 of the Emergency Planning and Community Right-To-Know Act, 56 Fed. Reg. 48795 (September 26, 1991). It, therefore, seems anomalous to argue that the date the information is actually made available to the public is not relevant to the determination of a penalty under a statute making "extent and gravity" of the violation factors required to be considered.[2/] Nevertheless, acceptance of this position would amount to questioning the policy behind the Act and shift the focus from the owner or operators' failure to report to EPA'S efficiency or lack thereof in making the information available. It is concluded that the date information is entered, or the date it is anticipated that it will be entered, in the TRI database is not probative and not discoverable. Complainant need not answer Interrogatory No. 17. Complainant's view as to whether the 1988 or the 1992 ERP is more beneficial to Respondent is demonstrated by the fact that the complaint was amended to reduce the penalty claimed and Complainant need not answer Interrogatory No. 18.

As indicated above, Complainant's objections to complying with request for production of document Nos. 2, 3, 5, 6, and 13 are overruled. The only matter requiring comment here is No. 13, which concerns ABEL, a computer program used in determining ability to pay. This request will be granted only to the extent it concerns

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[2/] While EPCRA § 325(c) does not expressly incorporate the factors in §§ 325(b)(1)(C) or (b)(2) as criteria for determining penalties for violations of EPCRA §§ 312 or 313, it is reasonable to conclude that Congress intended the same factors to apply.

application of the program to Respondent. Complainant has the burden of production and of persuasion as to Respondent's ability to pay the proposed penalty. In re New Waterbury, Ltd. A California Limited Partnership, TSCA Appeal No. 93-2 (EAB, October 20, 1994).

ORDER

Respondent's motion for discovery is granted in part and denied in part as indicated above. Complainant will answer the interrogatories and supply the documents as to which discovery has been granted within 30 days of the date of this order.

Dated this 1st day of September 1995.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER ON DISCOVERY**, dated September 1, 1995, in re: AGRI-FINE CORPORATION, Dkt. No. EPCRA-V-019-92, was mailed to the Regional Hearing Clerk, Reg. V, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: September 1, 1995

ADDRESSEES:

Robert W. Fioretti, Esq.
Fioretti & Des Jardins, Ltd.
8 South Michigan Avenue, Suite 3400
Chicago, IL 60603

Janice S. Loughlin, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, Region V
77 West Jackson Boulevard
Chicago, IL 60604

Ms. Jodi L. Swanson-Wilson
Regional Hearing Clerk
U.S. EPA, Region V
77 West Jackson Boulevard
Chicago, IL 60604