UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	**Docket No. RCRA-03-2004-0004**
Duncan Petroleum Corporation,	)	
	)	
Respondent	)	
	)	
	)	

Order on Complainant's Motion for Discovery and Motion in Limine

In this action under the Resource Conservation and Recovery Act, 42 U.S.C. § 6991e, ("RCRA"), involving allegations that the Respondent violated various provisions regarding underground storage tanks, ("USTs"), requirements found at Sections 9002-9010 of RCRA, 42 U.S.C. §§ 6991-6991i and the Maryland Authorized State Underground Storage Tank ("UST") Program (MD. REGS. CODE tit. 26 ("COMAR") §§ 26.10.02 to 26.11), authorized by EPA pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991*c1*. Complainant, EPA has filed a motion for discovery "to clarify numerous issues of fact associated with Respondent[], [Duncan's] liability for the violations alleged in the Complaint and Respondent's ability to pay the civil penalty proposed . . . ." Motion at 1-2. EPA's Motion in Limine works in tandem with the discovery motion, as it seeks an order "barring Respondent from introducing into evidence at hearing any of the information sought through Complainant's interrogatories and Requests For Production of Documents and/or barring Respondent from asserting defenses with regard to which Respondent has failed to provide discovery, as appropriate." Motion at 2.

A thirty-four page attachment accompanies the Motion for discovery. While the attachment presents fourteen listed interrogatories, the subpart questions within each of those fourteen reveals that far more questions are actually being requested of the Respondent. For example, "Interrogatory #1," which is divided into three subparts, seeks in subpart "a," "detailed statements . . . supporting each of Respondent's denials," regarding the Respondent's "factual contentions and legal arguments" for 12 separate denials in Respondent's Answer. For

---

1 On June 30, 1992, the State of Maryland was granted final authorization to administer the UST program pursuant to Section 9004 of RCRA, 42 U.S.C. 6991*c*, and 40 C.F.R. Part 281, Subpart A in lieu of the federal UST program pursuant to Subtitle I of RCRA, 42 U.S.C. 6991-6991i. Maryland's UST program is enforceable by EPA pursuant to Section 9006 of RCRA, 42 U.S.C. 6991*e*.

subpart "b" of Interrogatory #1, EPA asks fifteen individual questions regarding specific USTs and for each of those 15 tanks, it seeks "clear and detailed" statements regarding the "date of installation" and the "type/construction" of each tank. The effect of these particulars is that EPA is actually asking 84 questions within the first two subparts of its first interrogatory. Although the third subpart of EPA's first question is more difficult to tabulate, it is not difficult to imagine that, on its own, that subpart could easily dwarf the information sought in the first two subparts of the first interrogatory, because it seeks "a clear and detailed statement describing *any and all liquid substances, including but not limited to 'regulated substance(s),'* . . . which were contained in each [of *three* identified tanks] from *May 1998 through March 2003, and the respective time periods during which each such tank contained such substances*." Motion at A-1. Thus, conservatively estimating the information sought by EPA regarding "Interrogatory #1," Complainant is actually seeking over 100 separate, detailed, pieces of information from the Respondent.

Interrogatory #2 takes the same approach as Interrogatory #1, as it is divided into 9 subpart questions, and, spread among those 9 subparts, there are 23 further subpart questions. Even this description does not convey the breadth of Interrogatory #2. For example, regarding subpart "a," which itself has five subquestions, EPA seeks information regarding the modification of the ATG system of the "INCON tank" at Respondent's Preston Facility, by identifying each person with personal knowledge about the modification, the time period such knowledge was gained, the circumstances of the acquired knowledge, the person's "work experience and qualifications to install, modify, operate and/or maintain the ATG . . . system . . . [and] at whose direction each such person performed work associated with installing, modifying, operating and/or maintaining the ATG release detection system . . . ." Motion at A-2.

In Respondent's Opposition to EPA's Motion it notes that the discovery has been made nearly a year after the complaint was filed and seeks "literally hundreds of requests for information." Opposition at 2 (emphasis in original). Duncan notes that it is a small company, with only four employees. It contends that the broad discovery sought by EPA would be "extremely burdensome on the company" and "unreasonably delay the proceeding." *Id*. Duncan contends that, apart from this formal discovery request, it has already responded to many EPA requests for information regarding this matter, requests which began as far back as January 2002. As Duncan sees it, EPA's request, upon considering its size and eleventh hour timing, "is nothing short of intentional harassment of a small company, designed to make [it] unable to continue to fight the baseless charges that have been brought against it." *Id*. at 3.

EPA's Reply narrowly construes Duncan's opposition as limited to whether the information sought is unreasonably burdensome and whether it will cause a delay in the proceedings. Under that approach, EPA expressly contends that the Respondent has waived any objection to a claim that the information sought lacks significant probative value, as well as any of the other factors listed at 40 C.F.R. § 22.19(e)(1), save the delay or burden grounds. EPA concedes that, prior to initiating this litigation, it "undertook a lengthy investigation relating to Duncan Petroleum's Corp.'s ownership and involvement with the specific Underground Storage Tanks (USTs) at issue." Reply at 3-4. The balance of EPA's Reply is a lengthy attempt to show that each of its requests does not create an unreasonable burden on the Respondent. *Id*. at 7-16. The Reply finishes with a reiteration of EPA's Motion in Limine seeking to bar "Respondent

from introducing into evidence at hearing any factual information which is sought through Complainant's Interrogatories and Requests For Production of Documents . . . ." *Id.* at 18.

As noted by the Complainant, the Consolidated Rules of Practice ("Procedural Rules") for these proceedings provide, at 40 C.F.R. § 22.19(e), that after the prehearing exchange information has been delivered, a party may move for additional discovery. While that provision requires that the judge determine that such discovery not cause unreasonable delay in the proceeding, nor present an unreasonable burden on the party who is to provide the information, and that the information involves "significant probative value on a disputed issue of material fact relevant to the liability or the relief sought" and is most reasonably obtained from the non-moving party, all of those preconditions are prefaced by the court's discretion to order the discovery or not: "[t]he Presiding Officer *may* order such other discovery" assuming that the preconditions are satisfied. 40 C.F.R. § 22.19(e)(1) (emphasis added).

Thus, the administrative law judge has wide discretion when it comes to matters of a hearing, particularly with discovery.2 The Agency's policy toward discovery "permits less extensive discovery." *In the Matter of Easterday Janitorial Supply Company*, Docket No. FIFRA-09-99-0015, 2001 EPA ALJ LEXIS 19, *15 (Jan. 31, 2001) (citing 64 Fed. Reg. 40,138, 40,160 (July 23, 1999)). In that context the Agency noted that:

> There is no inherent unfairness in rules that permit less extensive discovery than those of the Federal courts. Restrictions on discovery work as both [a] burden and an advantage, and as some of the commenters acknowledge, respondents share in the advantages as well as the burdens . . . [t]he CROP limits the Agency's discovery to "information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought." As a result, EPA foregoes in its administrative proceedings the opportunities afforded by extensive discovery in exchange for the benefits of more expeditious case resolution.3

---

2 The Environmental Appeals Board ("EAB") has stated that while "it reviews the Presiding Officer's factual and legal conclusions on a *de novo* basis, it may apply a deferential standard of review to issues such as [] . . . decisions regarding discovery." *Janitorial* at *9 (citing *In re Bil-Dry Corp.*, RCRA Appeal No. 98-4, slip op. at 18 n.15 (Jan. 18, 2001) (citing *In re Chempace Corp.*, FIFRA Appeal Nos. 99-2 & 99-3, slip op. at 23 (May 18, 2000)). This approach is consistent with that taken by the federal courts. *Id*. n.6 (citing *Cruden v. Bank of New York*, 957 F.2d 961, 972 (2d Cir. 1992) ("A trial court enjoys wide discretion in its handling of pre-trial discovery, and its ruling with regard to discovery are reversed only upon a clear showing of an abuse of discretion.").

3 It is also important to note that "[n]either the [C]onstitution nor the Administrative Procedure Act confers a right to discovery in federal administrative proceedings." *In re Advanced Electronics, Inc.*, CWA Appeal No. 00-5, *20 (EAB Mar. 11, 2002) (citing *Kenrich Petrochems., Inc. v. NLRB*, 893 F.2d 1468, 1484 (3rd Cir. 1990), *reh'g granted in part*, 907 F.2d 400 (3rd Cir. 1990), *cert. denied*, 498 U.S. 981 (1990). The Federal Rules of Civil Procedure for discovery also do not apply to administrative proceedings. *In the Matter of Easterday Janitorial Supply Company*, Docket No. FIFRA-09-99-0015, 2001 EPA ALJ LEXIS 19, *10 (Jan. 31,

64 Fed. Reg. at 40,160.

As EPA conceded in its Reply, it already has undertaken "a *lengthy investigation* relating to Duncan Petroleum's Corp.'s ownership and involvement with the specific Underground Storage Tanks (USTs) at issue." EPA Reply at 3-4 (emphasis added). This is consistent with the Agency's recognition that the information it gathers prior to its enforcement action is generally acquired from the respondent through an inspection or information collection request or through respondent's own reporting. *See* 64 Fed. Reg. at 40,161.

Count XII, covering paragraphs 234 through 276 of the Complaint, provides representative insight into EPA's Motion. The essence of the charge for this Count is a failure to provide release detection monitoring for particular USTs at Respondent's Chestertown tanks. In particular, paragraph 276 alleges that Respondent failed "to ensure that the Chestertown Tanks were monitored at least once every 30 days for releases by using one of the methods permitted [by idenitifed COMAR regulations] during [identified] times . . . [constituting violations of] COMAR § 26.10.05.01, .02.B. and .04." Respondent denied the alleged violation and in addition to its answers, added in the "Defenses" section to its answer, "at all relevant times, and [] at all facilities and tanks referred to in the Complaint, the operator of the facility provided and operated a method or combination of methods of release protection as required by COMAR § 26.10.05.04." Answer at 23, ¶ 3.

The Complaint goes on to acknowledge that EPA conducted an inspection at Chestertown on June 12, 2001 to determine if the USTs there were in compliance. Another inspection followed on October 17, 2002. On January 14, 2002 EPA requested records from the Respondent regarding these tanks "documenting the performance of release detection . . . since June 2000." Complaint at ¶ 254. The Complaint then acknowledges that, in response to the January 14th letter, Respondent "provided EPA with records for Chestertown." *Id*. at ¶ 255. On August 23, 2002, EPA requested "*inter alia* documentation verifying that release detection was used at Chestertown for . . . November 2000; December 2000; January 2001; March 2001; April 2001; and May 2001." *Id*. at ¶ 256. The Complaint relates that the Respondent provided EPA with records for various Chestertown tanks for January through December 2000 and 2001. Next, EPA, in March 2003, sought "documentation verifying that release detection was provided for the Chestertown Tanks for . . . March 2002 through February 2003." *Id*. at ¶ 258. That same month, Respondent in response to the March 2003 request, provided, *inter alia*, records and handwritten notes for certain Chestertown Tanks for January 2002 through March 2003. *Id*. at ¶

259. More requests followed. In January 2004, EPA wanted documentation verifying that release detection was provided for the Chestertown Tanks from March 1, 2003 through December 31, 2003. A meeting between the parties ensued, regarding the January 2004 request, and at that time, according to the Complaint, "Respondent provided EPA with handwritten notes purporting to be groundwater monitoring records for 2003 for Chestertown." *Id*. at ¶ 261. Thus,

---

2001). Therefore, the Agency's procedural rules govern. *Id*. (citing *Pacific Gas & Elec. Co. v. FERC*, 746 F.2d 1383, 1387 (9th Cir. 1984).

prior to the Complaint being filed in September 2004, it can hardly be contended that the Respondent had not provided responses to EPA's multiple requests for information regarding these tanks.4

Having considered the filings regarding these motions, the Court agrees with the Respondent that the broad discovery sought by EPA would be extremely burdensome on this small company and that it would unreasonably delay the proceeding. Accordingly, upon consideration, EPA's Motion for Discovery and Motion in Limine is DENIED.

When discovery is denied, this does not equate to a barrier to the search for the truth. Rather, the decision to grant or deny discovery involves a balancing of interests, as the rule itself recognizes. Further, there are consequences where a side does not voluntarily exchange sought-after information, as the Procedural Rules require that the parties identify the witnesses and summarize their expected testimony. In addition, they must provide "[c]opies of all documents and exhibits intend[ed] to [be] introduce[d] into evidence at the hearing." 40 C.F.R. § 22.19(a)(2)(ii). The consequence of failing to comply with this provision is that non-identified or exchanged information is not admitted at the hearing. "[A] document or exhibit that has not been included in [the] prehearing information exchange shall not be admitted into evidence, and any witness whose name and testimony summary has not been included in [the] prehearing information exchange shall not be allowed to testify." 40 C.F.R. § 22.19(a)(1). **With these requirements in mind, the Court directs the parties to *carefully* review their witnesses' summaries to make sure that, in good faith, they contain the required "brief summary of [the witnesses] expected testimony." Upon such review, if appropriate, the parties should promptly supplement their witness summaries. The parties are also reminded of the requirement that, per 40 C.F.R. § 22.22(a)(1), exhibits, witnesses and the summary of expected testimony, are to be exchanged "at least 15 days before the hearing date."** The Court will enforce these provisions and will not allow either side, as EPA expressed it, "to 'hide the ball' . . . until both parties are standing before this Court in the midst of an evidentiary hearing." 5 Reply at 17.

Last, the Court is aware that there is an outstanding Motion, filed by EPA, for Partial

---

4 This recounts only EPA's side of the information requests it had made prior to the filing of the Complaint. From the Respondent's perspective, its Answer agrees that EPA made these various information requests but that the Complaint's description understates the scope of EPA's requests, as each request sough "much more extensive information concerning [its] facilities than set out in [the Complaint]." Also, to be fair to the Respondent, while the Complaint alleges that certain records were not submitted *to EPA* for certain Chestertown tanks for particular months, the Respondent states that *it did submit* those records to the Maryland Department of the Environment ("MDE") and that it may still have possession of them. EPA has not claimed that the Respondent had a duty to independently submit those records to it, and not just to MDE.

5 While this admonition applies equally to both parties, this should allay EPA's expressed concern over whether the Respondent might engage in a tactic of surprise, by attempting to obfuscate its position in this litigation. Modern litigation does not operate this way. The parties are required to disclose their positions, exhibits and expected summary of their witnesses in advance of the hearing and in accordance with the Consolidated Rules of Practice.

Accelerated Decision as to some counts. While the Court intends to issue an Order regarding that motion as soon as time allows, the parties should not interpret the delay in issuing that Order as indicating the outcome. Rather, both sides should operate under the assumption that, unless the Order determines otherwise, all counts will be tried at the hearing and that they should prepare accordingly.

_____

William B. Moran
United States Administrative Law Judge

Dated: October 21, 2005
Washington, D.C.