UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
JLM Chemicals, Inc.	)	Docket No. 5-MM-98-003
	)	
Respondent	)	

ORDER GRANTING LIMITED DISCOVERY

The Respondent in this case, JLM Chemicals, Inc. ("JLM" or the "Respondent"), has filed a motion, dated February 10, 1999, for leave to take discovery. JLM seeks to serve the Region 5 Office of the United States Environmental Protection Agency (the "Region" or "Complainant") with a series of requests to admit, follow-up interrogatories and document requests, and a notice to depose a Region witness. The Region has filed a memorandum in opposition to Respondent's motion for leave to take discovery, and both parties have filed subsequent replies.

On August 28, 1998, the Region filed a Complaint charging JLM with five counts of violations of the notification requirements of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), and the Emergency Planning and Community Right-to-Know Act ("EPCRA"). The charges stem from a release of benzene, in an amount exceeding the reportable quantity, from the Respondent's chemical manufacturing facility in Blue Island, Illinois, on November 2, 1995.

Count I of the Complaint alleges that JLM failed to immediately notify the National Response Center of the release, in violation of CERCLA §103(a), 42 U.S.C. §9603(a). Count II alleges that the Respondent failed to immediately notify the State Emergency Response Commission ("SERC"), in violation of EPCRA §304(a), 42 U.S.C. §11004(a). Count III alleges that JLM failed to immediately notify the Local Emergency Planning Committee ("LEPC") of the release, in violation of EPCRA §304(a), 42 U.S.C. §11004(a). Count IV of the Complaint alleges that JLM failed to

provide a written follow-up emergency notice to the SERC as soon as practicable, in violation of EPCRA §304(c), 42 U.S.C. §11004(c). Finally, Count V alleges that the Respondent failed to provide a written follow-up notice to the LEPC, also in violation of EPCRA §304(c), 42 U.S.C. §11004(c). The Region proposes to assess a total civil penalty under CERCLA and EPCRA of $177,451 for these violations, apportioned as follows: Count I - $18,750; Count II - $18,750; Count III - $56,925; Count IV - $41,513; and Count V - $41,513.

In its Answer, the Respondent admitted the chief factual allegations of the Complaint, with respect to four of the five counts (all except Count IV), but contested the assessment of any penalties. Thus, to a large extent, the hearing will likely focus on the assessment of an appropriate penalty for these violations, rather than Respondent's liability.[(1)]

The Respondent's discovery request is accordingly narrowly drawn with respect to the Region's proposed penalty assessment. The Respondent essentially seeks an explanation of whether the Region, in its penalty calculation, applied a particular guideline in the civil penalty policy issued for these violations of CERCLA and EPCRA.

The Region calculated its proposed civil penalty by following the Interim Final Enforcement Response Policy for Sections 304, 311 and 312 of EPCRA and Section 103 of CERCLA, dated January 8, 1998 (the "Penalty Policy," submitted as Exhibit 9 in Complainant's prehearing exchange). In Section IV of the Penalty Policy (p. 9) there is a discussion of the general application of the guidelines and statutory factors. The last paragraph of Section IV states that a respondent's failure to provide notification or submit required reports to each point of compliance (i.e., each entity that is due a notification or report, such as the SERC and LEPC), is a separate violation. The Penalty Policy then states that:

> "For first time violators, however, EPA may propose one penalty for multi-point of compliance situations where the facts and circumstances warrant it."

I will refer to this as the "first-time violator single penalty guideline," or, in shortened form, the "single penalty guideline."

In this case the Region proposed separate penalties for each alleged failure of JLM to notify or submit a report to a point of compliance. JLM's proposed discovery essentially seeks an explanation of whether the Region considered the first-time violator single penalty guideline in this case, and whether it applies it in general.

The EPA Rules of Practice authorize the ALJ to grant discovery beyond the prehearing exchanges if such discovery will not unreasonably delay the proceedings, if the information sought is not otherwise obtainable, and if such information has significant probative value. 40 CFR §22.19(f)(1). The ALJ may order depositions only upon the additional showing that the information cannot be obtained by alternate means or that the evidence may not be preserved for presentation by a witness at the hearing. 40 CFR §22.19(f)(2).

JLM's proposed discovery here consists of nine requests to admit, with follow-up interrogatories and document requests. The interrogatories consist only of requesting an explanation of any response that is not an unqualified admission. The document requests seek copies of any documents referred to in the responses. JLM also seeks to depose Sylvia Palomo, of the Region's Office of Chemical Emergency Preparedness and Prevention. The Region opposes this proposed discovery primarily on the ground that the information sought does not have significant probative

value.

This decision finds that the information sought does have significant probative value to justify the requests to admit (with follow-up interrogatories and document requests), but that the Respondent has not shown good cause to take the requested deposition. Hence, the requested discovery, as thus limited, will be ordered.

The Respondent's requests to admit are narrowly restricted only to the Region's application of the first-time violator single penalty guideline. The first six requests (##1-6) simply would require the Region to admit or deny that the Penalty Policy and this guideline are applicable in this case, that JLM is a "first-time violator," and whether the Region considered the guideline in this case. The last three requests to admit (##7-9) address whether the Region applies the first-time violator single penalty guideline generally in its CERCLA and EPCRA enforcement programs. There is no dispute that this proposed discovery will not unreasonably delay the proceedings and that the information is not otherwise obtainable.

The Penalty Policy, by using the word "may," gives the Region discretion to assess a single penalty for first-time violators who fail to notify multiple points of compliance of a release of a hazardous substance. By seeking multiple penalties in this proceeding (assuming JLM is a first-time violator), it is apparent that the Region either: (a) did not apply the first-time violator single penalty guideline; or (b) determined that the facts and circumstances surrounding the alleged violations did not warrant assessing a single penalty. The first six requests to admit essentially only require the Region to say which of those two courses it followed. This should actually have been articulated in Complainant's prehearing exchange, anyway. The Region does list Sylvia Palomo as a witness to testify about "her calculation of the proposed civil penalty." Neither the prehearing exchange nor the penalty calculations attached to the Complaint specifically refer to the single penalty guideline for first-time violators. It should be a very simple matter for Ms. Palomo to respond to the requests to clarify whether or how the Region considered that guideline in this case.

While it is true that the proposed discovery is not strictly seeking factual matter, the information sought, in the context of this proceeding, could have significant probative value. As indicated above, the determination of an appropriate civil penalty will likely be the main issue at the hearing. The complainant has the burden of showing that its proposed penalty is appropriate. 40 CFR §22.24. The Rules further require the presiding officer to "consider any civil penalty guidelines issued under the Act," and to set forth in the decision specific reasons for deviating from the amount proposed in the complaint. 40 CFR §22.27(b). The Region has properly placed its penalty calculation at issue in its prehearing exchange. The judge must therefore conduct a clear and thorough review of the penalty calculation in the context of the Penalty Policy in order to ultimately determine an appropriate civil penalty in EPA administrative enforcement proceedings.

The Respondent's requests ##1-6 only seek a simple clarification of the Region's penalty calculation with respect to the its consideration of the first-time violator single penalty policy in this proceeding. The response to this question could focus the issues for hearing by, for example, indicating the particular facts and circumstances that the Region did evaluate in its determination whether to apply the single penalty guideline. Hence, requests to admit ##1-6, which address only the Region's application of the guideline in this particular proceeding, seek information that could have significant probative value with respect to the determination of an appropriate civil penalty. The Respondent's motion to serve those requests to admit and follow-up interrogatories and document requests will therefore be granted.

The Respondent's requests ##7-9 would require the Region to admit or deny whether it applies the single penalty guideline generally. The Region opposes these requests on the basis that they do not seek information with significant probative value, since they concern the Region's actions in other cases. In support of its position, the Region cites the Chief Judicial Officer's decision in *In re Chautauqua Hardware Corporation*, 3 E.A.D. 616 (CJO, EPCRA Appeal No. 91-1, June 24, 1991). The ruling in *Chautauqua* is not however applicable here. Unlike in *Chautauqua*, the Respondent here is seeking information to determine whether the Region correctly applied the Penalty Policy -- not to challenge the validity of the Policy itself. (See *Chautauqua* at 6 E.A.D. 622).

The Respondent's discovery requests here are much more narrowly drawn than those of the Respondent in *Chautauqua*. It is too facile to rely on the statement in *Chautauqua* that "[w]hat has happened in other cases can have no bearing on any factual issues in this case." 6 E.A.D. at 627. JLM's request here also does not amount to a search for penalties assessed in other cases to compare with this case. Requests ##7-9 simply extend the inquiry into the correctness of the Region's application of the single penalty policy. The focus of the discovery requests is on the Region's own practice in its application of a single provision of the Penalty Policy. The proposed discovery does not seek to compare penalty assessments in various cases brought under CERCLA and EPCRA. While it is premature to consider whether the discovery request may lead to any evidence admissible at hearing, requests ##7-9 seek information that may have probative value in relation to the Region's penalty calculation. As stated above, that penalty calculation will likely be the central issue in this proceeding.

Hence, Respondent's proposed requests to admit, ##1-9, with the follow-up interrogatories and document requests, will not unduly delay the proceedings, seek information that is not otherwise obtainable, and seek information having probative value. The Respondent's motion for such discovery will therefore be granted, in accordance with the directions given in the order below.

The Respondent has not, however, shown good cause for taking the deposition of Sylvia Palomo. The information sought concerning the Region's consideration of the first-time violator single penalty policy can adequately be obtained by the written requests to admit, with the follow-up interrogatories and document requests. Further, Ms. Palomo is scheduled to testify as a witness for the Region at the hearing on the penalty calculation. There will be ample opportunity at hearing to further explore this issue. Thus, the Respondent has not made the requisite showing of good cause to take her deposition pursuant to 40 CFR §22.19(f)(2).

Order

The Respondent's motion for leave to take discovery is granted with respect to its requests to admit, interrogatories, and document requests. The motion is denied with respect to the deposition of Sylvia Palomo. The Complainant is directed to respond to the written discovery within 10 days of its receipt of this order.

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Andrew S. Pearlstein
Administrative Law Judge

Dated: May 12, 1999
Washington, D.C.

1. The Region has also filed a motion for accelerated decision, seeking an order finding JLM liable for the alleged violations. That motion will be decided in a separate decision.