

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Pekin Energy Company) Docket No. 5-CERCLA/EPCRA-95-043
)
Respondent)

ORDER GRANTING MOTION TO DISMISS COUNTS XI-XVI
and
ORDER ON DISCOVERY

This case has been referred back to me for litigation upon termination of the alternative dispute resolution process. Two motions are pending. The Region 5 Office of the United States Environmental Protection Agency (the "Complainant" or "Region") has moved to dismiss Counts XI to XVI of the Complaint, and has also filed a motion for further discovery. The Pekin Energy Company, of Pekin, Illinois (the "Respondent" or "Pekin") has filed a response in opposition to the motion for further discovery.

The Complaint in this proceeding charges the Respondent with a series of violations of the reporting requirements of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), and the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA") in connection with several releases of toxic chemicals from Pekin's facility in 1991 and 1994. The Complaint seeks assessment of a total civil penalty of \$385,000 for 16 counts of violations.

Motion to Dismiss Counts XI to XVI

The Region moves to dismiss Counts XI to XVI, which concern releases of ethanol from Pekin's facility in 1991. The Region states that the ethanol at issue is not listed as a hazardous substance in 40 CFR §302.4. Reporting of those releases was

therefore not required. Respondent does not oppose this motion. The motion to dismiss Counts XI, XII, XIII, XIV, XV, and XVI of the Complaint is therefore granted. This reduces the penalty sought to \$240,000 for the remaining 10 counts.

Motion for Discovery

- Operating Charts

The Complainant seeks discovery of two items from Respondent. The first are color copies of its operating charts that show pressure and temperature of Pekin's distillation system, for the dates of the two alleged cylcolhexane releases -- June 30 and October 23, 1994. In its response, Pekin has indicated it has supplied the Region with a color copy of the operating chart for October 23, 1994. A black and white copy had previously been produced. Respondent states, however, that no such operating chart exists for June 30, 1994, since the computer data necessary to generate the chart was "automatically deleted" from the company's computer system "within a brief predetermined time."

The discovery request is moot with regard to the October 23 chart, which has been supplied. If the June 30 chart does not exist and cannot be reproduced, of course Pekin need not comply. To further substantiate this, however, Pekin will be required to produce, as requested by Complainant, a copy of its records retention policy, or the equivalent information more specifically describing the period of time and procedures followed for deletion of such data.

- Logbooks

The Complainant also seeks unredacted copies of the Respondent's logbooks for the same two dates -- June 30 and October 23, 1994. Respondent has produced redacted copies of those logbooks, which Respondent asserts include all information related to the cyclohexane releases on those dates. Pekin claims the redacted material consists of highly confidential business information with no probative value concerning the releases. Further, pursuant to an agreement reached during the mediation process, Respondent has disclosed the subject matter of the redacted portions to the Respondent.

Complainant has not made a sufficient showing that the missing information has significant probative value, as required by the EPA Rules of Practice governing motions for discovery, 40 CFR

§22.19(f). On the motions before me, there is no basis to question Respondent's assertion that all relevant portions of the logbooks have been produced. Complainant only states that complete logbook entries would be "highly relevant to Respondent's knowledge of and reaction to the release." The Region does not however explain how the missing entries could be relevant. Respondent has stated that the logbook entries encompass all plant operations, most of which have nothing to do with the releases, and that the subject matter of the redacted entries has been disclosed to Complainant. The Region has not addressed this point, and has thus not shown how the censored entries could be relevant to the issues surrounding the cyclohexane releases. While it is true that confidential business information could be protected, it is not necessary to invoke those procedures unless a sufficient showing is made that the confidential material has significant probative value. Since Complainant has failed to make such a showing in support of this portion of its motion, it will be denied.

Summary of Rulings

1. Complainant's motion to withdraw Counts XI to XVI of the Complaint is granted.
2. Complainant's motion for further discovery is denied with respect to the October 23, 1994 color operating chart, as moot.
3. With respect to the June 30, 1994 operating chart, Respondent will be required to substantiate its claim that it no longer exists and cannot be reproduced, by producing its records retention policy, or equivalent information relating to the operating chart data.
4. Complainant's motion for discovery of the redacted portions of Respondent's logbooks for June 30 and October 23, 1994 is denied.

Andrew S. Pearlstein

Administrative Law Judge

Dated: October 20, 1997

Washington, D.C.