8/9/91

**UNITED STATES**
**ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

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| **IN THE MATTER OF** | ) | |
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| **THE C. P. HALL COMPANY** | ) | **Docket No. TSCA-V-C-61-89** |
| | ) | |
| **Respondent** | ) | |

**ORDER ON RESPONDENT'S MOTION FOR DISCOVERY AND COMPLAINANT'S MOTION TO STRIKE**

On September 28, 1990, respondent filed a motion for leave to take discovery. After a series of motions by both parties, causing delay and confusion, the Administrative Law Judge (ALJ), in an order served February 4, 1991,[1] directed the parties to engage in prehearing exchanges not later than March 13. Following this, the parties were advised that a motion to compel discovery would be entertained if voluntary discovery was unsuccessful. On May 14, respondent served a motion to compel discovery. Complainant served its response on May 24.

Some threshold thoughts are appropriate here. A large amount of discretion is accorded the ALJ in questions concerning discovery, and the resolutions of discovery issues perforce turn upon the facts of the individual case and the applicable law and regulations. Discovery can be salutary. Stated broadly, it may lead to admissible evidence; it may more precisely define and

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[1] Unless otherwise stated, the year is 1991.

narrow the issues; it may result in a more expedited hearing or the settlement of the matter. Notwithstanding these vaunted virtues, discovery as a litigation art may be put to inapposite uses to the disadvantage of justice. Therefore, let it be emphasized here that neither party will be permitted, under the guise of discovery, to engage in delaying, paper-producing, action-avoiding tactics. Further, discovery in an administrative hearing is different from federal civil proceedings. There is no basic constitutional right to pretrial discovery in administrative hearings. Silverman v. Commodity Futures Trading Commission, 549 F.2d 28, 33 (7th Cir. 1977); Klein v. Peterson, 696 F.Supp. 695, 697 (D.D.C. 1987). With this backdrop, the discovery motion is addressed. Under the Consolidated Rules of Practice, 40 C.F.R. Part 22, the parties are required only to exchange the names of the expert and other witnesses along with a "brief narrative" summary of their testimony, and documents which each party intends to introduce into evidence. 40 C.F.R. § 22.19(b). Beyond this, the parties are not obligated to complete any other discovery. Although voluntary discovery is strongly encouraged, it is not mandatory. After the prehearing exchanges, if the parties are not able to complete discovery voluntarily, then they may motion for further discovery pursuant to 40 C.F.R. § 22.19(f). At this juncture, it may be appropriate to mention that in response to a letter from complainant dated July 12, the ALJ on July 19, without covering letter, sent to both parties explanations of two enforcement response policies, dated July 30, 1984 and May 28, 1986, in the

hope that they may contribute to clarification of the penalty policy, or settlement of this matter, or both.

The significant language of section 22.19(f)(1) concerns delay, the obtainability of the information elsewhere and the probative value of the information sought.[2] The extent to which discovery will be granted is determined by laying the motion alongside 40 C.F.R. § 22.19(f).[3] In pertinent part, the aforementioned provides:

> (f) Other discovery. (1) Except as provided by paragraph (b) of this section, further discovery, under this section, shall be permitted only upon determination by the Presiding Officer:
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> (i) That such discovery will not in any way unreasonably delay the proceeding;
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> (ii) That the information to be obtained is not otherwise obtainable; and
>
> (iii) That such information has significant probative value.
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> (2) The Presiding Officer shall order depositions upon oral questions only upon a showing of good cause and a finding that:
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> (i) The information sought cannot be obtained by alternate means; or
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> (ii) There is substantial reason to believe that the relevant and probative evidence may otherwise not be preserved for presentation by a witness at a hearing (emphasis added).

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[2] In re Rockwell International Corp., Docket No. TSCA-PCB-VIII-86-028, (Order Granting Further Discovery, Jan. 28, 1988 at 3).

[3] Id.

The original basis for respondent's motion for leave to take discovery was to acquire information concerning the TSCA penalty policy. Specifically, respondent claimed it lacked access to intra-agency statements regarding the decision to propose 39 separate violations. In addition, respondent, in its motion to compel discovery, stated it needed information concerning the promulgation and substance of the TSCA penalty policy because it sought to challenge the promulgation and substance of the policy itself. (Motion at 2).

The Chief Judicial Officer ruled recently that the deliberative process concerning the formulation by a final rule or penalty is privileged and shielded from documentary discovery. In the Matter of Chautauqua Hardware Corporation, (hereinafter Chautauqua), EPCRA Appeal No. 91-1 at 12, (June 24, 1991). The test for deliberative process has been further explained in Jordan v. United States Department of Justice, 591 F.2d 753, 772-774 (D.C. Cir. 1978). Though the case arose in the context of the Freedom of Information Act, it is nonetheless instructive. First, the deliberative process must be predecisional. The privilege only protects those communications that occur before the adoption of the final policy. Second, the communication must be deliberative; that is, it must somehow reflect the mental processes by which a final policy was formulated. For public policy reasons, the deliberative process privilege is available in administrative proceedings

governed by the rules of Part 22.[4] In Chautauqua, at 16, it was held that EPA did not have to assert affirmatively this privilege. "It is sufficient that the Region vigorously opposed the release of the documents. It can be safely assumed that the Region would have invoked the privilege had it known this tribunal would recognize it."

Among its preachments, Chautauqua makes it clear that to the extent that respondent seeks discovery to challenge the substance of the penalty policy, the information does not have significant probative value within the meaning of section 22.19(f)(1)(iii). Such a request is not designed to prove a fact that bears on the appropriateness of the proposed penalty. Respondent wants to show that there is no reasonable basis for the per chemical penalty approach. However, whether or not the penalty policy should impose a separate penalty for each chemical on the inventory update form is a legal or policy issue. When documents are sought to challenge the legal or policy decisions underlying that penalty, the information does not have significant probative value within the meaning of section 22.19(f)(1)(iii). Chautauqua, at 10-11.

Respondent's motion consists of three sections. Request for Production of Documents, Interrogatories and Depositions. They will be addressed seriatim.

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[4] The deliberative process serves, among others, to assure that subordinates within an agency will feel free to provide the decision maker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism. See Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

I

**Request for Production of Documents**

Request number "1" has been given in the prehearing exchange.

Request number "2" for other documents related to the inspection of respondent's facility is questionable as to its probativeness concerning liability. Respondent has admitted to failing to report chemical substances over 10,000 pounds. Thus, the probativeness of such information is not apparent. Request number "2" is **DENIED**.

Request number "3" is overly broad and would cause undue delay in the proceeding. Further, the request for all documents relating to the regulation of respondent from 1976 to the present is outside the scope of the issue. Request number "3" is **DENIED**.

Request number "4" concerning documents giving complainant the basis for selecting C. P. Hall for inspection goes to the question concerning whether or not there was selective enforcement by complainant. Such information lacks significant probative value; it is within the discretion of EPA to select those respondents who are allegedly in violation of the pertinent statutes. Further, the request intrudes upon the deliberative process of EPA enforcement, which is privileged information. Request number "4" is **DENIED**.

The information in request number "5," to the extent that it is probative, is provided in the prehearing exchange under the penalty calculation. In other regards, it is overly broad. Request number "5" is **DENIED**.

Request number "6" is **DENIED** for the same reasons as request number "5".

Request number "7" is **DENIED** for the same reasons as request number "5", except to the following extent: Two documents, Recordkeeping and Reporting Rules, TSCA sections 8, 12, 13, Document No. TSCA PC 5, Office of Pesticides and Toxic Substances 7130184, and another, TSCA sections 8, 12, 13, Enforcement Response Policy, Office of Compliance Monitoring, Document No. TSCA PC 10, 5128186, were apparently not submitted in the prehearing exchange and there exists the strong probability that they may be significantly probative in determining the penalty amount during the period of respondent's alleged TSCA section 15(3) violation. To this latter extent, the request is **GRANTED**, and complainant shall deliver up the two documents.

Request number "8" seeks documents concerning all violators of the TSCA update rule. The purpose of this discovery request is to produce, in the main, information bearing on the appropriateness of the proposed penalty; the materials requested cannot be used to prove a fact bearing on that issue. Chautauqua at 17. "What happened in other cases can have no bearing on the factual issues of this case." Id. Request number "8" is **DENIED** because it does not have significant probative value. Additionally, the request is overly broad, and also would unreasonably delay the proceeding.

Request number "9" information has been provided in the prehearing exchange. This request is **DENIED**.

Request number "10" is **DENIED** for the same reason as number "9".

Request number "11" concerns all documents relating to on-site inspection procedures. Whether such information would be probative is not apparent with respect to liability. To the extent it is relevant, it has been provided in the prehearing exchange. The request, in part, also intrudes into EPA deliberative process. The request is **DENIED**.

Request number "12." Unable to rule upon this request. On August 1, 1991, both complainant and respondent advised staff of ALJ that Complainant's Response to Respondent's First Set of Interrogatories is a non-existent document.

Request number "13" has been provided in the prehearing exchange. This request is **DENIED**.

## INTERROGATORIES

The respondent has not demonstrated that the information sought in Interrogatory 1 is of significant probative value. Interrogatory "1" is **DENIED**. The information sought in interrogatories 2, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, to the extent of its relevancy, has been provided in the prehearing exchange. The motion is **DENIED** concerning these interrogatories. The information sought in interrogatories 3 and 12 is overly broad, would delay the proceeding, and has not been demonstrated to be of significant probative value. The information concerning these interrogatories is **DENIED**. The information sought in

interrogatories 4, 5 and 19, either intrudes upon the deliberative process of EPA or is not significantly probative to the issues involved in this matter, or both. The motions concerning these interrogatories are **DENIED**. The information sought in interrogatory 13 may be probative in that it seeks when and who provided complainant information for the alleged violation. Except to the extent that providing this information would not breach a confidential relationship, impinge upon deliberative process, or result in unreasonable delay, the information sought in this interrogatory is **GRANTED**.

## DEPOSITIONS

A party seeking to depose a witness must also satisfy the requirements of 40 C.F.R. § 22.19(f)(2). The critical language regarding depositions is that same may only be granted upon a showing of good cause and a finding "that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing." With respect to each element, the discovery may have significant probative value in that it may aid respondent in its defense. Yet, respondent has failed to meet the requirements of "not otherwise obtainable" and "good cause." Concerning "not otherwise obtainable," the complainant has provided in the prehearing exchange adequate information of the expected testimony in order to prepare defenses. In terms of good cause, the complainant has provided the regulations and given its rationale concerning the basis for the penalty assessment and

potential or actual harm the violations can cause. Moreover, respondent has not established that the relevant and probative evidence may not otherwise be preserved by a witness at the hearing. Complainant's prehearing exchange states that, among others, Messrs. Abeer Hashem and Robert Allen will appear as witnesses. The motion is **DENIED**.

II

On May 14, complainant served a motion to strike respondent's prehearing exchange in part or, in the alternative, to order respondent to comply with the prehearing exchange requirements. Respondent served its response on May 24.

Complainant seeks to strike seven witnesses of respondent on the grounds that the brief, narrative summary of their testimony is inadequate. Complainant contends that 40 C.F.R. § 22.19(b) requires more than the identity of the witness and the topic on which witnesses will testify. Striking witnesses at this stage in the proceeding is premature. Section 22.19(b) requires only that a party make available to other parties "(1) the name of the expert and other witnesses he intends to call together with a brief narrative summary of their expected testimony." (emphasis added). Thus, respondent's information concerning its witnesses is sufficient. Respondent is, of course, at liberty to provide the complainant voluntarily with the information sought. However, absent complainant being permitted additional discovery under 40 C.F.R. § 22.19(f), respondent has no further obligation. The

motion to strike respondent's prehearing exchange or, in the alternative, to compel with respect to respondent's witnesses is **DENIED**.

Complainant also seeks to strike certain documents or exhibits on the grounds that such exhibits are provided without witnesses to establish their foundation and the exhibits are without a brief narrative of expected testimony, including any testimony to be given on how the exhibit relates to the issues in the case. Under 40 C.F.R. § 22.19(b)(2), the parties are only required to identify the document of which a copy is provided. Though desirable, the rule does not appear to command that the parties provide witnesses to establish the foundation of documents unless the ALJ determines otherwise, which, of course, will depend, among others, on the nature and probativeness of the document.

**IT IS ORDERED** that, the motion to strike certain documents and compel is premature and improper; it is **DENIED**.

**IT IS FURTHER ORDERED** that, within **15** days of the service date of this order, and to the extent not done so already, respondent respond to complainant's motion for an accelerated decision, served October 26, 1990, as supplemented by its submission of November 8, 1990.

Frank W. Vanderheyden
Administrative Law Judge

Dated: August 9, 1991

**IN THE MATTER OF C. P. HALL COMPANY**, Respondent,
Docket No. TSCA V-C-61-89

## Certificate of Service

I hereby certify that the foregoing Order, dated 8/9/91, was sent this day in the following manner to the below addressees:

Original by Regular Mail to:

Ms. Beverely Shorty
Regional Hearing Clerk
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Copy by Regular Mail to:

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Marion I. Walzel
Secretary

Dated: August 9, 1991