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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
STANCHEM, INC. ,)	Docket No. CWA-2-I-95-1040
)	
)	
RESPONDENT)	

ORDER DENYING COMPLAINANT'S MOTION TO COMPEL

An order, dated February 13, 1998, addressed Complainant's motions to compel and for discovery, and StanChem's motions to bifurcate the hearing and for discovery. Complainant's motion to compel was directed at StanChem's alleged failure to provide summaries of the expected testimony of its witnesses and to be more specific as to Federal Register and other materials upon which it intended to rely. An amended prehearing exchange filed by StanChem was deemed to be adequate compliance with the requirement for summaries of expected witness testimony and StanChem's response to the mentioned order, dated March 27, 1998, includes an extensive list of citations to the Federal Register (Id. 1). Complainant's motion for discovery was granted in part, StanChem's motion for a bifurcated hearing was denied and StanChem's motion to compel was granted in part.

Complainant's motion to compel, dated April 3, 1998, alleges that StanChem did not adequately comply with the February 13, 1998, discovery order. Referring to the alleged failure to provide economic benefit information, Complainant points out that paragraph 11 of its proposed order [adopted by the ALJ] required that StanChem:

Specify any and all internal rates of return on equity or return on investment utilized or projected by the respondent during the period 1989-1998, and provide an explanation of how those rates were calculated or derived.

StanChem's response was to the effect that its capital projects after 1989 and

through 1996, including improvements to its wastewater improvement system, did not produce a rate of return and were undertaken to maintain existing production capability. StanChem asserted that financial data for 1997 and 1998 were not yet available.

Complainant says that this response appears to purposefully evade the question which was not confined to return on "capital projects", but clearly called for any and all rates of return on equity or internal rates of return on investment utilized or projected by StanChem during the 1989-98 period (Motion at 1, 2). According to Complainant, the information sought is the return on equity achieved by the corporation as a whole. Additionally, Complainant emphasizes that StanChem was required to explain how these rates were calculated or derived.

Complainant points out that StanChem utilizes Coopers & Lybrand, one of the Big Six international accounting firms, to perform accounting, auditing and financial analyses functions and that it is unlikely that StanChem over an approximate ten-year period has never made any calculations or projections of return on equity or investment. Complainant asserts that return on equity is a component of the "weighted average cost of capital" used in determining an appropriate discount rate for the economic benefit calculation. If StanChem is unable or persists in its refusal to furnish such data, Complainant says that StanChem should be ordered to provide copies of all audited financial statements (unaudited statements if audited statements are not available) for the period 1989-1997 and copies of all state and federal income tax returns, including supporting schedules, for the mentioned years (Motion at 2, 3).

Responding to the motion, StanChem says that, as a small manufacturer, it does not make investments other than capital projects (Response, dated April 20, 1998, at 1). Therefore, StanChem confined its response to capital projects. StanChem reiterates assertions made in response to the discovery order that its capital projects after 1989 and through 1996 did not produce a return and that it did not make any calculations or projections of returns during that period. Accordingly, StanChem asserts that it fully complied with Paragraph 11 of the discovery order and that any further calculations or projections would not provide any information of probative value. Pending an audit by Cooper & Lybrand, StanChem states that financial data for 1997 are not available (Response at 2). Moreover, StanChem says that capital improvements related to its wastewater pretreatment facility occurred prior to 1997 and that, if subsequent capital investments produced a return, it would be irrelevant.

StanChem asserts that, through Cooper & Lybrand, it has provided data concerning its marginal tax rates for the years in question and emphasizes that its [tax returns and financial statements] contain sensitive and confidential business information. StanChem argues that Complainant has not, and can not, show that the requested documents have any relevance or probative value to the matters at issue herein and urges that the motion to compel be denied.

Discussion

Complainant's motion to compel is based upon the contention that it needs StanChem's return on equity or projections thereof in order to determine StanChem's "weighted cost of capital" and to calculate an appropriate discount rate. It is noted however, that the BEN User's Manual uses a standard discount rate of 10.6%, which is based in part on the "average corporate long-term weighted-average cost of capital over the past ten years." (Id. 4-19, 4-32). The manual states that the model assumes that the entity earned a return on these delayed and avoided costs at the same rate. The manual further provides that standard values should be used in the absence of data specific to the violator and that a standard value should not be changed in the absence of reliable information substantiating the change. (Id. 4-1). In this regard, model runs provided by Complainant in response to the ALJ's order indicate Complainant initially utilized a discount rate of 11.3%, while more recent model runs utilize a discount rate of 10.9%. Discount rates higher than the 10.6% specified by the BEN manual increase the alleged economic benefit from StanChem's delayed compliance. Presumably, Complainant has data supporting the higher discount rates. However, no explanation for these rates has been provided.

Although actual or projected returns on equity could at least theoretically affect the cost of capital, e.g., the cost of borrowing money, StanChem has denied that it made or projected any returns on equity during the years in question and has denied that its income tax returns or financial statements will provide any information of relevance to [issues at] the hearing (Response at 1, 2). The 10.6% discount rate used in the BEN manual presumably is evidentiarily supportable. StanChem is certainly on notice that the BEN discount rate of 10.6% will be used in the economic benefit calculation unless StanChem is prepared to challenge that rate. Moreover, it seems unlikely that the precision in calculation of the alleged economic benefit from noncompliance is such that the 0.3% difference between a discount rate of 10.6% and 10.9% will have any appreciable effect on the claimed benefit. In any event, Complainant hasn't alleged or shown the contrary. Under these circumstances, it is concluded that Complainant's motion to compel in this respect will be denied.

Failure to Describe Polymer Processes

Complainant points out that Paragraph 19 of the proposed discovery order (adopted by the ALJ) required StanChem to detail each step in processes that result in the generation of (A) acrylic and vinyl acetate latex polymer, (B) urea formaldehyde melamine condensate, and (C) melamine pyrophosphate. StanChem's response was to attach a trade publication (Attachment M) describing steps typically followed, and types of raw materials typically added, by members within the industry to make acrylic and vinyl acetate polymers. Complainant's objection was that StanChem had failed to clearly specify that the processes mentioned in the paper described StanChem's processes (Motion at 3, 4).

Responding, StanChem asserts that the processes described in Attachment M accurately describe StanChem's processes (Response at 3). Thus, Complainant's objection to StanChem's response to the discovery order, dated February 13, 1998, in this regard has been satisfied.

Trade Organization OCPSF Materials

Complainant points out that paragraph 29 of its proposed discovery order (adopted by the ALJ to the extent that documents and materials StanChem was required to furnish were limited to those pertaining to the applicability or potential applicability of the OCPSF rule to StanChem's operations) required StanChem to: Identify any trade, lobbying or similar business organization that Respondent or any of Respondent's officers or management officials has been a member of since November 5, 1987; identify the dates of such membership; and provide any materials received by the Respondent, its officers, or management officials since November 5, 1987 from such organizations.

StanChem's response was that it has been a member of National Paint and Coatings Association (NPCA) and Manufacturers of Exterior Insulation since November 5, 1987, and that it discontinued its membership in the Chemical Manufacturer's Association (CMA) as of June 21, 1988. StanChem did not identify any such materials that pertain to the applicability or potential applicability of the OCPSF rule to StanChem's operations (Response at 9).

Complainant complains that StanChem is obviously narrowly interpreting the order to only apply to materials which specifically name StanChem (Motion at 4). Complainant points out that StanChem acknowledged being a member of the NPCA and Manufacturers of Exterior Insulation since November 5, 1987. In litigation, concluded in 1989, Complainant says that NPCA challenged the applicability of the OCPSF regulations to facilities engaging in the same manufacturing processes as does Respondent. Chemical Manufacturer's Association v U.S. EPA, 879 F.2d 177, 253-57 (5th Cir. 1989). Complainant says that NPCA has informed EPA that it kept its membership well-informed of the OCPSF litigation and of developments related thereto. Complainant alleges that it is, therefore, certain that the NPCA, on more than one occasion, provided materials to Respondent explaining the OCPSF regulations and the positions taken by the NPCA in the litigation.

Although Complainant states that StanChem's knowledge of the OCPSF rule is

irrelevant to its liability, it says that such knowledge is clearly related to Respondent's culpability and thus to the appropriateness of the proposed penalty (Motion at 4, 5). Complainant asserts that the materials distributed to its members by the NPCA describing the OCPSF regulations, explaining how the regulations apply to facilities engaged in the same processes employed by Respondent, and explaining the litigation are highly relevant to StanChem's knowledge of the OCPSF regulations. Complainant argues that, even if StanChem's strained interpretation of the order is permissible, it did not comply with the spirit of the order and, therefore, requests that StanChem be ordered to supply:

all materials, in their entirety, that Respondent received from the NPCA and Manufacturers of Exterior Insulation that a) describe the Organic Chemicals, Plastics and Synthetic Fibers Point Source Category effluent guidelines and standards (the "OCPSF rule"), b) discuss the requirements of the OCPSF rule, or c) discuss the OCPSF litigation in which the organization was involved or which was otherwise relevant to Respondent's operations.

StanChem's response is simple: it asserts that it did not, and does not, have any of the alleged documents sought by Complainant (Response at 4).

StanChem may not be ordered to produce documents which it denies possessing.

ORDER

Complainant's motion to compel is denied.*

Dated this 5th day of May 1998.

Original signed by undersigned

Spencer T. Nissen
Administrative Law Judge

* In accordance with the suggestion in StanChem's "Reply," dated May 1, 1998, a ruling on StanChem's motion to take depositions will be deferred pending responses to its FOIA requests. The status of these matters will be discussed in a conference call to be scheduled during the week of July 27, 1998.

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