UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
William A. Rowell	)	
	)	
a/k/a William Rowell and as William A. Rowell, Jr.,	)	**Docket No. TSCA-03-2005-0110**
	)	
d/b/a Rowell Management Co., and as Southwest Trade School,	)	
	)	
Respondent	)	
	)	

ORDER GRANTING RESPONDENT'S MOTION FOR DISCOVERY

Respondent has filed a Motion for Discovery pursuant to 40 C.F.R. § 22.19(e). Respondent requests that Complainant be ordered to produce the following:

> [A]ny and all "outreach" documents sent to the following agencies, advising or encouraging or requiring those agencies to advise landlords of the existence of the Lead Paint Disclosure Rules:
>
> a. Philadelphia Housing Authority; and
> b. Philadelphia Department of Public Health.

Motion at 2.

Complainant objects to the discovery on the grounds that (a) the motion is procedurally defective, (b) Complainant has already provided documents responsive to the request, and (c) the requested documents are not of significant probative value. Response at 5, 8, & 11. For the following reasons, Respondent's motion for discovery is granted.

First, the motion is not procedurally defective. The only potentially fatal procedural defect in Respondent's submission of its motion was a failure to formally file this pleading with the Regional Hearing Clerk, pursuant to 40 C.F.R. § 22.5(a). However, Respondent did ultimately submit its Motion for Discovery to the Regional Hearing Clerk on September 8, 2005, thus curing this defect and placing the motion properly before this court.

Also, Complainant's argument that this motion is not properly before this court because the motion was submitted "via fax only" is, in the context of this case, completely unpersuasive. Response at 6-8. The fact of the matter is that this court received a copy of the Motion for Discovery, as did Complainant. Inasmuch as Complainant does not even allege prejudice as a result of Respondent's facsimile submission, and this court detects none, its hyper-technical

argument must fail.[1] Accordingly, this court accepts Respondent's motion as having been filed timely and properly. 40 C.F.R. § 22.5(a).

Complainant's second argument identifies a number of documents which the Agency has submitted as part of its initial pre-hearing exchange and which it considers to be responsive to Respondent's discovery request. These documents include: CX 34, "EPA Interpretive Guidance for the Real Estate Community on the Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing, Part I (August 20, 1996), Part II (December 5, 1996) and Part III (August 2, 2000)"; CX 35, "EPA & HUD Fact Sheet; EPA and HUD Move to Protect Children from Lead-Based Paint Poisoning; Disclosure of Lead-Based Paint Hazards in Housing, EPA-747-F-96-002 (March 1996; Revised 12/96)"; CX 36, "EPA and HUD Real Estate Notification and Disclosure Rule Questions and Answers"; CX 38, "Feb. 2000 EPA Section 1018 Disclosure Rule Enforcement Response Policy (with 2/23/00 Corrections)"; CX 40, "Copies of the 1995, 1999, and 2001 EPA Lead Hazard Pamphlet: Protect Your Family and Your Home: 2. EPA Lead Hazard Pamphlet: Protect Your Family and Your Home, (EPA 747-K-99-001), May 1995…. 3. EPA Lead Hazard Pamphlet: Protect Your Family and Your Home, (EPA 747-K-94-001), April 1999…. 4. EPA Lead Hazard Information Pamphlet: Protect Your Family and Your Home, (EPA 747-K-94-001), September 2001"; CX 47, "Chapter 6, HUD Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing, 1995 ('HUD Guidelines')"; CX 48, "Chapter 7, HUD Guidelines for the Evolution and Control of Lead-Based Paint Hazards in Housing, 1995 ('HUD Guidelines')"; and CX 49, "Chapter 15, HUD Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing, 1995 ('HUD Guidelines')." Response at 9-10.

While these prehearing exchange documents may indeed be responsive in part to Respondent's discovery request, the fact that they may be so does not mean that Respondent is not entitled to other relevant material of significant probative value, such as the additional "outreach" documents sought.

Complainant also argues that the requested documents lack probative value. Response at 13-14. Complainant notes that 40 C.F.R. § 22.19(e) requires discovery to be of "significant probative value," meaning the "tendency of a piece of information to prove a fact that is of consequence in the case." Chautauqua Hardware Corp., EPCRA Appeal No. 91-1, 3 E.A.D. 616, 622, 1991 EPCRA Lexis 2 (CJO, Order on Interlocutory Review, 1991). In that regard, Complainant essentially argues that the "'outreach' materials provided—or not provided—and any advice, instructions and/or directives given—or not given—to separate and independent local

[1] Similarly, Complainant's argument that Respondent has not met the prerequisites for "other discovery" under 40 C.F.R. 22.19(e)(1)(ii) because prior to filing its discovery motion Respondent did not ask Complainant to voluntarily produce the requested "outreach" material must likewise fail. See Response at 10. Even though technically correct, under the circumstances of this case, there is no point in denying the discovery motion on this ground and thereafter granting leave to Respondent (which this court would do) to refile the motion, but only after asking Complainant to voluntarily comply with its request. If, on the one hand, Complainant is asserting that the discovery motion is unnecessary because it would have provided the information voluntarily, had Respondent only asked, then the Agency should provide the information now and be done with it. If, on the other hand, Complainant would have refused such a request (as seems to be the case, at least in part, given its opposition to the discovery motion) then justice would not be served in this administrative proceeding by denying an otherwise valid discovery request.

government agencies have no bearing upon the violations alleged, or the penalty proposed, in this proceeding against the Respondent." Response at 13 (emphasis in original).

At this point, it is impossible to know whether the requested documents will or will not be of significant value, or even of any value, to Respondent. It is enough though that the requested material is, in the view of this court, of significant probative value to the issues to be decided. The fact that Complainant views these issues more narrowly than Respondent-- i.e., it does not see the relevance of the requested "outreach" documents-- is not a bar to Respondent's discovering this material. Respondent is not bound to view the case in the same light as its opponent. Nor is the fact that, as represented by Complainant, the Section 1018 Disclosure Rule Enforcement Response Policy (CX 38) already assumes a respondent's "lack of knowledge" (apparently the reason for Respondent's present request) for penalty calculation purposes a basis for denying discovery. See Response at 14-15. In that regard, this court notes that the Enforcement Response Policy is non-binding. See Capozzi Custom Cabinets, RCRA (3008) Appeal No. 02-01, 11 E.A.D. __, 2003 App. LEXIS 2, 49 (EAB 2003) ("the Board has repeatedly explained that this regulatory requirement [to consider the penalty policy] does not compel an ALJ to use a penalty policy in making his or her penalty determination.").[2] It is not until Respondent obtains and reviews any outreach material that it will be able to determine whether and how this information enables it to better explain its side of the story. It will then be the task of this court to determine whether any such information offered into evidence by Respondent should be accepted into the record and, if so, the weight to be accorded.

In sum, Respondent's discovery request will not unreasonably delay this proceeding, nor is there any indication that it will pose an unreasonable burden on Complainant. The information sought is in the possession of the Complainant and it has significant probative value regarding the relief sought by Complainant--i.e., the civil penalty. 40 C.F.R. 22.19(e)(1). Accordingly, Complainant is directed to produce the requested documents no later than October 3, 2005. Also, Complainant is to inform this court of any inability to produce these documents no later than September 30, 2005. In so ordering this discovery, this court notes that Complainant has most recently provided Respondent with a document titled, Campaign for Lead-Safe Children Summary and Evaluation Report, October, 2000. This report reflects the results of a month-long campaign "to promote throughout Philadelphia messages including 'disclos[ing] information about lead hazards to prospective tenants and home buyers.[']" Response at 10 & Attachment B. EPA has also provided Respondent with a newspaper article, dated April 10, 2000, "regarding the dangers that lead poses to children and including an interview of the Chief of EPA Region III's Toxic Programs and Enforcement Branch and a listing of sources of information on lead-poisoning prevention." Response at 11 & Attachment C. The parties are to confer as to the extent, if any, that this report and recent newspaper article satisfy Respondent's discovery request.

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Carl C. Charneski
Administrative Law Judge

Issued: September 19, 2005
Washington, D.C.

[2] For this reason, Complainant's reliance on Palm Harbor Homes, Inc, Docket No. EPCRA-4-99-55, Order Denying Respondent's Motion for Additional Discovery, slip op. at 3 (ALJ, Dec. 22, 2000), is also unpersuasive. See Response at 15.