10/17/96

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
AGRI-FINE CORPORATION,	)	DOCKET NO. EPCRA-V-019-92
	)	
	)	
RESPONDENT	)	

ORDER

In this proceeding under Section 325 of the Emergency Planning and Community Right-To-Know Act (EPCRA), 42 U.S.C. § 11001 et seq., Complainant has filed a motion to exclude evidence, also referred to as a motion to compel discovery, requesting issuance of an order 1)to exclude admission into evidence of any financial information, witness testimony and exhibits of which Agri-Fine has failed to provide notice to Complainant; and 2) to exclude evidence of Agri-Fine's ability (inability) to pay unless it provides information requested in a letter, dated September 3, 1996. The complaint, filed on May 4, 1992, charges Agri-Fine in three counts with failing to file "Form Rs", showing quantities of sulfuric acid processed during the years 1987, 1988, and 1989, with the Administrator and the State of Illinois by July 1 of the year following as required by EPCRA § 313. Agri-Fine's answer, filed without benefit of counsel, admitted processing quantities of sulfuric acid as alleged in the complaint, professed ignorance of the existence of "Form Rs" and alleged that imposition of a penalty of the magnitude sought ($51,000) would almost certainly drive it out of business, to the detriment of its employees and customers.

The complaint has been amended to reduce the proposed penalty to $42,532. By an order, dated August 31, 1995, Complainant's motion for an accelerated decision as to liability was granted and the only remaining issue is the amount of an appropriate penalty. A hearing on this matter has been scheduled to commence in Chicago on October 29, 1996.

By letters, dated June 17, 1992, and September 30, 1992, Agri-Fine provided EPA copies of its income tax returns for the years 1989, 1990, and 1991. Using this data, the Agency's ABEL computer program and the formula for determining ability to pay in the Agency's Toxic Substances Control Act PCB penalty policy, Complainant says that "it did not find that Respondent would be unable to pay the proposed penalty."[1/]

In accordance with the ALJ's order, Complainant filed its prehearing exchange on October 16, 1992. Documents and information Agri-Fine was directed to submit included "financial statements or other data supporting contention that imposition of proposed penalty...would jeopardize its ability to remain in business." Although Agri-Fine requested and was granted an extension of time in which to submit its prehearing exchange, its submission, dated

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[1/] Memorandum in Support of Motion to Amend the Complaint and Motion for an Accelerated Decision at 15. Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy (45 Fed. Reg. 59770, September 10, 1980) establish four percent of a firm's gross sales or revenues as a reasonable guide as to its ability to pay (Id. 59775).

November 13, 1992, did not include any proposed exhibits or identify any prospective witnesses.

Complainant filed its motions to amend the complaint and for an accelerated decision on August 2, 1993. Thereafter, Agri-Fine retained counsel who filed an amended answer, opposed Complainant's motion for summary judgement and filed a motion for discovery which was granted in part. Nevertheless, Agri-Fine has not identified any witnesses or exhibits it proposes to offer at the hearing on this matter.

Complainant's letter to counsel for Agri-Fine, dated September 3, 1996, referred to previously, requested copies of Agri-Fine's income tax returns for the years 1992 to 1995 inclusive and an opportunity to review its financial statements, including an income statement, balance sheets and statement of cash flows for the last five years. Failing to obtain the documents requested, Complainant filed the pending motion. Agri-Fine has not responded thereto.

DISCUSSION

Complainant has the burden of producing "some evidence regarding the respondent's general financial status from which it can be inferred that the respondent's ability to pay should not affect the penalty amount." In re New Waterbury, Ltd., TSCA Appeal No 93-2, 5 EAD 529 (EAB, Oct. 20, 1994). The scope of the financial information sought in Complainant's motion is, however,

excessive.[2/] Tax information from which gross revenues and expenses may be determined, balance sheets or statements of cash flow from the most current year, or information from general business sources, such as Compustat, Dun and Bradstreet, or Value Line, should enable Complainant to establish a prima facie case as to Agri-Fine's current ability to pay the proposed penalty, or, at the very least, to meet the criterion of New Waterbury. Complainant's evidence is, of course, subject to rebuttal. To date, however, Agri-Fine has not indicated that it intends to offer any witness testimony or documentary evidence at the hearing. Under Rule 22.19(b) (40 CFR Part 22), documents which have not been exchanged are subject to exclusion and witnesses whose names have not previously been identified may be precluded from testifying. While the Administrative Procedure Act (5 U.S.C. § 556(d)) allows Agri-Fine to limit its defense to the cross-examination of Complainant's witnesses, it is highly unlikely that defenses to the imposition of a penalty, such as lack of culpability and ability (inability) to pay, may be successfully presented by such methods.

[2/] Discovery is permitted upon a determination by the ALJ that such discovery will not in any way unreasonably delay the proceeding; the information is not otherwise obtainable, and such information has significant probative value. 40 CFR § 22.19(f).

In view of the foregoing, Agri-Fine will be directed to provide Complainant either a copy of its most recent income tax return or a copy of its most recent financial statements.[3/] Additionally, Agri-Fine will be given one more opportunity to identify witnesses whose testimony is to be offered at the hearing, providing a summary of their expected testimony, and providing a copy of any exhibits to be proffered at the hearing. If Agri-Fine fails to comply, its defense at the hearing will be limited to cross-examination of Complainant's witness or witnesses. Because the Act has been construed as requiring that ability to pay be considered in determining the penalty, Complainant's motion that Agri-Fine be precluded from raising the issue unless it furnishes the requested information will be denied.

ORDER

Complainant's motion that Agri-Fine be precluded from raising the issue of ability to pay unless it furnishes information requested by Complainant is denied. Agri-Fine will provide Complainant a copy of its most recent federal income tax return or a copy of its most recent financial statements, i.e., profit and loss, income and expenses, balance sheet, and/or statement of cash flows. Additionally, if Agri-Fine intends to offer any evidence at the hearing, it will identify prospective witnesses, provide a

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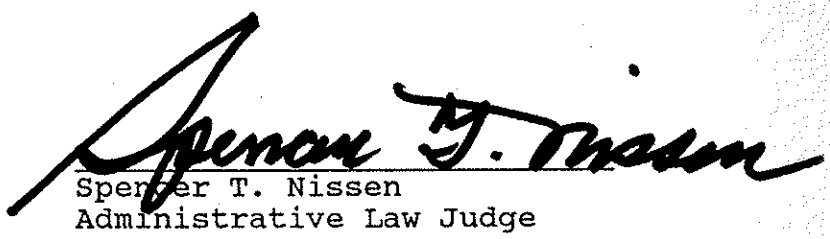
[3/] Agri-Fine may protect such information from public disclosure by claiming or identifying it as confidential business information. See 40 CFR § 2.201.

summary of their expected testimony and provide a copy of any exhibits it intends to proffer.

Agri-Fine will comply with this order on or before October 23, 1996.[4] The hearing will proceed as scheduled.

Dated this 17th day of October 1996.



Spencer T. Nissen
Administrative Law Judge

[4] Complainant may supplement its prehearing exchange on or before the above date.

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER**, dated October 17, 1996, in re: AGRI-FINE CORPORATION, Dkt. No. EPCRA-V-019-92, was mailed to the Regional Hearing Clerk, Reg. V, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Helen F. Handon
Legal Staff Assistant

DATE: October 17, 1996

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