



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

Mr. Bruce Gebhardt
U.S. Polychemical Corp.
584 Chestnut Ridge Road
Chestnut Ridge, NY 10977

MAR 7 2011

Re: Final Confidentiality Determination for dispersant formula and chemical components

Dear Mr. Gebhardt:

U.S. Polychemical Corporation (the Company) has asserted a confidentiality claim for the formula and components of your product Dispersit SPC 1000 submitted in accordance with Subpart J of the National Contingency Plan (NCP), 40 CFR Part 300. This information is responsive to requests filed with the U.S. Environmental Protection Agency (EPA or Agency) under the Freedom of Information Act (FOIA), 5 U.S.C. §552. The requests sought the formula for oil spill dispersants on an EPA Product Schedule, the dispersant components, and any health and safety studies submitted to the Agency under Toxic Substances Control Act (TSCA) §8(e) for the components. One request is also the subject of a current lawsuit in the Northern District of Florida, *Florida Wildlife Federation, et al. v. United States Environmental Protection Agency* (N.D. FL. 4:10 cv 293-WS/WCS).

Pursuant to 40 C.F.R. part 2, subpart B, I am issuing the final determination on your confidentiality claim. I have carefully considered the Company's claim and substantiation. For the reasons explained below, I conclude that the formula and components of your product do not meet the elements of Exemption 4 and shall be released. As a result of this determination, EPA may release the health and safety data associated with the components.

With respect to EPA's implementation of this determination, subject to 40 CFR §2.205(f)(2), EPA may make the information available to the public on the tenth (10th) working day after the date of the business's receipt of the written notice, unless the EPA legal office has first been notified of the commencement of an action in a Federal court to obtain judicial review of the determination and to obtain preliminary injunctive relief against disclosure.

BACKGROUND

Dispersants are chemical agents that emulsify, disperse, or solubilize oil into the water column or promote the surface spreading of oil slicks to facilitate dispersal of the oil into the

water column. The Clean Water Act directs EPA to prepare a schedule of dispersants, other chemicals, and oil spill mitigating devices and substances that may be used to remove or control oil discharges. Section 311(d)(2)(G), 33 U.S.C. 1321(d)(2)(G). Pursuant to Subpart J of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 C.F.R. part 300, EPA maintains a Product Schedule that identifies all dispersants that have been authorized for use on oil discharges. Eleven manufacturers have a total of 14 dispersant products listed on the Schedule. Each manufacturer claimed its formula and list of components as confidential. In response to the FOIA request and litigation described above, the Agency is reviewing the confidentiality claims. One company, Nalco Company, previously waived its confidentiality claim for the identity of the components for its two dispersant products, Corexit EC9500A and EC9527A.

More specifically, the Company originally claimed the formula and components of Dispersit as confidential when this information was submitted to the Agency. By e-mail letter dated June 7, 2010 from R. Craig Matthiessen, Director, Regulations and Policy Development Division, Office of Emergency Management, EPA requested that the Company substantiate its claims of confidentiality for DISPERSIT SPC 1000, aka SEACARE E.P.A. (ECOSPERSE POLLUTION ABATEMENT). By e-mails dated June 8th and June 21 to Craig Matthiessen, you responded to EPA's request for substantiation ("response") concerning DISPERSIT SPC 1000.

DISCUSSION

FOIA Exemption 4 exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). In order for information to meet the requirements of Exemption 4, EPA must find that the information is either (1) a trade secret; or (2) commercial or financial information obtained from a person and privileged or confidential (commonly referred to as "Confidential Business Information" ("CBI")). Additionally, EPA's regulations at 40 C.F.R. § 2.208 state that, in order for business information to be entitled to confidential treatment, the Agency must have determined that, inter alia:

- (1) The business has asserted a claim of confidentiality and that claim has not expired, been waived, or been withdrawn;
- (2) The business has shown that it has taken reasonable measures to protect the confidentiality of the information, and that it intends to continue to take such measures;
- (3) The information is not, and has not been, reasonably obtainable by a third party without the business' consent through legitimate means; and
- (4) No statute specifically requires disclosure of the information.

You do not meet the threshold requirements of 40 C.F.R. § 2.208 because you have waived the identity of the components and because the formula percentage as well as the component list are publicly available in a patent.

First, you have indicated that the Company is not claiming that the identity of the product components is confidential. In an e-mail dated June 8, 2010, you stated that DISPERSIT SPC 1000 "is protected by the Patent laws of the United States and we have no objection to the information being made available to the public. We ask that the exact percentages of the formulation only be revealed under critical situations where no other course is available to the EPA." By e-mail dated June 10, 2010, Mr. Mattheissen asked to confirm in writing your subsequent discussion that U.S. Polychemical Corp. has waived any confidentiality claim for the specific chemical components, but is maintaining its claim for the exact percentages of the formulation. You replied by e-mail dated June 21, 2010, with short responses to each of the substantiation questions that were provided on June 7, 2010. Your response limited your confidentiality concern only to the release of the exact percentage formulation. Based on these exchanges, the EPA considers that U.S. Polychemical Corp. has waived its confidentiality claim as to the specific chemical components.

Additionally, I also find that both the specific chemical components and percentages of your formulation are not entitled to confidential treatment because they are not confidential and are reasonably obtainable by a third party. As you acknowledge in your substantiation, there is a related patent for DISPERSIT SPC 1000. More specifically, EPA staff located patent No. 6,261,463 dated July 17, 2001 (filed on March 4, 1999). This patent, for a "Water Based Oil Dispersant" was assigned to U.S. Polychemical Marine Corp., Chestnut Ridge, NY. The current NCP listing for Dispersit SPC 1000 lists the manufacturer as US Polychemical Corp. of Chestnut Ridge, NY. A comparison of the preferred formulation (7F in Table X) and the reported toxicity data for Polychem SPC 1000 (in Table XIV) contained in the patent would allow your competitors to reasonably ascertain the formulation of your product, Dispersit SPC 1000, based on the Trade IDs listed in Table X. EPA compared chemical identities reported in the patent with the contents of Dispersit SPC 1000 claimed as CBI and determined a significant disclosure had already occurred. In addition, the toxicity data reported in the patent for this preferred formulation is the identical data reported in the NCP schedule for the Dispersit SCP 1000. Therefore, this information claimed as confidential does not qualify for confidential treatment under Exemption 4 and shall be disclosed. Accordingly, I do not have to address the remaining elements of Exemption 4.

CONCLUSION


I find that the identity of the components and the formulation of Dispersit SPC 1000 does not meet the requirements of FOIA Exemption 4, as discussed above. Pursuant to EPA's regulations at 40 C.F.R. § 2.205(f), this constitutes the final EPA determination concerning U.S. Polychemical's business confidentiality claims.

Pursuant to EPA's regulations at 40 C.F.R. § 2.205(f), this constitutes the final EPA determination concerning your business confidentiality claim. This determination may be subject to judicial review under 5 U.S.C. §§ 701 *et seq.* In response to the above-referenced FOIA requests, EPA will release the data to the FOIA requestor on the tenth working day after the date of your receipt of this determination, unless the EPA Office of General Counsel has first

been notified of your commencement of an action in Federal court (1) to obtain judicial review of this determination and (2) to obtain preliminary injunctive relief against disclosure. Even if you have commenced an action in Federal court, EPA may make this information available to the public if the court refuses to issue a preliminary injunction or upholds this determination. In addition, EPA may make this information available to the public, after reasonable notice to you, whenever it appears to the Agency that you are not taking appropriate measures to obtain a speedy resolution of the action.

Should you have any questions concerning this matter, please call Kevin Miller at (202) 564-2691.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. S. Minoli', with a small dot at the end.

Kevin S. Minoli
Acting Associate General Counsel
General Law Office

cc: HQ FOI Office