UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

Via electronic filing December 14, 2015

Sybil Anderson, Headquarters Hearing Clerk
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900R
William Jefferson Clinton Building
1200 Pennsylvania Ave. NW
Washington, DC 20460

Re: In the Matter of: Aylin, Inc., et al (Docket No. RCRA-03-2013-0039)

Dear Ms. Anderson:

Please find enclosed a copy of Complainant's Sur-Reply to Respondents' Reply to Complainant's Response to Respondents' Motion to Conduct Additional Discovery and Complainant's Motion for Leave to File Sur-Reply in the above-referenced matter, filed electronically via the Office of Administrative Law Judges' electronic filing system. Please let me know if there is any difficulty with this submission. Thank you in advance.

Sincerely,

Janet E. Sharke
Senior Assistant Regional Counsel (3RC50)
sharke.janet@epa.gov
215-814-2689

cc: Jeffrey Leiter, Esq., Counsel for Respondents

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

In the Matter of:	)	
	)	
Aylin, Inc., Rt. 58 Food Mart, Inc., Franklin Eagle Mart Corp., Adnan Kirisciogl u, 5703 Holland Road Realty Corp., 8917 South Quay Road Realty Corp., and 1397 Carrsville Highway Realty Corp.	)	**Docket No. RCRA-03-2013-0039**
	)	
	)	**Proceeding Under Section 9006 of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. § 6991e**
Respondents.	)	

MOTION FOR LEAVE TO FILE COMPLAINANT'S SUR-REPLY TO RESPONDENTS' REPLY TO COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION FOR LEAVE TO CONDUCT ADDITIONAL DISCOVERY

In accordance with 40 C.F.R. § 22.16(a) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* ("Rules of Practice"), Complainant, the Director of the Land and Chemicals Division, U.S. EPA, Region III, moves for leave to file Complainant's Sur-Reply to Respondent's Reply to Complainant's Response to Respondents' Motion for Leave to Conduct Additional Discovery.

The Rules of Practice provide for only two responses to a motion: one by the nonmoving party (or parties) and the other a reply to such response(s) by the movant. 40 C.F.R. § 22.16(a). Any additional responses shall be permitted only by order of the presiding officer. *Id.* Accordingly, Complainant seeks leave to file this attached Sur-Reply in order to better inform the Court in rendering her decision as to the discovery requested by Respondents.

As stated in the accompanying Sur-Reply, much of the information sought by Respondents was provided by Complainant in its Motion for Partial Accelerated Decision and Memorandum of Law in support and the accompanying affidavits of Andrew Ma and Leslie Beckwith filed on November 20, 2015. Because this was a day after Complainant filed its Response to Respondents' Discovery Motion, such Response was necessarily not as comprehensive as possible regarding the information requested and only addressed generally the information Respondents sought from Andrew Ma.

WHEREFORE, for the foregoing reasons, Complainant respectfully requests that this Court issue an Order granting Complainant's Motion for Leave to File Complainant's Sur-Reply.

Respectfully submitted,

12/14/2015
Date

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ATTORNEYS FOR COMPLAINANT

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In the Matter of:	)	**Docket No. RCRA-03-2013-0039**
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Respondents.	)	

COMPLAINANT'S SUR-REPLY TO RESPONDENTS' REPLY TO COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION FOR LEAVE TO CONDUCT ADDITIONAL DISCOVERY

In accordance with 40 C.F.R. §§ 22.16(a) and (b) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* ("CROP" or "Rules of Practice"), Complainant, the Director of the Land and Chemicals Division, U.S. EPA, Region III, submits this Sur-Reply to Respondent's Reply to Complainant's Response to Respondents' Motion for Leave to Conduct Additional Discovery and to Supplement Their Prehearing Exchanges to Add a Witness ("Disc. Mot.").

I. The Standards for "Other Discovery" under the Rules of Practice

As set forth in Complainant's Response to Respondents' Discovery Motion, the Rules of Practice, which govern this proceeding, set forth stringent conditions under which discovery may be ordered by a presiding officer, as provided at 40 C.F.R. § 22.19(e)(1) and (3). Complainant restates and incorporates by reference the arguments made in its Response to Respondents' Discovery Motion, but reiterates only that: "[I]n administrative hearings parties do not have a

constitutional right to take depositions, or indeed discovery at all, absent a showing of prejudice, denying the party due process." *Chippewa Hazardous Waste Remediation & Energy, Inc.*, 12 E.A.D. 346, 368 (EAB 2005) (citations omitted).

II. Argument

A. Respondents Fail to Meet the Standards for "Other Discovery"

1. Written Discovery

Respondents' proposed written discovery does not seek information that is relevant and probative or has not already been voluntarily provided to Respondents as required by 40 C.F.R. § 22.19(e)(1)(ii) and (iii).

Complainant has already provided voluntarily the information sought by Respondents in ten of the eleven proposed interrogatories.

Complainant has voluntarily provided the information sought in Respondents' first and eleventh proposed interrogatories and identified all persons, including Virginia Department of Environmental Quality ("VADEQ") employees, who have personal knowledge of the facts and the nature of such knowledge in its prehearing exchange submittals.

Complainant has voluntarily provided the information sought in Respondents' second proposed interrogatory regarding notice to the Commonwealth of Virginia of the First Amended Complaint. *See*, CX 152.

Complainant has voluntarily provided the information sought in Respondents' third, fourth and fifth proposed interrogatories regarding the status of Respondent Kiriscioglu as an "operator" within the meaning of 9 VAC § 25-580-10. *See,* Memorandum of Law in support of Complainant's Motion for Partial Accelerated Decision at 22-27 ("AD Mot.").

Complainant has voluntarily provided the information sought in Respondents' sixth

proposed interrogatory regarding release detection. *See, Id.* at 27-39.

Complainant has voluntarily provided the information sought in Respondents' seventh proposed interrogatory regarding financial responsibility. *See, Id.* at 52-56.

Complainant has voluntarily provided the information sought in Respondents' eighth and ninth proposed interrogatories regarding cathodic protection. *See, Id.* at 50-52.

Respondents' tenth proposed interrogatory seeks information on downward penalty adjustments including ability to pay as well as "how the proposed penalty . . . is consistent and equitable with civil penalties obtained by you in other enforcement cases and settlements for similar violations alleged in the Amended Complaint." As noted below, to date Respondents have failed to comply with this Court's order, and provide all the financial documentation necessary for Complainant to analyze each Respondent's ability to pay. As to information regarding penalties in other cases and settlements[1], the discussion and ruling by the Presiding Officer in *Special Interest Auto Works* is dispositive. In that matter, the Presiding Officer determined that, consistent with EAB and (EAB-predecessor) Chief Judicial Officer decisions, information relating to civil penalties in other cases did "not have a tendency to prove a fact bearing on Respondents' liability for the alleged violation or the appropriateness of the proposed penalty," thus lacking "'significant probative value' on a disputed issue of material fact" and therefore was not discoverable under 40 C.F.R. § 22.19(e)(1)(iii). *In the Matter of: Special Interest Auto Works, Inc.*, Docket No. CWA-10-2013-0123, Order on Respondents' Amended Motion for Accelerated Decision and Motion for Leave to Conduct Discovery (ALJ, October 13, 2015) at 31-32, citing *Chataqua Hardware Corp.*, 3 E.A.D. 616, 622 (CJO 1991) (Order on Interlocutory Review), *Chem. Lab Prods., Inc.*, 10 E.A.D. 711, 728 (EAB 2002).

1 The Rules of Practice specifically state that settlement positions and information regarding their development are not discoverable. 40 C.F.R. § 22.19(e)(2).

Therefore, Respondents fail to meet the standards for "other discovery" as set forth in 40 C.F.R. § 22.19(e)(1) as to the proposed interrogatories.

2. Depositions of Andrew Ma and Leslie Beckwith

Respondents seek to depose two of Complainant's proposed witnesses, one of which is EPA employee Andrew Ma.[2] Respondents seek to depose Mr. Ma, in order to ask, *inter alia*, "responsive follow up questions necessary to elicit detailed information regarding his observations [of his inspection of the Respondents' three retail gasoline stations]. For example, a key issue in three counts of Complainant's First Amended Complaint involves where *VADEQ* determines an underground storage tank system to end by regulatory definition and practice." R. Reply at 6 (emph. added). This information is neither most reasonably obtained from EPA nor does it have significant probative value on a disputed issue of material fact, as required by 40 C.F.R. § 22.19(a)(ii) and (iii). Information regarding where *VADEQ* determines an UST ends "by regulatory definition and practice" is not most reasonably obtained from the non-moving party, Complainant, but rather most reasonably obtained from VADEQ. To the extent that VADEQ has promulgated a regulatory *definition,* Respondents can, and should have already, provided a copy of such regulation in their prehearing exchange submittals. More importantly, as an EPA employee and inspector, Mr. Ma cannot attest to any of VADEQ's "*regulatory practices,*" including where the terminus of an UST lies. Any such testimony would be pure

2 Complainant had agreed to allow Mr. Ma to be deposed in December 2015 (more than a year after the originally scheduled date in November 2014) but reconsidered this decision in light of the extensive testimony provided by Mr. Ma in his 104-paragraph affidavit attached to the A.D. Motion. This decision proved justified, as the only information Respondents seek from Mr. Ma relates to VADEQ interpretations or nonexistent "observations" of Respondent Kirisciogluo. Respondents' claim that Complainant's decision is part of a pattern of counsel's reneging on promises (*e.g.*, providing expert reports) is simply unfounded (the only expert report prepared to date has, in fact, been produced to Respondents). To suggest, as Respondents do, that Complainant's counsel may have intentionally misled Respondents is, at best, unseemly. Indeed, Respondents have not fulfilled their own obligations, for example, they have failed to date to provide the complete financial documentation needed by Complainant, and as ordered by the Court, to analyze each Respondent's ability to pay.

speculation on the part of Mr. Ma.

In addition, any VADEQ determination is not information that has significant probative value on a disputed issue of material fact relevant to liability. VADEQ's interpretation of where an UST ends is not binding or dispositive on EPA, as Respondents will presumably argue. The EAB has soundly rejected an analogous argument in considering in a case brought by EPA under Subtitle C of RCRA in the delegated state of Michigan. *In re Gen. Motors Automotive – N. Am.*, 14 E.A.D. 1, 87-91 (EAB 2008). As part of its defense, GM argued that "'EPA is not entitled to substitute its interpretation of Michigan's EPA-authorized, *state law*, hazardous waste programs. As an authorized state, Michigan, not EPA, is responsible for interpreting and administering its authorized state regulations and making site-specific regulatory determinations.'" *Id.* at 89 (emph. original). In affirming the presiding officer's finding, the EAB explicitly stated that the "State of Michigan's interpretation of RCRA [as to the point of generation of a RCRA-regulated 'waste'] does not bar EPA from enforcing a contrary understanding within that state's boundaries." *Id.* at 95. *See*, also, *In Re S. Timber Prods., Inc.*, 3 E.A.D. 371, 376-78 (JO 1990).

Respondents also seek to depose Mr. Ma as to "his observations of Mr. Kiriscioglu and the two prongs of the Selective Enforcement Doctrine." R. Reply at 7. Respondents state that they have "asserted an affirmative [defense] in their Answer to Complainant's First Amended Complaint that the Complainant has treated them in a manner different that [sic] other similarly situated parties in Region III (*i.e.*, Selective Enforcement Doctrine)." *Id.* The record is devoid of any reference to such affirmative defense. Despite having had not one, but two, opportunities to raise such defense in their original and Amended Answers, Respondents have failed to do so. Respondents raised eleven stated defenses in their Amended Answer, four of

which were not previously raised (and unrelated to amendments to the complaint), but did *not* raise selective prosecution, contrary to Respondents' assertion. Am. Answer at 13-14.

This explains why, as Respondents complain, no information regarding this supposed defense was included in either Complainant's prehearing exchange submissions or in Mr. Ma's declaration. Prior to December 2, 2015, the filing date of Respondents' Reply, Complainant had no notice of such affirmative defense. If, at this late stage of the proceeding, Respondents choose to assert a new defense, they cannot reasonably complain about a dearth of information in the record. Moreover, Respondents face "a daunting burden in establishing that the Agency engaged in illegal selective enforcement, for courts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions." *In re B&R Oil Co.*, 8 E.A.D. 39, 51 (EAB 1998).

The Rules of Practice require that Respondents state, *inter alia*, "the circumstances or arguments which are alleged to constitute the grounds of any defense" in their Answer. 40 C.F.R. § 22.15(b). Respondents failed to plead any circumstances or arguments in either their original or Amended Answers regarding their "selective prosecution" defense, thereby prejudicing Complainant as it prepared its dispositive motion. This Court should vigorously discourage such derogation of the Rules of Practice and deny Respondents the opportunity to go on a fishing expedition and depose Complainant's chief witness in search of any information to support this late and deficiently plead defense and any other defense not already raised.

The other information Respondents seek from Mr. Ma is "whether Respondent Adnan Kirisciogl u is an 'operator' under VADEQ's regulations." R. Reply at 7. This is one of the issues Respondents state is in dispute but not addressed in Mr. Ma's affidavit.[3] *Id.* For the

3 Because Respondents have not identified what other disputed issues Mr. Ma should have addressed in his

reasons stated previously, any testimony given by Mr. Ma as to the VADEQ regulatory definition of operator is neither probative nor relevant. In addition, as stated above, VADEQ's interpretation even of its EPA-approved regulations is simply not dispositive or binding on EPA.

Respondents also seek to depose Mr. Ma regarding his "observations" of Respondent Kiriscioglu. Of these, there simply were none. As Mr. Ma's declaration makes clear, Mr. Ma had no occasion during the investigative phase of this matter on which to observe Respondent Kiriscioglu. For reasons unknown to Complainant, Mr. Kiriscioglu declined to attend any of the inspections. As attested to by Mr. Ma, the representatives of Respondents who did attend the inspections -- Jennifer and Tamer Arklan and the Rt. 58 Food Mart station attendant – did not include Mr. Kiriscioglu.

Respondents also seek to depose Complainant's proposed witness VADEQ employee Leslie Beckwith. The information Respondents seek from Ms. Beckwith "go[es] to whether any [financial responsibility] omission by the Respondents is considered a recordkeeping violation by VADEQ, rather than an absence of financial responsibility based on VADEQ's enforcement procedures and precedents." R. Reply at 8. Such information does not have significant probative value on a disputed issue of material fact relevant to liability or the proposed penalty. As stated, *supra*, a delegated state's interpretation of regulations – even one approved by EPA as part of delegation -- is not binding on EPA. Hence, whether VADEQ considers Respondents' "omissions" of the EPA-approved financial responsibility regulations (9 VAC 25-590-10 *et seq.*) to be record-keeping violations is not information that has *significant probative value* on a disputed issue of material fact or relief sought. Likewise, VADEQ's

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declaration, and, consequently, may fall within the scope of his proposed deposition, Complainant contends that Respondents have failed to "describe in detail the nature of the information" sought as required by 40 C.F.R. § 22.19(e)(1). Respondents state that the affidavits of Mr. Ma and Ms. Beckwith will likely narrow the scope of each proposed deposition (R. Reply at 4), but fail to describe how.

enforcement procedures and precedents as to such violations simply have no significant probative value bearing on Respondents' liability or the proposed penalty.

In the matter at hand Respondents assert that they seek significant, probative evidence that may not otherwise be preserved for the hearing." R. Reply at 7. First, as set forth above, the information that Respondents seek from Complainant's witnesses is neither relevant nor probative. In addition, as Respondents acknowledge, Complainant has stated that both Mr. Ma and Ms. Beckwith will be called to testify at the hearing." *Id.* Complainant fully intends to present the testimony of both Mr. Ma and Ms. Beckwith at the hearing, unless the issues are narrowed by Order of this Court, or stipulation of the parties. Hence there is no reason for any belief, nor do Respondents offer any, that the evidence Respondents seek from either proposed deponent will not be preserved for testimony at the hearing scheduled to commence on April 25, 2016. Therefore, Respondents fail to meet the second of the two alternative standards set forth in 40 C.F.R. § 22.19(e)(3)(i) and (ii).

In addition, Respondents can reasonably obtain the information they seek by alternative means of discovery, such as interrogatories. Respondents argue that they should be able to depose, rather than serve interrogatories on, Ms. Beckwith in order to ask "responsive follow-up questions of Ms. Beckwith that go directly to the issue of liability and provide them with a meaningful opportunity for the hearing." *Id.* at 6. Respondents also state that they "should not have to wait until the hearing to pose follow-up questions . . . to Mr. Ma that go directly to the issue of liability and provide the Respondents with a meaningful opportunity to prepare for the hearing." *Id.*

If the ability to pose follow-up questions were the standard by which a judge were to decide which means of discovery, if any, a party could utilize, depositions would always be

favored over interrogatories, rendering meaningless 40 C.F.R. § 22.19(e)(3)(i). The recent ruling by the Presiding Officer in *Special Interest Auto Works* cited by Respondents in support of their request is distinguishable from the instant matter. In that case, the Presiding Officer found depositions of the four EPA expert witnesses warranted due to the complex nature of their expected testimony (involving hydrological and economic benefit models and ecological and toxicological effects of a discharge on a watershed). *In the Matter of: Special Interest Auto Works, Inc.*, Docket No. CWA-10-2013-0123, Order on Respondents' Amended Motion for Accelerated Decision and Motion for Leave to Conduct Discovery (ALJ, October 13, 2015), at 27-29. The Presiding Officer also allowed depositions of EPA's three fact witnesses of their "actual observations" of the site in question, because the "brief narrative summary" of each witness's testimony in the prehearing exchange was determined to be insufficiently detailed. *Id.* at 29-30. Neither of these circumstances is present in the instant matter: there are no complex issues justifying any "follow-up" questions nor is there insufficient detail in the record as to the expected testimony of either Mr. Ma or Ms. Beckwith. Certainly, the limited information Respondents seek from Ms. Beckwith could be easily posed as interrogatories. Indeed, interrogatories, rather than a deposition, is particularly appropriate where, as here, the proposed deponent is employed not by EPA, but by another entity, and therefore cannot be directed to appear for deposition absent the issuance of a subpoena in accordance with 40 C.F.R. § 19(e)(4).

Therefore, Respondents fail to meet either of the two standards provided by the Rules of Practice for additional discovery via depositions as required by 40 C.F.R. § 22.19(e)(3)(i) or (ii).

IV. Conclusion

For the reasons set forth above, Respondents have not satisfied the standards articulated in the Rules of Practice at 40 C.F.R. § 22.19(e)(1) and (3) by which "other discovery" may be had. Accordingly, Respondents' Motion for Leave to Conduct Additional Discovery should be denied.

WHEREFORE, Complainant requests this Court issue an Order Denying Respondents Motion for Leave to Conduct Additional Discovery.

Respectfully Submitted,

12/14/2015
Date

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Louis F. Ramalho
Senior Assistant Regional Counsel
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1650 Arch Street
Philadelphia, PA 19103-2029
ATTORNEYS FOR COMPLAINANT

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, in accordance with the procedures set forth in the Standing Order Authorizing Electronic Filing in Proceedings before the Office of Administrative Law Judges, dated August 11, 2014, I filed Complainant's Sur-reply to Respondents' Reply to Complainant's Response to Respondents' Motion for Leave to Conduct Additional Discovery and Complainant's Motion for Leave to File Sur-reply, Docket No. RCRA-03-2013-0039, for service to:

Sybil Anderson, Headquarters Hearing Clerk
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U.S. EPA, Mail Code 1900R
William Jefferson Clinton Building
1200 Pennsylvania Ave., NW
Washington, DC 20460

The Hon. Christine D. Coughlin
Administrative Law Judge
U.S. EPA Mail Code 1900R
William Jefferson Clinton Building
1200 Pennsylvania Ave., NW
Washington, DC 20460

I further certify that on the date set forth below, I served via e-mail and first class mail a true and correct copy of the foregoing to:

Jeffrey Leiter, Esq.
Counsel for Respondents
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12/14/2015
Date

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