UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Martex Farms, Inc.,	)	Docket No. FIFRA-02-2005-5301
	)	
RESPONDENT	)	
	)	

ORDER DENYING RESPONDENT'S MOTION *IN LIMINE*

On September 1, 2005, Respondent filed a Motion *in Limine* seeking the exclusion from admission into the record at hearing certain of Complainant's proposed exhibits contained in Complainant's May 26, 2005 Initial Prehearing Exchange ("PHE"). Specifically, Respondent seeks to exclude from the record the following:

1) Complainant's Exhibit ("CX") 31: six satellite photographs of Martex Farms, copied onto CD-ROM;

2) CX-10(a): inspection notes of Jorge Maldonado Medina regarding his September 5, 2003 inspection of Martex Farms;

3) CX-13(a): inspection notes of Roberto Rivera Velez regarding his April 26 and 29, 2004 inspections of Martex Farms;

4) CX-14: a June 8, 2004 cover letter to a Science Applications International Corporation ("SAIC") "Summary Inspection Observation Report" for Martex Farms;

5) CX-15: Worker Protection Standard ("WPS") Use Inspection Report for Martex Farms, dated April 26, 2004; and

6) Affidavits of Alvaro Acosta, included as part of CX-13 (regarding the Jauca facility) and CX-15 (regarding the Coto Laurel facility).[1]

[1]Respondent's Motion *in Limine* seeks an Order excluding "the sworn statement subscribed by Mr. Alvaro Acosta included as part of Exhibit C-16." Motion *in Limine* at 2. CX-

Complainant filed a Response opposing Respondent's Motion *in Limine* on September 15, 2005. Pursuant to Rules of Practice 22.7(a) and 22.16(b), 40 C.F.R. §§ 22.7(a) and 22.16(b), Respondent's Reply (if any) to Complainant's Response to the Motion was due to be filed on or before September 26, 2005. As of the date of this Order, Respondent has not filed any such Reply.

I. Standards for Motions *In Limine*

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits at 40 C.F.R. Part 22 ("Rules" or "Rules of Practice"). Rule 22.22(a) provides in pertinent part that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value." 40 C.F.R. § 22.22(a).

"[A] motion *in limine* should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." Noble v. Sheahan, 116 F.Supp.2d 966, 969 (N.D.Ill. 2000). Motions *in limine* are generally disfavored. Hawthorne Partners v. AT&T Technologies, Inc., 831 F.Supp. 1398, 1400 (N.D.Ill. 1993). If evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial so that questions of foundation, relevance, and prejudice may be resolved in context. *Id.* at 1401. Thus, denial of a motion *in limine* does not mean that all evidence contemplated by the motion will be admitted at trial. Rather, denial of a motion *in limine* means only that without the context of trial the court is unable to determine whether the evidence in question should be excluded. United States v. Connelly, 874 F.2d 412, 416 (7th Cir. 1989).

The admissibility of exhibits is dependent upon the context in which they are offered. The issues for hearing in this case are whether, during 2003 and 2004, Respondent violated the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136j(a)(2)(g), and the Worker Protection Standards ("WPS") promulgated thereunder at 40 C.F.R. Part 170 by failing to notify workers and pesticide handlers of pesticide applications, failing to provide decontamination supplies to workers and pesticide handlers, and failing to provide personal protective equipment ("PPE") to pesticide handlers, and, if so, what is the appropriate penalty for such violation(s). *See* Second Amended Complaint and Notice of Opportunity for Hearing ("Complaint").

---

16 consists of a SAIC "Summary Inspection Observation Report" for Martex Farms which does not contain any "sworn statement subscribed by Mr. Alvaro Acosta." However, two different Affidavits by Mr. Acosta, both dated April 26, 2004, are included in CX-13 and CX-15 (one Affidavit in each exhibit). As explained *infra*, it appears that Respondent's objections to the two different Affidavits are not identical. In any event, this Tribunal understands the reference to CX-16 in Respondent's Motion *in Limine* to be a clerical error, and that Respondent seeks the exclusion of Mr. Acosta's Affidavits wherever they appear in Complainant's PHE.

II. CX-31: The CD-ROM Containing Satellite Images

CX-31 consists of a CD-ROM containing six satellite photographs of Martex Farms. Respondent argues: "[T]he diskette ... is empty. Efforts by [R]espondent to examine the diskette have failed... Therefore, this object is inadmissible insofar [as] it was never produced by [Complainant]." Motion *in Limine* at 1. Complainant's Response to Respondent's Motion *in Limine* ("Complainant's Response") explains: "Complainant [has] sent Respondent a working copy of the CD-ROM... As Complainant has learned that the files on the copy of the CD-ROM provided to the Court do not open, Complainant has attached hereto a working copy of [CX-31]." Complainant's Response at 2.

Indeed, this Tribunal is now able to open and view all six of the satellite images contained on the CD-ROM offered as CX-31, as attached to Complainant's Response. As aerial photographs of Martex Farms – the agricultural operation here at issue – the images are clearly relevant, and Respondent does not argue that they are not relevant. Therefore, Complainant having cured the claimed deficiency by providing working copies of the CD-ROM offered as CX-31 to both Respondent and to this Tribunal, Respondent's Motion *in Limine* as to CX-31 is **DENIED**.

III. CX-10(a) (Medina inspection notes); CX-13(a) (Velez inspection notes); CX-14 (SAIC "Summary Inspection Observation Report"); and CX-15 (April 26, 2004 WPS Use Inspection Report)

Regarding CX-10(a), CX-13(a), CX-14, and CX-15, Respondent contends that these exhibits "have been censored to the extent that portions of their content have been marked over ... [and] should not be admitted into evidence because the deleted parts make the documents not trustworthy." Respondent's Motion *in Limine* at 2.[2] In support of this proposition, Respondent cites Evans v. Holsinger, 48 N.W.2d 250 (Iowa, 1951). *Id.* The Iowa Supreme Court in Evans held:

> The defendant was permitted to introduce into evidence ... a certified copy of a birth certificate... However, on its own motion the court struck out, by cutting into ... the exhibit, [some] lines..., so that a hole ... appears in the certificate. No explanation was given *to the jury* as to why this mutilation took place; *nor are we advised* by the record what was thus deleted... Under such circumstances, imagination might readily outrun reality. The *jury* was, in effect, *invited to speculate* upon what had been deleted, and why... The question naturally arises as to what was deleted... It is said that: "Where a record offered in evidence is interlined, erased, or mutilated, the interlineations or erasures should as a general rule be *fully and satisfactorily explained*..." 32 C.J.S., Evidence, pp. 509-510, § 646... The conclusion is inescapable that prejudicial error appears in the

[2]Respondent's objection to CX-15 on the grounds of redaction is misplaced, as CX-15 does not appear to contain any redactions.

introduction into evidence of the mutilated copy of the record.

Evans, 48 N.W.2d at 252-253 (emphasis added). Thus, the "prejudicial error" (and presumably the untrustworthiness of the document) found by the Evans court flowed from the *lack of explanation* for the redaction given to the *fact finder*.

In the present case, this Tribunal is, of course, the finder of fact. Complainant explains that it "redacted those portions of the documents referring to investigation of *other facilities* [than Martex Farms]," and claims that "the information that was redacted is confidential and potentially subject to investigatory privilege." Complainant's Response at 3 (emphasis added).

Under the reasoning of Evans (cited by Respondent), this Tribunal, having examined the documents in question as the finder of fact, *would* presently be satisfied that Complainant has "fully and satisfactorily explained" the redactions such that this Tribunal need not "speculate upon what [has] been deleted, and why." However, this Tribunal need not apply Evans to decide the admissibility of the evidence in the context of the instant Motion *in Limine*. Rather, this Tribunal, following the guidance of Hawthorne Partners, shall defer the question of admissibility of CX-10(a), CX-13(a), CX-14, and CX-15 until such time as those exhibits might be offered into evidence at hearing, at which time admissibility will be decided pursuant to the standard set forth in Rule 22.22(a), 40 C.F.R. § 22.22(a).[3] Therefore, Respondent's Motion *in Limine* as to CX-10(a), CX-13(a), CX-14, and CX-15 is **DENIED**.

[3]The Rules of Practice do not specifically address the "redaction" issue presented by Respondent's Motion *in Limine*. In such situations, federal rules and decisions may also be looked to for guidance. *See, e.g., In re Patrick J. Neman, D/B/A The Main Exchange*, 5 E.A.D. 450, 455, n.2 (EAB 1994): "When a procedural issue arises that is not addressed in Part 22, the Board has the discretion to resolve the issue as it deems appropriate. 40 C.F.R. § 22.01(c). In the exercise of this discretion, the Board finds it instructive to examine analogous federal procedural rules and federal court decisions applying those rules. *See In re Wego Chemical & Mineral Corporation*, TSCA Appeal No. 92-4, at 13 n. 10 (EAB, Feb. 24, 1993) (although the Federal Rules of Civil Procedure do not apply to Agency proceedings under Part 22, the Board may look to them for guidance); *In re Detroit Plastic Molding*, TSCA Appeal No. 87-7, at 7 (CJO, Mar. 1, 1990) (same)."

IV. **CX-13 and CX-15 (containing Acosta Affidavits)**[4]

CX-13 is a "Worker Protection Standard Use Inspection Report For Martex Farms, (April 26 and 29, 2004 Inspection of *Juaca [sic] facility*)." Complainant's PHE at 4 (emphasis added). CX-15 is a "Worker Protection Standard Use Inspection Report For Martex Farms, (April 26, 2004 Inspection of *Coto Laurel facility*)." *Id.* at 5 (emphasis added). Both CX-13 and CX-15 contain "Affidavits" of Mr. Acosta dated April 26, 2004, but the Affidavits are not the same. Mr. Acosta's Affidavit contained in CX-13 is written in Spanish (accompanied by an English translation) and pertains to an April 26, 2004 inspection of the Jauca facility. Mr. Acosta's Affidavit contained in CX-15 is written in English and pertains to an April 26, 2004 inspection of the Coto Laurel facility.

Respondent argues:

> [T]he sworn statement subscribed by Mr. Alvaro Acosta included as part of Exhibit C-16 [sic], was drafted by inspectors of the [U.S. Environmental Protection Agency ("EPA")]. Mr. Acosta did not observe the alleged facts as presented in the affidavit. In fact, he was not present at the time of the inspection and ... does not have personal knowledge as to the observations in the statement. In any event, he is available as a witness such that an affidavit is not necessary. Finally, if respondent [sic] intends to submit the ... statement to prove the truth of the matter asserted, the exhibit is heresay [sic] under FRCP [sic] 801(c).

Respondent's Motion *in Limine* at 2-3. Thus, Respondent appears to advance three different arguments against admission of the Affidavit(s): 1) that Mr. Acosta was not present during the inspection(s); 2) that Mr. Acosta is available as a witness; and 3) that the Affidavit(s) are inadmissible hearsay under Federal Rule of Evidence ("FRE") 801(c).

In response, Complainant argues that Mr. Acosta's Affidavits "are admissible both as to the substance thereof as well as the credibility of Mr. Acosta as a witness," citing FRE 613 and 801 and U.S. v. Morgan, 555 F.2d 238 (9th Cir. 1977). Complainant's Response at 4. That is, Complainant suggests that the Affidavits are admissible both for "impeachment" purposes under FRE 613(b) and 801(d)(1)(A), *and* "to prove the truth of the matter asserted" under FRE 801(d)(1)(A).

---

[4]As noted *supra*, Respondent's Motion *in Limine* seeks an Order excluding "the sworn statement subscribed by Mr. Alvaro Acosta included as part of *Exhibit C-16*." Motion *in Limine* at 2 (emphasis added). However, CX-16 does not contain any "sworn statement subscribed by Mr. Alvaro Acosta." Mr. Acosta's Affidavits are included, however, in CX-13 (regarding the Jauca facility) and CX-15 (regarding the Coto Laurel facility). Therefore, this Tribunal understands the reference to CX-16 in Respondent's Motion *in Limine* to be a clerical error, and that Respondent intends to seek the exclusion of Mr. Acosta's Affidavits as they appear in CX-13 and CX-15.

As to Respondent's first argument regarding Mr. Acosta's presence or lack thereof at the inspections, from Respondent's arguments presented in "Respondent's Motion in Opposition of Complainant's Motion for Findings of Fact and Conclusions of law and Complainant's Motion for Partial Accelerated Decision as to Liability" ("Respondent's Accelerated Decision Response") dated August 29, 2005, it appears that Respondent is only arguing that Mr. Acosta was not present during the Coto Laurel facility inspection.[5] Respondent does *not* contend that Mr. Acosta was not present during the Jauca facility inspection.[6] In that the parties represent that Mr. Acosta will be present at hearing, at which time a foundation may be laid for his general testimony regarding the inspection of the Coto Laurel facility, a decision on the admissibility of the Affidavit pertaining to that inspection (CX-15) can best be made at that point.

In regard to Respondent's second argument, while Respondent is correct that Rule 22.22(d) provides that Affidavits are admissible where the affiant is unavailable under FRE 804(a) and that Mr. Acosta does not meet the "unavailable standard," that does not make his Affidavit inadmissible. Rather, such document could be admissible under 22.22(c) as written testimony or otherwise based upon the foundation laid for the exhibit at hearing. *See, J.V. Peters & Co.*, 7 E.A.D. 77, 96-97 (EAB 1997), *aff'd sub nom. Shillman v. United States,* No, I:97-CV-1355 (N.D. Ohio, Jan. 14, 1999), *aff'd in part,* 221 F.3d 1336 (table format), No. 99-3215, 2000 U.S. LEXIS 15800 (6th Cir. June 29, 2000), *cert. denied,* 531 U.S. 1071 (2001).

Finally, while FRE 802 severally limits the extent and type of hearsay admissible at trials in Federal proceedings, hearsay is generally admissible in these administrative proceedings to prove the truth of the matter asserted and for impeachment in that Rule 22.22(a) provides that this Tribunal shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value.. . " The issue with regard to the hearsay is whether it fits one of the prohibited categories of evidence such as "unreliable" or "repetitious" and that is a determination to be made at the hearing.

Based upon the foregoing, following the guidance of Hawthorne Partners, this Tribunal defers the question of admissibility of Mr. Acosta's Affidavits contained in CX-13 and CX-15 until such time as those exhibits might be offered into evidence at hearing, at which time admissibility will be decided pursuant to the standards set forth in Rules 22.2, 40 C.F.R. §§ 22.22. Therefore, Respondent's Motion *in Limine* as to Mr. Acosta's Affidavits contained in CX-13 and CX-15 is **DENIED**.

---

[5] *See, e.g.*, Respondent's Accelerated Decision Response at 5 and 7; Respondent's PHE at 4-5.

[6] *See, e.g.,* Respondent's Accelerated Decision Response at 10.

ORDER

For all of the foregoing reasons, Respondent's Motion *in Limine* is, in its entirety, hereby **DENIED**.

_____
Susan L. Biro
Chief Administrative Law Judge

Dated: September 27, 2005
Washington, D.C.