UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Easterday Janitorial Supply Company	)	**DOCKET NO. FIFRA-09-99-0015**
	)	
	)	
RESPONDENT	)	

ORDER DENYING MOTION FOR RECONSIDERATION/REQUEST FOR INTERLOCUTORY APPEAL

On December 13, 2000, the undersigned Administrative Law Judge ("ALJ") issued an Order ("Order") granting Easterday Janitorial Supply Company's ("Respondent") Motion to Take Depositions Upon Oral Questions ("Respondent's Motion") that was filed pursuant to 40 C.F.R. § 22.19(e), *Other Discovery*, on December 11, 2000. The Order permitted Respondent to depose three witnesses that the U.S. Environmental Protection Agency ("Complainant") identified as individuals who were responsible for conducting inspections at Respondent's facilities. Complainant subsequently filed a Motion for Reconsideration/Request for Interlocutory Appeal on December 26, 2000. ("Complainant's Motion"). By facsimile, Respondent submitted its Opposition to Motion for Reconsideration ("Respondent's Opposition") to the ALJ on December 27,

2000.[1/] For the reasons stated below, Complainant's Motion for Reconsideration/Request for Interlocutory Appeal is DENIED.

DISCUSSION

1. EPA's Motion For Reconsideration/Request For Interlocutory Appeal Is Timely

Under Section 22.29(a) of the Consolidated Rules of Practice ("Consolidated Rules"), 40 C.F.R. § 22.29(a), ***Request for Interlocutory Appeal***, "[a] party seeking interlocutory appeal of [orders or rulings other than an initial decision] to the Environmental Appeals Board shall file a motion within 10 days of service of the order or ruling." Further, Section 22.7(a) of the Consolidated Rules, ***Computation***, provides that while Saturdays, Sundays, and Federal holidays are included in computing the 10-day period, the "day of the event from which the designated period begins to run shall not be included. . . . When a stated time expires on a Saturday, Sunday or Federal holiday, the stated time period shall be extended to include the next business day."

[1/] Complainant filed a Reply to Respondent's Opposition on January 4, 2001.

In this proceeding, the Court's Order was served by facsimile transmission on December 13, 2000. Accordingly, Complainant was required to file its Motion no later than December 23, 2000. However, December 23, 2000 was a Saturday while Monday, December 25, 2000, was a Federal holiday. Therefore, the "next business day" as contemplated by Section 22.7(a) became Tuesday, December 26, 2000, the date that Complainant submitted its Motion. As a result, Respondent's argument that Complainant's "Motion is untimely and must be denied" (Respondent's Opposition at 5) fails, because Complainant's Motion for Reconsideration/Request for Interlocutory Appeal was filed within the time requirements contemplated by the relevant provisions of the Consolidated Rules of Practice.

2. Complainant's Motion For Reconsideration/Request For Interlocutory Appeal Lacks Merit

Although Complainant's Motion for Reconsideration/Request for Interlocutory Appeal was timely filed, it must be denied for lack of merit. Complainant states that its Motion is filed pursuant to Section 22.29(a) of the Consolidated Rules of Practice, 40 C.F.R. § 22.29(a).[2/]

[2/] Complainant also states that its Motion is filed pursuant to Section 22.16(a) of the Consolidated Rules of Practice, 40 C.F.R. § 22.16(a), which sets forth general (continued...)

(Complainant's Motion at 1). In considering such motion, Section 22.29(b) of the Consolidated Rules, 40 C.F.R. § 22.29(b), *Availability of Interlocutory Appeal*, must also be considered. This section provides:

> The Presiding Officer may recommend any order or ruling for review by the Environmental Appeals Board when:
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> (1) The order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion; and
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> (2) Either an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.

A. No Important Question Of Law Exists In This Matter Requiring The ALJ To Certify An Interlocutory Appeal

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[2/] (...continued)
provisions pertaining to motions. It is under this provision that Complainant moved for Reconsideration, because the Consolidated Rules do not specifically provide for a Motion for Reconsideration of an Order.

In its Motion, Complainant addresses the first tier of the above-stated standard by arguing that the Order involves both an important question of law and policy for which there exist substantial grounds for difference of opinion. With regard to the important question of law, Complainant asserts that the Order "failed to address the elements necessary to grant depositions under § 22.19(e).[3/] . . . Instead of addressing these criteria it appears that the Presiding Judge has fashioned new criteria for ordering depositions. . . . But neither the

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[3/] Section 22.19(e) of the Consolidated Rules of Practice, 40 C.F.R. § 22.19(e), provides in part:

> The Presiding Officer may order such other discovery only if it:
> (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
> (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
> (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought. . . .
> (3) The Presiding Officer may order depositions upon oral questions only in accordance with paragraph (e)(1) of this section and upon an additional finding that:
> (i) The information sought cannot reasonably be obtained by alternative methods of discovery; or
> (ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

complexity of a case, the limited scope of a request nor the reasonableness of a request are bases for ordering further discovery under § 22.19(e)." (Complainant's Motion at 3-4).

Complainant's argument, substantively speaking, is incorrect and must therefore fail. The complexity of the case as well as the limited scope and reasonableness of the request precisely represent the bases for providing the "Other Discovery" contemplated by the regulations. Here, the Respondent has demonstrated, pursuant to Section 22.19(e), that such discovery neither unreasonably delays nor burdens Complainant, seeks information that is most reasonably obtained from Complainant, and seeks information that has significant probative value on a disputed issue of material fact relevant to liability. Moreover, the Court has determined that pursuant to Section 22.19(e)(3)(i), the information sought by Respondent cannot reasonably be obtained by alternative methods of discovery.

Accordingly, Respondent's request to depose Complainant's three witnesses, Karl Carillo and Larry Catton, California state pesticide use specialists, and Amy Miller, an EPA specialist, who were responsible for conducting the inspections at Respondent's facilities, is reasonable, particularly in light of

the fact that significant factual disputes exist between the parties concerning '"revocation notices provided to Respondent and the inspections at Respondent's facilities."' (Order at 2).

Apart from questioning the legal sufficiency of the Court's Order, Complainant further argues that Respondent's Motion raises irrelevant or unsupportable arguments,[4/] which fail to satisfy the requirements of Section 22.19(e).[5/] (Complainant's

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[4/] Specifically, Complainant takes issue with the fact that Respondent relies upon, but does not identify what, specific factual disputes exist "concerning the conduct of the actual inspections." (Complainant's Motion at 5 citing Respondent's Motion to Take Depositions Upon Oral Questions at 3). Further, Complainant contends that the existence of factual disputes alone does not entitle Respondent to depositions under 40 C.F.R. § 22.19(e). Id. at 6. In addition, Complainant argues that the number of violations and the penalty amount are not relevant considerations under 40 C.F.R. § 22.19(e). Id. Finally, Complainant states that other methods exist besides depositions that will allow Respondent to prepare its defense to the Complaint. Id.

[5/] In addressing Respondent's failure to adequately address Section 22.19(e) in its Motion, Complainant essentially argues that Respondent failed to meet the criteria under: (1) Section 22.19(e)(1)(i), because depositions are unduly burdensome, and the request in this case was unreasonable since it did not make any additional requests for information from Complainant beyond Complainant's prehearing exchange; (2) Section 22.19(e)(1)(ii), because Respondent failed to demonstrate that Complainant has been unwilling to provide any non-privileged information to Respondent upon reasonable request; (3) Section 22.19(e)(1)(iii), because Respondent's failure to articulate what information it seeks beyond the exploration of the basis of the anticipated testimony constitutes a "fishing expedition," (continued...)

Motion at 5-7). These arguments, however, were previously considered by the Court and do not alter the Court's conclusion that Respondent adequately addressed the qualifying criteria articulated in Section 22.19(e) of the Consolidated Rules.

The Environmental Appeals Board ("the Board") has recently held that despite the fact that it "reviews the Presiding Officer's factual and legal conclusions on a de novo basis, the Board may apply a deferential standard of review to issues such as the Presiding Officer's . . . decisions regarding discovery." In re Bil-Dry Corp., RCRA (3008) Appeal No. 98-4, slip op. at 18 n.15 (EAB Jan. 18, 2001) (citing In re Chempace Corp., FIFRA Appeal Nos. 99-2 & 99-3, slip op. at 23 (EAB May 18, 2000)). As a result of the Board's holding, which is consistent with holdings of the federal courts,[6] it is evident that the ALJ in administrative

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[5] (...continued)
which is expressly disfavored by the Consolidated Rules of Practice; (4) Section 22.19(e)(3)(i), because other methods, such as interrogatories, exist to obtain information; and (5) Section 22.19(e)(3)(ii), because Respondent failed to provide any basis to allege that any reason exists to believe that relevant and probative evidence would not be preserved for presentation by Complainant's witnesses at hearing.

[6] See Radio Corp. of America v. United States, 341 U.S. 412, 420 (1951) ("Whether the Commission should have reopened its proceedings to permit RCA to offer proof of new discoveries for its system was a question within the discretion of the Commission which we find was not abused."); Cruden v. Bank of
(continued...)

hearings has wide latitude as to all aspects of the conduct of a hearing. Accordingly, Complainant's arguments in opposition to the Court's discovery Order do not merit expanded review.

B. Denial Of Such Discovery Request Might Prejudice Respondent's Ability To Adequately Prepare A Defense To The Allegations Charged In The Complaint

Having so concluded, the Court nevertheless feels compelled to address Complainant's assertion that there is no fundamental unfairness or violation of Due Process in denying Respondent the opportunity to depose Complainant's witnesses in this matter. (Complaint's Motion at 11). As correctly noted in its Motion, Complainant's position is supported by the fact that "[t]here is no basic constitutional right to pretrial discovery in administrative proceedings." (Complainant's Motion at 11 citing Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28, 33 (7th Cir. 1977)). Further, the Administrative Procedure

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[6/] (...continued)
New York, 957 F.2d 961, 972 (2d Cir. 1992) ("A trial court enjoys wide discretion in its handling of pre-trial discovery, and its ruling with regard to discovery are reversed only upon a clear showing of an abuse of discretion."); Voegeli v. Lewis, 568 F.2d 89, 96 (8th Cir. 1977) ("[a] district court has very wide discretion in handling pretrial discovery"); and Burns v. Thiokol Chem. Corp., 483 F.2d 300, 307 (5th Cir. 1973) ("Of course the particular details of the discovery process are committed to the sound discretion of the trial court.").

Act contains no provision for pretrial discovery in the administrative process, and the Federal Rules of Civil Procedure for discovery do not apply to administrative proceedings. See Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28, 33 (7th Cir. 1977); see also NLRB v. Valley Mold Co., Inc., 530 F.2d 693, 695 (6th Cir. 1976) (citing Frilette v. Kimberlin, 508 F.2d 205, 208 (3d Cir. 1974), cert. denied 421 U.S. 980 (1975) ("The Administrative Procedure Act does not confer a right to discovery in federal administrative proceedings."); McClelland v. Andrus, 606 F.2d 1278, 1285 (D.C. Cir. 1979) ("the Federal Rules of Civil Procedure . . . are inapplicable and the Administrative Procedure Act fails to provide expressly for discovery").

Although the federal courts acknowledge that no constitutional right to discovery exists, they realize that the constitutional requirements of due process may be denied in the absence of discovery. See Housing Auth. of County of King v. Pierce, 711 F. Supp. 19, 22 (D.D.C. 1989). As a result, the courts recognize that the specific facts of the case must govern, such that "discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process." See McClelland, 606 F.2d at 1286. Accordingly, it is evident that an agency must always ensure that its procedures satisfy the requirements of due process. See Withrow v.

Larkin, 421 U.S. 35, 46 (1975) ("Concededly, a 'fair trial in a fair tribunal is a basic requirement of due process.' . . . This applies to administrative agencies which adjudicate as well as to courts."); see also Swift & Co. v. United States, 308 F.2d 849, 851 (7th Cir. 1962) ("Due Process in an administrative hearing, of course, includes a fair trial, conducted in accordance with fundamental principles of fair play and applicable procedural standards established by law.").

In addition to the due process arguments, the Supreme Court has consistently expressed the view that:

> ...the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case [See Footnote 5]. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. But discovery, like all matters of procedure, has

> ultimate and necessary boundaries. . . . [L]imitations inevitably arise when it can be shown that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry [Emphasis Added].

Hickman v. Taylor, 329 U.S. 495, 507-08 (1947). See Schlagenhauf v. Holder, 379 U.S. 104, 114-15 (1964) ("that the deposition-discovery rules are to be accorded a broad and liberal treatment"); Societe Nationale Industrielle Aerospatiale v. United States Dist. Court S. Dist. Iowa, 482 U.S. 522, 540 n.25 (1987) (stating the fundamental maxim of discovery is that '[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.').[7/]

[7/] See also SEC v. Sargent, 229 F.3d 68, 80 (1st Cir. 2000) ("The Supreme Court has long recognized that the Federal Rules of Civil Procedure are to be construed liberally in favor of discovery."); Titan Sports, Inc. v. Turner Broad. Sys., 151 F.3d. 125, 128 (3d Cir. 1998) ("Indeed, the Supreme Court has not shown enthusiasm for the creation of constitutional privileges because [they] 'contravene [the] fundamental principle . . . that the public has a right to every man's evidence.' . . . Pretrial discovery is therefore, 'accorded a broad and liberal treatment.'"); Corley v. Rosewood Care Ctr., Inc., 142 F.3d 1041, 1052 (7th Cir. 1998) ("The Supreme Court has long recognized that as part of his investigation and trial preparation, counsel may choose to take sworn statements from individuals having knowledge of the claims or defenses at issue."); Credit Lyonnais, S.A. v. SGC Int'l, Inc., 160 F.3d 428, 430 (8th Cir. 1998) ("The rules for depositions and (continued...)

"Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial." In re Coleman Trucking, Inc., Docket No. 5-CAA-96-005, 1997 EPA ALJ LEXIS 123, at *10 (Apr. 3, 1997) (citing Hickman, 329 U.S. at 501). The Court later held that "[m]odern instruments of discovery serve a useful purpose as noted in Hickman v. Taylor . . . They together with pretrial procedures make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." In re Coleman Trucking, Inc., at *10-11,(citing United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958)).

Given this background, requiring Respondent to proceed to hearing without the opportunity to depose Complainant's witnesses in order to adequately prepare a defense would be patently unfair. Complainant asserts that Respondent will be able to glean what the

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[7/] (...continued)
discovery 'are to be accorded a broad and liberal treatment.' [citing Hickman, 329 U.S. at 507] . . . Additionally, the rule governing depositions provides a broad right. A party may depose almost anyone, including corporations, who may provide relevant information."].

witnesses will testify to based on the fact that Respondent possesses all the documentation that the witnesses will rely on for their testimony. (Complainant's Motion at 8).

Complainant's argument however, is simply unpersuasive. Relevant documentation, even if accessible by Respondent, might not fully convey the inspectors' mental impressions or understanding of the facts in issue. Thus, in light of the 2,659 counts of violations and the immense proposed civil penalty alleged in the Complaint, Respondent is entitled to depose Complainant's witnesses, consistent with the requirements of due process noted in the Court's findings in Hickman and Procter & Gamble.

C. No Important Questions Of Policy Exist

In so finding, the Court rejects Complainant's next argument that the Court's Order undermines the Agency's long-standing policy of limiting discovery in administrative litigation to avoid unnecessary delay and motion practice, which may open the door for discovery and depositions in virtually every disputed matter. (Complainant's Motion at 13-14). The Agency's policy however, does not require less extensive discovery than that of the federal courts; instead, it **permits** less extensive discovery. 64 Fed. Reg.

40,137, 40, 160 (1999). Further, it is evident that the policy behind 40 C.F.R. 22.19(e)(1) was not intended to "significantly alter the amount of discovery permitted, although it is hoped that [changes to § 22.19(e)(1)] will reduce the amount of litigation over whether discovery is to be allowed." Id. at 40,160.

If anything, Complainant's argument contravenes the Agency's policy of limiting the amount of litigation related to the amount of discovery allowed. It is clear that the Agency relies on the discretion of the ALJ to resolve whether the amount of discovery requested is appropriate, because "it is the sort of standard that judges are accustomed to apply. EPA is confident that the impartial presiding officers can implement these standards in a fair and efficient manner." Id. Finally, Complainant's argument regarding unnecessary delay and motion practice must fail, because "administrative convenience or even necessity cannot override the constitutional requirements of due process." Silverman, 549 F.2d at 33. Therefore, the Court's position on discovery is consistent with existing regulations, such that no important questions of policy concerning which there are substantial grounds for difference of opinion exist.

3. Complainant Incorrectly Argues That Review After A Decision Is Rendered By This Court Will Be Inadequate Or Ineffective

Finally, Complainant asserts that immediate review of the Order is necessary to prevent it from wasting unnecessary time and expense conducting depositions. In support of this assertion, Complainant cites In re Chautauqua Hardware Corp., 3 EAD 616 (EAB June 24, 1991). Unlike the instant proceeding however, the Board in In Re Chautauqua found that Respondent's discovery requests were so broad that compliance with them would have been wasteful. Id. at 619.

Moreover, Complainant's reliance on the Board's holding in In Re Chautauqua is misplaced for two primary reasons. First, the Board found that the case presented three "exceptional circumstances" warranting interlocutory review:

> [1] that some of the requested documents would reveal the deliberative processes of the Agency, [2] that unnecessarily complying with Chautauqua's broad discovery requests would waste EPA resources, and [3] that this case raises fundamental issues of first impression . . ..

Id.

In the matter at hand, none of the Board's "exceptional circumstances" are present. Respondent does not request any documents that would reveal Complainant's "deliberative processes."[8/] Respondent merely seeks to depose Complainant's witnesses, in part, to clarify the "significant factual disputes between the parties concerning 'revocation notices provided to Respondent and the inspections at Respondent's facilities.'" (Order at 2). Further, Respondent's discovery request is not so broad that compliance with it would constitute an unnecessary waste of time and resources. The information sought has significant probative value, and any possibility that a waste of time or resources would occur has been minimized by the Order's mandate that each deposition shall not exceed 3 hours, at the time and location agreed to by the parties. (Order at 3). Finally, this proceeding does not raise fundamental issues of first impression. In re Chautauqua represented the Board's seminal decision on the scope of discovery under the Consolidated Rules of Practice, such that there was no longer a "complete absence of any

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[8/] According to the Board, the "deliberative process" is one "by which an administrative agency formulates a final rule or policy." In re Chautaqua, 3 EAD at 619.

decisions by [the Board] addressing" this fundamental issue. In re Chautauqua, 3 EAD at 619.

The second, and most important, reason that Complainant's reliance on the In re Chautauqua decision is misplaced is that the Board appears to foreclose any possibility that it will undertake interlocutory review involving discovery requests beyond the In re Chautauqua decision. Specifically, the Board states:

> It should be noted that, in the future, interlocutory review will not be routinely granted to resolve discovery disputes.

In re Chautauqua, 3 EAD at 619 n.4.

Based on the foregoing discussion, Complainant's remaining arguments requesting immediate review of the Order need not be considered. However characterized by it, Complainant has not demonstrated that an adequate appeal of the Order is unobtainable after a decision is issued in this case. The fact that Complainant may incur some expense during the deposition process does not mean that effective appellate review will be unavailable. Discovery orders are appropriate for appellate review. See In re ICC

Industries, Inc., Docket No. TSCA-8(a)-90-0212, TSCA Appeal No. 91-4, 1991 EPA APP. LEXIS 13, at *9 (EAB Dec. 2, 1991) ("As a general rule, an appeal to the Administrator as a matter of right may be obtained only from an initial decision.").

ORDER

Accordingly, Complainant's Motion for Reconsideration/ Request for Interlocutory Appeal is **DENIED**. Absent agreement by the parties, these depositions shall now be concluded no later than **March 15, 2001**. The deposition of each witness **shall not exceed 3 hours**, at the time and location agreed to by the parties.

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Stephen J. McGuire

Administrative Law Judge

January 31, 2001

Washington, D.C.