

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
)
Easterday Janitorial Supply) Docket No. FIFRA-09-99-0015
Company)
)
)
Respondent)

ORDER GRANTING MOTION FOR DEPOSITIONS

On December 11, 2000, Respondent, Easterday Janitorial Supply Company, pursuant to 40 C.F.R. Section 22.19(e), filed a Motion To Take Depositions Upon Oral Questions in the above-stated proceeding. On December 12, 2000, Complainant, the United States Environmental Protection Agency (EPA) filed a timely Response to said Motion.

40 C.F.R. Section 22.19(e), *Other Discovery*, provides that (1) "after the information exchange..., a party may move for additional discovery. The motion shall specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought (and where relevant, the proposed time and place where discovery would be conducted). 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 substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing."

Respondent's Motion requests that three named individuals, Karl Carrilo and Larry Catton, California state pesticide use specialists and Amy Miller, an EPA specialist/case developer be deposed. The three named individuals have been identified by Complainant as witnesses who were responsible for conducting inspections at Respondent's facilities. Respondent seeks to depose these witnesses, in part, as there are significant factual disputes between the parties concerning "revocation notices provided to Respondent and the inspections at Respondent's facilities." Respondent also seeks information with respect to Ms. Miller's conclusions, as her testimony is expected to show how the evidence supports the alleged violations and how the proposed penalty was calculated.

In its Response to Motions For Depositions, Complainant urges that Respondent's Motion does not set forth in sufficient detail the nature of the information sought and that it cannot be determined what information Respondent seeks that has not already been provided through the Complaint or Complainant's Prehearing Exchange.

The Complaint in this case alleges 2,659 violations of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended, 7 U.S.C. Section 136 *et seq.* The Administrator seeks to assess a civil administrative penalty of up to \$5,500 for each of the alleged violations. Given the complexity of the issues relating to the counts alleged, Respondent's limited request for further discovery regarding the conclusions of the witnesses in question, as well as the basis for those conclusions, is reasonable and otherwise meets the standards set forth in 40 C.F.R. Section 22.19(e). See, *In the Matter of Intermountain Farmers Association, FIFRA-8-99-58 (ALJ Order on Discovery), March 24, 2000, 2000 WL 343971 (EPA ALJ).*

Under the circumstances of this case, to deny such request might well prejudice Respondent's ability to adequately prepare a defense to the allegations charged in the Complaint. An administrative agency must grant discovery if a "refusal to do so would so prejudice a party as to deny him due process." *In the*

3.

Matter of: ICC Industries, Inc., TSCA-8(a)-90-0212 (Order on Interlocutory Review), EAB TSCA Appeal No. 91-4 (December 2, 1991), 1991 WL 280349 (E.P.A.); citing McClelland v. Andrus, 606 F.2d 1278, 1286 (D.C. Cir. 1979).

Accordingly, pursuant to 40 C.F.R. Section 22.19(e), Respondent's Motion To Take Depositions is **GRANTED**. Absent agreement by the parties, these depositions shall be concluded no later than **January 15, 2001**. The deposition of each witness **shall not exceed 3 hours**, at the time and location agreed to by the parties.



Stephen J. McGuire
Administrative Law Judge

December 13, 2000
Washington, D.C.