



UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF )  
 )  
E. I. du Pont de Nemours ) DOCKET NOS. TSCA-HQ-2004-0016  
and Company, ) RCRA-HQ-2004-0016  
 )  
 )  
RESPONDENT )

ORDER DENYING DUPONT'S MOTION FOR MODIFICATION  
OF THE PREHEARING ORDER (TO COMPEL ADMISSIONS)

On September 15, 2004, Respondent E.I. du Pont de Nemours and Company ("DuPont") filed its First Set of Requests for Admissions, seeking responses to seventy-two (72) statements for the stated purpose of avoiding unnecessary proof at trial.<sup>1</sup> On October 1, 2004, DuPont filed its Motion for Modification of Prehearing Order, seeking to compel Complainant, the United States Environmental Protection Agency, Office of Regulatory Enforcement ("ORE"), to respond to DuPont's requests for admissions at the time when ORE files its initial prehearing exchange. DuPont contends that ORE's responses to the requests for admission will allow the parties to narrow the issues to be brought before the undersigned, place the parties on more equal footing with respect to responses to each other's factual allegations and burdens during the prehearing exchange, and may expedite these proceedings.

On October 14, 2004, ORE filed its Response to DuPont's Motion for Modification of the Prehearing Exchange, which requested that DuPont's requests for admissions remain in

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<sup>1</sup>On September 16, 2004, I entered a Prehearing Order that set forth a schedule for the parties' prehearing exchange and directed that DuPont's First Request for Voluntary Production of Documents and First Set of Requests for Admissions would be held in abeyance pending the filing of the prehearing exchange.

abeyance and that I deny DuPont's Motion. ORE contends that it is premature for DuPont to claim that the prehearing exchanges will not respond to certain factual issues. ORE further contends, *inter alia*, that the prehearing exchange process is fair and that DuPont is in a better position than ORE to understand the details of the events described in the Complaint.

In DuPont's Reply Brief in Support of its Motion for Modification of the Prehearing Order, filed October 28, 2004, DuPont contends, *inter alia*, that its requests relate to EPA's conduct and that ORE is in a far better position than DuPont to determine the details of the events in question and to confirm that the statements DuPont makes in the requests are true. On the fairness issue, DuPont states that, absent an order to respond to DuPont's requests *before* DuPont's prehearing exchange, DuPont must prepare its prehearing exchange without knowing which of the statements of fact ORE eventually will admit.

### Discussion

The Rules of Practice,<sup>2</sup> 40 C.F.R. part 22, provide for a prehearing information exchange, in accordance with the instructions in the Administrative Law Judge's ("ALJ") prehearing order. 40 C.F.R. § 22.19(a). Essentially, this exchange consists of discovery for the parties. The Rules of Practice, under the heading titled "[o]ther discovery," further provide that after the information exchange a party may move for additional discovery.<sup>3</sup> 40 C.F.R. § 22.19(e)(1). The ALJ 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

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<sup>2</sup> The term "Rules of Practice" refers to the rules governing these proceedings: "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits." 40 C.F.R. part 22.

<sup>3</sup> The ALJ also may order depositions upon oral questions, but only where additional conditions, over and above those in Section 22.19(e)(1) of the Rules of Practice, are satisfied. 40 C.F.R. § 22.19(e)(3).

issue of material fact relevant to liability or the relief sought. *Id.*

The requirements concerning "other discovery" set forth in Section 22.19(e) of the Rules of Practice, however, do not limit a party's right to request admissions or stipulations. 40 C.F.R. § 22.19(e)(5).

The Rules of Practice also provide that at any time before the hearing begins, the ALJ may direct the parties and their counsel to participate in a conference *to consider* matters including: simplification of issues and stipulation of facts not in dispute; the exchange of exhibits, documents, prepared testimony, and admissions or stipulations of fact which will avoid unnecessary proof, and; any other matters which may expedite the disposition of the proceeding. 40 C.F.R. § 22.19(b)(emphasis added).<sup>4</sup>

Assuming *arguendo* that an ALJ has authority to compel a party to answer requests for admission, DuPont's motion to compel responses to its requests for admissions is premature. The parties have not filed yet their prehearing exchange. Usually, the prehearing information exchange precedes a prehearing conference in which the parties can be directed to participate to consider admissions or stipulations of fact which will avoid unnecessary proof. 40 C.F.R. §§ 22.19 (a), (b). Also, it is yet to be determined how the upcoming oral argument on the parties' motions for accelerated decision may impact these proceedings.

With regard to the fairness issue, I observe that the Rules of Practice do not explicitly provide authority for an ALJ to require a party to answer an opposing party's requests for admissions. Nonetheless, the movant is not without some recourse. First, the movant may seek an order directing the parties to participate in a prehearing conference to consider admissions or stipulations of fact which will avoid unnecessary proof. 40 C.F.R. § 22.19(b). The movant may request other discovery, including depositions upon oral questions. 40 C.F.R. § 22.19(e).<sup>5</sup> Additionally, an ALJ may issue a subpoena for

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<sup>4</sup>Section 22.4(c) of the Rules of Practice also provides general authority for an ALJ to consider a party's request for admissions. 40 C.F.R. §§ 22.4(c)(5), (8), (10).

<sup>5</sup>ORE points out that the preamble to the Rules of Practice acknowledges that the applicable prehearing exchange and discovery procedures are more restrictive than that of (cont.)

discovery purposes or require the attendance of witnesses or the production of documentary evidence by subpoena. 40 C.F.R. § 22.19(e)(4).

Accordingly, DuPont's Motion for Modification of the Prehearing Order is DENIED. After completion of the prehearing exchange process, DuPont may renew its motion to compel responses to requests for admissions if it considers such action necessary. Nevertheless, I encourage the parties to seek voluntary admissions from each other in furtherance of narrowing the issues and the facts.

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Barbara A. Gunning  
Administrative Law Judge

Dated: November 5, 2004  
Washington, D.C.

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(continued) the Federal courts but indicates that such can provide benefits for both complainants and respondents. In particular, ORE cites the preamble to the Rules of Practice: "There is no inherent unfairness in rules that permit less extensive discovery than those of the Federal courts. Restrictions on discovery work as both an burden and an advantage, and as some of the commenters acknowledge, respondents share in the advantages as well as the burdens." 64 Fed. Reg. 40,138, 40,160 (July 23, 1999).