

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
Mathie Energy Supply Company, Inc.,) **Docket No. FIFRA-05-2012-0022**
)
Respondent) **Dated: July 10, 2013**

ORDER ON MOTION FOR ENTRY OF PROTECTIVE ORDER

I. Introduction

Complainant, Director of the Land and Chemicals Division of the United States Environmental Protection Agency (EPA) Region 5, initiated this proceeding by a Complaint issued on September 6, 2012 under Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136l(a). Complainant filed its Prehearing Exchange, and Respondent was granted an extension until July 31, 2013 to file its prehearing exchange. On May 29, 2013, Complainant filed a Motion for Entry of Protective Order Regarding Confidentiality (“Motion”) and attached a proposed “Stipulation and Protective Order Regarding Confidentiality” (“Proposed Order”).

The procedural rules that govern this proceeding, 40 C.F.R. Part 22 (“Rules of Practice”) provide in pertinent part that “[a] party’s response to any written motion must be filed within 15 days after service of such motion.” 40 C.F.R. § 22.16(b). “Any party who fails to respond within the designated period waives any objection to the granting of the motion.” *Id.* Respondent’s response to the Motion was due on June 13, 2013. Because Respondent did not respond to the Motion, any objections Respondent may have had are waived. *Id.* However, Respondent is not represented by counsel and there is no indication that Respondent has stipulated to the terms of the Proposed Order. The waiver of any objection does not, as a matter of law, entitle the moving party to the relief requested in its motion. *Asbestos Specialists, Inc.*, 4 E.A.D. 819, 825 (EAB 1993).

II. The Motion and the Proposed Protective Order Regarding Confidentiality

In the Motion, Complainant requests the entry of a protective order to protect certain documents it has received from Respondent on the grounds that they “may constitute confidential business information pursuant to 40 C.F.R. Part 2, Subpart B,” but to “avoid the expense and delay attendant to any determination of confidentiality under 40 C.F.R. Part 2, Subpart B, or to any similar confidentiality determination, and avoid unauthorized release.” Mot. at 1. The Motion states that Respondent has asserted that the documents are entitled to

confidential treatment but that Complainant has not determined whether they are all entitled to confidential treatment under 40 C.F.R. Part 2, Subpart B. Referring to such documents as “Documents,” Complainant states in the Motion that it has generated documents which contain information that is claimed confidential by Respondent, and refers to these as “Document-Derived Materials.” *Id.* Complainant asserts that “[t]he filing of confidential information is necessary to the just adjudication of this Administrative Proceeding.” *Id.* Complainant’s Proposed Order contains the following substantive provisions:

1. All Documents and Document-Derived Materials served in this Administrative Proceeding shall thereafter be handled by the Parties in accordance with the terms of this Protective Order.
2. Any Documents and Document-Derived Materials to be served by the Complainant or Respondent in this Administrative Proceeding shall be clearly stamped, marked, or otherwise identified as “Confidential.”
3. Complainant and Respondent, their attorneys, and representatives shall use the Documents and Document-Derived Materials for purposes of this Administrative Proceeding only and any appeals therefrom, and shall not disclose the Documents and Document-Derived Materials to third parties; provided, however, that nothing herein shall prevent the disclosure of Documents and Document-Derived Materials to the following persons:
 - a. The Administrative Law Judge assigned to this Administrative Proceeding and her staff in connection with the submittal of prehearing exchanges and the presentation of evidence at any hearing in this Administrative Proceeding or appeal therefrom;
 - b. Counsel for the Parties and their employees and the witnesses who are actively engaged in the hearing of this matter provided that such persons agree to be bound by the provisions of this Protective Order;
 - c. Persons who authorized or who were a recipient prior to its submittal to Complainant, of a Document;
 - d. Consultants and experts retained by the Parties in connection with this Administrative Proceeding provided that such persons are provided a copy of this Protective Order and agree to be bound by it; and
 - e. Any other such person who is entitled to review such Documents or Document-Derived Materials as a result of federal or state laws or court orders.
4. Complainant and Respondent, their counsel, and representatives who obtain Documents and Document-Derived Materials which are served in the

Administrative Proceeding shall take all necessary and appropriate measures to maintain the confidentiality of the Documents and Document-Derived Materials, shall share the Documents and Document-Derived Materials only with persons authorized to receive them pursuant to this Protective Order, and shall retain the Documents and Document-Derived Materials in a secure manner. No other person shall be permitted access to these Documents and Document-Derived Materials.

5. Any person who obtains access to Documents and Document-Derived Materials may make copies, duplicates, extracts, summaries, or descriptions of the Documents and Document-Derived Materials or any portion thereof for the purpose of this Administrative Proceeding only and any appeals therefrom. All copies, duplicates, extracts, summaries, or descriptions shall be subject to the terms of this Protective Order to the same extent and manner as original Documents.

6. Any Documents and Document-Derived Materials that are filed with this Tribunal shall be filed in sealed envelopes or other appropriate sealed containers on which shall be endorsed the caption of this Administrative Proceeding, an indication of the nature of the contents of such sealed envelope or container, the word "CONFIDENTIAL," and a statement substantially in the following form:

"This envelope contains Documents and/or Document-Derived Materials that are filed in this case by _____ and are subject to a Protective Order in this case and shall not be opened and the contents are not to be displayed or revealed except by order of the Presiding Officer."

7. All Documents and Document-Derived Materials, filed in this Administrative Proceeding shall remain confidential and shall be accorded *in camera* treatment.

8. Any unauthorized disclosure of Documents and Document-Derived Materials, shall not result in a waiver of any claim of confidentiality.

9. Within 60 days after the termination of this Administrative Proceeding and any appeal therefrom . . . any person who obtained Documents and Document-Derived Materials, shall assemble and return such information to Complainant, including all copies, duplicates, extracts, summaries or descriptions of the Documents and Document-Derived Materials or portions thereof. Such return shall be certified in writing by the person who obtained the information from Complainant. All such information covered by this Protective Order that constitutes the work product of counsel for a party shall be destroyed; and the Headquarters Hearing Clerk shall maintain under seal all papers filed under seal unless this Tribunal orders otherwise.

III. Applicable Regulations

“EPA administrative enforcement hearings are generally open to the public.” *Ronald H. Hunt*, EPA Docket No. TSCA-03-2003-0285, 2004 EPA ALJ LEXIS 133, *9 (ALJ, Aug. 3, 2004) (Order on Joint Motion for Protective Order, Complainant’s Motion for Discovery and Motion in Limine and Motion to Stay issuance of Witness Subpoenas) (citing 40 C.F.R. § 22.3(a)). However, the Rules of Practice provide in pertinent part that:

[a] person who wishes to assert a business confidentiality claim with regard to any information contained in any document to be filed in a proceeding under these Consolidated Rules of Practice shall assert such a claim in accordance with 40 CFR part 2 at the time that the document is filed. A document filed without a claim of business confidentiality shall be available to the public for inspection and copying.

40 C.F.R. § 22.5(d)(1); see also, 40 C.F.R. § 22.9(a). The Rules of Practice provide that “[i]n the presentation, admission, disposition and use of oral and written evidence, EPA officers, employees and authorized representatives shall preserve the confidentiality of all information claimed confidential . . . unless disclosure is authorized pursuant to 40 CFR part 2.” 40 C.F.R. § 22.22(a)(2). The Rules provide further that “[a]ny affected person may move for an order protecting the information claimed confidential.” *Id.*

Part 2, Subpart B, of Title 40 of the Code of Federal Regulations (“Confidentiality Rules”) “establish[es] the basic rules governing business confidentiality claims, the handling by EPA of business information which is *or may* be entitled to confidential treatment, and determinations by EPA of whether information is entitled to confidential treatment for reasons of business confidentiality.” 40 C.F.R. § 2.202(a) (emphasis added). Business information is defined as “any information which pertains to the interests of any business, which was developed or acquired by that business, and (except where the context otherwise requires) which is possessed by EPA in recorded form.” 40 C.F.R. § 2.201(c). “Action shall be taken” pursuant to the procedures under 40 C.F.R. Part 2, Subpart B, to determine whether business information is entitled to confidential treatment whenever an EPA office “[d]esires to determine whether business information in its possession is entitled to confidential treatment, even though no request for release of the information has been received” or “[d]etermines that it is likely that EPA eventually will be requested to disclose the information at some future date.” 40 C.F.R. § 2.204(a)(2), (3).

Under the Confidentiality Rules, EPA officers and employees are prohibited from disclosing any business information except as authorized by the Confidentiality Rules, and “shall take appropriate measures to properly safeguard such information and to protect against its improper disclosure.” 40 C.F.R. § 2.211(a) and (b). Violations of these prohibitions or requirements result in adverse personnel action, and willful violation may result in criminal prosecution. 40 C.F.R. § 2.211(c).

Where a claim of confidentiality has been asserted with respect to business information, that information “shall be treated as being entitled to confidential treatment until there has been a

determination in accordance with the . . . [Confidentiality Rules] that the information is not entitled to confidential treatment.” 40 C.F.R. § 2.209(a). The Confidentiality Rules list certain persons to whom the information may be disclosed in certain circumstances, namely Congress, the Comptroller General, other Federal agencies, and “another EPA office, officer, or employee with an official need for the information.” 40 C.F.R. § 2.209. The Rules also specify that EPA may disclose information as ordered by Federal court or as consented to by the affected business. *Id.* There are rules providing for certain disclosures in specific circumstances pursuant to activities under the various environmental statutes. 40 C.F.R. § 2.301-2.311.

Finally, the Rules provide that any agreements or promises by EPA to the affected business to keep business information confidential must be consistent with Part 2 Subpart B. 40 C.F.R. § 2.215(a).

IV. Discussion and Conclusion

Complainant is bound under the Confidentiality Rules to treat as confidential within the limits set by the Rules, the information claimed as confidential by Respondent, unless and until the information is determined under procedures set forth in the Rules not to be confidential. It is important for Complainant to document immediately the Respondent’s claim of confidentiality and the Complainant’s responsibility to comply with Part 2 Subpart B, to identify documents claimed as confidential and additional documents generated that may contain confidential information, and to ensure that such information will be handled in accordance with the requirements and prohibitions in 40 C.F.R. Part 2 Subpart B and Part 22. A motion for protective order may be an appropriate vehicle to accomplish this in the context of a proceeding governed by the Rules of Practice, particularly where Respondent is not represented by counsel. However, such an order must be in consistent with the limits set forth in Part 2 Subpart B. Complainant cannot be granted a protective order that would allow disclosures unauthorized under the Confidentiality Rules, essentially circumventing them. *See*, 40 C.F.R. § 2.209(d) (only a “Federal court” may order EPA to make disclosures not otherwise authorized by the Rules).

The Proposed Order does not appear to be consistent with the Confidentiality Rules. For example, Sections 3b and 3d of the Proposed Order permit disclosure of information to all “[w]itnesses who are actively engaged in the hearing of this matter” and “[c]onsultants and experts retained by the parties,” which would appear to include individuals who are not EPA officers or employees and not within the special rules under FIFRA, 40 C.F.R. § 2.307. Complainant has not established that Respondent has given consent to disclose confidential information to these individuals. Therefore, the Proposed Order is not acceptable. Instead, Complainant shall treat under the protections of 40 C.F.R. Part 2 Subpart B all information in its possession that is claimed by Respondent as confidential, and shall comply with the Rules of Practice, including 40 C.F.R. §§ 22.5(d) and 22.22(a)(2), with regard to documents filed and evidence offered in this proceeding. In these circumstances, no protective order is necessary. If there is a need for closing the hearing, or a portion of the hearing, to the public, a party may file a motion for protective order pursuant to 40 C.F.R. § 22.22(a)(2).

The case file does not show which documents are claimed as confidential. To ensure that Complainant has marked as confidential all information Respondent claims as confidential, Complainant shall confirm that it has done so as set forth below.

V. Order

1. For the foregoing reasons, Complainant's Motion for Entry of Protective Order Regarding Confidentiality is **DENIED**.
2. Complainant shall continue to comply with the provisions of 40 C.F.R. Part 2 Subpart B with regard to any documents which Respondent has claimed are entitled to confidential treatment for reasons of business confidentiality.
3. Complainant shall, **on or before July 19, 2013**, serve on Respondent a document listing and briefly identifying the Documents it has received from Respondent for which a claim of business confidentiality has been made. The parties shall, **on or before July 26, 2013**, file a joint Status Report as to the status of identifying such Documents.
4. Complainant and Respondent shall adhere to the following procedures set forth in the Procedural Rules, 40 C.F.R. § 22.5(d) for preserving the confidentiality of business information for any documents filed in this proceeding:

A person who wishes to assert a business confidentiality claim with regard to any information contained in any document to be filed in [this] proceeding . . . shall assert such a claim in accordance with 40 CFR part 2 at the time the document is filed.

Two versions of any document which contains information claimed confidential shall be filed with the [Headquarters] Hearing Clerk:

- (i) One version of the document shall contain the information claimed confidential. The cover page shall include the [caption identifying the Respondent and docket number] and the words "Business Confidentiality Asserted". The specific portion(s) alleged to be confidential shall be clearly identified within the document.
- (ii) A second version of the document shall contain all information except the specific information claimed confidential, which shall be redacted and replaced with notes indicating the nature of the information redacted. The cover page shall state that information claimed confidential has been deleted and that a complete copy of

the document containing the information claimed confidential has been filed with the Regional Hearing Clerk.

Both versions of the document shall be served on the [judge] and the complainant.

M. Lisa Buschmann
Administrative Law Judge