6/10/96

UNITES STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of Health Care Products, Inc. Respondent	FIFRA Docket No. 93-H-02F
In the Matter of Celltech Media, Inc. aka Health Care Products, Inc. Through its Agent, Meditox, Inc. Respondent	FIFRA Docket No. 95-H-04

ORDERS

These orders will address several pending motions concerning discovery, evidentiary, and procedural matters in the above captioned proceedings. A complete summary of the charges and prior proceedings may be found in the undersigned Administrative Law Judge's ("ALJ's") Orders on Motions dated June 13, 1996.

Respondent's Motion for Discovery

The former ALJ in this proceeding, Judge Head, set a schedule for the filing of prehearing exchanges and subsequent motions seeking discovery and responses. The parties agreed to a revised and extended schedule in a stipulated motion dated March 6, 1996. In a Prehearing Order dated March 7, 1996, the undersigned ALJ adopted the stipulated revised schedule, which required discovery motions to be filed by March 25, 1996 and responses by April 8, 1996. That Order also stated that a motion seeking discovery should not be filed without first seeking voluntary production of the material from the opposing party.

Pursuant to the filing schedule, the parties have filed their prehearing exchanges by February 26, 1996, and reply exchanges by April 8, 1996.

Respondent filed a Motion to Take Discovery dated March 24, 1996. Attached to the motion are Respondent's proposed interrogatories, document requests, and demands for inspection. Complainant filed its Opposition to Respondent's Motion to Take Discovery on April 5, 1996.

As pointed out by Complainant, Respondent's motion for discovery completely fails to meet the requirements of the EPA Rules of Practice, 40 C.F.R. §22.19(f). In addition, Respondent

made no attempt to first seek voluntary disclosure from Complainant. Therefore, Respondent's motion to take discovery must be denied.

Discovery in EPA administrative enforcement proceedings is governed by 40 C.F.R. §22.19. Subsection (b) sets forth the extent of discovery required in these proceedings. That is the prehearing exchange consisting of lists of proposed witnesses, summaries of their expected testimony, and copies of all documents and exhibits which each party intends to introduce into evidence. Subsection (f) provides that any further discovery beyond that afforded by the prehearing exchanges shall be permitted only upon determination by the ALJ:

> (i) That such discovery will not in any way unreasonably delay the proceeding;
> (ii) That the information to be obtained is not otherwise obtainable; and
> (iii) That such information has significant probative value.

Subdivision (f)(3) then requires that a party desiring an order of discovery to make a motion therefor setting forth the circumstances warranting the taking of the discovery, and the nature of the information expected to be discovered.

Respondent's motion makes no attempt to satisfy any of these requirements. It merely lists the discovery devices it seeks leave to serve. Respondent does make a statement to the effect that it "understands" that no ruling from the ALJ will be necessary unless Complainant objects or opposes the requested discovery, and the parties cannot themselves resolve the dispute. In a later motion to stay these proceedings, dated May 7, 1996, Respondent indicates it would like to respond to Complainant's opposition to its motion to take discovery.

The ALJ believes however that there is no room for misunderstanding the explicit requirements for a motion for further discovery in the Rules. The direction in my March 7 Order that the parties first seek voluntary production of discovery materials is fully consistent with the requirement of §22.19(f)(1)(ii) that the information sought is not otherwise obtainable. The first way to find out if it is otherwise obtainable is to ask for it. Respondent's failure to follow that common sense directive has now led to us all wasting time on this patently defective motion, after the time for properly seeking discovery has past. Respondent's motion to take discovery is denied.

Complainant's Motion to Strike Witnesses and Exhibits

Complainant filed a motion dated April 5, 1996 to strike several witnesses and exhibits listed in Respondent's prehearing

exchange. Respondent has not responded to this motion, although in a motion to stay these proceedings dated May 7, 1996, Respondent indicated it would like to respond.

Under 40 C.F.R. §22.16(b), the 10-day period for a response to Complainant's motion has passed, and Respondent "may be deemed to have waived any objection to the granting of the motion." Nevertheless, the Administrative Law Judge is free to issue a ruling based on his determination of the merits of the motion. In the Matter of Asbestos Specialists, Inc., 4 EAD 819, 825-826 (EAB, October 6, 1993).

In this motion, Complainant contends that the testimony of several of Respondent's proposed witnesses, all EPA officials involved in the preparation of these enforcement actions, be excluded as irrelevant, unduly repetitious, and of no probative value. Complainant also seeks to exclude several documentary exhibits consisting mostly of material related to other FIFRA litigation, as irrelevant to the instant charges.

Complainant's motion is denied at this time, without prejudice to later renewal, as premature. In view of the facts that the parties have yet to file supplements to their prehearing exchanges, that there has been no further discovery, that the hearing has yet to be scheduled, and that Complainant must present its direct evidence first, it is too early to get involved in rulings on excluding evidence. In general, such rulings will more efficiently be made closer to the time of the hearing, or, in a case like this that will certainly require multiple days of hearing, during the hearing itself. The prehearing exchange at this stage is only intended to include all currently expected witnesses and evidence. Respondent is entitled to modify its case and react to that of Complainant, upon adequate notice, as this proceeding moves closer to the hearing. Although Respondent's motion to take discovery was denied above, there is still nothing preventing the parties from engaging in voluntary discussions and disclosure that could mutually aid the parties in focusing their respective cases.

Although Respondent did not respond to the instant motion to exclude, its proposed evidence will not be excluded without allowing it an opportunity to present an offer of proof at the appropriate time, pursuant to 40 C.F.R. §22.23(b). Complainant's motion to exclude witnesses and evidence is therefore denied as premature.

Respondent's Motion to Stay Actions

Respondent filed a motion dated May 7, 1996 to stay these proceedings "pending disposition of case dispositive motions." Complainant filed a reply dated May 17, 1996. The motion is denied as moot. The "case dispositive" motions were decided recently in the ALJ's Orders dated June 13, 1996. In addition, the Respondent's

motion to take discovery and Complainant's motion to exclude evidence are decided in these Orders. Therefore, no further pleadings will be accepted on those motions.

Further Proceedings

The captioned proceedings are now ready to be set for hearing. Tentatively, the hearings will begin in early October, 1996, with the exact dates to be determined. Within 30 days after receipt of these rulings, the parties are directed to indicate dates they would be available for the hearing in October and November of this year. The exact dates and location will be set after receipt of those statements of availability, as well as resolution of the final venue in accord with the procedure set in the June 13, 1996 Orders. To clarify that procedure, any request by Respondent to change the venue from New York City, and objection of Complainant, should follow the standard motion practice set forth in 40 C.F.R. §22.16. The parties are encouraged to confer with each other to arrive at mutually convenient dates for the hearing.

Andrew S. Pearlstein
Administrative Law Judge

Dated: June 18, 1996
Washington, D.C.

CERTIFICATE OF SERVICE

I do hereby certify that the foregoing Orders was filed in re Health Care Products, Inc., FIFRA Docket No. 93-H-02F; Celltech Media, Inc., FIFRA Docket No. 95-H-04; and exact copies of the same were mailed to the following:

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Dated: June 18, 1996