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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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BEFORE THE ADMINISTRATOR

HEARINGS CLERK
EPA--REGION 10

IN THE MATTER OF)
)
DAVID D'AMATO,) DOCKET NO. CWA-10-2010-0132
)
RESPONDENT)

ORDER ON RESPONDENT'S MOTION TO DEPOSE HEATHER DEAN

On March 15, 2011, this Tribunal received a package from Respondent David D'Amato ("Respondent") containing *inter alia* a Motion to Depose Heather Dean and Respondent's Prehearing Exchange information. However, no certificate of service accompanied this motion and there was no evidence that it had been properly filed with the Regional Hearing Clerk. On April 8, 2011, this Tribunal again received a package containing the identical filings as the March 15th shipment, including the Motion to Depose Heather Dean ("Motion")^{1/} along with a proper certificate of service stating that Respondent had resent the documents to all parties on March 28, 2011, by U.S. Postal Service. Also on April 8, 2011, this Tribunal received Complainant's Motion to Extend Time for Filing Response to Respondent's Motion to Depose Heather Dean ("Motion to Extend").

In its Motion to Extend, Complainant stated that it has voluntarily made Ms. Heather Dean available to Respondent for informal questioning and that Respondent had agreed to withdraw the Motion. Motion to Extend at 1-2. Complainant also stated that Respondent had agreed to withdraw the Motion to Depose promptly, but in the event that withdrawal was not immediate and given EPA Counsel's planned work absence, Complainant requested an extension to file any response to the Motion until May 11, 2011. Respondent filed no response to the Motion to Extend.

^{1/} Respondent is reminded of the previous instruction to file promptly a Notice with this Tribunal responding to item 1(c) of the original Prehearing Order and stating the number of days he anticipates that his direct case, exclusive of cross-examination or rebuttal, will take.

On May 11, 2011, Complainant filed its Response to Respondent's Motion to Depose Heather Dean ("Response") arguing that Respondent had not met the standard contemplated in the Rules of Practice to justify a deposition. Response at 3.^{2/} Respondent has filed no reply to date. In its Response, Complainant cites Rule 22.19(e), which addresses the standard for additional discovery beyond the Prehearing Exchange. Rule 22.19(e) provides:

(1) After the [Prehearing 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.

40 C.F.R. § 22.19(e)(1)(i)-(iii). Rule 22.19(e)(3) lays out additional, disjunctive conditions one of which must be met before depositions may be ordered, namely:

- (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 hearing.

40 C.F.R. § 22.19(e)(3).

^{2/} Having received Complainant's Response and having received no objection from Respondent regarding the additional time taken to file the Response, Complainant's Motion to Extend is **DENIED** as moot. Any objection to the timeliness of Complainant's Response is deemed waived.

Respondent, as the movant, bears the burden of satisfying the standard contemplated in Rule 22.19(e). In his Motion, Respondent makes the following short arguments:

1. Ms. Heather Dean is Complainant's primary witness,
2. Her testimony will involve application of a scientific method or regulatory methodology unknown to Respondent,
3. Respondent requires an opportunity to understand and prepare for this testimony before arriving at the courthouse,
4. Denial of the Motion would deprive Respondent of his "basic right to confront one witness" and would "undermine the basic principles of due process[,]"
5. Unlike Respondent, Ms. Dean is not facing a proposed penalty in excess of \$200,000,
6. Ms. Dean is accustomed to answering such questions,
7. Granting the Motion would cause no harm to EPA, and
8. Denial of the Motion would "render the outcome of this case a foregone conclusion from the point of view of the respondent."

See Motion at 1-2.

Initially, I note that while Respondent is proceeding *pro se*, he has been alerted to the need to follow the Rules of Practice on several occasions and yet the instant Motion has not addressed Rule 22.19(e), instead relying on more general arguments. In the interest of fairness, I address each argument in turn to determine whether, despite the lack of formality in the Motion, Respondent might nevertheless have articulated sufficient facts and arguments to meet the standard.

As Respondent correctly observes, Ms. Dean is EPA's lead witness. See Complainant's PHE at 2. This argument insinuates that information sought from Ms. Dean has "significant probative value" and Complainant does not dispute this implicit assertion. 40 C.F.R. § 22.19(e)(1)(iii). Respondent's second and third points deal with the substance of Ms. Dean's anticipated testimony and Respondent's ability to prepare a rebuttal to it. This is not one of the considerations under Rule 22.19(e), but I note that Complainant, in its Response, delineates the various documents already provided in the PHE that describe Ms. Dean's methods, procedures, and guidelines. Response at 3-4 (citing CX

09 & 10 and relevant website materials from the Army Corps of Engineers).

Respondent's fourth argument refers to the "basic principles of due process" embodied in the Confrontation Clause of the Sixth Amendment to the United States Constitution. There is no constitutional right to discovery by deposition, "or indeed any discovery at all, absent a showing of prejudice, denying the party due process." See, e.g., *Chippewa Hazardous Waste Remediation & Energy, Inc.*, 12 E.A.D. 346, 368 (EAB 2005).^{3/} Importantly, Respondent has not made any showing of prejudice that a deposition could ameliorate. Respondent's lack of familiarity with the methods, procedures, and guidelines employed by Ms. Dean could be remedied by any number of means short of a formal, deposition on oral examination.

Respondent's fifth argument is not relevant to the Motion to Depose.

Respondent's final three arguments suggest that the Motion to Depose "[w]ill neither unreasonably delay the proceeding nor unreasonably burden the non-moving party." 40 C.F.R. § 22.19(e)(1)(i).

In its Response, Complainant argues that Respondent has not satisfied Rule 22.19(e)(1)(ii) because Complainant has voluntarily offered to provide the information Respondent seeks through informal questioning "by telephone at any reasonable scheduled time." Response at 3. Therefore, Complainant asserts, Respondent has not demonstrated a need for deposition. In addition, Complainant argues that because the information sought can reasonably be obtained by alternative methods, Respondent has failed to meet the requirements of Rule 22.19(e)(3)(i).^{4/} Response at 4 (noting that Respondent could use interrogatories and/or requests for production of documents to obtain the necessary information).

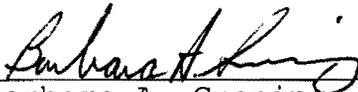
Complainant also argues that Respondent's description of the requested information is somewhat "vague" and therefore he has

^{3/} I also note that the Confrontation Clause is limited by its own language to criminal prosecutions and not administrative proceedings. See *Malave v. Holder*, 610 F.3d 483, 487 (7th Cir. 2010) ("In *Richardson v. Perales*, 402 U.S. 389, [](1971), the Justices roundly rejected the argument that the due process clause creates for administrative adjudication the same constitutional requirement of live testimony that the confrontation clause establishes for criminal trials.").

^{4/} Respondent also argues that there is no reason to believe the evidence will not be preserved for hearing because Ms. Dean has been named as a witness and will be available for examination and cross-examination at hearing. Response at 4.

failed to describe in detail the nature of the information sought. Response at 3-4. Additionally, Respondent has not proposed the time and place where discovery would be conducted. *Id.* at 4.^{5/}

Complainant's arguments are persuasive. Respondent currently has alternative means of obtaining the information sought and Complainant has offered to make Ms. Dean available for informal questioning by telephone. Additionally, even construing Respondent's minimal arguments in the most favorable light, he still fails to meet the standard contemplated in the Rules of Practice. He has identified no substantial prejudice that would result in a denial of due process if this Motion is denied. Finally, there is no indication or argument that the evidence will not be preserved for hearing. Thus, I find Respondent has failed to demonstrate that the requested deposition is warranted at this time. Therefore, the Motion is **DENIED** without prejudice.



Barbara A. Gunning
Administrative Law Judge

Dated: May 27, 2011
Washington, DC

^{5/} Lastly, Complainant asserts that while Ms. Dean and Respondent are both in Anchorage, Alaska, Ms. Dean cannot be deposed in the absence of counsel, who resides in Seattle and would be unduly burdened by the significant costs to travel to Alaska for a deposition. Response at 4.

**In the Matter of *David D'Amato*, Respondent.
Docket No. CWA-10-2010-0132**

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing **Order on Respondent's Motion to Depose Heather Dean**, issued by Barbara Gunning, Administrative Law Judge, dated May 27, 2011, was sent this day 27th day of May 2011, in the following manner to the addressees listed below.



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Dated: May 27, 2011
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