

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8**

2010 DEC 22 PM 1:52

Docket No. **FIFRA 08-2010-0017**

FILED  
EPA REGION VIII  
HEARING CLERK

In the Matter of:	)	
	)	
Wendy Mealer and	)	COMPLAINANT'S RESPONSE TO
Dennis Stokebrand,	)	RESPONDENT'S INTERROGATORIES,
	)	REQUESTS FOR PRODUCTION AND
	)	ADMISSIONS (FIRST SET)
Respondents	)	

COMES NOW the Complainant, by and through its attorney, Eduardo Quintana, pursuant to 40 C.F.R. parts 22.5 and 22.16, and requests the Presiding Officer to deny RESPONDENTS' INTERROGATORIES, REQUESTS FOR PRODUCTION AND ADMISSIONS (FIRST SET) dated December 15, 2010. As grounds for this request, EPA states and affirms as follows.

**DISCOVERY REQUEST IS UNTIMELY AND PREMATURE**

Respondents' Interrogatories, Request for Production and Admissions (First Set) should be DENIED because it is premature and untimely. In EPA administrative adjudications, discovery is conducted pursuant 40 C.F.R. § 22.19. 40 C.F.R. § 22.19 is much more limited in scope compared to the district court counterpart. In fact, pre-hearing exchanges and supplemental exchanges have yet to occur in this case. Additionally, Respondents have failed to disclose in the motion the methods, instrumentalities, and nature of the discovery requests making the motion defective on its face. Lastly, Respondents have failed to make any argument regarding the three criteria necessary to grant a motion for other discovery. Therefore, Respondents' request for other discovery should be denied because the pre-hearing exchange has yet to occur, the motion is defective on its face, and none of the criteria necessary to grant such a motion can be found in this case.

*Applicable Standard – Discovery Requests*

Respondents' request is devoid of any citation to the Rules of Practice, 40 C.F.R. Part 22. The discovery process in EPA administrative adjudications is governed by 40 C.F.R. § 22.19. "In an administrative proceeding governed by the Rules of Practice, discovery, as it is typically thought of under the Federal Rules of Civil Procedure, occurs through a prehearing exchange of information in accordance with Section 22.19(a)." In the Matter of Aguakem Caribe, Inc., Dok. No. RCRA-02-2009-7110, 2009 EPA ALJ WL 2470250 (June 2, 2010). Each party is obligated to "file a prehearing exchange." 40 C.F.R. § 22.19(a)(1). If a document is not included in the prehearing exchange, it cannot be admitted into evidence at the hearing. Id. Each party must supplement the prehearing exchange as information becomes available to them. 40 C.F.R. § 22.19(f). After prehearing exchanges, a party may request other discovery as necessary and

within the limits proscribed by 40 C.F.R. 22.19(e). In the Matter of FRM Chem, Inc., Advanced Products Technology, Inc., Custom Compounds, Inc., Dok. No. FIFRA 07-2008-0035, FIFRA 07-2008-0036, FIFRA 07-2009-0041, FIFRA 07-2009-0042, 2010 EPA ALJ WL 2470252 (May 27, 2010).

*Respondents' Motion is Untimely because Prehearing Exchanges Have not Occurred*

Respondents' Request for Discovery should be denied because the Consolidated Rules of Practice do not allow for other discovery until the prehearing exchange has occurred. "After the information exchange provided for in [prehearing exchange], a party may move for additional discovery." 40 C.F.R. § 22.19(e)(1). In fact, no other discovery is permitted until the prehearing exchange has occurred. In the Matter of City of St. Charles, Dok. No. CAA-05-2008-0003, 2008 EPA LJ WL 2626264 (June 30, 2008). In the case at bar, no prehearing exchange has occurred yet. Therefore, no other discovery is permitted by the Consolidated Rules of Practice at this time. Respondents' motion is untimely and should be denied.

*The Motion must be Denied because the Three Criteria for Other Discovery are not Present*

For a Presiding Officer to grant a motion for other discovery, she must find three criteria present. Without a finding on each criteria in favor of the movant, the Presiding Officer cannot grant other discovery. "The Presiding Officer may order such other discovery *only* if it: Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party; Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and 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) (emphasis added). Therefore, a Presiding Officer must find in favor of all three criteria to grant other discovery.

Respondents have made no argument, either factual or legal, as to the reasons the Presiding Officer should find in favor of these three criteria. In fact, Respondents' Interrogatories, Request for Production and Admissions (First Set) does not cite a single provision of the Consolidated Rules of Practice, 40 C.F.R. Part 22. Because prehearing exchange has yet to occur, the record and potential evidence at the hearing is devoid of any factual context that would meet any of these factors.

PRAYER FOR RELIEF

Accordingly, for all the reasons listed above, Complainants respectfully request the Court to DENY Respondents' Interrogatories, Request for Production and Admissions (First Set) dated December 15, 2010.

Respectfully submitted,

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,  
REGION VIII,  
Complainant

Date: 12/22/2010



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Eduardo Quintana,  
Legal Enforcement Program

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of COMPLAINANT'S RESPONSE TO RESPONDENTS' INTERROGATORIES, REQUESTS FOR PRODUCTION AND ADMISSIONS (FIRST SET) was hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wynkoop Street; Denver, Colorado 80202-1129, and that a true copy of the same was sent as follows:

A copy by pouch mail to:

Barbara A. Gunning  
Administrative Law Judge  
EPA Office of Administrative Law Judges  
1200 Pennsylvania Avenue, NW  
Mail Code 1900L  
Washington, D.C. 20460

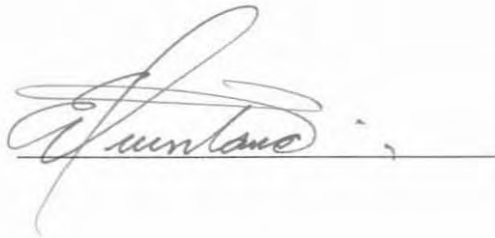
and

A copy via first class mail to:

Steven D. Sandven, Esq.  
Law Office  
300 North Dakota Avenue, Ste. 106  
Sioux Falls, SD 57104

12/22/2010

Date



A handwritten signature in cursive script, appearing to read "S. Sandven", is written over a horizontal line.