UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Clarke Environmental Mosquito	)	
Management, Inc.	)	DOCKET NO: FIFRA 02-2005-5203
	)	
	)	
Respondent	)	

ORDER DENYING RESPONDENT'S MOTION FOR DISCOVERY BY DEPOSITION, DIRECTING COMPLAINANT'S COMPLIANCE WITH PREHEARING EXCHANGE REQUIREMENT FOR A SUMMARY OF EXPECTED TESTIMONY OF ITS WITNESSES, AND DIRECTING COMPLAINANT'S COOPERATION IN DISCOVERING TESTIMONY OF NYDEC EMPLOYEES

I. Introduction

These proceedings arise out of a contract for mosquito control awarded to Clarke Environmental Mosquito Management, Inc ("Clarke") by the City of New York, Department of Health sometime prior to March 1, 2000, to alleviate health risks posed by the West Nile Virus. The pesticide applications at issue were made during the summer and fall of 2000. The complaint initiating the proceeding, issued by the Director, Division of Enforcement and Compliance Assistance, U.S. EPA, Region 2, on December 16, 2004, contained 135 counts alleging exposure on a daily basis to the pesticides Anvil and Vectolex, the latter a larvicide, which were applied by Clarke, of three named employees (applicators) of Clarke for 53 days, 49 days and 33 days, respectively. These exposures were alleged to constitute applications of pesticides in a manner inconsistent with their labeling in violation of FIFRA § 12(a)(2)(G); each day of such applications constituting a separate violation. For these alleged violations, it was proposed to assess Clarke a penalty totaling $742,500.

Clarke answered, denying the alleged violations, denying that any penalty was appropriate , asserting certain affirmative defenses including that EPA approved Clarke's methods of application and lack of fair notice and requested a hearing. The parties have exchanged prehearing information in accordance with Consolidated Rule 22.19(a) and an order of the ALJ.

On August 17, 2005, Clarke filed a Motion for Discovery, seeking leave to conduct additional discovery pursuant to Rule 22.19(e) entitled "Other discovery"[1]. Clarke seeks to subpoena and depose six individuals who have been identified as witnesses for Complainant.[2] Additionally, Clarke seeks to depose two non-party witnesses, employees of the NYDEC, who have not been listed as proposed witnesses by either party. Clarke alleges that it will be unable to properly defend itself without the requested depositions and that its due process rights will be impaired unless the requested discovery is granted.. Clarke states that the motion is properly filed under 40 C.F.R. Section 22.19(e), and asserts that EPA witnesses will not be unreasonably burdened by the discovery, that the discovery will not create any unreasonable delay in the proceeding, that the information is not otherwise obtainable, and has significant probative value (Motion at 2, 3).

A. Respondent's Argument

Clarke states that discovery will not unreasonably delay the proceeding because the hearing is scheduled to commence on November 14, 2005. Clarke also argues that allowing discovery will not create an unreasonable burden on the parties because the depositions will be taken in the geographic area of the location of the witnesses. Clarke alleges that it has had numerous discussions with Complainant endeavoring to obtain agreement to the taking of depositions, but that Complainant has refused to agree to depositions in this proceeding (Motion at 2).

---

[1] Rule 22.19 provides: " (e) *Other discovery.* (1) After the information exchange provided in paragraph (a) of ths section, 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 fact relevant to liability or the relief sought.

(2) Settlement positions and information relating to their development (such as penalty calculations for purposes of settlement based upon Agency settlement policies) shall not be discoverable..
(3) The Presiding Officer may order depositions upon oral questions only in accordance with paragraph (e)(1) of this section and upon an additional finding that:
(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 not be preserved for presentation by a witness at the hearing.

[2] Motion at 3. The Administrative Procedure Act (5 U.S.C. § 551 et seq.) authorizes employees presiding at hearings subject to the APA (ALJs) , inter alia, "to issue subpoenas authorized by law" (5 U.S.C. § 556)(c)(2). This means that an ALJ may issue subpoenas only if the statute under which the proceeding is brought authorizes the issuance of subpoenas.. FIFRA § 14 authorizes the assessment of civil penalties for violations of the Act, but does not authorize the issuance of subpoenas. in proceedings for the assessment of penalties. This limitation is evident from the Consolidated Rules of Practice (40 C.F.R. Part 22), Rule 22.4 © providing that the Presiding Officer (ALJ) may "…(9) issue subpoenas authorized by the Act;" and Rule 22.19(e) providing in pertinent part: (4) "The Presiding Officer may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized by the Act…." It is concluded that the ALJ does not have authority to issue subpoenas in this civil penalty proceeding.

Turning to specific witnesses, Clarke alleges that Complainant has offered only a vague description of the testimony of Dr.Adrian Enache and Ms.Tracy Truesdale. According to Complainant , Dr. Enache who is a Supervisory Environmental Scientist, Pesticides Team, Pesticides and Toxic Substances Branch, Division of Enforcement and Compliance Assistance, EPA Region 2, is expected to testify to FIFRA regulatory issues including, but not limited to, the bases upon which [FIFRA] penalties are calculated and the implementation of the applicable penalty policy entitled "Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act" ("ERP") [July 2, 1990] (Prehearing Exchange at 2, 3). Additionally, Dr. Enache will testify as to how the proposed penalty in this case is consistent with and supported by the ERP (id.).

Ms Tracy Truesdale is an Environmental Protection Specialist, Pesticides Team, Pesticides and Toxic Substances Branch, Division of Enforcement and Compliance Assistance, EPA Region 2 (Prehearing Exchange at 2). According to Complainant, Ms. Truesdale will testify about FIFRA regulatory issues, including how penalties are calculated and implementation of the ERP in Region 2.

Clarke asserts that these descriptions are vague and that depositions will provide information as to how these two witnesses will testify. Additionally, Clarke says that Dr. Enache may have information helpful to Clarke in that Complainant only recently disclosed notes taken by Dr. Enache at the time of his observations of Clarke's operations on at least two occasions in the summer of 2000 (Field Observation Form, Motion, Exh 2). Also, Clarke states that its witnesses recall that Dr. Enache may have been present for applications as many as six times during the mentioned period.

Clarke states that Mr. Kent Smith,[3] Mr. Leslie Rouff, and Mr. Samuel Gowrie should be deposed because these are the former Clarke employees upon whose statements Complainant bases this enforcement proceeding (Motion at 4, 5) Specifically, Respondent asks to depose the witnesses so as to clarify conflicting statements allegedly made to their consulting physician, Dr. Allan Rogers, approximately four months after the termination of their employment with Clarke; in testimony in a New York State workman's compensation proceeding and in affidavits to EPA included with Complainant's prehearing exchange. Respondent says that it should be allowed to depose these three witnesses regarding their methods for applying pesticides, the type of protective equipment used, facts regarding their alleged exposure and symptoms concerning the pesticides.

In addition, Respondent argues that deposition of Dr. Alan Rodgers is necessary because he may have both fact and opinion testimony concerning the alleged pesticide exposure suffered by Messr. Smith, Rouff and Gowrie.

[3] At the time the Motion for Discovery was filed, Clarke stated that it lacked knowledge of the current address of Mr. Kent Smith. Thus, Clarke sought leave of the ALJ to take Mr. Smith's deposition if his address was subsequently obtained.. In Complainant's Response to Clarke's Motion for Discovery, Complainant stated that Mr. Kent Smith's mailing address is 880 Colgate Avenue, Apt. 6M, Bronx, New York 10473.

Finally, Clarke states that Mr. Zahir Shah and Mr. Errol Webley possess "important information" because as employees of the NYDEC they conducted inspections of Clarke's operations during the summer and fall of 2000.[4] A copy of reports of inspection of Clarke's operations during July, August and September 2000 conducted by Messrs. Shah and Webley is included in Complainant's Prehearing Exchange (Exh O).

Alleging that the information sought has significant probative value, Respondent states that the information is relevant to the issues raised in the proceeding. Respondent contends that the depositions of Dr. Enache and Ms. Truesdale have significant probative value because doing so would clarify the basis of testimony regarding the calculation of penalty. Respondent also states that depositions of Mr. Kent Smith, Mr. Leslie Rouff, and Mr. Samuel Gowrie have significant probative value by allowing for a detailed clarification of prior conflicting statements. In the case of Dr. Rodgers, Respondent argues that there is significant probative value because he consulted with Mr. Kent Smith, Mr. Leslie Rouff, and Mr. Samuel Gowrie. Respondent argues that deposition of Dr. Rodgers could lead to vital fact and opinion testimony related to the alleged pesticide exposure. Lastly, Respondent argues that depositions of Mr. Shah and Mr. Webley are appropriate because they repeatedly confirmed in reports that Clarke applied larvacide and pesticide in accordance with FIFRA. (Motion at 6).

B. Complainant's Opposition

Responding to the motion. Complainant asserts that Clarke has failed to satisfy all of the requirements for "other discovery" set forth in Rules 22.19(e)(1) and 22.19(e)(3) (Complainant's Response to Respondent's Motion for Discovery ("Opposition"), dated September 6, 2005, at 1, 2). Firstly, Complainant argues that Respondent's requests for depositions would impose an unreasonable burden on party and non-party witnesses. In particular, Complainant alleges that attendance of non-party witnesses at depositions would be an unreasonable burden because it would require time away from their personal and professional obligations and potentially cause loss of earnings (Opposition at 3). Additionally, Complainant says that attendance by EPA personnel at the number of depositions sought by Clarke would be an unreasonable burden on the Agency as they will be unavailable for other assigned duties, possibly for several days.

Secondly, Complainant contends that Respondent has not shown that the information sought could not be obtained by an alternative methods of discovery, such as interrogatories or informal telephone conferences or interviews (Opposition at 2, 4). With respect to Clarke's former employees, Messrs. Kent Smith, Leslie Rouff, and Samuel Gowrie, Complainant points out that Clarke has affidavits of these persons which were provided in settlement negotiations and in Complainant's prehearing exchange. Additionally, Complainant notes that Clarke posseses transcripts of the testimony of Messrs. Smith and Rouff taken in the workman's compensation proceeding (Respondent's Prehearing Exchange, Exhs. 29 and 30). Accordingly, Complainant argues that Clarke has all the details regarding the pesticide applications, personal

[4] In its Prehearing Exchange, Clarke identifies Mr. Webley as an employee of U.S. EPA (id. 3). However, inspection reports signed by Mr. Webley bear the heading "New York Department of Environmental Conservation" (Exh O), and it is concluded that he was an employee of the NYDEC at the time of the events at issue.

protective equipment, exposure to Anvil and Vectolex, and symptoms of such exposure suffered by the applicators necessary to properly cross-examine these witnesses, all of whom have agreed to appear at the hearing (Opposition at 3, 4).

With regard to Allan C. Rogers, M.D., Complainant points out that Clarke has the detailed notes of Dr. Rogers' examination of Messrs. Smith, Rouff and Gowrie, [laboratory] test results, and medical diagnoses for these individuals, which were included in Respondent's Prehearing Exchange as Exhibits 37, 38, and 39. Indeed, Complainant says that because Clarke has had its expert review and comment on these records, Complainant intends to file a supplemental prehearing exchange to include Dr. Rogers as a witness .[5]. Complainant contends that Clarke has made no showing that questions concerning these records and the diagnoses may not be raised and answered through interrogatories. Complainant says that Dr. Rogers has agreed to testify at the hearing and that Clarke will have an opportunity to cross-examine Dr. Rogers at that time (Opposition at 5).

Complainant notes that Clarke has previously declined Complainant's suggestion that the hearing be bifurcated to allow Complainant's witnesses to testify in the New York area, but that Clarke is now willing to travel to the New York and Boston areas for the purpose of taking depositions. Pointing out that it will incur the expense of traveling to Chicago for the hearing, Complainant argues that traveling to Boston for the purpose of taking Dr. Rogers' deposition would be unreasonably burdensome within the meaning of Rule 22.19(e)(1)(i) (Opposition at 5).

Regarding Dr. Adrian Enache, Complainant says that , although Clarke is mistaken as to the number of site visits by Dr. Enache, Complainant has been aware for some time that he was present for at least one spraying event during the period at issue (Opposition at 5). Complainant alleges that Clarke is also aware of this fact, pointing out that Clarke acknowledged in its answer that EPA representatives were present on at least one of the more than 50 inspections conducted by the NYDEC (Answer at 34) and refers to proposed testimony of a Clarke witness, Mr. Rufus Cox, that Dr. Enache visited the Bronx site on at least six occasions (Prehearing Exchange at 11). A Field Observation Report, apparently prepared by Dr. Enache, containing observations he made at the time of a site visit on July 24, 2000, is attached to Clarke's motion (Motion, Exh 2). Complainant alleges that this report and two other reports prepared by Dr.Enache were read aloud and discussed during a settlement conference on June 15, 2005.. Complainant states that an additional 16 Field Observation Reports, including three prepared by Dr. Enache, are contained in its Supplemental Prehearing Exchange (Exh S). Complainant says that Dr. Enache is a long-time employee of the Agency and will be a witness at the hearing. Additionally, Complainant states that it has been and remains willing to voluntarily provide information reasonably sought by Clarke and that any additional questions it has for Dr. Enache may be addressed through an informal telephone conference or through interrogatories (Opposition at 6).

---

[5] Opposition at 4, note 2 By a Motion to Supplement Initial Prehearing Exchange, dated September 6, 2005, Complainant has moved to expand the testimony of Dr. Adrian Enache to include site visits and observations he made during the summer and fall of 2000 (at least July 24 and August 17, 2000), and to include the testimony of Allan C. Rogers, M.D., presently Medical Director, Occupational Health Service, Morton Hospital, Trenton, MA, as to his consultation with and diagnoses of Apprentice Applicators, apparently at least Messrs. Smith, Rouff and Gowrie, employed by Clarke during the summer and fall of 2000. Additional exhibits identified by Complainant include Exhibit R, the Curriculum Vitae for Allan C. Rogers, M.D. and Exhibit S, EPA Field Observation Reports.

Regarding Ms. Tracy Truesdale, Complainant says that she may be called primarily as a penalty calculation witness. Complainant states that she has no direct personal knowledge of Clarke's spraying operations and that her testimony will not go to establish a fact of consequence to Clarke's liability. Complainant asserts that the penalty calculations were explained in its prehearing exchange and that Clarke has not shown unwillingness on Complainant's part to voluntarily provide information, a lack of methods of obtaining the information other than depositions, or the need to preserve evidence (Opposition at 6).

Regarding Messrs.. Zahir Shah and Errol Webley, Complainant points out that these individuals were not included as witnesses in Clarke's prehearing exhange and that they are not on Complainant's witness list (id. 6). Moreover, Complainant alleges that in a telephone conversation on August 10, 2005, counsel for Clarke acknowledged that he not contacted either Mr. Shah or Mr. Webbley and did not know whether they would be willing to testify at the hearing or whether they can provide evidence relevant to liability that would assist in Clarke's defense. Accordingly, Complainant asserts that Clarke has not even attempted to obtain the information voluntarily or to meet the probative evidence or preservation of evidence requirements of Rule 22.19(e)(3) for ordering depositions (Opposition at 7).

Complainant states that the provisions of FIFRA [authorizing civil penalties] do not provide subpoena authority [6] and argues that the motion for discovery should be denied in its entirety (id. 7).

II**. Clarke's Memorandum of Law In Support of Its Motion For Discovery**

As permitted by Consolidated Rule 22.16(a), Clarke filed a response to Complainant's Opposition to Clarke's Motion For Discovery under date of September 15, 2005 (Memorandum of Law In Support of Motion For Discovery) ("Memorandum"). Clarke asserts that the disclosures of potential testimony from Complainant have been both vague and inherently contradictory.. Clarke says that depositions of Complainant's witnesses would afford Clarke an opportunity to verify and crystallize Complainant's allegations prior to the hearing and enhance Clarke's ability to present a meritorious motion for accelerated decision (Memorandum at 1, 2).

Clarke argues that Complainant should be required to present Dr. Adrian Enache and Ms Tracy Truesdale for deposition, pointing out that in its initial disclosure, Complainant indicated only that Dr. Enache will testify regarding "FIFRA regulatory issues" and penalty calculation pursuant to the FIFRA penalty policy (Memorandum at 2). Clarke alleges that it does not have adequate means to ascertain Ms. Truesdale's testimony without a deposition, saying that at the settlement conferences she has never explained her view concerning Complainant's application of the penalty policy. Acknowledging that it could in theory serve an interrogatory requesting the disclosure of the substance of her testimony, Clarke states that it suspects that Complainant's response would be identical to that in its Prehearing Exchange, namely that " Ms. Truesdale will

[6] This contention is supported by the fact that FIFRA § 6 Is entitled "Administrative review; suspension" and § 6(d), "Public hearings and scientific review", authorized "Hearing Examiners" (ALJs) to issue a subpoena to compel testimony or production of documents from any person [in a cancellation or change in classification proceeding]..

testify about FIFRA regulatory issues, including how penalties are calculated and the implementation of the FIFRA enforcement response policy in Region 2".[7]

Clarke notes that Complainant has moved to supplement its Prehearing Exchange to include Dr. Enache as both an opinion and fact witness, i.e., to include his observations at site visits on at least July 24 and August 17, 2000. It should be noted that the parties disagree as to the number of site visits by Dr. Enache, Clarke alleging that Dr. Enache visited the Bronx site at least six times (supra at 5). Clarke emphasizes that Dr. Enache is at the heart of this dispute and points out that Clarke has already had discussions with Dr. Enache at settlement conferences, including the one on June 15, 2005 (Memorandum at 2). Clarke alleges that Dr. Enache has provided very little information and submits that further attempts to elicit information from Dr. Enache via interrogatories and informal telephone conferences, as suggested by Complainant, would be futile. Additionally, Clarke says that interrogatory answers which have been vetted by Complainant's counsel and informal telephone discussions would be of little value in terms of a motion for accelerated decision .[8] Clarke maintains that its due process rights will be impaired if it is not allowed to depose Dr. Enache.

Clarke maintains that because of the welter of conflicting statements, it cannot anticipate the testimony of Messrs. Smith, Rouff and Gowrie at the hearing. (Memorandum at 3). Clarke alleges that Complainant filed this action based in part on the sworn affidavit of Leslie Rouff, dated February 11, 2003, points to the testimony and statements of Leslie Rouff as the best example of the confusing set of facts faced by Clarke at this time. Clarke notes that Mr. Rouff's affidavit states that he began working for Clarke in June or July in the summer of 2000, while the New Employee or Change Report signed by Mr. Rouff (Memorandum, Exh 2) indicates that he became an employee of Clarke on or about August 8, 2000.[9] Additionally, Clarke points out that in his affidavit Mr. Rouff swore that he worked "7 days a week" and "sprayed Anvil the majority of the time, from approximately 10:00 p.m. until 5:00 a.m. " Clarke states, however, that job travel records prepared by Mr. Rouff indicate that he applied Anvil on 11 days in August during the period August 15 through August 30 and on five days in September, that is the 1, 6, 17, 22 and 24 (R's Exh 21) and that there are no records indicating that he worked from 10:00 p.m. until 5:00 a.m.(Memorandum at 3). Clarke also points to discrepancies in Mr. Rouff's statements, noting that in his affidavit he stated "We sprayed all night and were never given any safety equipment; no respiratory mask, gloves or protective clothing", which is to be compared with Dr. Roger's report of his consultation with Mr. Rouff at Mt. Sinai Hospital on February 21, 2001 (Memorandum, Exh 4), which according to Clarke was approximately five months after

[7] Memorandum at 3. In a telephone conference call with counsel on September 20, 2005, the ALJ informed Complainant that its Prehearing Exchange did not comply with the requirement of Rule 22.19(a) and the ALJ's order for a summary of the expected testimony of its witnesses regarding the penalty calculation. This deficiency is more telling here, because Civil Penalty Calculation Worksheets, normally utilized in penalty calculations in accordance with the ERP, have not been provided. Complainant was informed that it would be directed to comply with the requirement for a summary of the expected testimony of its witnesses and to provide the Civil Penalty Calculation Worksheets, if used in the penalty calculation.

[8] In the September 20th telephone conference (supra note 7), Complainant affirmed its offer to have Dr.Enache available for informal telephone discussions and the ALJ opined that, because of the number of factual matters at issue, it was unlikely that this case could be decided on a motion for accelerated decision.

[9] .The New Employee or Change Report signed by Mr. Rouff is dated "8-8-00", which presumably is the hire date. The space for the Hire Date on the form is, however, blank.

his last spraying operations for Clarke, and which provides in pertinent part: "He worked night shift for Clarke and used gloves, shared respirator, not used always used and had exposures to fogging spray and spilled liquids." Clarke points to Mr. Rouff's testimony before the Workers Compensation Board for the State of New York on March 26, 2002, where, in response to as question as to the type of equipment he was wearing, he replied:" At one point we started to have a box of surgical gloves. They had the regular paint masks you would use. They always ran out. There was never enough for everybody". Workman"s Compensation Board transcript (R's Exh 30).

Clarke asserts that these are just a few examples of conflicting evidence in this case and, given that Complainant has based this enforcement action on the veracity of Messrs. Smith, Rouff and Gowrie, argues that Clarke should be allowed to take their depositions prior to the hearing (Memorandum at 4).

Clarke says that it requires the deposition of Dr. Rogers, noting that Complainant has now moved to supplement its Initial Prehearing Exchange to include both fact and opinion testimony from Dr. Rogers. Clarke states that apparently, Dr. Rogers will recount the subjective histories provided by Messrs. Smith, Rouff and Gowrie during their visits to his office in early 2001.In its Supplemental Prehearing Exchange, Complainant states that Dr. Rogers is expected to testify that Anvil 10+10 ("Anvil") and Vectolex were the mosquito adulticide and larvacide, respectively, reported to have been handled by unnamed Apprentice Applicators during their employment by Clarke in the New York City area. According to Complainant, Dr. Rogers will recount scenarios which were described by these applicators in which they reported inappropriate use of personal protective equipment, such as only the use of wrist high thin gloves with splashed liquid above and inside these gloves, or lack of available appropriate protective equipment, such as personal respirators with fit testing and gloves with cuffs and forearm protection during liquid transfers that included splashes with dermal, inhalation and ingestion exposures. Clarke asserts that is unclear from Complainant's proposed disclosure whether these are the opinions of Dr. Rogers, reported facts from former employees of Clarke, or the opinions of Complainant (Memorandum at 5). Moreover, Complainant submits that Dr. Rogers will testify with a reasonable degree of medical certainty that Smith, Rouff and Gowrie suffered pesticide poisoning "consistent with repeated acute exposures to the pyrethroid pesticide known as Anvil."

Clarke argues that, given the critical importance of Dr. Rogers' testimony and the highly speculative nature of his conclusions, Clarke should be allowed to take his deposition prior to the hearing in this matter. Clarke emphasizes that as with other aspects of Complainant's enforcement action, Dr. Rogers' testimony is based entirely on the stories provided by Smith, Rouff and Gowrie. Clarke says that it should be afforded the opportunity to explore and verify Dr. Roger's opinions.

Clarke contends that Zahir Shah and Errol Webley are critical fact witnesses because they were two of the NYDEC employees who repeatedly inspected Clarke's operations in New York City during the summer and fall of 2000 and found that Clarke's application of larvacide and pesticide complied with FIFRA. Clarke notes that unsurprisingly, Complainant objects to the depositions of Mr. Shah and Mr. Webley, contending that Clarke has not made any attempt to secure information from these individuals. Clarke alleges, however, that in view of the fact that

the NYDEC inspectors were acting as "designees" of EPA, Clarke concluded that it would not be prudent to attempt contacting these individuals for informal interviews (Memorandum at 6). Moreover, because Clarke cannot predict how Mr. Shah and Mr. Webley will testify, Clarke says they have not been listed as witnesses at this time. Clarke maintains, however, that due process and fairness require that it be permitted to secure the testimony of Messrs. Shah and Webley by deposition, because they may confirm that Clarke's operations complied with FIFRA in all respects.

Discussion

The Rules of Practice are not hospitable to discovery by means of oral depositions, Rule 22.19(e)(3) providing that the ALJ may order oral depositions only upon findings that, in addition to the requirements for other discovery in Rule 22.19(e)(1), (i.e., the information will not unreasonably delay the proceeding nor unreasonably burden the non-moving party; seeks information which 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), the information cannot reasonably be obtained by alternative methods of discovery or there is substantial reason to believe that relevant and probative evidence may not otherwise be preserved for presentation by a witness at the hearing (supra note 1). This stringent provision for discovery by oral depositions means that in proceedings subject to the Consolidated Rules of Practice (40 C.F.R. Part 22) oral depositions are seldom granted over the opposition of the opposing party. See, e.g., Safety-Kleen Corporation, Docket Nos. RCRA-1090-11-10-3008(a) and 11-11-3008(a), Order on Discovery, 1991 EPA ALJ LEXIS 21 (December 6, 1991).

It should also be noted that the ALJ does not have authority to issue subpoenas in FIFRA civil penalty proceedings (supra note 2).

The prehearing exchange of information provided by Rule 22.19(a) and the ALJ's order are intended as substitutes for discovery and to avoid surprise at the hearing. Although Rule 22.22(a) provides a "good cause" exception, Rule 22.19(a) is very specific as to the sanction for noncompliance, providing that documents or exhibits which have not been included in prehearing information shall not be admitted into evidence and witnesses whose name and summary testimony have not been included in prehearing information shall not be allowed to testify. Here, Clarke justly complains that Complainant has provided only vague and non-specific information as to the proposed testimony of its penalty witnesses, Dr. Adrian Enache and Ms. Tracy Truesdale., and has not complied with the requirement of Consolidated Rule 22.19(a) for a brief narrative summary of the expected testimony of these witnesses. While Complainant has provided more details as to the penalty calculation in its prehearing exchange in response to the ALJ's order, these details are not attributed to any named witness.[10] Moreover, although the penalty was purportedly calculated in accordance with the Enforcement Response Policy for FIFRA, the ERP contemplates the use of Civil Penalty Calculation Worksheets (Appendix D). Complainant has not provided worksheets as to the penalty

[10] Id. at 23 et seq. Complainant states that a total "gravity adjustment value "of 12 was reached in this instance. The ERP provides that the matrix value will be assessed, if the gravity adjustment value is 8 or above (ERP at 22).

calculation in this instance. As the parties were informed in the conference all on September 20th, Complainant will be directed to provide brief narrative summaries of the expected testimony of its witnesses Dr. Adrian Enache and Ms. Tracy Truesdale as to the calculation of the penalty and a copy of the civil penalty worksheets, if used in the penalty calculation. In view thereof, and, because the only discretion involved in calculating a penalty in accordance with the ERP appears to be in the application of the adjustment factors (supra note 11), Clarke should have all the information required to appropriately cross-examine Complainant's witnesses as to the penalty calculation and has not shown the necessity of deposing Complainant's witnesses in this regard.

In its Motion to Supplement Initial Prehearing Exchange, Complainant proposes to expand the testimony of Dr. Adrian Enache to include observations at the time of a site visit on July 24, 2000. The description of his proposed testimony indicates that he was also present for the planning stage of a proposed spraying event in Brooklyn on August 17, but according to Complainant did not observe any actual spraying and therefore made no comments. Additionally, he canceled a September 12 apraying event on Staten Island due to wind speeds in excess of 10 mph. Complainant says that it has located additional Field Observation Reports including two more prepared by Dr. Enache for the dates indicated. These Reports have been included in Complainant's Supplemental Prehearing Exchange (Exh S). Although Clarke asserts that its witness will testify that Dr. Enache visited the Bronx site on at least six occasions (Phx at 11), such conflicts are a solid and obvious basis for cross-examination . It appears that some well directed interrogatories might well elicit useful information as to Dr. Enache's site visits and observations other than those referred to in the expanded Prehearing Exchange. Complainant, having successfully opposed Clarke's motion for depositions upon the ground that the information is obtainable by other methods, is expected to fully cooperate in obtaining complete answers to interrogatories directed to Dr. Enache by Clarke, if Clarke elects to file interrogatories.

In response to comments by experts for Clarke in its prehearing exchange, Complainant says that it now proposes to call as a witness, Allan C. Rogers, M.D., the physician who consulted with and diagnosed as suffering from pesticide poisoning the three former employees of Clarke, whose complaints are the genesis of this proceeding (Motion to Supplement Initial Prehearing Exchange, dated September 14, 2005). The description of Dr. Roger's proposed testimony minimally complies with the rule for a brief narrative summary of his expected testimony.[11] Complainant emphasizes that Clarke has in its possession and has included in its Prehearing Exchange records concerning Dr. Rogers' examination of the individuals whose complaints are the foundation of this proceeding and that Clarke has had its experts review and comment on these records. Complainant contends that Clarke has not shown the necessity of deposing Dr. Rogers or, in any event, that any additional information needed cannot be obtained by alternative means. It is concluded that this contention must be accepted, given that Clarke is aware of Dr. Rogers' diagnoses and of the apparent statements made to him by the former employees of Clarke which are central to this proceeding. Accordingly, Clarke has a solid basis

[11] In a telecom with counsel on September 27, 2005, Complainant emphasized that Dr. Rogers had agreed to testify in this proceeding in Chicago, characterizing him more or less as a "professional witness."

for cross-examination at the hearing , which is all that is contemplated by the Consolidated Rules of Practice, given the bias against discovery by deposition shown by the Rules.

Regarding the three former employees of Clarke, Messrs. Kent Smith, Leslie Rouff and Samuel Gowrie ,Clarke asserts that it should be allowed to depose these individuals regarding their application methods, the personal protective equipment they wore, their alleged exposure to Anvil, the symptoms they allegedly suffered and all other issue related to their allegations. Clarke claims that it cannot anticipate the testimony of Messrs. Smith, Rouff and Gowrie and that their depositions are necessary in order to explore inconsistencies in their statements to Dr. Rogers, in testimony in the workman's compensation proceeding, and in their affidavits included with Complainant's Prehearing Exchange. Clarke acknowledges that Complainant has little or no control over these individuals and that they are represented by counsel. This is especially true because there is no subpoena authority in this proceeding. Complainant says that these individuals have all agreed to testify at the hearing and that Clarke will have an opportunity at that time to address any perceived inconsistencies between the affidavits and transcripts of testimony through cross-examination. It is concluded that this contention must be accepted because, if a party is aware of conflicting statements by a proposed witness, an appropriate foundation for cross-examination at the hearing has been established and, as noted previously, this is all that is contemplated by the Rules of Practice.

Mr. Zamir Shah and Mr. Errol Webley are employees of the NYDEC who conducted numerous inspections of Clarke's spraying operations during the summer and fall of 2000 and apparently found nothing remiss as to Clarke's methods of applying the pesticides. Counsel for Clarke initially acknowledged that he has not contacted these individuals, does not know whether they would be willing to testify nor whether they have information that might be helpful to Clarke's defense. The failure to contact or attempt to contact Messr. Shah and Webley was apparently due to concerns that such contacts might "poison the well" and make it highly unlikely that they would be forthcoming with any information useful to Clarke. Clarke's Motion was based on the premise that their attendance for depositions could be compelled by subpoena, which, subpoena authority not being provided in FIFRA civil penalty proceedings, is not the case. It now develops that the NYDEC is refusing to make Mr. Shah and Mr. Webley available for informal interviews, for any type of discovery or for testimony at a hearing. Although it is not clear that Clarke's assertion that these individuals were acting as "designees" of EPA in conducting the inspections is accurate, this refusal borders on, if it does not cross, the demarcation of a violation of Clarke's due process rights[12]

In the teleconference on September 27, 2005, it was agreed that counsel for Clarke would be addressing a set of interrogatories to Mr. Shah and Mr. Webley with a view to ascertaining their observations and opinions as to Clarke's spraying operations at issue herein not later than

[12] .While it is well settled that there is no constitutional right to discovery in administrative proceedings **, Silverman v. Commodity Futures Trading Comm.,** 549 F.2d 28 (7th Cir. 1977), a respondent is nevertheless entitled to due process which embodies the concepts of fairness and prejudice (or the lack thereof) . See, e.g., **McClelland v. Andrus,** 606 F.2d 1278 (D..C. Cir. 1979).

October 7, 2005, and that EPA would use its influence to persuade NYDEC to be responsive to the interrogatories.[13]

III. Order

1. Complainant's Motion to Supplement Initial Prehearing Exchange is granted.

2. Complainant is directed to provide summaries of the expected testimony of its witnesses, Dr. Adrian Enache and Ms. Tracy Truesdale, as to the penaltycalculation and to provide a copy of the Civil Penalty Computation Worksheet or Worksheets.

3. Clarke's Motion for Discovery by Deposition is denied.

4. Not later than October 7, 2005, Clarke will prepare and serve interrogatories addressed to Mr. Zamir Shah and Mr. Errol Webley through NYDEC for the purpose of obtaining their observation and conclusions as to Clarke's spraying operations under the contract with the New York City Department of Health during the summer and fall of 2000.

5. Complainant is directed to do its utmost to persuade NYDEC to be responsive to the interrogatories.

Dated this _____day of September 2005.

Washington, D.C.

_____
Spencer T. Nissen
Administrative Law Judge

[13] In the mentioned telephone conference, the ALJ invited the parties' attention to Rule 22.4(c)(5), which authorizes the ALJ to order a party or an officer or agent thereof, to produce testimony, documents, or other non-privileged evidence, and failing the production thereof without good cause being shown, draw adverse inferences against that party.

In the Matter of Clarke Environmental Mosquito Management,Inc.
Docket No. FIFRA-02-2005-5203

CERTIFICATE OF SERVICE

I certify that the foregoing Order Denying Respondent's Motion for Discovery By Deposition, Directing Complainant's Compliance With Prehearing Exchange Requirement For A Summary Of Expected Testimony Of Its Witnesses, And Directing Complainant's Cooperation In Discovering Testimony of NYDEC Employees, dated September 29, 2005, was sent this day in the following manner to the addressees listed below.

_____

Maria Whiting-Beale
Legal Staff Assistant

Dated: September 29, 2005

Original and One Copy By Pouch Mail To:

Karen Maples
Regional Hearing Clerk
U.S. EPA
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy By Facsimile and Pouch Mail To:

Karen L. Taylor, Esquire
Assistant Regional Counsel
U.S. EPA
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy by Facsimile and Regular Mail To:

Frances X. Lyons, Esquire
Gardner Carton & Douglas LLP
191 N. Wacker Drive, Suite 3700
Chicago, IL 60606-1698

David J. Tescon, Esquire
Chuhak & Tescon
30 South Wacker Drive, Suite 2600
Chicago, IL 60606-7413