UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	
Nicor Gas,	)	
	)	**DOCKET NO. TSCA-HQ-2015-5017**
	)	
Respondent.	)	

OPPOSITION TO RESPONDENT'S MOTION FOR ADDITIONAL DISCOVERY AND FOR EXTENSION OF TIME

In accordance with 40 C.F.R. § 22.16 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), Complainant, the Acting Director of the Waste and Chemical Enforcement Division of the United States Environmental Protection Agency ("EPA" or "the Agency"), through counsel, submits this Opposition to Respondent's Motion for Additional Discovery and for Extension of Time ("Opposition Motion").

On November 2, 2016, Respondent filed a Motion for Additional Discovery and for Extension of Time ("Respondent's Motion"). Respondent requests additional discovery in the form of interrogatories and document requests, and seeks to depose six witnesses. Respondent also motions for a protracted discovery period to accommodate its lead attorney's case schedule. The Rules of Practice at 40 C.F.R. § 22.19(e) outline the requirements for requesting additional discovery and the proper standards used by the Presiding Officer to determine whether such a motion may be granted. Additionally, the Rules of Practice at 40 C.F.R. § 22.7(b) require a demonstration of "good cause" in motioning for an extension of time. This court has previously recognized that:

"[t]he standard for discovery under the Rules of Practice is more restrictive than that

> under the Federal Rules of Civil Procedure… In general, the information provided through the prehearing exchange and the ability to cross-examine witnesses at the hearing is sufficient in these proceedings…discovery will be granted if "a refusal to do so would so prejudice a party as to deny him due process." In the Matter of Motiva Enters. LLC, 2001 EPA ALJ LEXIS 159, *6-7 (E.P.A. August 17, 2001).

As articulated below, Respondent has not met its burden under either 40 C.F.R. § 22.19(e) or 40 C.F.R. § 22.7(b).

I. RESPONDENT'S MOTION FOR ADDITIONAL DISCOVERY UNDER 40 C.F.R. § 22.19(e)(1)

The Rules of Practice at 40 C.F.R. § 22.19(e)(1) state that a request for discovery shall "describe in detail the nature of the information and/or documents sought." The Presiding Officer may order such 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.

A. Granting Respondent's Requests Will Unreasonably Delay the Proceeding and Unreasonably Burden the Non-Moving Party

The Rules of Practice at 40 C.F.R § 22.19(e)(i) prohibit additional discovery that will unreasonably delay or unreasonably burden the non-moving party. *See* 40 C.F.R. § 22.19(e)(i). Respondent requests 160 days for depositions and other discovery with an additional 60 days after discovery for preparation of dispositive motions, resulting in a total of 220 additional days. The Complaint was filed on September 15, 2015. It is now more than a year later and Respondent's proposed timetable will push the due date for dispositive motions to approximately July 2017, almost two years from the Complaint filing date. Such an extensive period of time will unreasonably delay the proceeding and, thereby not meet the requirements of 40 C.F.R. §

22.19(e)(1)(i).

As described below, the information sought by Respondent via interrogatories and document requests is either publicly available or has been previously provided via FOIA requests. Ordering EPA to perform Respondent's legal research or to resubmit information would be unreasonably burdensome. The Agency would be further unreasonably burdened if forced to devote time and resources to preparing for and defending the depositions of five of its witnesses (i.e.; Dr. Michelle Watters, Dr. Justin Roberts, Mr. Tony Baney, Mr. Kendall Moore and Mr. Tony Martig) when such depositions, discussed below,[1] have no significant probative value. With regard to Respondent's request to depose Mr. Michael Calhoun, while the Agency feels deposing Mr. Calhoun is burdensome and unnecessary, [2] it requests the same opportunity should the court rule in favor of Respondent on this issue.

B. Respondent Does Not Seek Information Most Reasonably Obtained by EPA and Which the Agency Has Refused to Provide

1. Interrogatories and Document Requests

The Rules of Practice at 40 C.F.R. § 22.19(e)(ii) require a showing that Respondent seeks information most reasonably obtained by Complainant that the Agency has refused to provide voluntarily, which is simply not the case. Respondent's Motion lists two interrogatories and associated document requests for prior enforcement actions, and guidance documents relating to the specific subsections of 40 C.F.R. § 761.30 at issue in this litigation. Respondent's Motion at 5. Civil enforcement actions, as well as guidance materials on EPA's regulatory

[1] *See* Section I.C of Opposition Motion.
[2] As noted previously by this tribunal, deposing a nonparty witness burdens both the witness and the opposing party by requiring them to "spend time and resources in preparation for the oral examination." *See* Aylin, 2015 EPA Admin. Enforce. LEXIS 6221, * 10-11.

initiatives, are available publicly online. Respondent can therefore identify and access this information through rudimentary online searches. Prior enforcement action filings are available on the Administrate Law Judges (ALJ) and Environmental Appeals Board (EAB) websites,[3] EPA's website,[4] and legal search engines.

EPA's Office of Pollution Prevention and Toxics places guidance documents, including those specifically associated with Polychlorinated Biphenyls ("PCBs"), on EPA's website.[5] Historical information surrounding rulemaking can be found online at the National Service Center for Environmental Publications.[6] Lastly, preambles to relevant rules and notice and comment documents are located online at EPA's Regulations.gov website.[7]

Respondent's request is unreasonable because Respondent can obtain these resources as, and in the same manner as, the Agency. The Respondent is on an equal footing with the Agency in terms of access. In fact, Complainant would likely undertake virtually identical methods of information gathering as Respondent in order to fulfill this frivolous request. Furthermore, because this information is readily available to the public, Respondent cannot reasonably assert that EPA has refused to provide it.

In addition to information available online, EPA has responded to FOIA Requests from Respondent's counsel in 2008, 2012 and 2016 related to PCBs. For example, a 2012 FOIA Request demanded, among other things, that Complainant provide "copies of any and all records referring or relating to…. the application of. . . . regulations or policies to owners or operators of natural gas pipeline systems with PCBs ≥ 50 ppm in their system." EPA responded

[3] https://www.epa.gov/alj; https://yosemite.epa.gov/oa/eab_web_docket.nsf
[4] https://www.epa.gov/dockets
[5] https://www.epa.gov/pcbs
[6] https://www.epa.gov/nscep
[7] http://regulations.gov

on February 7, 2013 with information including materials that Respondent requests in its Motion.

Respondent therefore fails to meet both the criteria granting an additional discovery request under 40 C.F.R. § 22.19(e)(1)(ii), and the high bar articulated in Motiva of showing that a denial of discovery would be so prejudicial as to deny Respondent due process. In the Matter of Motiva Enters., *6-7.

2. Depositions

Respondent's request for depositions of EPA's witnesses includes Dr. Watters, Dr. Roberts, Mr. Baney, Mr. Moore and Mr. Martig, in addition to Mr. Calhoun, a nonparty witness. Respondent's Motion at 2-4. Deposing these individuals is unwarranted, unnecessary and does not meet the requirements stated in 40 C.F.R. § 22.19(e)(1)(ii).

40 C.F.R. § 22.19(e)(1)(ii) prohibits granting a motion if the movant seeks information that the non-moving party has provided voluntarily. Noticeably absent from Respondent's Motion is the assertion that EPA has refused to provide *the information* it seeks. While the Agency has not voluntarily agreed to depositions of its witnesses, EPA has been forthcoming with the evidence required during pre-hearing exchange, including the subject matter of witness testimony. *See e.g.,* Complainant's Exhibit, CX 40, CX 1.

Respondent seeks to depose Dr. Watters and Dr. Roberts to determine if their testimony will be duplicative. Respondent's Motion at 2. Complainant has supplied Respondent with Dr. Watters' expert report, which Dr. Watters will elaborate on at trial. *See* CX 46. Her testimony will not be specific to Respondent's natural gas pipeline system or Complainant's asserted violations. Her testimony will not be "needlessly duplicative or cumulative" with that of Dr. Roberts. With respect to dioxin and furans, she will discuss generally that "high heating of PCBs

can produce chlorinated dibenzofurans." *Id.* at 7. She will not discuss the technical details of this specifically occurring in the natural gas context. As stated in Complainant's Rebuttal Prehearing Exchange, the testimony of Dr. Roberts will focus on how PCBs can transform into dioxins and furans when heated in natural gas appliances. Respondent never approached EPA to ask how the testimony on this point differs from that of Dr. Watters. If Respondent had asked, EPA would have pointed to this section of the export report to clarify the differences in testimony.

C. Respondent's Requests Lack Significant Probative Value of Material Fact Relevant to Liability or the Relief Sought

The Rules of Practice at 40 C.F.R. § 22.19(e)(1) broadly requires that the moving party "describe in detail the nature of the information and/or documents sought," while 40 C.F.R. § 22.19(e)(1)(iii) specifically mandates a demonstration by Respondent that it "seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought." Respondent has not identified the disputed issues of material fact that are relevant to liability or the relief sought and for which the information sought would have probative value.

1. Interrogatories and Document Requests

The requested interrogatories and document requests do not meet the threshold of 40 C.F.R. § 22.19(e)(1)(iii) because Respondent has not demonstrated that the information it seeks provides "significant probative value on a disputed issue of material fact relevant to liability or the relief sought." *See* In re Chautauqua Hardware Corp., 3 E.A.D. 616, 6§ 22-23 (June 24, 1991) ("the phrase "probative value" denotes the tendency of a piece of information to prove a fact that is of consequence in the case."). The relative probative value of this information cannot be determined until Respondent specifies in detail what it seeks and demonstrates that EPA can most reasonably obtain it.

2. Depositions

The requested depositions do not meet the threshold of 40 C.F.R. § 22.19(e)(1)(iii) because the information Respondent seeks lacks "significant probative value on a disputed issue of material fact relevant to liability or the relief sought." *See* In re Chautauqua Hardware Corp. 22-23. As this Court has previously noted, "depositions are not a routine part of these administrative adjudicatory proceedings and consequently the showing required to justify depositions is substantial." In the Matter of Heser, 2007 EPA ALJ LEXIS 5, *4 (E.P.A. Feb. 23, 2007); In re Nova Chemicals, Inc., Docket No. CERCLA-01-2005-0051, 2006 EPA ALJ LEXIS 28 (ALJ, August 2, 2006).

The requested depositions do not meet the threshold of 40 C.F.R. § 22.19(e)(1)(iii). Deposing Dr. Watters and Dr. Roberts to identify their opinions and the basis for their opinions, as well as whether their testimony will be duplicative, does not have "significant probative value on a disputed issue of material fact relevant to liability or relief sought" for the following reasons: (1) the scope and basis for expert testimony is not a disputed issue of material fact relevant to liability as their testimony is not to address Respondent's argument that it exempt under 40 C.F.R. § 761.30(i)(B) or that Respondent failed to comply 40 C.F.R. § 761.30(i)(A)(iii)(*2*)-(*3*) &(*5*); (2) the opinions and basis for their opinions are set forth in Complainant's Rebuttal Prehearing Exchange, as well as in Section I.2 of this Opposition Motion; and (3) Respondent may raise an objection to have duplicative testimony stricken during the hearing. *See* In re Chautauqua Hardware Corp., at 22-23.

With regard to Mr. Martig, Mr. Baney, and Mr. Moore, Respondent similarly fails to provide a detailed description of the nature of the information it seeks in deposing these three witnesses. Rather, Respondent simply indicates that two of the three are central actors with

"unique information that has significant probative value on disputed issues." Respondent's Motion at 3. Respondent further states that "Mr. Martig took Respondent's call in 2007 when it voluntarily reported the detection of PCBs." *Id.* Respondent has not identified in detail the nature of the information it seeks from Mr. Martig. With respect to Mr. Baney, Respondent cites to the fact that he calculated the penalty associated with this action. Complainant submitted a detailed statutory factor-by-factor analysis, as described in the PCB Penalty Policy, on both the violation and the violator in its Initial Prehearing Exchange, Sections 2(C) and 2(D). Respondent also seeks to depose Kendall Moore. Mr. Moore generally collected split samples with Respondent and EPA has provided Respondent with its data sampling results, so that Respondent has equal information on how sampling was conducted and access to the sampling results. Moreover, Respondent will have the opportunity to cross-examine Mr. Martig, Mr. Baney and Mr. Moore at hearing.

For the forgoing reasons Respondent has not met the requirement under 40 C.F.R. § 22.19(e) for additional discovery. The Presiding Officer should therefore find that any additional discovery in the form of interrogatories, document requests, or depositions is unwarranted.

II. RESPONDENT'S MOTION FOR DEPOSITIONS UNDER 40 C.F.R. § 22.19(e)(3)

The provisions at 40 C.F.R. § 22.19(e)(3) provides further restrictions on discovery requests that entail depositions. The Rules of Practice state that the Presiding Officer may order depositions upon oral questions only upon an additional finding that:

> (i) The information sought cannot reasonably be obtained by alternative methods of discovery; or
> (ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

This court has emphasized that the "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), 1991 EPA ALJ LEXIS 21, Order on Discovery, 1991 EPA ALJ LEXIS 21 (December 6, 1991)." In the Matter of Clarke Envtl. Mosquito Mgmt., 2005 EPA ALJ LEXIS 83, *24-25 (E.P.A. Sept. 29, 2005).

Respondent's Motion should be dismissed absent a showing that relevant and probative evidence may not be preserved for trial. In the Matter of D'Amato, 2011 EPA ALJ LEXIS 11, *6-9 (E.P.A. May 27, 2011); 2011 EPA Admin. Enforce. LEXIS 31295, *8; Chippewa Hazardous Waste Remediation & Energy, Inc., 12 E.A.D. 346, 368 (EAB 2005). Respondent has not presented any showing that any relevant and probative evidence may not be preserved for trial. As stated in Complainant's Initial Prehearing and Rebuttal Exchanges, Complainant intends to put its experts on the stand for direct and cross examination. Respondent therefore has no legitimate reason to believe, nor does it demonstrate in its Motion, that information potentially garnered from EPA's witnesses will not be preserved for presentation at hearing.

Opposing counsel has requested to depose Mr. Calhoun, a former EPA employee whom Respondent claims has not agreed to speak voluntarily. Complainant has not identified Mr. Calhoun in its Initial Prehearing Exchange or Rebuttal Prehearing Exchange witness list. Respondent placed Mr. Calhoun on its witness list. It is inappropriate to call Mr. Calhoun as a fact witness. Testimony related to the general presence of PCBs in interstate transmission pipelines and EPA's Compliance Monitoring Program is irrelevant to the claims against Nicor, which involve specific violations of EPA's PCB regulations in Nicor's natural gas pipeline system. Furthermore, Respondent's motion's reference to "other related issues involving PCBs" is overly vague and is not sufficiently indicative of the testimony that Mr. Calhoun would be asked to provide.

While EPA is concerned that deposing Mr. Calhoun will unreasonably delay the proceeding and burden the nonmoving party. if the Presiding Officer grants a deposition of Mr. Calhoun, Complainant requests that it be present at the deposition.

Finally, if the Presiding Officer grants any of the deposition requests made by Respondent, Complainant respectfully requests that it be permitted to submit a motion to depose select witnesses identified by Respondent, as Respondent has not submitted any expert reports for its expert witnesses.

III. MOTION FOR EXTENSION OF TIME UNDER 40 C.F.R. § 22.7(b)

Respondent asserts that its lead counsel "has an upcoming trial in Indiana state court that will occupy the majority of his time from mid-December 2016 through mid-February 2017" and seeks 160 days for discovery to allow Mr. Ter Molen sufficient time to participate in discovery plus an additional 60 days to file dispositive motions, for a total of a 220-day delay. Respondent's Motion at 2. Complainant opposes Respondent's Motion for an extension of time.

Respondent must show that it has "good cause" in making the motion for extension of time and must consider "prejudice to other parties" under 40 C.F.R. § 22.7(b). Respondent has not shown good cause in making a 220-day extension by simply stating that its lead counsel will be engaged in other litigation. According to the signature block on several of the court filings associated with this action, Respondent's counsel team handling this action is comprised of four attorneys. The other three attorneys should be capable of moving forward towards resolution and this court should not allow Respondent to employ these delaying tactics.

As discussed above, Respondent's Motion will "unreasonably delay the proceeding" and "unreasonably burden" Complainant, resulting in prejudice to Complainant. *See* Opposition Motion at Section I. In addition, such a long delay may adversely burden the witnesses. Such an

extension would also lack the benefit of ongoing additional settlement negotiations while Respondent's lead counsel completes an unrelated state trial. Respondent's extension request, if granted, benefits no other party but Respondent.

IV. Conclusion

Respondent has not met the requirements established in 40 C.F.R. § 22.19(e) or 40 C.F.R. § 22.7(b) for the forgoing reasons. Complainant therefore respectfully requests that this court deny Respondent's Motion for Additional Discovery and for Extension of Time.

Respectfully Submitted,

11.17.2016
Date

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CERTIFICATE OF SERVICE

I hereby certify that the original of the *Opposition to Respondents' Motion for Additional Discovery and for Extension of Time*, Docket No. TSCA-HQ-2015-5017, has been submitted electronically using the OALJ E-Filing System.
A copy was sent by email to:

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11.17.2016 /s/ John Lawrence
Date Law Clerk

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