

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

## BEFORE THE ADMINISTRATOR

## ORDER ON DISCOVERY

The Intermountain Farmers Association (“IFA”) has filed a motion seeking discovery in this matter. IFA moves that the U.S. Environmental Protection Agency (“EPA”) be compelled to produce a report prepared by its identified expert witness setting forth the conclusions reached by the expert to which she intends to testify. Respondent cites to Rule 26(a)(2) of the Federal Rules of Civil Procedure as support for its expert report request. In addition, IFA asks that EPA be compelled to produce information regarding its expert witness’s qualifications and background, including a list of publications; a listing of matters in which this individual has appeared as an expert witness in the past four years; and the data relied upon by the expert in reaching her conclusions. Finally, IFA requests permission to depose EPA’s expert.

In response, EPA submits that it already has provided respondent with its expert's qualifications, background, and list of publications. In all other respects, EPA opposes respondent's motion. The agency does, however, request that it be allowed to depose IFA's identified expert witness in the event that respondent's deposition request is granted.

Discovery in this case is governed by Rule 19(e) of the Consolidated Rules of Practice, 40 C.F.R. 22.19(e). While it is appropriate to look to the Federal Rules of Civil Procedure for guidance to resolve discovery disputes not addressed by Rule 19(e), the discovery issues raised in this matter can be resolved short of reference to the Federal Rules.

Analysis of these discovery issues begins with EPA's identification of Suzanne Wuerthele as an expert witness. Wuerthele is a toxicologist with the Office of Air and Radiation, EPA Region VIII. In its prehearing exchange, EPA stated: "Ms. Wuerthele will testify regarding the human health and environmental effects and potential endangerment of exposure to Parathion 8EC. Ms. Wuerthele will be called as a witness to establish through testimony the potential endangerment to the human health and environmental gravity components of the penalty proposed in the Complaint. Ms. Wuerthele will refer to Complainant's Exhibits 1 through 5, 10, 11, and 15." Prehrg. Exch. at 3.<sup>1</sup> Aside from this

<sup>1</sup> The exhibits referred to by EPA were provided to IFA.

testimonial summary, EPA represents that it does not intend to submit into evidence any expert reports.

IFA essentially argues that it needs to know more about Wuerthele's expert conclusions regarding the matters to be tried, particularly the basis for her conclusions, in order to properly prepare for hearing. Hence, its request for a Rule 26(a)(2) report.

Respondent's request for more information regarding the conclusions of Wuerthele, as well as the basis for those conclusions, is a reasonable one which satisfies the criteria for further discovery under Rule 19(e). Accordingly, IFA's request to depose Wuerthele is *granted*.<sup>2</sup> EPA's request to depose IFA's identified expert, Ann C. Nelson, also a toxicologist, is *granted*. Absent an agreement by the parties, these depositions shall be concluded no later than April 14, 2000, and the deposition of each witness shall not exceed 3 hours.<sup>3</sup>

Finally, the last outstanding discovery request is that EPA provide a list of Wuerthele's participation as an expert witness in the preceding four years. This request also is *granted*. This listing will not unduly burden EPA. The agency is to provide a list of Wuerthele's participation as an expert only, not the conclusions that she offered in each instance, nor the basis for those conclusions. Moreover, a reasonable, good faith effort to prepare such a list will constitute compliance with this order. EPA shall provide this information to IFA at least three business days before any deposition of Wuerthele.

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Carl C. Charneski  
Administrative Law Judge

Issued: March 24, 2000  
Washington, D.C.

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<sup>2</sup> Given EPA's description of Wuerthele's expected testimony, and citation to complainant's exhibits upon which the witness will rely, the ordered deposition will sufficiently enable IFA to prepare its case. Accordingly, EPA need not prepare an expert report pursuant to Fed. R. Civ. P. 26(a)(2).

<sup>3</sup> In order to keep costs at a minimum, the parties may wish to consider taking depositions by telephone, or informally interviewing each other's identified witness by telephone in lieu of a formal deposition. Also, the parties may wish to consider taking depositions or interviews at the hearing site, in which case this court will accommodate the parties.