UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
Environmental Protection Services, Inc.,	)	**Docket No. TSCA-03-2001-0331**
	)	
Respondent	)	

ORDER ON RESPONDENT'S REQUEST FOR DEPOSITIONS

Pursuant to 40 C.F.R. 22.19(e)(1), respondent Environmental Protection Services, Inc. ("EPS"), moves for an order allowing the depositions of six United States Environmental Protection Agency ("EPA") employees. The individuals named by EPS for deposition are John Smith, Scott Rice, Scott McPhilliamy, Ann Marie Finnegan, Daniel Kraft, and William J. Muszynski.

EPA opposes respondent's deposition request as to all six employees, generally arguing that in administrative enforcement hearings discovery is "limited," and "indeed is disfavored and allowed only in an extremely limited set of circumstances." Compl. Opp. at 1. Offering an extraordinarily narrow reading of the discovery provisions of 40 C.F.R. 22.19(e)(1), complainant submits that depositions are not appropriate where a narrative of the witness's expected testimony is provided and where the opposing party will have the opportunity at hearing to conduct cross-examination.[1]

The undersigned declines this invitation to essentially read the discovery tool of deposition out of the procedural rules. As explained below, EPS's motion to conduct depositions is *granted* as to Smith, Rice, and McPhilliamy, and it is *denied* as to Finnegan, Kraft, and Muszynski.

a. Scott McPhilliamy

In its prehearing exchange, EPA identified Scott McPhilliamy as an EPA inspector who conducted an inspection of the EPS facility on July15, 1999, and on November 2, 1999. EPA submits that McPhilliamy, among other things, is expected to testify as to his observations and

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[1] Of course, this assumes that the narrative of the witness's expected testimony sufficiently identifies the full scope of such testimony. It is not unusual, however, for the parties to differ on this point. EPA's position also assumes that the witnesses identified in the prehearing exchange will actually testify at hearing, thus being available for cross-examination. Again, experience shows that this is not always the case.

findings during these inspections, as well as the contents of his inspection reports and any communications that he might have had with respondent.

In view of the rather general narrative summary provided by EPA for this witness, this Tribunal is of the view that respondent cannot fairly prepare for the hearing in this case without more detail as to McPhilliamy's knowledge concerning the facts surrounding his inspection of the EPS facility. EPA's narrative summary of this witness's expected testimony essentially tells respondent very little. In essence, in its prehearing exchange, EPA submits only that Inspector McPhilliamy conducted two PCB inspections of respondent's facility, made observations and findings, and engaged in some form of communication with respondent's employees.

Respondent is entitled to more information than already provided by complainant as to this expected witness's testimony and the only way that it can obtain this information is to question McPhilliamy. Moreover, the fact that McPhilliamy ultimately may be asked these questions at the hearing is no reason for denying respondent the opportunity to depose this individual. First, the scope and nature of the deposition is different from the scope and nature of the administrative hearing. Second, in order to properly prepare its defense to the charges leveled against it, common sense and basic fairness require that respondent be given the opportunity to review and consider the sworn statements of the opposing witnesses before the hearing begins. The fact that McPhilliamy may be available for cross-examination is simply too little, too late.

b. Scott Rice

In its prehearing exchange, complainant identified Scott Rice as an EPA inspector who conducted an inspection of the EPS facility on July 15, 1999, and on November 2, 1999. According to EPA, Rice will testify as to his observations and findings during these two inspections, including his inspection procedures, any relevant regulatory requirements, and his communications with respondent. In addition, Rice is expected to testify as to his analysis of scrap metal burn data submitted by EPS and as to penalty calculations involving the "TSCA PCB Penalty Policy."

As in the case of Inspector McPhilliamy, it is unreasonable to expect EPS to be able to adequately prepare for the hearing in this matter without an opportunity to explore in more detail Inspector Rice's knowledge of the facts relevant to this case, and the basis for his knowledge.

c. John Smith

In its prehearing exchange, EPA identifies this witness as John H. Smith, Ph.D. EPA then states, "Dr. Smith is expected to testify as an expert as to: the regulatory requirements 40 C.F.R. Part 761, including but not limited to, the self-implementing decontamination procedures, PCB classification of electrical equipment, batch testing, 40 C.F.R. Section 761.79, and PCB scrap metal ovens, 40 C.F.R. Section 761.72."

EPA's narrative summary of Dr. Smith's expected testimony is even more cryptic than that of the two EPA inspectors identified as possible witnesses. The narrative summary of Dr. Smith's expected testimony identifies only the areas as to which this expected witness is to testify as an expert. It doesn't identify this witness's area of expertise, the basis of his expertise, his expert opinion, or the basis for that opinion. Without deposing this witness, EPS would be in a posture of having to make an educated guess as to the expected testimony of this witness. Moreover, EPA's argument that Dr. Smith should not be deposed because "[h]e does not participate in enforcement activities or make enforcement decisions, and does not have direct personal knowledge of Respondent's facility" is a curious one. Compl. Opp. at 4. After all, respondent seeks to depose Dr. Smith, not because he has been identified by complainant as a fact witness, but because he has been identified by EPA as an expert witness in this case. As such, respondent is entitled to discover the expert opinions of this witness, as well as the basis for those opinions. *See* Rule 26(b)(4), Fed. R. Civ. P.

d. <u>Ann Marie Finnegan, Daniel Kraft, and William J. Muszynski</u>

These three individuals are EPA employees in Region II. In seeking their deposition, EPS states that they "were involved with and/or responsible for investigations of G&S in Region II, and responsible for communications involving EPS to Region III." Resp. Mot. at 7. Respondent submits that its request to depose Finnegan, Kraft, and Muszynski "goes directly to EPS's selective enforcement defense." *Id.*

As noted in an earlier order, the standard is high for prevailing in a defense for selective prosecution. *See United States v. Armstrong,* 517 U.S. 456, 463-64 (1996); *United States v. Smithfield Foods, Inc.,* 969 F.Supp. 975, 984-85 (E.D. Va. 1997); *Newell Recycling Co.,* 8 E.A.D. 598, 634-35 (EAB 1999), *aff'd* 231 F.3d 204 (5th Cir. 2000), *cert. denied*, 534 U.S. 813 (2001).[2] Moreover, in order to obtain discovery on this issue, the party alleging selective prosecution must make a preliminary, or threshold, showing as to the elements of this defense. *Attorney General of the United States v. Irish People, Inc.,* 684 F.2d 928 (D.C. Cir. 1982), *cert. denied,* 459 U.S. 1172 (1983); *Goodman Oil Co.,* Docket No. RCRA-10-2000-0113, 2001 EPA ALJ LEXIS 152, at *29 (Aug. 22, 2001). Respondent has thus far failed to make a credible showing that it can meet the requirements necessary to establish the defense of selective prosecution.

In seeking the depositions of Finnegan, Kraft, and Muszynski, EPS states that based upon its Freedom of Information Act requests to EPA Region II, and Region II's responses, "EPS can document that Region II unequivocally encouraged, sought and communicated with officials in

[2] Respondent must make a two-fold showing. First, respondent must show that it was singled out while other similarly situated violators were left untouched. Second, it must show that the government selected it for prosecution "invidious[ly] or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of ... constitutional rights." *United States v. Smithfield Foods, Inc., supra.*

Region III about Region III's enforcement efforts and actions against EPS, which goes directly to EPS's selective enforcement defense." Resp. Mot. at 7.

In support of this assertion, EPS attaches an e-mail dated June 26, 2001, from Kraft in EPA Region II to Inspector Rice in EPA Region III, and Rice's e-mail response. While the individuals generally discuss EPS and whether a complaint will be issued against the company, a reading of these e-mails does not support EPS's view that EPA was somehow unlawfully singling it out for prosecution. In addition, the various e-mails which respondent attaches to its reply memorandum likewise fail to support EPS's claim that it was being unlawfully singled out by EPA. The affidavit of Keith Reed, also referred to by respondent, likewise fails to provide much, if any, support for its argument of selective prosecution.

In sum, while EPS vigorously argues that it is the victim of the government's selective prosecution, it simply has not satisfied the imposing standard for deposing the three EPA individuals from Region II on this subject.[3]

ORDER

EPS's motion to depose Scott McPhilliamy, Scott Rice, and John Smith is *granted.* The parties are to confer on the timing, date, and location of the depositions. In the event that the parties are unable to reach agreement as to these matters, they shall so inform this Tribunal. Insofar as EPS seeks to depose Ann Marie Finnegan, Daniel Kraft, and William J. Muszynski, its motion is *denied.*

Carl C. Charneski
Administrative Law Judge

Issued: April 25, 2003
Washington, D.C.

[3] *See, e.g.,* Consent Agreement between EPA and G&S, dated July 10, 2001, involving a TSCA PCB enforcement action and attached to EPA's reply to respondent's opposition to motion to strike the defense of selective prosecution.