

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
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ERSPLAS, Inc.) Docket No. CWA-02-2001-3407
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Respondent)

ORDER DENYING MOTION TO CONDUCT FURTHER DISCOVERY

By Motion filed June 27, 2002, Respondent seeks to conduct further discovery and rescheduling of the evidentiary hearing in the above-stated case. Specifically, Respondent seeks to have the undersigned compel further discovery pursuant to 40 C.F.R. Part 22.19(f)(2), by allowing Respondent to take an oral deposition of Mrs. Evelyn Rivera Ocasio, an Environmental Protection Agency (EPA) Environmental Engineer, Enforcement and Superfund Branch, and oral telephonic depositions of EPA's announced experts, Mr. Jonathan D. Libber, EPA expert on penalty issues and Mr. Mark D. Ewan, Senior Associate, Industrial Economics Incorporated.

In the case at bar, Mrs. Rivera conducted the facility's inspections and was in charge of assessing the proposed Class II Civil Penalty for violations of Section 301 and 308 of the Clean Water Act (CWA). Respondent asserts that Mrs. Rivera "may have information with significant probative value as to what was her basis for the penalty assessment, which analytical methods were used for the assessment of the penalty, what were her impressions and findings upon inspection of the premises and her previous field experience, among others."

Respondent further requests that having deposed Mrs. Rivera, Respondent will determine if it is necessary to take the depositions of the EPA experts, Mr. Libber and Mr. Ewan. However, in order to expedite the proceedings, Respondent seeks an Order for discovery that includes the taking of depositions via telephone of such experts. Respondent further moves for an additional 60 days to conduct such discovery and therefore requests that the hearing be rescheduled for October 15-17, 2002, or at any other time convenient for both parties.

40 C.F.R. Part 22.19(f)(2) speaks to the requirement of a party to supplement or correct any exchange information which might be incomplete, inaccurate or outdated and the additional or corrective information has not otherwise been disclosed to the other party. As no such corrective or additional information on behalf of the Complainant has been indicated, Respondent's Motion cannot be supported under Section 22.19(f)(2).

Similarly, Respondent's Motion, examined against the criteria of Section 22.19(e), does

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not suggest that Respondent is entitled to the additional discovery sought. Section 22.19(e) provides, *inter alia*, that 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;
- (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

Moreover, the Presiding Officer may order depositions, upon the additional finding that:

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

Upon review of the instant record and based on the particular facts of this case, the Court concludes that Respondent's Motion does not meet the criteria set forth in Part 22.19(e) establishing that it is entitled to further discovery in this proceeding. With respect to the proposed deposition of Mrs. Rivera, the Court notes that Complainant's Prehearing Exchange, Attachment 1, identified an answer to question 4, pages 6-8, that Complainant provided a narrative statement explaining in detail the calculation of the proposed penalty, addressing each statutory factor listed in Section 309(g)(3) of the Clean Water Act. Moreover, in this same answer, and also included as Complainant's Prehearing Exchange, Exhibit 4, Complainant includes and makes reference to its 10 page, August 21, 2001, *Penalty Calculation Internal Memo* in which it again describes in great detail the factors and analytical methods that Mrs. Rivera considered in her assessment of the proposed penalty included in the Complaint. In such document, Mrs. Rivera provides a description of the facility (Memo, Section A, page 1), and applies the CWA Statutory Factors to the Respondent's operation.

As to Mrs. Rivera's *impressions and findings upon inspection of the premises*, the same Memo provides Respondent with adequate information regarding the results of her inspections which includes her findings, impressions and relates the CWA and its implementing NPDES regulations to Respondent's history of compliance/non-compliance, since 1992 when Respondent filed for its first NPDES permit. The Memo also includes her conclusions and recommendations.

In addition, the Court notes the Complainant's Prehearing Exchange Exhibits 5-7 which seem to provide Respondent with the information it is seeking through its motion. Moreover,

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Complainant asserts that Mrs. Rivera will be present at the hearing to testify about the inspections that she conducted, the NPDES regulations, and the calculations of the penalty proposed in the Complaint. Respondent shall be given ample leeway to cross-examine the witness on the instant issues for which he seeks depositions. Respondent has thus not detailed any information that it seeks in deposition that has not been made available in Complainant's Prehearing Exchange, nor has it demonstrated that the information it seeks will not be preserved for hearing without depositions. For these reasons, and the fact that the relief requested would unreasonably delay the evidentiary hearing, it fails to meet the criteria set forth in Part 22.19(e). Respondent's Motion as it pertains to the taking of the oral deposition of Mrs. Rivera is therefore, **DENIED**.

Similarly, Respondent's request to conduct telephonic depositions of Complainant's expert witnesses is **DENIED**. It is noted that Complainant listed these witnesses as a result of Respondent's intention to raise as a defense, its inability to pay the proposed penalty. Once Respondent concludes its presentation of its case, Complainant will determine if it is necessary to use any rebuttal witnesses. In addition, the witnesses at issue do not have any information that has significant probative value on any disputed issue of material fact relevant to liability or the relief sought in this particular case.

Complainant has no objection to providing general information about their proposed testimonies but such testimony will no doubt ultimately depend on Respondent's presentation of its case. The denial of such discovery request will not prejudice Respondent's ability to adequately prepare a defense to the allegations charged in the Complaint.

Accordingly, for the reasons stated, Respondent's Motion is **DENIED**.

Stephen J. McGuire
United States Administrative Law Judge

July 15, 2002
Washington, D.C.