



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF Martex Farms, Inc., RESPONDENT Docket No. FIFRA-02-2005-5301

ORDER DENYING RESPONDENT'S MOTION FOR THE ISSUANCE OF SUBPOENAS

On September 2, 2005, Respondent filed the instant "Motion for the Issuance of Discovery and Hearing Subpoenas" ("Motion for Subpoenas"), seeking "[p]ursuant to Rule 22.19(e) 1 [sic] of the Consolidated Rules of Practice, ... the issuance of discovery subpoenas for the taking of the depositions of Ms. Kathleen Callahan, EPA Region II Interim Administrator, and Mr. Carl A. Soderberg, EPA Director, Puerto Rico Office." Motion for Subpoenas at 1. Respondent states that Ms. Callahan's and Mr. Soderberg's deposition testimony is "relevant to respondent's affirmative defense of selective prosecution." Motion for Subpoenas at 1-2. More specifically, Respondent explains that "[t]he probative value of this information is related specifically to the question of whether Martex Farms, S.E. was singled out for the imposition of extreme civil penalties." Id. at 2. Respondent further moves that:

In the alternative, [Ms. Callahan and Mr. Soderberg] and Ms. Ana Delia Martínez, [Puerto Rico Department of Agriculture - Environmental Protection Agency (PRDA-EPA)], Mr. Jorge Maldonado, PRDA-EPA, and Mr. José A. de Jesús, PRDA-EPA, should be compelled to appear at the hearing to testify in the matter at bar.

Id. at 3.

Complainant filed a Response to Respondent's Motion for Subpoenas on September 15,

1Complainant notes that Ms. Callahan is currently the Deputy Administrator for Region II of the U.S. Environmental Protection Agency ("EPA"). Complainant's Response to Respondent's Motion for Subpoenas ("Complainant's Response") at 1, n.1.

2005, arguing: 1) that the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”) does not authorize this Tribunal to issue the requested subpoenas; 2) that Respondent has failed to make a requisite threshold showing of the essential elements of “selective prosecution;” and 3) that Respondent has failed to show the relevance or probative value of the testimony it seeks to compel.

Because, as explained below, FIFRA does not authorize this Tribunal to issue the subpoenas sought by Respondent to compel testimony either at a deposition or at hearing, this Tribunal need not address Complainant’s remaining arguments regarding “selective prosecution.”

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits at 40 C.F.R. Part 22 (“Rules” or “Rules of Practice”). Rule 22.19(e), 40 C.F.R. § 22.19(e), provides for “other discovery” beyond the Prehearing Exchange (“PHE”). Rule 22.19(e)(4) states: “The Presiding Officer may require the attendance of witnesses ... by subpoena, *if authorized under the Act.*” 40 C.F.R. § 22.19(e)(4) (emphasis added). Rule 22.21(b) similarly states: “The Presiding Officer may require the attendance of witnesses [at a hearing] ... by subpoena, *if authorized under the Act.*” 40 C.F.R. § 22.21(b) (emphasis added). Rule 22.4(c)(9) similarly states: “The Presiding Officer may ... [i]ssue subpoenas *authorized by the Act.*” 40 C.F.R. § 22.4(c)(9) (emphasis added). Rule 22.3(a) defines the term “Act” as “the particular statute authorizing the proceeding at issue.”

This proceeding is authorized by Section 14(a) of FIFRA, 7 U.S.C. § 136l(a). As explained in *In re Chempace Corp.*, unlike some other statutes, FIFRA does not authorize this Tribunal to issue subpoenas:

Complainant has filed a motion for issuance of subpoenas for the attendance of Respondent’s accountant and president. *FIFRA does not authorize the issuance of subpoenas in administrative hearings*, as do most of the other statutes that are enforced through such hearings. Hence, the EPA Rules of Practice do not authorize the presiding administrative law judge to issue such subpoenas under 40 CFR §22.04(c)(9).² That provision applies only to subpoenas “authorized by the Act,” in this case FIFRA. Complainant’s motion for issuance of subpoenas is therefore denied.

In re Chempace Corporation, EPA Docket No. 5-IFRA-96-017, 1997 WL 881227 (Order Denying Motions, Feb. 27, 1997) (emphasis added).

Similarly, in the present case, because this proceeding is authorized by FIFRA, which

²Rule 22.4(c)(9) currently states: “The Presiding Officer may ... [i]ssue subpoenas authorized by the Act.” 40 C.F.R. § 22.4(c)(9).

statute does not authorize this Tribunal to issue subpoenas, Respondent's instant "Motion for the Issuance of Discovery and Hearing Subpoenas" is **DENIED**.

Susan L. Biro
Chief Administrative Law Judge

Dated: September 16, 2005
Washington, D.C.