UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON-DC.

In the Matter of: **TaoTao USA, Inc.,** **TaoTao Group Co., Ltd., and** **Jinyun County Xiangyuan Industry Co., Ltd.** **RESPONDENTS**	Docket: CAA-HQ-2015-8065

RESPONDENT'S MOTION TO COMPLAINANT'S FIRST MOTION TO SUPPLEMENT THE PREHEARING EXCHANGE

TO THE HONORABLE JUDGE OF SAID COURT:

Respondents, TaoTao USA, Inc., TaoTao Group Co., Ltd., and Jinyun County Xiangyuan Industry Co., Ltd., (hereafter "Respondents") file this Response in Opposition to the Director of the Air Enforcement Division of the U.S. Environmental Protection Agency's Office of Civil Enforcement's (hereafter "Complainant") First Motion to Supplement the Prehearing Exchange ("Motion").

Respondent requests that the Tribunal deny Complainant's Motion on the grounds that this matter has been active for at least two years; and after an exhaustive exchange of discovery, any further orders that require Respondents to produce, respond to, or analyze discovery items at this point will unduly burden Respondents prior to trial since they lack sufficient opportunity to review the exhibits and conduct further investigation where necessary. Further, a grant of the Motion at bar will prejudice Respondent this close to trial since Respondent lacks an opportunity to effectively incorporate, respond to, or challenge the new Exhibits and discovery for the purposes of disputing the EPA's claims. Respondent files the below response pursuant to 40 C.F.R. §22.19(e) and §22.19(f).

FACTS

The exchange of discovery in this cause number has been sufficient and comprehensive, with Respondent and Complainant completing the following discovery:

1. On August 25, 2016, the EPA attached 160 Exhibits to a Pre-Hearing Exchange ("Prehearing Exchange") filed by the agency.

2. Respondents did not receive the Prehearing Exchange until August 29, 2016, and had the burden, more than two years after the filing of this case, of analyzing more than 160 Exhibits within a short span of time.

3. Complainant then filed a Rebuttal Prehearing Exchange, adding another 10 Exhibits and a new witness on October 13, 2016.

4. On the same day, October 13, 2016, Complainant filed a Request for Information to determine Respondent's Inability to Pay and asked Respondent to answer 27 additional requests for information and documents within a period of less than a month. Those particular requests were due to the EPA on November 4, 2016.

5. Respondents' Counsel advised Complainant's Counsel that Respondents intended to file a Supplemental Exchange to ensure they can adequately respond to the large number of Exhibits introduced by Complainant.

6. On November 21, 2016, Complainant submitted another request for information regarding Respondents' economic benefit claim.

7. A few days later on November 28, 2016, Complainant filed a Motion for Accelerated Decision as to Respondents' liability and simultaneously filed his Motion to Supplement Complainant's Prehearing Exchange and asked the Court to allow Complainant to file an additional 9 documents, adding to the 170 Exhibits already filed into the record. Further, the same Motion notates that Complainant would like to designate another expert witness.

Complainant basis its First Motion to Supplement the Prehearing Exchange with nine documents on Section 40 C.F.R. § 22.19(f)—a provision that relates specifically to situations where a supplement is allowed for the limited purpose of updating missing information from prior pre-hearing exchanges. Yet, Complainant's

requests go far beyond an attempt to make mere administrative updates, since most of the information requested is an attempt to delve into a new series of discovery that will have the effect of unreasonably delaying the proceeding and unduly burdening the Respondent in this matter.

On these grounds, 40 C.F.R. § 22.19(e), is more applicable since this rule applies when a party is attempting to place a new discovery burden on an opposing party after a pre-hearing information exchange has already occurred.

Specifically, Section 22.19(e) states the following:

> (1) After the information exchange provided for in paragraph (a) of this section, a party may move for additional discovery. The motion shall specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought (and, where relevant, the proposed time and place where discovery would be conducted).
>
> (2) The Presiding Officer may order such discovery only if the discovery "[w]ill neither unreasonably delay the proceeding nor unreasonably burden the non-moving party." 40 C.F.R. §22.19(e).

Against the backdrop of the above stated Rules, we analyze the First Motion to Supplement the Prehearing Exchange as follows:

a. <u>Complainant's First Request (For Documents CX 170- CX 173).</u>

Complainant is attempting to supplement their prehearing exchange with four additional documents that consist of material already provided to the Complainant by Respondent and that is related to prior exchanges. To the extent that these documents have already been provided for the record and were already part of a prior discovery process, Respondent argues a supplement to the exchange is unnecessary, burdensome, and untimely since the Complainant is seeking to add Exhibits two years after the commencement

of the proceeding and has had plenty of time to obtain and sufficiently file these documents for the record.

b. <u>Complainant's Second Request (For Documents CX 174 – and Related Information).</u>

Complainant in direct violation of Section 22.19(e) is attempting to add a letter from the Complainant to Respondent, dated November 21, 2016, in which Complainant attempts to request additional discovery after the pre-hearing exchange process was complete.

Here, Respondents object not only to the content of the letter sent, but to its inclusion since the letter evidences an attempt by the Complainant to seek additional documents two years after this process began in direct violation of Rule 22.19(e), which does not allow new discovery after the exchanges have been complete unless all elements of Rule 22.19(e) are met and a motion is filed.

Rather than filing a complete motion for this request and asserting in the motion that this new production request will not unduly burden or prejudice the non-movant, Complainant is attempting to introduce a letter that is outside the boundaries of what is required to obtain discovery after a pre-hearing exchange is complete.

A mere demand letter is not compliant with Section 22.19(e); therefore, this letter should be prohibited from the record since it does not evidence a valid attempt to recover the additional documents. Further, to the extent that Complainant is attempting to recover additional documents related to the economic benefit claims this late in the game, these requests are both untimely and burdensome. Complainant has had two years, a pre-hearing exchange, and a rebuttal pre-hearing exchange to sort through these issues.

c. <u>Third Request (For Documents CX175-CX178 and Related Information).</u>

In its third Request, Respondent is once again requesting to supplement information related to a new, expert witness, as well as materials and excerpts of rules and data tied to the expert witness's potential testimony, background, analysis, knowledge, or experience.

Adding an expert witness at this stage presents Respondent with the undue burden of having to analyze the witness's background, experience, and education, while also reviewing any legal theories that Complainant attempts to raise through the use of this expert. CX175 is a document from a treatise that specifically introduces the expert's material.

The remaining documents requested for inclusion in the record include a declaration from the expert witness, Ronald M. Heck, and documents of rules from the Federal Register. Complainant hopes to include the expert witness and materials as supplemental documentation when in fact this is new discovery produced well after the pre-hearing exchange, making it a direct violation of Rule 22.19(e), which requires Respondents to show the tribunal what information they are looking for and state why the Respondent is not

unduly burdened or prejudiced by this introduction. A new expert witness at this point would not only unduly burden Respondent, but it's untimely and requires taxing analysis and rebuttal from Respondent who has already gone through two substantial discovery exchanges with the Complainant.

SUPPORTING CASE LAW

In the Matter of Nicor Gas, another case in front of the EPA as Docket No. TSCA-HQ-2015-5017, the EPA itself relied on 40 C.F.R. § 22.19(e) to prevent additional discovery requested from a Respondent when that request was filed two years after the filing of the initial Complaint. **Exhibit A—(pp.2-3)**. Yet, in the case at bar, two years have passed since the initial Complaint, and the Complainant is still burdening Respondent with letters that request additional discovery. Further, Respondent is doing so here, without filing a proper motion or establishing a basis for supplementing the record with discovery that was either equally available to all parties previously or that is new, prejudicial and not raised pursuant to Section 22.19(e). Specifically, the Complainant's attempt to add a letter (Document CX-174) that requests additional discovery in violation of Section 22.19(e) is clearly impermissible by the EPA's own standards. Further, adding an expert witness and related materials (Documents CX175-CX178) at this point in the proceeding is unduly burdensome and prejudicial. And Documents CX170-CX173 create an unreasonable burden, are prejudicial at this point, and were equally discoverable long ago during the pre-exchanges.

Allowing the above-described documents into the record would also be contradictory since the EPA, when presented with the same issue in reverse, argued that it considers discovery requested two years after the complaint was filed both untimely and burdensome. ***See generally*** **Exhibit A.**

CONCLUSION

For the foregoing reasons, Respondents ask the Tribunal to deny Complainant's First Motion to Supplement the Prehearing Exchange as to all documents and discovery requested.

In the alternative, Respondents ask the Tribunal to deny the right to supplement any of the individual documents or discovery requests put forth in the First Motion to Supplement that the Tribunal declares impermissible under the Rules governing supplemental exchanges after the initial Prehearing Exchange.

Respectfully submitted,

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CERTICIFATE OF SERVICE

This is to certify that on January 3, 2016 the foregoing Motion to Dismiss was filed and served on the Presiding Officer electronically through the Office of Administrative Law Judges (OALJ) e-filing system. I certify that a copy of the foregoing Motion was served by electronic mail on the same day to opposing counsel and a copy was also mailed as follows:

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EXHIBIT A

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

ORDER ON RESPONDENT'S MOTION FOR ADDITIONAL DISCOVERY AND FOR EXTENSION OF TIME

The United States Environmental Protection Agency, Office of Enforcement and Compliance Assurance, Office of Civil Enforcement, Waste and Chemical Enforcement Division ("Complainant" or "Agency") initiated this proceeding against Nicor Gas ("Respondent") in September 2015.

The parties subsequently engaged in and completed their prehearing exchanges. During that process, the Agency proposed a range of witnesses, including expert witnesses Drs. Michelle Watters and Justin Roberts, as well as fact witnesses Tony Baney, Kendall Moore, and Tony Martig. Complainant's Initial Prehearing Exchange (Aug. 8, 2016); Complainant's Rebuttal Prehearing Exchange (Oct. 7, 2016). Respondent proposed as one of its fact witnesses Michael Calhoun, a former EPA employee. Respondent's Prehearing Exchange (Aug. 26, 2016). The deadline for filing dispositive motions was, after an extension, set for December 5, 2016. Order on Complainant's Motion for Extension of Time (Oct. 21, 2016).

On November 2, 2016, Respondent moved for additional discovery, namely to depose the witnesses listed above and to obtain from the Agency responses to certain interrogatories and requests for production of documents. Respondent also asked for an additional 160 days to complete this discovery, to be followed by 60 days within which the parties could file dispositive motions. Respondent's Motion for Additional Discovery and for Extension of Time ("Motion"). The Agency opposes the Motion, arguing it does not meet the standards set forth in the Consolidated Rules of Practice ("Rules") that govern this proceeding. Opposition to Respondent's Motion for Additional Discovery and for Extension of Time (Nov. 17, 2016) ("Opposition"); *see also* 40 C.F.R. Part 22.

Motion for Discovery

A party may move for additional discovery after the standard prehearing information exchange takes place. 40 C.F.R. § 22.19(e)(1). "The motion shall specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature

of the information and/or documents sought . . . . 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; and
> (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

40 C.F.R. § 22.19(e)(1). The Rules are more restrictive with respect to depositions as a form of additional discovery, providing that I may order them only upon additionally finding that "(i) [t]he information sought cannot reasonably be obtained by alternative methods of discovery; or (ii) [t]here is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing." 40 C.F.R. § 22.19(e)(3).

Notably, despite the Rules' general bias toward more streamlined adjudication that involves less discovery, I have "broad discretion to determine how to conduct the proceedings under the Rules of Practice." *Chem-Solv, Inc.*, Docket No. RCRA-03-2011-0068, 2012 EPA ALJ LEXIS 4, at *3-4 (ALJ, Feb. 29, 2012) (citing *Chippewa Hazardous Waste Remediation & Energy, Inc.*, 12 E.A.D. 346, 363 (EAB 2005)).

Depositions of Expert Witnesses

Dr. Michelle Watters is a medical officer at the Agency for Toxic Substances and Disease Registry and an expert in areas relating to exposures in occupational and environmental medicine. Complainant's Initial Prehearing Exchange at 3. She "will testify to the health concerns associated with polychlorinated biphenyls (PCBs)" and "may also testify as to how the exposure to PCBs can come from many locations such as exposure to PCB contaminated buildings such as residences, schools, churches and other buildings." Complainant's Initial Prehearing Exchange at 3. Additionally, her testimony may "cover secondary exposure relating to inhalation of PCBs and transformation from PCBS to other compounds . . . through a process of heating and volatilization." Complainant's Initial Prehearing Exchange at 3. Supplementing Dr. Watters's proposed testimony is her 14-page expert report "on public health implications from community exposure" to PCBs. Complainant's Exhibit ("CX") 46.

Respondent contends that Dr. Watters's expert report "does not fully disclose [her] opinions and the basis for those opinions. For example, the report does not disclose any opinions about Nicor or the events underlying the Complainant's allegations." Mot. at 2. Because the report does not reference Nicor other than in the case caption, Respondent asks to depose Dr. Watters "to determine whether [she] intends to opine on issues specific to Nicor, PCBs in Nicor's natural gas pipeline system, or the allegations of the Complaint." Mot. at 2-3. Respondent further argues the report does not disclose the bases for Dr. Watters's opinion

"regarding the public health implications for exposure to PCBs from natural gas pipelines" and that it is entitled to depose Dr. Watters to discover these bases. Mot. at 3.

In response, the Agency argues against the deposition on grounds that it will unreasonably delay the proceeding. Opposition at 2-3. The Agency further states that the deposition request "seeks information that [the Agency] has provided voluntarily." Opposition at 5. Specifically, the Agency contends that even though it opposes depositions, it "has been forthcoming with the evidence required during pre-hearing exchange, including the subject matter of witness testimony." Opposition at 5. The Agency adds that Dr. Watters's testimony "will not be specific to Respondent's natural gas pipeline system or Complainant's asserted violations." Opposition at 5. Also, according to the Agency, the deposition does not seek information of significant probative value because "the scope and basis for expert testimony is not a disputed issue of material fact relevant to liability", "the opinions and basis for their opinions" was already provided during the prehearing exchange process, and Respondent will have an opportunity at hearing to object to duplicative testimony. Opposition at 7. Finally, the Agency asserts that Respondent has made no showing that the evidence and testimony provided by Dr. Watters will not be preserved for presentation at hearing.

Respondent is entitled to depose Dr. Watters on the bases for her general opinions regarding the public health implications for exposure to PCBs from natural gas pipelines. Allowing discovery of this information through deposition is "reasonable" and "satisfies the criteria for further discovery under Rule 19(e)." *Intermountain Farmers Association*, Docket No. FIFRA-8-99-58, 2000 EPA ALJ LEXIS 22, at *3 (ALJ, Mar. 24, 2000). Additionally, "the purpose of the prehearing exchange is to afford the parties a meaningful opportunity to prepare for hearing . . . and such purpose can be achieved only if the prehearing exchange imparts sufficient information concerning, among other things, the testimony of each proposed witness." *Aylin, Inc., et al.*, Docket No. RCRA-03-2013-0039, 2016 EPA ALJ LEXIS 23 at *30 (ALJ, March 2, 2016) (citing *JHNY, Inc.*, 12 E.A.D. 372, 382 (EAB 2005)). In this instance, the prehearing exchange did not impart sufficient information to Respondent concerning Dr. Watters's proposed expert testimony.

Neither the deposition of Dr. Watters nor any of the other additional discovery this Order provides for will *unreasonably* delay the proceeding or burden the Agency because it allows Respondent to obtain information that is of probative value to the relief sought against it. In this particular instance, Dr. Watters's proposed testimony would appear to address the gravity of the alleged violations. Moreover, the give and take of an oral deposition enables Respondent to obtain a more complete understanding of Dr. Watters's (or any other witness's it deposes) reasoning than other forms of discovery would provide. It is only fair and equitable that Respondent have some opportunity to identify the roots of Dr. Watters's opinion prior to the hearing. Clearly, this is not information the Agency has already provided voluntarily, no matter how forthcoming it has otherwise been.

Dr. Justin Roberts is a chemist in the Agency's Office of Pollution Prevention and Toxics. He is slated to testify as an expert witness "regarding secondary exposure relating to inhalation of the PCBs and transformation from PCBS to other compounds (dioxins and furans) through a process of heating and volatilization." Complainant's Rebuttal Prehearing Exchange at 1. The Agency has not provided a related expert's report.

Respondent asks to depose Dr. Roberts because the "one-sentence disclosure of [his] anticipated testimony is plainly insufficient to disclose either his opinions or the basis for his opinions." Mot. at 2. Respondent also questions the extent to which his testimony will mirror that of Dr. Watters and indicates a deposition opportunity "will enable Nicor to identify whether their testimony will be duplicative and needlessly cumulative." Mot. at 2.

In response, the Agency contends Dr. Roberts's testimony will not duplicate Dr. Watters's. Opposition at 5. Rather, the Agency notes, Dr. Roberts's testimony "will focus on how PCBs can transform into dioxins and furans when heated in natural gas appliances." Opposition at 5-6. The Agency otherwise asserts the same arguments it raised in objecting to the deposition of Dr. Watters.

However, the same reasoning that permits Respondent to depose Dr. Watters applies in Dr. Roberts's situation as well. "Without deposing this witness, [Respondent] would be in a posture of having to make an educated guess as to the expected testimony . . . . " *Environmental Protection Services, Inc.*, Docket No. TSCA-03-2001-0331, 2003 EPA ALJ LEXIS 30, at *5 (ALJ, Apr. 25, 2003). Consequently, Respondent is entitled to depose Dr. Roberts to discover not only the bases for his opinions but the opinions themselves.

Depositions of the Agency's Fact Witnesses

The Agency also proposes to call as fact witnesses Tony Baney, Kendall Moore, and Tony Martig. Complainant's Initial Prehearing Exchange at 1-3. Mr. Baney is a Compliance Officer for EPA Headquarters and will testify about his PCB-related enforcement experience, his review of the evidence compiled in this case, how the penalty was calculated and proposed, and his opinion as to the appropriateness of the penalty taking into account the statutory penalty factors. Complainant's Initial Prehearing Exchange at 1-2. Mr. Moore works in the Pesticides and Toxics Compliance Section of the Agency's Region 5. He will testify that he obtained consent forms from homeowners, conducted inspections and home visits, and collected samples associated with the Nicor investigation. Complainant's Initial Prehearing Exchange at 2-3. Tony Martig is a section chief in the Agency's Region 5 office. He will authenticate evidence and testify to a June 13, 2007, conversation with Respondent's staff regarding their discovery of PCBs in their natural gas pipeline distribution system. Complainant's Initial Prehearing Exchange at 3-4.

Respondent argues that fairness dictates that it be allowed to depose these witnesses. Mot. at 3. "[E]ach possess unique information that has significant probative value on disputed

issues." Mot. at 3. Adding to that fact, Mr. Baney and Mr. Moore are "central actors" given their roles in the case, Respondent notes. Mot. at 3.

The Agency responds with the same arguments raised in regard to depositions of its experts. Additionally, it adds that Respondent "has not identified in detail the nature of the information it seeks from Mr. Martig." Opposition at 8. As for Mr. Baney and Mr. Moore, the Agency suggests the documentary evidence in the record is sufficient and no deposition is needed because Mr. Baney and Mr. Moore will be subject to cross examination. Opposition at 8.

Mr. Baney does in fact appear to be a "central actor in this proceeding." *Frank Acierno, et al.*, Docket No. CWA-03-2005-0376, 2008 EPA ALJ LEXIS 6, at *115 (ALJ, Feb. 15, 2008). His involvement in building the case and determining how the penalty would be calculated place him in the midst of the decision-making involved in seeking a penalty against Respondent. He has information about disputed issues of material fact that has significant probative value, notwithstanding documents the Agency has already provided that may offer insight into this same subject matter. Mr. Moore appears to possess similar, if not as broad, information with regard to the Agency's investigation. Mr. Martig may possess the least information of the three, however, he appears to have information that relates to a critical point in time – Respondent's report of the discovery of PCBs in its system. Given the probative value of the information these individuals appear to possess, and given that Respondent cannot efficiently discover it through other methods, Respondent is entitled to seek the depositions of these three witnesses.

Deposition of Respondent's Fact Witness

Respondent has proposed to call as a fact witness former Agency employee Michael Calhoun. Mr. Calhoun apparently worked on the Agency's compliance and monitoring programs in the 1980s and 1990s. Respondent's Prehearing Exchange at 13. He would testify about "the presence of PCBs in interstate transmission pipelines; EPA's Compliance Monitoring Program involving 13 interstate transmission companies whose systems contained PCBs; and other issues related to PCBs." Respondent's Prehearing Exchange at 13.

Respondent seeks from Mr. Calhoun information concerning the presence of PCBs in interstate pipelines, "which Nicor contends are the likely source of PCBs detected in its natural gas distribution system[.]" Mot. at 4. It also has questions about the Agency's compliance monitoring program and other PCB issues. Mot. at 4. However, even though Mr. Calhoun is no longer an Agency employee, he declined to meet with Respondent after "check[ing] with 'his people' at EPA." Mot. at 4. As a result, Respondent has been unable to obtain his testimony and believes the information he possesses "may otherwise not be preserved for presentation at the hearing." Mot. at 4.

In addition to previously mentioned arguments, the Agency claims "[i]t is inappropriate to call Mr. Calhoun as a fact witness." Opposition at 9. The Agency contends his proposed testimony is irrelevant because it does not involve the specific violations alleged to have

occurred in Respondent's pipeline system. Opposition at 9.

Despite the Agency's assessment, the information that Mr. Calhoun purportedly possesses seems to be of probative value to one of Respondent's arguments – that the source of the PCBs originated outside of its system. A deposition is the most reliable way for Respondent to obtain Mr. Calhoun's knowledge on this matter. Consequently, Respondent is entitled to seek Mr. Calhoun's deposition. Likewise, the Agency is entitled to be present at the deposition, and if Respondent succeeds in scheduling a deposition of Mr. Calhoun, it should coordinate with the Agency in identifying an agreeable time and place.

For the reasons stated above, I find that Respondent has satisfied the requirements of 40 C.F.R. § 22.19(e) and may seek the depositions of all the individuals named in its Motion. Likewise, the Complainant may move to depose select witnesses identified by Respondent.

Interrogatories and Requests for Production of Documents

Respondent avers that it has propounded two interrogatories and two document requests that the Agency has refused to answer. Respondent seeks to have the Agency "identify prior instances (if any) where it has either (i) brought an enforcement action asserting its current interpretation of the Mega Rule[1] or (ii) otherwise informed owners and operators of natural gas pipeline systems of its current interpretation." Mot. at 5. Respondent states that "[t]his information is probative not only to properly interpreting the Mega Rule, but also to support Nicor's defenses that EPA's interpretation is arbitrary and capricious and that EPA failed to provide fair notice of its interpretation to Nicor and the regulated community." Mot. at 5. According to Respondent, the interrogatories and document requests it has propounded read as follows:

> **Interrogatory No. 1:** Identify any prior enforcement actions or guidance documents where EPA asserted that "potential sources of introduction of PCBs" (40 C.F.R. § 761.30(i)(1)(iii)(A)(3)) include not only the original source of PCBs, but also equipment compressors, scrubbers, filters, or interconnects) that could capture and "re-introduce" PCBs that may be moving around a natural gas pipeline system.
>
> **Document Request No. 1**: For any prior enforcement actions or guidance documents identified in response to Interrogatory No. 1, produce the complaint initiating the action, prehearing exchanges and any additional written discovery (or the equivalent if filed in

[1] "Mega Rule" refers to the Agency's 1998 amendment of its TSCA regulations related to the disposal of PCB wastes. *See* Disposal of Polychlorinated Biphenyls, 63 Fed. Reg. 35384 (June 29, 1998).

federal district court), and any rulings in the action, along with the guidance documents.

Interrogatory No. 2: Identify any prior enforcement actions or guidance documents where EPA asserted that "historical data" under 40 C.F.R. § 761.30(i)(1)(iii)(E) is subject to the analytical requirements in 40 C.F.R. § 761.1(b)(2).

Document Request No. 2: For any prior enforcement actions or guidance documents identified in response to Interrogatory No. 2, produce the complaint initiating the action, prehearing exchanges and any additional written discovery (or the equivalent if filed in federal district court), and any rulings in the action, along with the guidance documents.

Mot. at 5.

The Agency responds that this information "is either publicly available or has been previously provided via FOIA requests." Opposition at 3. As a result, it "would be unreasonably burdensome" for the Agency to devote time to responding. Mot. at 3. The Agency states that it "is on equal footing" with Respondent in obtaining this information from various online resources and "would likely undertake virtually identical methods of information gathering" that Respondent could take to retrieve that information. Mot. at 4. As a result, the Agency would essentially be performing legal research for Respondent. Mot. at 3-4. The Agency further contends that it responded with similar information to FOIA requests made by respondent in 2008, 2012, and 2016. Mot. at 4. Finally, the Agency claims that Respondent has not demonstrated that this information has significant probative value. Mot. at 6.

In this case, the Agency is correct: Respondent's interrogatories and document requests are directed toward questions of law that can be answered through typical legal research methods. Prior enforcement actions and Agency guidance documents are all obtainable either online from websites the Agency suggested in its Opposition brief or through Freedom of Information Act requests. While perhaps more narrowly tailored requests would require an Agency response, as currently written, Respondent's interrogatories and requests for production of documents are overly broad and require no response.

Consequently, to the extent described above, Respondent's Motion for Additional Discovery is **GRANTED in part** and **DENIED in part**.

Motion for Extension of Time

I may grant an extension of time for filing dispositive motions "upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other

parties; or upon [my] own initiative." 40 C.F.R. § 22.7(b).

To conduct the additional discovery discussed above, Respondent requests an extension of time that includes 160 days for discovery plus a dispositive motions deadline that extends 60 days beyond that. One reason given for the expansive time frame is that Respondent's lead counsel has a trial in Indiana "that will occupy the majority of his time from mid-December 2016 through mid-February 2017." Mot. at 2 n.1.

The Agency contends that Respondent has not shown good cause for such a lengthy extension. Respondent's request will unreasonably burden the Agency and unreasonably delay these proceedings, the Agency asserts. Opposition at 10.

Both parties make reasonable arguments on this matter. The total amount of time that Respondent has requested is too extensive, however, and given the number of attorneys it has hired to work on this case, lead counsel's state court trial should not be a major obstacle. However, some amount of time is necessary to conduct the additional depositions approved by this Order, especially in light of the approaching holiday season. As such, Respondent's Motion for Extension of Time is **GRANTED in part** and **DENIED in part** as outlined below.

Conclusion

For the reasons stated above, I find the requirements of 40 C.F.R. § 22.19 satisfied in regard to Respondent's request for additional discovery through oral depositions. Respondent may seek to depose expert witnesses Drs. Michelle Watters and Justin Roberts, as well as fact witnesses Tony Baney, Kendall Moore, and Tony Martig. Additionally, the discovery-related deadlines are extended as follows:

All additional discovery must be complete by **March 31, 2017**.

All dispositive motions must be filed by **April 28, 2017**.

To the extent the Agency desires to seek depositions of any of Respondent's witnesses during the extended discovery period, it should promptly file the necessary motions.

SO ORDERED.

Christine Donelian Coughlin

Christine Donelian Coughlin
Administrative Law Judge

Dated: November 22, 2016
Washington, D.C.

In the Matter of *Nicor Gas*, Respondent.
Docket No. TSCA-HQ-2015-5017

CERTIFICATE OF SERVICE

I certify that the foregoing **Order on Respondent's Motion for Additional Discovery and for Extension of Time**, dated November 22, 2016, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.

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Dated: November 22, 2016
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