

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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BEFORE THE ADMINISTRATOR

2011 JUN 15 PM 5:43



IN THE MATTER OF)
)
MERCURY VAPOR PROCESSING) DOCKET NO. RCRA-05-2010-0015
TECHNOLOGIES, INC., a/k/a)
RIVER SHANNON RECYCLING, AND)
LAURENCE C. KELLY,)
)
RESPONDENTS)

**ORDER ON RESPONDENTS' AMENDED MOTION TO COMPEL DISCOVERY
AND REQUEST FOR THE PRODUCTION OF DOCUMENTS**

The above-captioned matter arises under the authority of Section 3008(a) of the Solid Waste Disposal Act, as amended, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as "RCRA"), 42 U.S.C. § 6928(a). The parties are reminded that 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 ("Rules of Practice"), 40 C.F.R. §§ 22.1-22.32.

On May 4, 2011, Respondents filed a Motion to Compel Discovery and Request for the Production of Documents ("Motion to Compel"). On May 11, 2011, Respondents filed an amended version of the Motion to Compel ("Amended Motion to Compel"), to which Respondents attached a letter addressed to counsel for Complainant and signed by Respondent Kelly, and a response from counsel for Complainant dated April 7, 2011.^{1/} Complainant filed

^{1/} Respondents referenced these documents in their Motion to Compel but filed the Motion without the documents attached. The undersigned's staff attorney subsequently advised Respondent Kelly of the need to file and serve those documents in accordance with the Rules of Practice in order to prompt the undersigned's consideration of the Motion and trigger the 15-day period for Complainant to respond. On May 11, 2011, Respondents filed the Amended Motion to Compel, along with copies of the documents. The Amended Motion to Compel and the documents are presently before the

(continued...)

an Opposition to Respondents' Motion to Compel Discovery and Request for the Production of Documents on May 18, 2011 ("Opposition").^{2/} To date, Respondents have not filed a reply.

Upon consideration, for the reasons set forth below, Respondents' Amended Motion to Compel is denied.

On June 8, 2011, Complainant filed a Motion for Leave to File First Supplemental Prehearing Exchange Instanter, in which Complainant seeks leave to file a supplemental prehearing exchange identifying, among other things, additional proposed witnesses. Complainant is advised that, if it wishes to call any further witnesses at the hearing, Complainant needs to move to supplement its prehearing exchange in order to identify such witnesses and provide summaries of their expected testimony without delay, rather than 15 days prior to the hearing.

I. APPLICABLE STANDARD

In an administrative proceeding governed by the Rules of Practice, discovery, as it is typically thought of under the Federal Rules of Civil Procedure, occurs through a prehearing exchange of information in accordance with Section 22.19(a), 40 C.F.R. § 22.19(a). Subsequent to the prehearing exchange, a party may move for "additional discovery" pursuant to Section 22.19(e)(1) of the Rules of Practice, 40 C.F.R. § 22.19(e)(1). Such a 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)." 40 C.F.R. § 22.19(e)(1).

The presiding Administrative Law Judge may grant a motion for additional discovery only if he or she finds that 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

^{1/} (...continued)
undersigned for consideration.

^{2/} Complainant's Opposition cites the Motion to Compel filed by Respondents on May 4, 2011, rather than the Amended Motion to Compel filed on May 11. However, the differences between the May 4 and May 11 versions of the Motion are slight and do not alter the substance of Complainant's objections.

(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). As the Environmental Appeals Board has noted, the application of this standard "involves the exercise of considerable discretion since it requires a subjective judgment on the need for, and value of, the additional discovery and the possible delay and disruption it might entail." *Chempace Corp.*, 9 E.A.D. 119, 134 (EAB 2000).

II. ARGUMENTS OF THE PARTIES

A. Respondents' Amended Motion to Compel

In their Amended Motion to Compel, Respondents relate that they were recently informed by several sources that the U.S. Environmental Protection Agency ("EPA" or "Agency") has conducted interviews of Respondent MVPT's customers, who Respondent MVPT identified to EPA in 2007, and non-customers. Respondents assert that they do not "resist these interview being conducted" in view of EPA's denial of the business confidentiality claim asserted by Respondent MVPT in this proceeding.^{3/} Amended Motion to Compel at 1. Respondents do object, however, to the "off handed statements" allegedly made to customers and non-customers that may have led these individuals to believe that Respondent MVPT "was conducting illegal activities during the course of Handling, Transporting or managing lamps" at its property in Riverdale, Illinois. *Id.* at 2.

Consequently, Respondents seek "any and all information and documents [EPA] may have obtained[,] including field notes, questions posed and answers received by individuals and any ancillary comments that were made at the time by the persons interviewed by [EPA] and the [EPA] interviewer conducting the interview regarding the operations of [Respondents.]" Amended Motion to Compel at 2. Respondents assert that, once this information is produced, Respondent MVPT "intends to create a series of affidavits confirming [the interviewees'] recollection of events," which may prompt Respondent MVPT to depose the interviewees or call them to testify at the hearing in this matter. *Id.*

^{3/} On May 20, 2010, Respondent MVPT filed a letter asserting a claim of business confidentiality "covering all of the information in our response." The record reflects that EPA subsequently determined that Respondent MVPT had waived this claim by failing to substantiate it and that EPA notified Respondent MVPT of its denial of the claim by letter dated December 21, 2010.

In support of their Amended Motion to Compel, Respondents argue that the requested discovery will neither unreasonably delay the proceeding nor unreasonably burden Complainant. Respondents state that they are "very aware that perception in the highly regulated waste industry is in fact reality and [that] that reason alone drives the need to hear directly from the interviewees what exactly they were either told or directed to read that could possibly cast a negative light on [Respondents]" Amended Motion to Compel at 2. Respondents further state that the information sought directly pertains to the issue of Complainant "acting as judge and jury related to erroneous and false accusations." *Id.* Finally, Respondents claim that the information "may serve to strengthen their defense and most certainly will shed additional light on what the intent of the opposing party has been and continues to be relating to this [proceeding]." *Id.* at 1.

Respondents attached to their Amended Motion to Compel a letter signed by Respondent Kelly, in which Respondents request the above-described information from counsel for Complainant. Respondents also attached the response from counsel for Complainant, dated April 7, 2011, denying Respondents' request.

B. Complainant's Opposition

Complainant objects to the discovery requested by Respondents on the grounds that Respondents fail to (1) describe with any specificity the information they are seeking, and (2) demonstrate that the requested information has any probative value on a disputed issue of material fact relevant to the liability or relief sought in this matter.

Specifically, Complainant contends that Respondents "fail[] to indicate the name, general identity or affiliation of any person(s) alleged to have made 'statements'; the name, general identity or affiliation of any persons to whom any 'statements' were allegedly directed; or any dates or timeframes on or during which 'statements' were allegedly made." Opposition at 3. Complainant further argues that Respondents "provide no indication . . . [of] how any of the information requested even remotely relates to a disputed issue of material fact or the relief sought in this case." Opposition at 5. Finally, Complainant claims that, even if the undersigned found the information requested by Respondents to have probative value on a disputed issue of material fact relevant to liability or the relief sought, that information is protected under the law enforcement investigatory privilege and not subject to discovery. Opposition at 6.

III. DISCUSSION


The objections raised by Complainant are persuasive. Respondents' Amended Motion to Compel appears to seek all information related to interviews that, according to Respondents, EPA conducted of Respondent MVPT's customers and non-customers in an effort by Respondents to determine whether statements were made during the course of the interviews that negatively affected the interviewed individuals' perceptions of Respondents. However, as Complainant correctly points out, Respondents fail to specify the identities of the individuals who allegedly made the statements, the identities of the individuals to whom the statements were allegedly made, and any timeframes during which the statements were allegedly made. Such a broad request for information lacks the specificity necessary to satisfy the requirement set forth at Section 22.19(e)(1) of the Rules of Practice, 40 C.F.R. § 22.19(e)(1), that a motion for additional discovery contain a detailed description of the nature of the information and/or documents sought.

Respondents' Amended Motion to Compel also fails to demonstrate that the requested information has significant probative value on a disputed issue of material fact relevant to liability or the relief sought, as required by Section 22.15(e)(1)(iii) of the Rules of Practice, 40 C.F.R. § 22.15(e)(1)(iii). The Environmental Appeals Board has defined the term "probative value" as the "tendency of a piece of information to prove a fact that is of consequence in the case." *Advanced Electronics, Inc.*, 10 E.A.D. 385, 395 (EAB 2002); *Chautauqua Hardware Corp.*, 3 E.A.D. 616, 622 (CJO 1991).

At issue in this proceeding is whether Respondents were required under RCRA to obtain a permit for their activities at their Riverdale property and whether the penalty and compliance order sought by Complainant constitute appropriate relief for the alleged violations. As Complainant contends, Respondents' Amended Motion to Compel fails to specify how information related to interviews conducted by EPA of Respondent MVPT's customers and non-customers is probative of any disputed issue of material fact relevant to the above-described questions.

For the foregoing reasons, I find that Respondents' Amended Motion to Compel fails to satisfy the standard for "additional discovery" set forth at Section 22.19(e)(1) of the Rules of

Practice.^{4/} Accordingly, Respondents' Amended Motion to Compel is hereby **DENIED**.



Barbara A. Gunning
Administrative Law Judge

Dated: June 9, 2011
Washington, DC

^{4/} Inasmuch as I find that the Amended Motion to Compel fails to satisfy this standard, I need not reach the question of whether the law enforcement investigatory privilege applies and protects the information sought by Respondents from discovery.

**In the Matter of Mercury Vapor Processing Technologies, Inc., a/k/a River Shannon Recycling,
and Laurence C. Kelly, Respondent.
Docket No. RCRA-05-2010-0015**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Order on Respondent's Amended Motion to Compel Discovery and Request for the Production of Documents**, dated June 9, 2011, was sent on this 9th day of June 2011, in the following manner to the addressees listed below.



Mary Angeles
Legal Staff Assistant

Original and One Copy by Facsimile and Pouch Mail to:

LaDawn Whitehead
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Copy by Facsimile and Pouch Mail to:

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Copy by Facsimile and Regular and Certified Mail to:

[CRR No. 7005 0390 0002 5028 8788]
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Dated: June 6, 2011
Washington, DC

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