



BEFORE THE ENVIRONMENTAL APPEALS BOARD  
 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
 WASHINGTON, D.C.



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|-----------------------|---|------------------------|
|                       | ) |                        |
| IN THE MATTER OF:     | ) |                        |
|                       | ) |                        |
| TIGER SHIPYARD, INC.  | ) | CERCLA 106(B) PETITION |
| PORT ALLEN, LOUISIANA | ) | NO. 96-3               |
|                       | ) |                        |
| PETITIONER            | ) |                        |
|                       | ) |                        |

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**ORDER DENYING TIGER'S MOTION IN LIMINE**

**I. BACKGROUND AND PROCEDURAL HISTORY**

Tiger Shipyard, Inc. (Tiger) operates a barge cleaning and repair facility on the Mississippi River just north of Port Allen, Louisiana. Based in part on statements allegedly made by former Tiger employees that drums containing rust and scale from the barge cleaning operations were dumped into the river, the United States Environmental Protection Agency, Region 6 (EPA) issued a unilateral administrative order (UAO) to Tiger on March 15, 1995, pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a). The UAO directed Tiger to locate and remove the suspected drums. Tiger complied with the order, removing 35 drums from the river bottom.

On April 9, 1996, Tiger timely filed a petition under Section 106(b)(2)(A) of CERCLA, 42 U.S.C. § 9606(b)(2)(A), for reimbursement of \$1,402,180.65, the costs it contends it incurred in complying with

the UAO. Tiger argues that it is not a liable party of Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and that Region 6 arbitrarily and capriciously selected the response action. On April 25, 1997, Region 6 responded to the petition for reimbursement. After numerous filings by the Parties, the Environmental Appeals Board (Board) determined that an evidentiary hearing on the issue of Tiger's liability was necessary.<sup>1</sup>

Pursuant to the Order of the Board dated April 20, 1998, the undersigned was appointed as the Presiding Officer in this case. The Presiding Officer was charged with conducting an evidentiary hearing and providing recommended findings to the Board on the following issues, namely, whether:

1. Tiger Shipyard, Inc. (Tiger) is liable within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2), as an operator of a facility at which hazardous substances were disposed of;
2. Tiger is liable within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), as a person who by contract, agreement or otherwise arranged for disposal of hazardous substances; and
3. Tiger is liable within the meaning of Section 107(a)(4) of CERCLA, 42 U.S.C. § 9607(a)(4), as a person who accepted any hazardous substances for transport to disposal facilities.

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<sup>1</sup>The foregoing summary was taken from the Order Granting, in Part, Request for Evidentiary Hearing and Denying Motions to Strike at 1 - 2 (EAB April 2, 1998).

If the Presiding Officer determines that the answer to issues 1, 2, or 3 is yes, the Presiding Officer shall make recommended findings on the following two additional issues, namely, whether:

1. Tiger has a defense to liability under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), by virtue of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3), which protects otherwise liable parties from the acts or omissions of third parties; and

2. Tiger has a defense to liability under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), by virtue of the "innocent landowner" defense raised by Tiger.

Order Scheduling Evidentiary Hearing at 1 - 2 (EAB April 20, 1998).

Furthermore, the Order provides that:

In conducting the prehearing proceedings and the evidentiary hearing, the Presiding Officer is authorized to make any necessary decisions including decisions regarding the admission of evidence. In so doing, the Presiding Officer shall look for guidance to the Consolidated Rules of Practice set forth at 40 C.F.R. Part 22 (recognizing, of course, that under the present circumstances the burden of establishing that reimbursement is appropriate is on Tiger).

*Id.* at 2.

On April 1, 1999, Tiger filed a Motion in Limine, requesting an Order excluding EPA Prehearing Exhibits Nos. 32 - 35 from this hearing. Tiger alleges that the documents were obtained in violation of Rule 6(e) of the Federal Rules of Criminal Procedure [Rule 6(e)]. For the reasons set forth below, Tiger's Motion is denied.

## II. DISCUSSION

### A. INTRODUCTION

The secrecy of grand jury proceedings has long been a hallmark of our judicial system. The rationale for this policy has been:

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; [and] (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

*In Re Grand Jury Subpoena*, 103 F.3d 234, 237 (2<sup>nd</sup> Cir. 1996). Rule 6(e) codified this policy of secrecy. Rule 6(e)(2) and (e)(3) provide the following in regard to disclosure of matters occurring before the grand jury:

(e) Recording and Disclosure of Proceedings

\* \* \* \*

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to -

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

Initially, the Presiding Officer questions whether this evidentiary hearing is the proper forum for this issue. It appears that the proper forum for determining whether grand jury information has been improperly disclosed is the Federal District Court for the Middle District of Louisiana. However, because no such motion has been filed with the Federal District Court, and the information has already been released, I will rule on the Motion in Limine.

**B. STANDARD OF REVIEW**

In order to establish a violation of Rule 6(e), Tiger must show that the disclosed material contained "matters occurring before the grand jury" which were disclosed by a person subject to Rule 6(e). *United States v. J. David Smith*, 992 F.Supp. 743, 753 (D. N.J. 1998). Persons subject to Rule 6(e) include "attorneys for the government" and "other governmental personnel as are deemed necessary . . . to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." Rule 6(e)(3)(A).

**C. BACKGROUND OF ALLEGED DISCLOSURE**

**1. Tiger's Position**

Attached to Tiger's Motion is an Affidavit of James A. Gilder, President of Cooper Gilder, Inc. Mr. Gilder was issued a Subpoena to Testify Before Grand Jury in which he was required to appear or in lieu of a personal appearance, provide certain documents relating to Tiger Shipyard, Inc. to Mr. T. Craig Carlton, Special Agent of the EPA, or Richard B. Launey, Assistant U.S. Attorney. Gilder Affidavit, Exhibit 1. Mr. Gilder complied with the Subpoena by providing certain documents to the government. Gilder Affidavit ¶ 3. Mr. Gilder also claims that he did not provide these documents to agency or representative of the United States or the State of Louisiana. *Id.* ¶ 4. Tiger claims that EPA Exhibits Nos. 32 - 35 contain copies of the documents provided by Mr. Gilder to the grand

jury in compliance with the subpoena. Furthermore, Tiger alleges that the first several pages of Exhibits 32 - 35 are compilations of facts found in the grand jury documents.

## **2. EPA's Position**

EPA contends that Exhibits 32 - 35 contain two types of documents: (1) summaries of cargos carried in barges cleaned by Tiger; and (2) records of transmittal of hazardous materials from Tiger to Cooper Gilder Chemical Company beginning in October 1994, with accompanying summaries of those records. EPA further contends that Tiger's Motion in Limine should only apply to the Cooper Gilder Documents (Item 2). However, EPA fails to explain how the summaries (Item 1) are unrelated to the Cooper Gilder documents (Item 2).

Furthermore, EPA states that the EPA Superfund Division obtained the Cooper Gilder documents (Item 2) from the Louisiana Department of Environmental Quality (LDEQ). After being told by counsel for Tiger that the documents were obtained by the government pursuant to a grand jury subpoena, the EPA Superfund attorneys learned that LDEQ had obtained the records in the course of providing assistance to the criminal prosecution, and the LDEQ believed that the documents were originally obtained through a grand jury subpoena.

## **D. PERSONS SUBJECT TO RULE 6(E)**

Tiger claims that the documents in question were disclosed to the EPA Region 6 Superfund Division by an attorney for the

government, since Mr. Gilder supplied the documents to Mr. Richard Launey, Assistant U.S. Attorney. Although Tiger does not deny that the documents could be provided to EPA's Criminal Investigation Unit or "other governmental personnel"<sup>2</sup>, Tiger contends that the documents cannot be subsequently disclosed to EPA civil personnel in the Superfund Division of Region 6. Based on the representations of EPA set forth above, it appears that documents were disclosed by someone subject to Rule 6(e). However, the disclosure was not made directly to the EPA Region 6 Superfund Division. It also appears that EPA obtained the documents in good faith. However, this does not change the fact that the documents were disclosed by some unnamed person subject to Rule 6(e). Thus, Tiger has satisfied the second element of the test.

**E. MATTERS OCCURRING BEFORE THE GRAND JURY**

"The determination of whether a particular matter is related to a matter occurring before a grand jury is one that depends entirely upon a fact-specific inquiry and the . . . court's judgment." *In Re Grand Jury Subpoena*, 103 F.3d at 239. Furthermore,

not every document presented in response to a grand jury subpoena becomes a matter occurring before the grand jury. Rule 6(e) does not prevent disclosure of all documents subpoenaed by a grand jury. *See In Re Grand Jury Investigation*, 630 F.2d 996, 1000 (3<sup>rd</sup> Cir. 1980), *cert denied*, 449 U.S. 1081 (1981). Even the mere fact that a document is reviewed by a grand jury does not convert it

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<sup>2</sup>As defined by Rule 6(e)(3)(A)(ii).



into a matter occurring before the grand jury as contemplated by Rule 6(e). *Id.*

A matter occurring before the grand jury includes the essence of what takes place in the jury room, in order to preserve the freedom and integrity of the deliberative process. *United States v. Smith*, 787 F.2d 111, 115 (3<sup>rd</sup> Cir. 1986) (quoting *Grand Jury Investigation*, 630 F.2d at 1000).

*United States v. J. David Smith*, 992 F.Supp. at 753.

A review of Exhibits 32 - 35 reveal that the bills of lading in question were created prior to issuance of the grand jury subpoena. A bill of lading is a "document evidencing receipt of goods for shipment issued by person engaged in business of transporting or forwarding goods." Black's Law Dictionary at 169 (6<sup>th</sup> Ed. 1990). Thus, these bills of lading were created independent of the grand jury process, and have legitimate uses unrelated to the grand jury proceedings. Therefore, the documents do not disclose the workings of the grand jury. See *In Re Grand Jury Investigation*, 630 F.2d 996, 1000 (3<sup>rd</sup> Cir. 1980), *cert denied* 449 U.S. 1081 (1981). The bills of lading also identify certain chemicals. Exhibits 32 - 35 are identified in EPA's Prehearing Exchanges as "[Year] Barges Cleaned at Tiger Shipyard and related information." Thus, it appears that these documents were sought for their own sake (e.g., to determine what chemicals Tiger handled at the facility), as opposed to learning about what took place before the grand jury. See *In Re Grand Jury Investigation*, 630 F.2d at 1001. In addition, this information could

have been obtained from Cooper Gilder by EPA through an information request letter issued pursuant to Section 104(e) of CERCLA, 42 U.S.C. § 9604(e) or Section 3007 of RCRA, 42 U.S.C. § 6927. Therefore, the material contained in EPA Exhibits 32 - 35 are not "matters occurring before the grand jury." See *United States v. Dynavac, Inc.*, 6 F.3d 1407, 1412 (9<sup>th</sup> Cir. 1993) (business records previously submitted to grand jury but created for purposes independent of grand jury proceeding were not matters occurring before the grand jury).

Furthermore, failing to exclude the documents from his hearing will not compromise the integrity of the grand jury process. The term of the federal grand jury has expired, with no indictment being returned against Tiger. Therefore, "most of the reasons for grand jury secrecy are no longer applicable and the others are less compelling." *In Re Grand Jury*, 583 F.2d 128, 130 (5<sup>th</sup> Cir. 1978).

### **III. CONCLUSION**

It is the decision of the Presiding Officer that the material contained in EPA Exhibit Nos. 32 - 35 are not "matters occurring before the grand jury." Therefore, it is hereby **ORDERED** that Tiger's Motion in Limine is denied. This ruling is limited to whether the material should be excluded from the hearing. It is not ruling on the ultimate admissibility of the exhibits.

Dated this 19<sup>th</sup> day of April, 1999.

/S/

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Evan L. Pearson  
Regional Judicial Officer

**CERTIFICATE OF SERVICE**

I hereby certify that on the 19<sup>th</sup> day of April, 1999, I served true and correct copies of the foregoing Order Denying Tiger's Motion in Limine on the following in the manner indicated below:

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED** \_\_\_\_\_

Clerk of the Environmental Appeals Board (1103B)  
U.S. Environmental Protection Agency  
401 M Street, S.W.  
Washington, D.C. 20460

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED** \_\_\_\_\_  
**AND VIA FAX (504) 582-8583**

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Evan L. Pearson  
Regional Judicial Officer