



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
BLACKINTON COMMON, LLC and) DOCKET NO. RCRA-01-2007-0164
CG2, INC.,)
)
RESPONDENTS)

ORDERS ON COMPLAINANT'S MOTIONS FOR SUBPOENAS
AND MOTION IN LIMINE

This proceeding 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 ("RCRA"), 42 U.S.C. § 6928(a)).¹ The hearing in this matter is scheduled to begin on November 17, 2008 in Boston, Massachusetts. A joint set of stipulated facts, exhibits, and testimony was filed November 3, 2008.

Both parties filed motions for leave to supplement their prehearing exchanges on October 31, 2008. These motions to supplement are **GRANTED**.²

Complainant filed a Motion for Issuance of Subpoenas for Attendance of Witnesses on November 3, 2008, and another Motion for Issuance of a Subpoena for Attendance of a Witness ("Motions

¹This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-32.

² This Order memorializes my oral granting of the parties' motions to supplement during a telephonic conference on November 6, 2008.

for Subpoenas") on November 5, 2008.³ Specifically, Complainant named William A. Howard, Ellen J. Bellio, Charles H. Lander, and Ronald O'Reilly as the witnesses for whom Complainant was seeking subpoenas.⁴ In support of its Motions for Subpoenas, Complainant states that the four identified witnesses have specific knowledge concerning Respondents' liability for Counts 1 and 2 of the Complaint and that such testimony is material to the issues presented. Complainant maintains that it cannot compel the attendance of these witnesses because they are not employees of the Environmental Protection Agency ("EPA") and that the issuance of subpoenas will ensure their attendance at the time and place of hearing. Complainant argues that, therefore, it has meet the criteria for the issuance of subpoenas set forth at Section 22.21(b) of the Rules of Practice, 40 C.F.R. § 22.21(b).

Respondents oppose Complainant's Motions for Subpoenas.⁵ Respondents argue that Complainant has failed to show the grounds and necessity for the requested subpoenas, as well as the materiality and relevancy of the evidence to be adduced, as required by Section 22.21(b) of the Rules of Practice. Respondents argue that Complainant does not claim that any of the witnesses have personal knowledge regarding Respondents' failure to adequately make hazardous waste determinations and ship material off-site as alleged in Counts I and II of the Complaint.

Respondents assert that while Complainant has described the proposed testimony of its witnesses, Complainant has not shown

³The issuance of subpoenas for the attendance and testimony of witnesses at civil administrative penalty hearings is authorized under Section 3008(b) of RCRA, 42 U.S.C. § 6928(b).

⁴William A. Howard was identified as a witness in Complainant's rebuttal prehearing exchange, Ellen J. Bellio and Ronald O'Reilly were listed as witnesses in Complainant's supplemental prehearing exchange, and Charles H. Lander was listed as a witness in Respondents' prehearing exchange and Complainant's prehearing exchange.

⁵ Although the Rules of Practice, at Section 22.16(b), 40 C.F.R. § 22.16(b), provide that a party's response to any written motion must be filed within 15 days after service of such motion, the Rule further provides that the Administrative Law Judge may set a shorter time for response. During the telephonic conference on November 6, 2008, Respondents' counsel was advised that their response to Complainant's Motions for Subpoenas and Motion in *Limine* was due by November 12, 2008.

grounds and necessity therefor, nor explained the materiality and relevance of the testimony. Specifically, Respondents argue that William A. Howard's proposed testimony concerns Waste Management's general review practices and that Complainant has failed to explain how this testimony is material or relevant to the violations alleged in the Complaint. Respondents assert that Complainant has failed to explain the relevancy or materiality of Ellen J. Bellio's proposed testimony regarding her technical review of Respondents' submission to Waste Management seeking approval to dispose of contaminated material. Respondents contend that Charles Lander's proposed testimony regarding the historical operations of the V.H. Blackinton facility has nothing to do with Respondents' liability. Respondents assert that Ronald O'Reilly's proposed testimony regarding contacts he received from Respondents has no relation to the claims of liability in the Complaint.

Respondents also argue that Complainant has not made a sufficient showing that the subpoenas are necessary to ensure the witnesses' attendance and that the witnesses will be unable to attend the hearing without a subpoena. Finally, Respondents assert that Complainant's motion should fail because Complainant does not contend that any of the listed witnesses are "key witnesses" or essential to Complainant's case. For these reasons, Respondents request that Complainant's Motion for Issuance of Subpoenas be denied.

Section 22.21(b) of the Rules of Practice allows the Administrative Law Judge to issue subpoenas under certain circumstances to require the attendance of witnesses or the production of documents at a hearing. Pursuant to Section 22.21(b), "[t]he Presiding Officer may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act, upon a showing of the grounds and necessity therefor, and the materiality and relevancy of the evidence to be adduced."

First, Complainant has made no showing of the grounds and necessity for the requested subpoenas. For example, Complainant has not demonstrated that the witnesses are unable or unwilling to appear as witnesses for the EPA at the hearing unless issued an administrative subpoena. Simply stating that the witnesses are not employees of the EPA does not demonstrate necessity.

Moreover, the narratives of the proposed testimony set forth in the Motions for Subpoenas do not sufficiently demonstrate the materiality and relevancy of the evidence to be adduced from William Howard, Charles Lander, and Ronald O'Reilly. Although

the materiality and relevancy of their proposed testimony possibly could be bolstered by reference to Complainant's prehearing exchange, there is little demonstration of such in the motions. See in the Matter of Julie's Limousine & Coachworks, Inc., Docket No. CAA-04-2002-1508, 2003 EPA ALJ LEXIS 28 at *3 (ALJ, April 23, 2003). Complainant's argument that Ellen Bellio's testimony would be relevant and material is persuasive, but Complainant still fails to demonstrate the necessity of a subpoena for Ms. Bellio.

Finally, I observe that Respondents have made a very compelling argument against the issuance of administrative subpoenas at this time.

As a condition precedent to granting a request for the issuance of subpoenas, Section 22.21(b) requires a showing of the grounds and necessity therefor along with the materiality and relevancy of the evidence to be adduced. See *In the Matter of Crown Central Petroleum Corp.*, Docket No. CWA-8-2000-06, 2001 EPA ALJ LEXIS 133 at *3-4 (ALJ, April 26, 2001); See in the Matter of Julie's Limousine & Coachworks, Inc., Docket No. CAA-04-2002-1508, 2003 EPA ALJ LEXIS 28 at *3 (ALJ, April 23, 2003). As discussed above, Complainant's Motions for Subpoenas fail to adequately comply with the requirements of this procedural rule. Therefore, at this time, Complainant's Motions for Subpoenas are **DENIED**.

Additionally, Complainant filed a Motion in *Limine* on November 3, 2008, requesting that Respondents be precluded from presenting any evidence at the hearing pertaining to financial inability to pay the proposed penalty. Complainant notes that Respondents, in their Answer and prehearing exchange, did not raise the issue of inability to pay.

During the telephonic conference with the parties on November 6, 2008, Respondents' counsel stated that Respondents did not intend to raise the issue of inability to pay and, therefore, the Motion in *Limine* was opposed as being unnecessary. Respondents have filed an Opposition to Complainant's Motion in *Limine*, claiming that the motion is superfluous and contrary to the provisions of the Rules of Practice. Respondents argue that while they have not raised an inability to pay defense, the Rules of Practice contemplate that upon showing "good cause for failing to exchange the required information and provided the required information to all parties as soon as it had control of the information, or had good cause for not doing so," the Administrative Law Judge may consider admitting documents, exhibits, or testimony into evidence under Section 22.22(a) (1) of

the Rules of Practice, 40 C.F.R. § 22.22(a)(1). Although I agree with Respondents that the Motion in *Limine* is somewhat superfluous, I nonetheless **GRANT** Complainant's Motion in *Limine* as a clarifying ruling. This does not mean, however, that Respondents are precluded from proffering evidence concerning ability to pay if they were to meet the requirements of Section 22.22(a)(1) of the Rules of Practice.

Dated: November 13, 2008
Washington, D.C.

Barbara A. Gunning
Administrative Law Judge