

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
ARSENAL ASSOCIATES,) Docket No. TSCA-III-725
)
 Respondent)
)

ORDER DENYING SUBPOENA DUCES TECUM

On October 6, 1997 Respondent, Arsenal Associates ("Arsenal"), through Counsel, filed with the Presiding Judge an Application for Issuance of Subpoenas Duces Tecum.⁽¹⁾ Complainant, EPA, filed a motion in opposition to the issuance of subpoenas with the Regional Hearing Clerk and the Presiding Judge on October 14, 1997. For the reasons set forth herein the application for Subpoenas Duces Tecum is denied.

Arsenal's application for issuance of subpoenas duces tecum seeks an array of documents from various public and private entities⁽²⁾. The entire supporting basis for its application is as follows:

As grounds for this Request, Counsel respectfully submits that the documents set forth in the proposed Subpoenas are relevant to allegations contained in the Complaint filed against Arsenal Associates by the USEPA.

Arsenal Application at 2. In its Motion To Deny Application For Issuance Of Subpoenas Duces Tecum, and Memorandum in Support thereof, EPA asserts that the Respondent's application should be denied because it fails to meet the criteria set forth in 40 C.F.R. §22.33(b).

The Consolidated Rules of Practice set forth at 40 C.F.R. Part 22, Subpart H--Supplemental Rules, ("Rules"), address the

issuance of subpoenas. In this proceeding under the Toxic Substances Control Act, Section 22.33(b) is applicable. While the production of documents may be required by the presiding judge's grant of a request for a subpoena, the rule provides criteria for its issuance.

(b) *Subpoenas*. (1) The attendance of witnesses or the production of documentary evidence may be required by subpoena. The Presiding Officer may grant a request for a subpoena upon a showing of (I) the grounds and necessity therefor, and (ii) the materiality and relevancy of the evidence to be adduced. Requests for the production of documents shall describe the evidence sought as specifically as practicable.

40 CFR Section 22.33(b) (1). Thus a showing of the **grounds and necessity therefor and the materiality and relevancy of the evidence to be adduced** is required. The evidence sought must also be described as specifically as practicable.

A prolonged discussion of this matter is unnecessary. On its face Arsenal's application must be rejected as it has failed to comply with the requirements of the procedural rule. The mere assertion that the documents sought "are relevant to allegations contained in the Complaint" provides no basis whatsoever to grant the subpoenas. As set forth above, the procedural rule describes five elements which must be demonstrated for the grant of a subpoena. Arsenal has

only described, with some specificity, the evidence it seeks, but has not tied it to the grounds and necessity, nor has it articulated the materiality and relevance.

Further, the Rules contemplate a prehearing exchange as the initial step in the disclosure of documents. 40 C.F.R. § 22.19(b). It may develop that some or all of the information Respondent needs will be disclosed with the prehearing exchange. Thus, it would also appear premature to seek the subpoenaed documents. Should Respondent determine subsequent to the prehearing exchange that documents are still needed, it will have a renewed opportunity to comply with the requirements of Rule 22.33(b) and, after the EPA has had the opportunity to respond to Arsenal's subpoena requests, such subpoenas as comport with the Rule will be granted.⁽³⁾ Respondent would thereafter be afforded a reasonable time to review any such subpoenaed documents prior to the hearing.

SO ORDERED.

William B. Moran

Administrative Law Judge

Dated: October 20, 1997

Washington, D.C.

IN THE MATTER OF ARSENAL ASSOCIATES, Respondent

TSCA-III-725

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Subpoena Duces Tecum**, dated October 20, 1997, was sent in the following manner to the addressees listed below:

Original by Pouch Mail to: Lydia A. Guy

Regional Hearing Clerk

EPA, Region 3

841 Chestnut Building

Philadelphia, PA 19107

Copy by Regular Mail to:

Counsel for Complainant: Charles McPhedran, Esquire

Assistant Regional Counsel

EPA, Region 3

841 Chestnut Building

Philadelphia, PA 19103

Counsel for Respondent: Alan S. Fellheimer, Esquire

Fellheimer, Eichen, Braverman

and Kaskey

One Liberty Place, 21st Floor

Philadelphia, PA 19103-7334

Aurora Jennings

Legal Assistant

Office of Administrative Law

Judges

Environmental Protection Agency

Dated: October 20, 1997

Washington, DC 20460

1. Arsenal Associates' Application for Issuance of Subpoenas Duces Tecum was filed with the Presiding Judge. The Consolidated Rules of Practice, set forth at 40 CFR Part 22, require that all documents served in the proceeding shall be filed with the Regional Hearing Clerk with copies to all parties and the presiding judge. 40 CFR § 22.05. The original application will be forwarded to the Regional Hearing Clerk with this Order. The subpoena forms will be retained by the Presiding Judge for potential subsequent use in this case.

2. Arsenal's subpoenas are directed toward the following: U.S. EPA; Pennsylvania Department of Environmental Resources; Energy Systems Group, Atomics International Division of Rockwell International; City of Philadelphia Fire Department; U.S. Department of Defense; U.S. Army Corp of Engineers; Dames & Moore; U.S. Department of the Army; and the Philadelphia Authority for Industrial Development. (EPA correctly notes that Arsenal's application repeats the numbers 5 and 6 and that the total number of subpoenas sought is nine.)

3. Any such subpoenas which may be approved would still be subject to any defenses to disclosure that the subpoenaed source may put forth.