

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the matter of)
)
Environmental Protection Services, Inc.,) **Docket No. TSCA-03-2001-0331**
)
Respondent)

**ORDER ON RESPONDENT'S
MOTION TO REOPEN THE HEARING**

Environmental Protection Services, Inc. ("EPS"), moves to reopen the record in this matter for the post-hearing submission of five exhibits into evidence. 40 C.F.R. 22.22(a)(1) & 22.28(a). This motion is dated March 16, 2004. The United States Environmental Protection Agency ("EPA") opposes respondent's motion to reopen. For the reasons set forth below, EPS's motion to reopen is *granted* as to Exhibit A and *denied* as to Exhibits B, C, D, and E.¹ Accordingly, Exhibit A is admitted into evidence, and Exhibits B, C, D, and E are rejected.

1. Exhibit A

Exhibit A is a PCB Inspection Report of G&S Motor Equipment Co., Inc. ("G&S"), prepared by EPA Inspector Ann Finnegan. The report, which bears the date October 15, 2003, recounts EPA's inspection of the G&S facility on October 3, 2002. This report was prepared approximately one month after the conclusion of the hearing in this case. EPS submits that this exhibit shows that "EPA provided favorable treatment to G&S Motor Equipment Company." Mot. at 2.

Inspector Finnegan was a witness in this matter. She testified, in part, about her inspections of G&S. Given the substance of her testimony, and given the "selective prosecution" defense advanced by respondent, the admission into evidence of Finnegan's inspection report, identified as Exhibit A, is necessary for a complete record.

2. Exhibit B

Exhibit B consists of four Uniform Hazardous Waste Manifests. Each manifest lists the generator as "Boston Edison (d/b/a Nstar)" and the designated facility as "G&S Motor Equipment, Inc." Also, the "US DOT Description" provided on these manifests states that the transformers are "Full non pcb oil."

¹ Complainant's Surreply and respondent's Surreponse have been accepted for filing.

In seeking the admission of these documents EPS submits that these hazardous waste manifests will show that EPA witness Dan Kraft's testimony was "inaccurate" and that EPA acted in "bad faith." Mot. at 4. Respondent further submits that Exhibit B "is contrary to the assertion made by Ann Finnegan that G&S is the generator of waste, and hence exempt from compliance with 40 C.F.R. § 761.97(1)." Reply at 2.

A major problem with respondent's seeking the post-hearing admission of Exhibit B is its failure to identify just when and where it obtained these documents. For instance, in moving that the record be reopened, EPS states, "[t]he majority of the documents attached hereto were subsequent to the close of the subject Hearing by way of Freedom of Information Act ("FOIA") requests to the Environmental Protection Agency." Mot. at 1. Accordingly, respondent concedes that some, but not all, of the documents it seeks to introduce into the record were the result of EPA's compliance with a post-hearing FOIA request. Moreover, in discussing Exhibits A, C, and D in its motion, EPS states that each of these exhibits were the product of such a FOIA request. Mot. at 2. No such claim, however, was made with respect to Exhibit B, a document which bears the facsimile heading of "APR 15 2002" and "FR HOLDREN ASSOC." Mot. at 4.

It does not appear, therefore, that Exhibit B is a FOIA document given by EPA to EPS *after* the conclusion of the hearing in this matter. Respondent, therefore has failed to show that its post-hearing request for the admission of this exhibit is timely. 40 C.F.R. 22.28(a); *F.C. Haab Co., Inc.*, 1997 EPA ALJ LEXIS 101, at *2-3 (Nov. 24, 1997) (Bullock, ALJ).

3. Exhibit C

Exhibit C is an EPA, Region II, PCB inspection report, dated February 27, 1989, concerning J. Supor and Son Company, Inc. EPS states that "this document demonstrates the EPA found 13 flat bed trailer loads of transformers in the Supor truck yard that had been received by Supor from G&S." Mot. at 5. EPS further states that EPA took no enforcement action against G&S, despite the fact that its inspectors observed oil leaking from one of the transformers, alleged to have been drained, and that the oil was "4 ppm." *Id.*

EPA challenges respondent's motion, arguing that this 1989 document is too far removed from the events of the present case to have any relevance. EPA also argues that EPS's representation that a PCB spill violation occurred here reflects an incorrect reading of the applicable standards. Resp. at 12-13.

Complainant's challenge to the relevance of this 1989 document is well-taken. In that regard, respondent fails to show how this inspection report has any bearing upon the facts of this case, particularly upon its argument of selective prosecution. Moreover, respondent offers no regulatory citation, or associated argument, to support its rather general contention that a violation occurred at J. Supor and Son Company, Inc., and that EPA just looked the other way.

4. Exhibit D

This exhibit consists of numerous FOIA requests made by EPS to EPA, along with EPA responses. In EPS's view, these documents uncover the manner in which G&S obtained a copy of the transcript of the present proceeding. Mot. at 6. According to respondent, "[t]he fact that G&S obtained access to the Hearing transcripts while copies were withheld from EPS is another example of EPA's preferential treatment of G&S, to EPS's disadvantage." *Id.*

To be sure, there were some problems associated with the production of the transcript in this case. First, there appears to have been a contract dispute between the court reporter and respondent. Second, there was a dispute between the respondent and the EPA Regional Hearing Clerk over a requested advance payment by EPA for the transcript. (*See* January 5, 2004, status report of EPA counsel John Ruggero). These problems, however, eventually were resolved and, in this tribunal's view, they were fairly resolved. The fact that G&S obtained a copy of the transcript of this proceeding pursuant to a FOIA request, at least as so far shown by EPS, has no bearing on this case.

5. Exhibit E

EPA seeks the admission into evidence of Exhibit E, two EPA press releases. One press release is dated December 12, 2002, and it is titled, "EPA Fines Company That Played Role in Improper PCB Disposal at Model City Landfill." The other press release is dated, June 19, 2002, and it is titled, "EPA Reaches Settlement With CWM For Violations Of PCB Rules At Facility In Model City." EPS states that these press releases can be found on EPA's web site. Mot. at 7.

The first day of the hearing in this case was June 17, 2003, and the final day was September 11, 2003. Respondent offers no explanation as to its delay in seeking the admission of these publicly available press releases which existed before this hearing even began. Accordingly, EPS's request for the admission of Exhibit E is untimely.

Carl C. Charneski
Administrative Law Judge

Issued: June 7, 2003
Washington, D.C.