UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
STRONG STEEL PRODUCTS, LLC,	**)**	**Docket No. CAA-5-2003-0009**
	)	
Respondent.	**)**	

ORDER ON RESPONDENT'S MOTIONS FOR ADMINISTRATIVE SUBPOENAS TO COMPEL TESTIMONY

I. Background

The Complaint in this matter, as amended, charges Respondent with violating the Clean Air Act (CAA). Respondent moved to dismiss the Complaint for lack of subject matter jurisdiction, due to an alleged failure of Complainant, EPA Region 5, to obtain a valid waiver of the jurisdictional limitation in Section 113(d) of the CAA. Complainant opposed the motion to dismiss and filed a Cross Motion for Partial Accelerated Decision requesting judgment that it had subject matter jurisdiction under a valid waiver determination under CAA § 113(d). The Motion to Dismiss was denied and Complainant's cross motion was granted by Order dated November 22, 2004 (Order), holding that Complainant had shown that it had a valid waiver under CAA § 113(d). Respondent filed a Motion for Reconsideration of the Order on the issue of whether the Regional Counsel was required by EPA Region 5 Delegation 7-6-A to review and concur in the waiver. The Motion for Reconsideration was denied by Order dated February 15, 2005.

On January 27, 2005, Respondent filed a "Motion for Administrative Subpoenas to Compel Testimony by Cheryl newton, George Czerniak, T. Leverett Nelson, and Linda Rosen; Or, Alternatively, for their Depositions." On the same, date, Respondent filed a "Motion for Administrative Subpoenas to Compel Testimony by Non-Party Witnesses." Complainant filed a Response to both of these Motions on February 11, 2005.

II. Motion for Administrative Subpoenas to Compel Testimony by EPA Region 5 Personnel

A. Arguments of the parties

In its Motion requesting the issuance of administrative subpoenas to compel the testimony at hearing of Cheryl Newton, George Czerniak, T. Leverett Nelson, and Linda Rosen

("Motion"), Respondent states that these individuals are all employees of EPA Region 5 and that compelling their attendance is beyond the control of Strong Steel. Respondent asserts that it intends to calls these individuals to testify so as to have an "opportunity to prove that no valid §113(d) waiver was granted for this case." Motion at 1. As a alternative to subpoenas, Respondent requests an opportunity to depose these witnesses at an appropriate time and place.

Respondent acknowledges that this Tribunal has already decided the issue of whether a valid CAA § 113(d) waiver was granted in this case, but states that allowing these individuals to testify "would be consistent with the Court's continuing obligation to ensure that it has subject matter jurisdiction and may avoid a potential remand." Motion at 1; Memorandum in Support of Motion for Administrative Subpoenas (Memo) at 2, 3. Respondent states that it has not yet had an opportunity to question these individuals and that they are key witnesses on this issue. Respondent claims that "[i]t is never too late for a party to challenge subject matter jurisdiction or too late for a court to listen to relevant evidence on that issue."

In support of its request to subpoena Ms. Newton, the Director of Region 5's Air and Radiation Division (ARD), Respondent notes that the Order considered her signature on the Complaint as evidence that she made a waiver determination in this case. However, Respondent alleges that Complainant has "refused" to name Ms. Newton as a witness and "declined" to have her sign a written statement to support the Complainant's position that she granted the waiver. Respondent argues that this Tribunal, in ruling on the § 113(d) waiver, erroneously failed to draw "an adverse inference against Region 5 pursuant to 40 C.F.R. § 22.19(g)(1) because Region 5 failed to produce evidence uniquely within its control." Memo at 4. Besides being the "absolutely key witness" on the CAA § 113(d) waiver issue, Respondent also asserts that Ms. Newton is "the Complainant in this case" and as such Strong Steel has a right to confront and examine her as a witness. Memo at 6.

As to George Czerniak, Respondent notes that as ARD Branch Chief, he signed the memorandum requesting the § 113(d) waiver. Respondent suggests that "Mr. Czerniak's honest testimony will refute Ms. Rosen's declaration" regarding the Agency's "routine practices" which Complainant submitted in support of its claim that a valid waiver was granted. Memo at 8.

Respondent notes that in the Order, this Tribunal relied in part on the declarations of Ms. Rosen and Mr. Nelson which were submitted with Complainant's Cross Motion for Accelerated Decision on the jurisdiction issue. It asserts that Complainant had not listed either of those persons as potential witnesses beforehand "so Respondent had no way of knowing that they had any relevant testimony to give in this case. Because Respondent's Reply was due only 10 days later, it had no opportunity whatsoever to confront Mr. Nelson or Ms. Rosen and test the reliability of their statements." Memo 8-9. Further, Respondent argues that this Tribunal should not have relied upon those declarations to grant Complainant's Motion for Partial Accelerated Decision on the subject matter jurisdiction issue but should have instead denied both competing motions "without prejudice, allowed Region 5 to call Ms. Rosen and Mr. Nelson as witnesses at the hearing, and allowed Strong Steel a fair opportunity to cross-examine them." Memo at 9. Further, Respondent argues that Rule 22.22(c) and (d) do not allow such declarations to be

accepted as evidence unless the witness is unavailable within the meaning of Federal Rule of Evidence 804(a) or is available for cross examination and so if Respondent does not have an opportunity to cross-examine these witnesses" their Declarations cannot be accepted as evidence and cannot properly serve as support for the Court's Order granting Region 5's Cross-Motion for Accelerated Decision-Jurisdiction." Memo at 9-10.

Complainant opposes the issuance of subpoenas because issuance of subpoenas would be unduly burdensome and will delay the proceeding. Complainant opposes the request for depositions because Respondent has not met the criteria for "other discovery" in 40 C.F.R. § 22.19(e). Complainant argues that Respondent has until now consistently considered the testimony of Mr. Nelson, Ms. Rosen and Mr. Czerniak as irrelevant to the waiver determination. That the decision as to the waiver cannot be reviewed at this point in proceeding, Complainant asserts. Complainant specifically requests that the hearing not be continued, and points to two proposed witnesses who may not be able to testify if the hearing is postponed. Response, n. 5 and Attachments 1, 2.

B. Discussion

The issue of whether a valid CAA § 113(d) waiver was obtained by the Complainant prior to filing this action was ruled upon over two months ago. Specifically, by lengthy Order dated November 22, 2004, this Tribunal ruled that Complainant had shown by a preponderance of the evidence that the Region 5 ARD Director, Cheryl Newton, who had delegated authority from the Administrator to make waiver determinations under CAA § 113(d), in fact made such a waiver determination for the Complaint, to establish jurisdiction in this matter. This ruling was entered after substantial briefing by both parties as well as the submission of additional evidence by the parties in support of their positions, including the declarations of various persons.[1]

Prior to this Tribunal entering that Order on the Motions, Respondent never requested an opportunity to conduct discovery or take depositions in regard to the issue. *See*, Order at 20. Moreover, since that Order was entered, Respondent has not requested an opportunity for interlocutory appeal, and its Motion for Reconsideration did not request reconsideration of whether the ARD Director had made a valid waiver determination, but only requested reconsideration of whether the Regional Counsel was required to review and concur in the waiver.

It appears from its Motion, that Respondent regrets its inaction and now wishes to have the matter of the ARD Director's waiver determination reconsidered and an opportunity for discovery granted. Unfortunately for Respondent, it is too late at this point. This matter is set

[1] In addition to the original Motion to Dismiss and Response/Cross-Motion for Accelerated Decision filed the respective parties, Respondent also submitted a Reply to EPA's Response on September 3, 2004, and Complainant submitted a Sur-Reply on September 20, 2004.

for hearing to begin in a few days, on March 1, 2005. This Tribunal's decision on the issue of subject-matter jurisdiction is law of this case and may not be relitigated in subsequent stages of this proceeding, except to prevent plain error.[2] *See, J.V. Peters & Co.*, 7 E.A.D. 77, 93 (EAB 1997), *aff'd sub nom. Shillman v. United States*, 1:97-CV-1355 (N.D. Ohio Jan. 14, 1999), *aff'd in part*, 221 F.3d 1336 (6th Cir. 2000), *cert. denied sub nom. J.V. Peters & Co. v. United States*, 69 U.S.L.W. 3269 (Jan. 8, 2001) (citing JAMES W. MOORE, MOORE'S FEDERAL PRACTICE pp. 404[1] & 404[10](2d ed. 1991)) (a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation.); *Schoolcraft Constr., Inc.*, 8 E.A.D. 476, 482 (EAB 1999), *Lyon County Landfill*, 2002 EPA App. LEXIS 4, *27 , 2002 EPA App. LEXIS 4 (EAB 2002), *Rogers Corporation*, 2000 EPA App. LEXIS 28, * , 2000 EPA App. LEXIS 28 (EAB 2000), *Bethenergy*, 1992 EPA App. LEXIS 74, *7; 3 E.A.D. 802 (EAB 1992) (while the doctrine of the law of the case is a heavy deterrent to vacillation on arguable issues, it is not designed to prevent the correction of plain error), *citing* 1B Moore's Federal Practice § 0.404[1] (2nd Ed. 1991).

The issues raised by Respondent in the Motion do not rise to the level of "plain error." Contrary to Respondent's assertion, this Tribunal was not obliged to draw "an adverse inference against Region 5 pursuant to 40 C.F.R. 22.19(g)(1) because Region 5 failed to produce evidence uniquely within its control," specifically, a declaration of Ms. Newton as to her making a waiver determination. Memo at 4. As indicated in the Order, the Rules provide that an adverse inference may be drawn against a party for its failure to provide information within its control as required pursuant to "this section," *i.e.*, information required by the prehearing exchange or requested in a motion for discovery. 40 C.F.R. §§ 22.19(g)(1). Respondent failed in its Reply to the Motion for Accelerated Decision to point to any specific request for Ms. Newton's testimony or admission on the issue in the prehearing exchange or discovery. Thus, it was not appropriate for this Tribunal to draw an adverse inference from a lack of testimony by Ms. Newton.

Moreover, it was not "plain error" for this Tribunal to have relied upon the Declarations to rule upon the jurisdiction issue based on the evidence presented, and grant Complainant's Cross-Motion for Accelerated Decision. As stated in the prior Order, Respondent's Motion to Dismiss is analogous to a motion to dismiss for lack of jurisdiction over the subject matter under FRCP 12(b)(1). When such a motion is filed, the court has a duty to weigh the evidence and resolve any factual disputes. *Scarfo v. Ginsburg*, 175 F.3d 957, 961 (11th Cir. 1999); *Robinson v. Government of Malay*, 269 F.3d 133, 141 (2nd Cir. 2001)("A district court 'may' consult evidence to decide a 12(b)(1) motion . . . [i]t 'must' do so if resolution of a proffered factual issue may result in the dismissal of the complaint for want of jurisdiction"). The plaintiff has the burden to support allegations of jurisdictional facts by competent proof. *Grafon Corp. v. Hauserman*, 602 F.2d 781, 783 and n. 4 (7th Cir. 1979); *Sapperstein v. Hager*, 188 F.3d 852, 856 (7th Cir. 1999). In ruling on a FRCP 12(b)(1) motion, the court considers affidavits, declarations

[2] Plain error is defined as an error "so obvious and substantial that failure to correct it would infringe a party's due process rights and damage the integrity of the judicial process." Black's Law Dictionary 563 (7th ed. 1999).

or any other evidence the parties have presented. *United States v. LDL Biotechnologies*, 379 F.3d 672 n. 13 (9th Cir. 2004); *Kamen v. AT&T,* 791 F.2d 1006, 1011 (2nd Cir. 1986); *Bowyer v. U.S. Dep't of Air Force*, 875 F.2d 632, 635-6 (7th Cir. 1989); *Southway v. Central Bank of Nigeria*, 328 F.3d 1267, 1274 (10th Cir. 2003)(plaintiff must present affidavits or other evidence sufficient to establish the court's subject matter jurisdiction by a preponderance of the evidence).

In this case, Complainant properly submitted Declarations and other documents in support of its claim that subject matter jurisdiction existed based upon the issuance of a valid CAA 113(d) waiver. There is no requirement that declarations submitted in support or opposition of accelerated decision be independently admissible as evidence at hearing based upon the declarant's known future unavailability or that the party proffering the affidavit commit to producing the witness at hearing. On motions for dismissal for lack of jurisdiction under FRCP 12(b)(1), summary judgment under FRCP 56(c) "is relevant to the jurisdictional challenge in that the body of decisions under FRCP 56 offers guidelines in considering evidence submitted outside the pleadings." *Kamen, supra.* Affidavits in support of a motion for summary judgment can be used to cut through well pleaded denials of fact. *Ruddy v. U. S. Fidelity & Guaranty Co.*, 40 F.R.D. 484 (M.D. Pa. 1966). Therefore the scope of supporting documents which may be relied upon in regard to accelerated decision is much broader. At the summary judgment stage, the court requires evidence -- not absolute proof, but not mere allegations either. *Reese v. Anderson*, 1991 U.S. App. LEXIS 4431 (5th Cir., 1991). *See, Wright & Miller, Federal Practice & Procedure* § 2722 (noting that affidavits supporting summary judgment are, by their nature, ex parte and not subject to cross-examination). The Rule to which Respondent refers, Rule 22.22 (40 C.F.R. § 22.22), is applicable only to evidence to be admitted into the record at hearing. Therefore, it was not "plain error" for this Tribunal to consider Complainant's Declarations in ruling on the motions to dismiss and for accelerated decision.

After a movant for summary judgment has presented its arguments and supporting documents, the opposing party must designate specific facts showing that there is a genuine issue for trial by presenting affidavits, depositions, answers to interrogatories, admissions on file, or other evidence. The motion for summary judgment places the nonmovant on notice that all arguments and evidence opposing the motion must be properly presented and supported. *Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 796 F. Supp. 1164 (S.D. Ind. 1992). Summary disposition may not be avoided merely by alleging that a factual dispute may exist, or that future proceedings may turn something up. *Green Thumb Nursery, Inc.*, 6 E.A.D. 782 n. 23, 1997 EPA App. LEXIS 4 (EAB 1997).

Thus, once the Complainant has presented competent proof of jurisdictional facts, the Respondent must come forward with all arguments and evidence in support of dismissal. However, the parties do not enjoy wide latitude on discovery on the issue of jurisdiction, and they are not entitled to an oral evidentiary hearing on the issue. As the First Circuit has stated, "determining whether a case belongs in federal court should be done quickly, without an extensive fact-finding inquiry. 'To make the "which court" decision expeditiously and cheaply,' a judge must simplify the inquiry." *Spielman v. Genzyme Corp.*, 251 F.3d 1, 4-5 (1st Cir. 2001),

quoting *Pratt Central Park Ltd Partnership v. Dames & Moore*, 60 F.3d 350, 352 (7th Cir. 1995). Upon submission of such affidavits, declarations or other evidence, "[t]he facts may give rise to a factual controversy, 'the resolution of which requires the District Court to weigh the conflicting evidence in arriving at the factual predicate upon which to base the legal conclusion that subject matter jurisdiction exists or does not.'" *Bowyer, supra (quoting Grafon Corp. v. Hausermann*, 602 F.2d 781, 783 ((7th Cir. 1979)). Moreover, as the parties are aware, discovery in administrative proceedings generally is more limited than that in Federal court.

If, however, Respondent believed such evidence existed to rebut Complainant's evidence, but did not have immediate access to such evidence, it could have asked for a stay to allow it the opportunity to take the depositions of Complainant's's declarants or conduct other types of discovery. *See* FRCP 56(f);[3] *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289 (8th Cir. 1975), *cert. den.* 424 U.S. 915 (1976)(An affidavit that the party opposing motion for summary judgment cannot, for reasons outside his control, present by affidavit facts essential to justify his opposition has the effect of either postponing entry of summary judgment or precluding it altogether and a party seeking the shelter of this rule must do so in good faith and must conclusively justify inability to respond adequately or not at all to the movant's affidavits.); *Kamen, supra* (in resolving claims that they lack jurisdiction under FRCP 12(b)(1), courts have acted in a fashion suggestive of FRCP 56(f) in permitting the party *asserting* jurisdiction to conduct discovery). No effort was made by Respondent to depose the individuals or to obtain a delay in consideration of the motion until such depositions could be taken. *See, State Mut. Life Assur. Co. of America v. Deer Creek Park*, 612 F.2d 259 (6th Cir. 1979); *Southway, supra* (lower court did not abuse discretion by denying additional discovery where there was no proper FRCP 56 affidavit submitted showing with specificity why extra time was needed and how that time and material that was sought would rebut the motion for dismissal). Thus, Respondent cannot now be heard to complain that it had no opportunity to file counter-affidavits or to take depositions.

Similarly, there was no error in granting the Complainant's motion for accelerated decision, deciding the jurisdiction issue without a hearing. Respondent is not entitled to present testimony of the Region 5 personnel at the hearing in regard to the jurisdictional issue, where the Order has set forth the law of the case, where parties are not entitled even in Federal court to an

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[3] It has been said that FRCP 56(f) specifically provides an "escape hatch" for a party who genuinely needs more time to assemble favorable evidence so that he may confront a summary judgment motion. *United States v. One Lot of U.S. Currency*, 1991 U.S. App. LEXIS 3387 (1st Cir. 1991). FRCP 56(f) provides, "Should it appear from the affidavits of a party opposing the [summary judgment] motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." Fed. R. Civ. P. 56(f). While the Rules do not explicitly provide for the same "escape hatch," a party in a similar situation in an administrative proceeding could seek such relief under the Rules.

oral hearing on jurisdictional issues, and furthermore, where their testimony would have no connection to the merits of the case. *Gulf Oil v. Copp Paving Co.*, 419 U.S. 186, 203 n. 19 (1974)("If there is an identity between the jurisdictional issues and certain issues on the merits . . . [then] under *Land v. Dollar*, 330 U.S. 731 (1947), [there is] no objection to reserving the jurisdictional issues until a hearing on the merits."); *United States v. Fargas*, 267 F. Supp. 452, 455 (S.D. NY)("The court, in its discretion, may order that such a motion [under FRCP 12(b)(1)] be deferred for determination at the trial of the general issue [FRCP 12(b)(4)]. The Motion should be so deferred where determination of the validity of the defense would necessarily involve consideration of issues which will determine the merits.")

In that the Respondent seeks testimony from the four Region 5 personnel only in regard to the issue of subject matter jurisdiction, a ruling upon which has already been made in this proceeding and which ruling is "law of the case," the issuance of administrative subpoenas for the witnesses' testimony or the taking of their depositions at this point in the proceeding is unwarranted. In the event a judgment is entered against Respondent in this matter, it may raise such issue, if it deems appropriate, in its appeal. However, it may not do so at the administrative hearing to be held in this proceeding.

Therefore, Respondent's Motion for Administrative Subpoenas to Compel Testimony By Cheryl Newton, George Czerniak, T. Leverett Nelson, and Linda Rosen; or, Alternatively, for Their Depositions is hereby, **DENIED**.

III. Motion for Administrative Subpoenas to Compel Testimony by Non-Party Witnesses

In this Motion to Compel Testimony by Non-Party Witnesses, Respondent requests subpoenas for thirteen individuals who were suppliers of automobiles or appliances to Respondent, and were named in investigation reports of Reginald Arkell, and were named as potential witnesses in its Second Motion to Supplement its Prehearing Exchange. Respondent wishes to subpoena them as witnesses to "explain or clarify statements they allegedly made to Mr. Arkell or in response to Region 5 information requests." Motion at 1.

Specifically, Respondent seeks to subpoena Douglas Billingsley or High Goldsmith, Ronald Logan, Jr., Merle R. Miller or William Wolf, Jovan Paunovic, and John Kapousis, who were referred to in Respondent's original Prehearing Exchange as "other witnesses" who signed or were named in a response to Complainant's information requests. Respondent points out that it listed them with summaries of expected testimony in a letter to Complainant dated July 30, 2005. Respondent's Second Motion to Supplement Prehearing Exchange, proposed Exhibit 45. These individuals are representatives of the eight suppliers of appliances and/or automobiles to Respondent named in the original or First Amended Complaint. Second Amended Complaint ¶ 37.

In addition, Respondent seeks to subpoena Vincent Quinn, Charles Wilson, Mitch Binkowski, John Jepson, and Edward or Dan Kurzawa, who represent suppliers who were named

only in the Second Amended Complaint. Second Amended Complaint ¶ 37.

In Response, Complainant asserts that the individuals would not have adequate time to quash the subpoena or obtain counsel, that the subpoena seeks testimony on information which is already contained in documents submitted by these witnesses (Complainant's Prehearing Exhibits 11, 12, 88; Respondent's Prehearing Exchange Exhibit 9, Attachment 4), and seeks irrelevant information: whether the person believes he took the final step in the disposal process. Complainant cites to FRCP 45(c)(1) which imposes on a party seeking a subpoena the requirement to take reasonable steps to avoid imposing an undue burden or expense on the person subject to the subpoena. Complainant asserts that the request for subpoenas is vague and does not provide the individuals with adequate notice of the scope of their testimony, or their potential liability. Complainant asserts further that these individuals are Respondent's customers, yet Respondent has wasted a year and not conducted any investigation or discovery of these individuals. Complainant requests that the request for subpoenas be denied and that Respondent be sanctioned such that it may not call these witnesses at hearing.

Subpoenas may be granted "upon a showing of the grounds and necessity therefor, and the materiality and relevancy of the evidence to be adduced." 40 C.F.R. § 22.21(b). Respondent has not specified what it expects to have the individuals testify to, except to "explain or clarify statements allegedly made to Mr. Arkell" or in response to information requests. In its Second Motion to Supplement Prehearing Exchange, dated January 27, 2005, Respondent summarized testimony of the individuals as including items they handle for disposal, whether they contain CFCs, whether they signed CAA agreements with Respondent, whether they believe they are the "final disposer," and whether they recover CFCs. See also, Respondent's proposed Exhibit 45. Respondent has not asserted what statements or subjects require clarification or explanation. Respondent has not otherwise discussed the necessity for their testimony. Respondent has not asserted that the witnesses are unable or would refuse to testify unless compelled by subpoena. *See, Norman Mayes,* EPA Docket No. RCRA-UST-04-2002-0001 , 2004 EPA ALJ LEXIS 5 *8 (ALJ, Feb. 27, 2004)(no showing of grounds and necessity for subpoena); *Julie's Lomousine and Coachworks, Inc.,* EPA Docket No. CAA-04-2002-1508, 2003 EPA ALJ LEXIS 2 *3 (ALJ, April 23, 2003)(no showing of grounds and necessity for subpoena although testimony may be material and relevant); *Robert and Susan Wheeler,* EPA Docket No. CWA-05-2001-0019, 2002 EPA ALJ LEIXS 63 *5 (ALJ, Octobr 1, 2002)(subpoena granted where witness was unable to be present at hearing unless subpoena issued). Therefore, Respondent has not met the standard of Rule 22.21(b) for subpoenas.

Accordingly, the Motion for Administrative Subpoenas to Compel Testimony by Non-Party Witnesses is **DENIED.**

As to its request for sanction, Complainant essentially is requesting an order in limine to prohibit the testimony of the thirteen individuals. Complainant, however, has not presented arguments or any other support for such request which could render it a motion under 40 C.F.R. § 22.16(a). Even if it were a proper motion, "[A] motion in limine should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Noble v. Sheahan,* 116

F. Supp. 2d 966, 969 (N.D. Ill. 2000). Motions in limine are generally disfavored. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). If evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial so questions of foundation, relevancy, and prejudice may be resolved in context. *Id.* at 1401. Accordingly, Complainant's request is denied.

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Susan L. Biro
Chief Administrative Law Judge

Dated: February 17, 2005
Washington, D.C.