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 MOTION IN LIMINE
TO EXCLUDE CERTAIN OF COMPLAINANT'S PROPOSED EXHIBITS

By Motion dated January 27, 2005, Respondent moved for an Order excluding from admission into the record at hearing certain of Complainant's proposed exhibits ("C's Exs.") or parts thereof (Motion). Specifically, Respondent seeks to exclude from the record the following:

1) C's Exs. 64 and 65 - Declarations of Joseph Cardile;
2) Paragraph 9 of C's Ex. 107 - Declaration of John Shepler;
3) C's Ex. 109 - photographs taken August 2, 1999 by C. Elliott;
4) C's Exs. 112 and 118 - documents from the City of Detroit.

Complainant filed a Response opposing the Motion on February 11, 2005.

I. Standards for Motions In Limine

Rule 22.22(a) of the Consolidated Rules of Evidence provides in pertinent part that:

> The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . . .

40 C.F.R. § 22.22(a).

"[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. Thus, denial of a motion in limine does not mean that all evidence contemplated by the motion will be admitted at trial. Rather, denial of the

motion in limine means only that without the context of trial the court is unable to determine whether the evidence in question should be excluded. *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989).

The admissibility of exhibits is dependent upon the context in which they are offered. The issues for hearing in this case are whether, from December 1, 1998 to March 1, 2002, Respondent disposed of small appliances, MVACs and/or MVAC-like appliances without recovering refrigerants from them or verifying that the refrigerant had been previously evacuated, in violation of 42 U.S.C. § 7413(a)(3) and 40 C.F.R. § 82.156(f), and, if so, what is the appropriate penalty for such violation(s). *See*, Second Amended Administrative Complaint.

II. Admissibility of the Declarations of Joseph Cardile (C's Exs. 64 & 65)

Complainant's Exhibits 64 and 65 consist of the Declarations of Joseph Cardile, who was the Region's environmental engineer responsible for this case from 1999 to 2003. Respondent seeks to exclude these Declarations on the grounds that Complainant has indicated that it will not be calling Mr. Cardile to testify at hearing. In support of exclusion, Respondent notes that Rule 22.22(c) provides that written testimony is only admissible if the witness is subject to "appropriate oral cross-examination;" and that Rule 22.22(d) only allows the admission into evidence of affidavits of witness who are "unavailable," as that term is defined by Rule 804(a) of the Federal Rules of Evidence (FRE). Respondent argues that because Mr. Cardile is not "unavailable" as a witness, and nevertheless Complainant intends not to call him at hearing, his Declarations are inadmissible. Motion at 4–8. Additionally, Respondent argues that Complainant's Ex. 65 is inadmissible because it contains statements which can only be provided by an expert witness and Mr. Cardile has not been identified as an expert. Motion at 8–10. Respondent asserts that statements in the Declaration have no foundation and are an impermissible interpretation of law.

Procedurally, Complainant challenges the motion by pointing out that it included Exhibits 64 and 65 in its Prehearing Exchange a year ago, and that the deadline set in the Order Scheduling Hearing for pre-trial motions, August 13, 2004, elapsed five months before the Motion was filed. The second deadline provided (in the Order on Motion to Dismiss and Motion for Accelerated Decision) for pre-trial motions, January 27, 2005, was to accommodate the filing of the Second Amended Complaint, Complainant argues, and does not apply to the Motion. Response n. 4.

On its merits, Complainant challenges the motion by asserting that hearsay evidence is admissible in administrative proceedings and that it is therefore "irrelevant whether the 'declarant' of the hearsay is present for cross examination." Response at 6. Complainant asserts that Respondent could have subpoenaed Mr. Cardile as a witness. Complainant asserts that aside from whether he is an expert, Mr. Cardile is presenting the results of his experience and knowledge, as the technical assignee for CFC violations. As to laying a foundation for statements in the Declaration, Complainant says that this may be done at hearing, and that the Presiding Judge will assign the appropriate weight and credibility to the evidence. As to

Respondent's argument that a statement is an impermissible legal interpretation, Complainant asserts that it is Mr. Cardile's evaluation of whether weigh tickets comply with the law, and whether they are contracts, and that his statements provide the Judge with an understanding of Complainant's position. Complainant explains that an inspector's "opinion" testimony related to liability and penalty is useful to the Presiding Judge, for understanding the reasons for Complainant's actions as to the Complaint. Response, n. 6.

Complainant's procedural arguments are of no avail. The Order granting the motion to amend the Complaint provided, "Any prehearing motions, such as motions to amend the prehearing exchange, motions for subpoena, and motions in limine, shall be filed on or before **January 27, 2005.**" This provision was set in view of the hearing having been postponed and is not limited to motions on issues relevant to amendment of the Complaint.

As to the arguments on the merits of the Motion, the mere assertion of the general principle that hearsay is admissible in administrative proceedings is insufficient to override the specific rules of 40 C.F.R. § 22.22(c) and (d), which limit the admissibility of affidavits and written testimony prepared by a witness. The question is whether Mr. Cardile's Declarations may be admitted into evidence under Rule 22.22(c) or 22.22(d). There is no indication that he will be available for cross examination at the hearing, so the remaining question is whether he is "unavailable."

"Unavailability" is defined under FRE 804(a) as including circumstances where a witness:

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
> (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

Complainant has not requested a subpoena for Mr. Cardile, and has not established that any of the other circumstances listed above apply to Mr. Cardile. Therefore, at this time there is no evidence he is unavailable as a witness. Consequently, his Declarations are inadmissible. It is not necessary to address Respondent's argument as to his qualification as an expert.

III. Admissibility of Paragraph 9 in Declaration of John Shepler

Complainant's Exhibit 107 is the Declaration of John Shepler, who took over as the

Regional environmental engineer responsible for this case when Mr. Cardile was transferred to another Region in 2003. Respondent notes in its Motion that like Mr. Cardile, Complainant has indicated that it does not intend to call Mr. Shepler as a witness at hearing. Respondent notes in its Motion that "[a]lthough Strong Steel could properly ask the Court to exclude Mr. Shepler's Declaration and its attachments in their entirely, for the purposes of this Motion Strong Steel is asking only that the Court exclude ¶9 of Mr. Shepler's Declaration." Motion at 11.

Respondent asserts that in Paragraph 9 of his Declaration, Mr. Shepler goes beyond merely authenticating inspection reports and explaining non-controversial issues such as the dates during which he worked on this case, and states "that the last reasonable point at which Strong Steel can inspect a vehicle to determine if there is a charge in it is at or near the weigh station." Respondent argues that this opinion is inadmissible unless Complainant produces Mr. Shepler as a witness at hearing and so makes him available for cross-examination.

In addition, Respondent argues that Paragraph 9 is inadmissible because Mr. Shepler did not visit Strong Steel's facility until March 2004, two years after the period of the alleged violations. Relying on this Court's Order on the Motion to Preserve, Respondent asserts that Mr. Shepler's observations at that time would not be relevant.

Complainant asserts, as with Mr. Cardile's Declarations, that Mr. Shepler's Declaration is hearsay admissible regardless of whether Mr. Shepler is present for cross examination, and that Respondent could have subpoenaed him. Complainant points out Respondent's choice of opposing request for, rather than taking the opportunity for, a deposition or mini-trial of Mr. Shepler. Referring to Respondent's position that there were no charged vehicles after the last reasonable point of inspection, Complainant asserts that it must be able to present evidence in rebuttal, as to his observations in March 2004 and assessment of where that point of inspection was. His observations, and explanations of violations are necessary as a CAA inspector; the RCRA inspector, Mr. Powers, can only testify as to what he saw.

Mr. Shepler is a former Agency employee. Anticipating his resignation from EPA, Complaint filed a Motion to Preserve his testimony in a deposition. The Order on that motion recognized that there may be some points to which only Mr. Shepler can testify to, based on his March 2004 inspection, but because Complainant had not specified any such items, the Motion was denied. Anticipating that Complainant may offer an affidavit of Mr. Shepler into evidence, the Order on the Motion to Preserve discussed the issue of admissibility of an affidavit of Mr. Shepler as follows:

> Where the witness is, in the strict sense of FRE 804(a), "unavailable" – *i.e.*, refusing to comply with a court order to testify, absent from the hearing and not procured by process, lacking memory, dead, ill, or infirm – and thus cannot be cross examined, the judge may admit the witness' affidavit. 40 C.F.R. § 22.22(d). Courts have held under FRE 804(a) that the proponent of the affidavit or statement must offer evidence that it has taken all reasonable steps to procure the witness' testimony and was unsuccessful. *United States v. Eufracio-Torres*, 890

> F.2d 266 (10th Cir. 1989). Where a witness refuses to testify, before the witness' statement is admitted into evidence, a court should order the witness to testify or the proponent should subpoena the witness to testify. *United States v. Oliver*, 626 F.2d 254 (2nd Cir. 1980); *Perricone v. Kansas City So. Ry.*, 630 F.2d 317 (5th Cir. 1980). It is premature at this point to determine the admissibility of any affidavit or deposition of Mr. Shepler, but it can be anticipated that, given Complainant's factual basis for Mr. Shepler's unavailability and its statement that it will not attempt to subpoena Mr. Shepler, any affidavit of Mr. Shepler would not be admissible under 40 C.F.R. § 22.22(d) on the basis that he is "unavailable."

Order on Motion to Preserve Testimony (Aug. 24, 2004), slip op. at 7-8. Complainant was thus warned that an affidavit may not be admitted into evidence. As noted above, the mere assertion of the general principle that hearsay is admissible in administrative proceedings is insufficient to override the specific rules of 40 C.F.R. § 22.22(c) and (d) which limit the admissibility of affidavits and written testimony prepared by a witness.

Accordingly, it is concluded that Paragraph 9 of Mr. Shepler's Affidavit is not admissible.

IV. Admissibility of Complainant's Exhibit 109

Complainant's Exhibit 109 consists of 5 photographs purportedly taken by "C. Elliott on August 2, 1999." Respondent asserts that the legends on the photographs indicate that they show the locations at which soil samples and an "oil sample" were taken and "views" of the site and that Complainant has stated that this exhibit "pertain to the operation and conditions at the facility. It argues that "[a]bsolutely nothing in any of these photographs is relevant or material to the alleged CAA violations" at issue in this case. Specifically, Respondent argues that "none of the photographs depicts a refrigerator, air conditioner, or other 'small appliance' subject to CFC regulations," and the views of automobiles do to show whether a motor vehicle air conditioner (MVAC) is present. Motion at 12. Respondent emphasizes that MVACs, not motor vehicles, are subject to regulation.

In response, Complainant asserts that the photos show the condition of the vehicles, and the conditions at the facility at the relevant times, in response to Respondent's claims that the facility was neat and clean, and "substantially all paved." Response at 12, citing Respondent's Prehearing Exchange pp. 2, 3 and R's Exhs. 4, 13, 14.

It cannot be concluded at this time that the photos in C's Exh 109 are "irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value" or clearly inadmissible for any purpose. 40 C.F.R. § 22.22(a). The condition of motor vehicles, which contain the MVACs, at Respondent's facility, has some bearing on disputed issues in this case, such as whether the MVACs were removed, were punctured, or whether they contained CFCs. Complainant will have an opportunity at the hearing to lay a foundation for the photos.

Accordingly, the Motion in Limine is denied as to Complainant's Exhibit 109.

V. Admissibility of Complainant's Exhibits 112 and 118

Complainant's Exhibit 112 consists of: (1) a Notice from the City of Detroit dated May 21, 1999 ordering Strong Steel to submit an application for a final permit and certificate of occupancy as required by City ordinances; (2) real estate property assessment information; and (3) a Memorandum from the City of Detroit dated September 20, 1999 indicating that it had received complaints concerning dust, debris, explosions, odors, traffic congestion, and vibrations related to Strong Steel's plant.

Complainant's Exhibit 118 is a report by EPA investigator Reginald Arkell in which he relates what city and state inspectors told him about how Respondent's facility operated and gasoline spills, refers to shipments of manifested hazardous waste from the plant, and includes several July 1999 documents regarding worker safety issues related to handling gasoline tanks on scrap cars at Strong Steel.

Respondent argues that both of these exhibits are inadmissible because they are not relevant to the CAA violations at issue in this case. Respondent notes that these exhibits were admitted in the hearing involving the RCRA violations. It claims that these exhibits are also not relevant to penalty because they would not fall within any factor under the Agency's Clean Air Act Stationary Source Penalty Policy (C's Ex. 37) since that document provides that the penalty factor "History of Noncompliance" includes only "prior violations under all environmental statutes enforced by the Agency" and "addressed through written notification by a State or EPA." Motion at 15. Respondent argues that "because C. Ex. 112 and 118 do not show any written notification by EPA or the State regarding environmental laws enforced by EPA, they cannot be considered in a penalty calculation."

Complainant argues that evidence of Respondent's "poor environmental compliance record" is relevant, material and probative under the CAA and in rebuttal to Respondent's assertions of environmental good deeds and that it is a responsible corporate citizen. Response at 14. It may be relevant to the penalty factor, "other factors as justice may require." Some items in C's Exh's 112 and 118 may be relevant to understanding Respondent's operations during the relevant time period, Complainant asserts, and indicate that whole automobiles were crushed at Respondent's facility, to rebut Respondent's assertions that individuals who crush the appliances took the final step in disposal.

In assessing penalties, Administrative Law Judges are not bound by the provisions of penalty policies such as the CAA Stationary Source Penalty Policy. *See e.g., Employers Ins. of Wausau*, 6 E.A.D. 735, 758-9 (EAB 1997) (The ALJ's "penalty assessment decision is ultimately constrained only by the statutory penalty criteria and by any statutory cap limiting the size of the assessable penalty . . ."). In determining the appropriate penalty, TSCA requires that "the nature, circumstances, extent, gravity of the violation[s]" be taken into account. 15 U.S.C. §

2615(a)(2)(B). Thus, regardless of whether the CAA Penalty Policy provides for it or not, the undersigned may consider citizens' complaints, actions taken by the City of Detroit, and Respondent's operations and activities in determining any penalty in this case.

Because Respondent has not established that C's Exhibits 112 and 118 are clearly inadmissible, Respondent has not met the standard for excluding C's Exhibits 112 and 118 on a motion in limine. Rulings on admissibility of those Exhibits will be deferred until trial so questions of foundation, relevancy, and prejudice may be resolved in context.

CONCLUSION AND ORDER

Therefore, Respondent's Motion In Limine to Exclude Certain of Complainant's Proposed Exhibits is denied in part and granted in part as follows:

a) The Motion in Limine is **GRANTED** as to C's Exs. 64 and 65 - Declarations of Joseph Cardile.

b) The Motion in Limine is **GRANTED** as to Paragraph 9 of C's Ex. 107 - Declaration of John Shepler.

c) The Motion in Limine is **DENIED** as to C's Ex. 109.

d) The Motion in Limine is **DENIED** as to C's Exs. 112 and 118.

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Susan L. Biro
Chief Administrative Law Judge

Dated: February 18, 2005
Washington, D.C.