UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
ARCO Chemical Company,	)	
	)	Docket No. EPCRA-III-240 and
	)	CERCLA-III-027
Respondent	)	

ORDER QUASHING EPA SUBPOENAS

Respondent Lyondell Chemical Worldwide, Inc., f/k/a ARCO Chemical Company ("ARCO") has filed a Motion seeking a protective order to quash four subpoenas issued by the Environmental Protection Agency ("Complainant" or "EPA") to ARCO.[(1)] In particular, EPA has issued subpoenas *duces tecum* and *ad testificandum* for the appearance of two current ARCO employees, one former employee and one corporate designee. The subpoenas assert that they are issued pursuant to the authority of Section 122(e)(3)(B) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. Section 9622(e)(3)(B). The Court was provided with a "courtesy copy" of the subpoenas, via facsimile, on February 26, 1999. For the reasons which follow, Respondent's Motion is **GRANTED**.

At the outset it is important to recognize the context in which EPA seeks the above described subpoenas. The cover letter which accompanies the subpoenas makes it clear that they were issued in connection with EPA Docket CERCLA-III-027, which along with EPCRA-III-240 are the very matters before this Court. The undersigned was designated as the Administrative Law Judge presiding in this matter on December 16, 1998. Order of Designation, December 16, 1998.

On January 13, 1999, this Court issued its Prehearing Order, which Order stated that the EPA Rules of Practice ("Rules"), as set forth at 40 C.F.R. Part 22, were applicable to the proceeding, a fact explicitly recognized by EPA in the Administrative Complaints.[(2)] The Prehearing Order directs that the parties are to make their initial prehearing exchange by March 18, 1999.

The Administrative Complaints allege that on or about August 22, 1996, there was a release of propylene oxide, a hazardous substance, and that this release violated certain CERCLA and EPCRA provisions. Significantly, the information sought pursuant to the subpoenas *relates to exactly the same subject and event addressed in the administrative complaints*.

In its Motion, ARCO points out that the discovery procedure in these proceedings contemplates the prehearing exchange as the primary discovery mechanism and that other discovery is accomplished by the filing of a Motion and is permitted only upon a determination of certain findings by the Presiding Officer. 40 C.F.R. Section 22.19(f). No such Motion has been filed by EPA in this matter. Similarly, while the Supplemental Rules of Practice to the Consolidated Rules contemplate the availability of subpoenas for the CERCLA and EPCRA proceedings involved here, they also require, as a condition precedent to granting a request for their issuance, a showing of the grounds and necessity therefor together with the materiality and relevancy of the evidence to be adduced. 40 C.F.R. Section 22.39 and 22.40. No motion or showing has been shown with respect to these provisions either.

ARCO also correctly points out that while EPA relies upon the authority of Section 122 (e)(3)(B) of CERCLA for the subpoenas sought here, it is using the subpoenas to acquire information for this litigation, and not for the limited purpose of that provision of gathering information for the allocation of liability among those potentially responsible. Indeed, the subject of Section 122 is "Settlements" and it is clear that there is a limited purpose contemplated for their use: to wit, to collect information for performing the allocation of responsibility. There is no pretense here that EPA is using the limited subpoena authority set forth in this provision for its intended purpose. Thus, this Court agrees with ARCO that EPA's attempt to inappropriately use the limited subpoena provision of Section 122 for a purpose beyond its scope, while simultaneously claiming that the Presiding Judge had no authority to quash the subpoenas and ignoring the contemplated subpoena provisions for Section 109 of CERCLA and Section 325 of EPCRA, offends basic principles of equity and fair play.[(3)] I concur with the reasons articulated by Judge Head's decision In the Matter of Atlas Metal and Iron Corporation, Docket No. TSCA-PCB-VIII-91-08, August 11, 1992, 1992 EPA ALJ LEXIS 306. There, as here, EPA was contending that the Presiding Judge did not have the authority to stay or quash the subpoenas sought. However, relying upon the Rules, and the specific provisions relating to the issuance under that (TSCA) proceeding, the Judge held that permission must be both sought and obtained prior to the issuance of a subpoena. Id. at *7,8.

None of the foregoing is intended to imply that EPA may not subsequently be able to obtain subpoenas in this case. EPA must, however, abide by the applicable procedural rules and make the required showing before such a motion is granted. In this respect any subsequent request for subpoenas should occur after the primary discovery vehicle of the prehearing exchange has been utilized, at which point an assessment of the genuine need for subpoenas can be analyzed.

So Ordered.

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William B. Moran
United States Administrative Law Judge

Dated: March 8, 1999
Washington, D.C.

1. In connection with Respondent's Motion, the Court has also received and considered Respondent's Amendment and Clarification to the Motion, Complainant's Reply, and Respondent's response thereto.

2. Pursuant to the Rules, the Court, in its January 13th Prehearing Order, relying

upon Section 22.12, *sua sponte*, consolidated these matters, which were originally filed as separate administrative complaints in Docket Nos. EPCRA-III-240 and CERCLA-III-027.

3. I find EPA's citation to In the Matter of Dominick's Finer Foods, Inc., Docket No. CERCLA/ EPCRA-007-95 (February 15, 1996) inapplicable for the following reasons. First, the judge in that case was not addressing the subpoena provision at issue here, but rather a CERCLA Section 104(e) information request. Second, the judge implicitly found that there must be a "valid [Section 104(e)] request" for such information involved. 1996 EPA ALJ LEXIS 97, *4. Clearly the subpoena request involved here is not a mere coincidence reflective of different Agency gears independently turning.

In the Matter of Arco Chemical Company, Respondent
Docket No. EPCRA-III-240 and CERCLA-III-027

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Order Quashing EPA Subpoenas, dated March 8, 1999, was sent this day in the following manner to the addressees listed below:

Original by Pouch Mail to: Lydia A. Guy
Regional Hearing Clerk
U.S., EPA, Region 3
1650 Arch Street
Philadelphia, Pennsylvania 19103

Copy by Facsimile and Regular Mail to:

Attorney for Complainant: Andrew Duchovnay, Esquire
Assistant Regional Counsel
U.S. EPA, Region 3
1650 Arch Street
Philadelphia, Pennsylvania 19103

Attorney for Respondent: Marc E. Gold, Esquire
Carol Fitzpatrick McCabe, Esquire
Manko, Gold & Katcher, LLP
401 City Avenue, Suite 500
Bala Cynwyd, Pennsylvania 19004

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Elaine Malcolm
Legal Assistant

Dated: March 8, 1999
Washington, D.C.