



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
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C-14J

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May 18, 2011

Hon. Barbara Gunning
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Re: Mercury Vapor Processing Technologies, Inc. a/k/a River Shannon Recycling
and Laurence Kelly
Docket No. RCRA-05-2010-015

Dear Judge Gunning:

Enclosed please find a copy of *Complainant's Opposition to Respondents' Motion to Compel Discovery and Request for the Production of Documents*, which was filed on May 18, 2011, in the above-referenced matter.

Sincerely,

A handwritten signature in blue ink that reads "Kasey Barton".

Kasey Barton
Assistant Regional Counsel

Enclosure

cc: Mr. Laurence Kelly (w/ enclosure)

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

IN THE MATTER OF:)
)
Mercury Vapor Processing) **DOCKET NO. RCRA-05-2010-0015**
Technologies Inc., a/k/a/ River Shannon)
Recycling)
13605 S. Halsted)
Riverdale, Illinois 60827)
EPA ID No.: ILD005234141 and)
)
Laurence Kelly)
)
)
Respondents.)
_____)

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**OPPOSITION TO RESPONDENTS’
MOTION TO COMPEL DISCOVERY AND
REQUEST FOR THE PRODUCTION OF DOCUMENTS**

Complainant, pursuant to 40 C.F.R. § 22.16 of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (“Consolidated Rules”), hereby sets forth reasons that the Presiding Officer should deny Respondents’ “Motion to Compel Discovery and Request for the Production of Documents” (“Motion to Compel”). The Motion to Compel concerns matters outside the scope of this proceeding. It seeks to dramatically expand the scope of this case, yet sets forth no facts whatsoever to support it.

I. Respondents’ Motion to Compel

On May 4, 2011, Respondents filed a Motion to Compel Discovery and Request for the Production of Documents. In the Motion to Compel, Respondents vaguely assert that they “have been informed by several sources that the USEPA investigation of the activities conducted at the Riverdale warehouse has somehow moved into the interview phase of interrogating customers and non-customer [sic] of MVP/RSR.” Respondents request that “the USEPA relinquish any

and all field notes, questions posed, answers received by named individuals and any ancillary comments that were made at the time by the interviewee or the interviewer.” Motion to Compel p. 2. From what can be discerned from the Motion to Compel, Respondents claim that they are requesting this information in order to show that a negative light has been cast on them and their business, and the information they are requesting goes to the issue of Complainant “acting as judge and jury related to erroneous and false accusations.” *Id.*

II. Legal Standard

A. “Other Discovery” under 40 C.F.R. § 22.19(e).

Under 40 C.F.R. § 22.16(a) of the Consolidated Rules, a motion must “[s]tate the grounds therefor with particularity,” and “[b]e accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon.” Additionally, 40 C.F.R. § 22.19(e)(1) allows a party to move for additional discovery, and states that “the motion shall specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought (and where relevant, the proposed time and place where discovery would be conducted).” The Presiding Officer may order the requested discovery only if she finds that it:

- (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
- (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
- (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to the liability or relief sought.

40 C.F.R. § 22.19(e)(1).

III. Argument

A. The Motion to Compel fails to contain a detailed description of the information or documents sought.

The gist of the Motion to Compel appears to be unsubstantiated and vague allegations about “statements that have apparently been made to customers and non-customers” by unspecified persons to unspecified persons, that “might lend them to believe that MVP/RSR was conducting illegal activities during the course of handling, transporting or managing their lamps. . .”¹ Motion to Compel p. 2.

The Motion to Compel entirely fails to “describe in detail the nature of the information and/or documents sought,” as required by Section 22.19(e). The motion fails to indicate the name, general identity or affiliation of any person(s) alleged to have made “statements”; the name, general identity or affiliation of any persons to whom any “statements” were allegedly directed; or any dates or timeframes on or during which “statements” were allegedly made.² The motion also fails to provide any factual support whatsoever (“any affidavit, certificate, other evidence or legal memorandum relied upon”) for its allegations. The motion is fatally vague and completely unsupported. As such the Motion to Compel should be denied.

¹ Carefully read, the Motion to Compel does not even state that the persons whose “statements” are of concern are EPA employees (“off handed statements that apparently have been made to customers and non-customers”). To the extent that such statements *may* be alleged to have been made by EPA employees, it should be noted that EPA performs a vast array of functions including civil and criminal investigations, rulemaking, state program oversight, etc. in programs which cover RCRA as well as other statutes, and EPA operates from various offices and divisions. It cannot be presumed that anyone from EPA talking to persons or entities who deal with hazardous waste lamps would have been working on the instant case.

² This complete lack of information would also make crafting relief on the Motion to Compel nearly impossible.

B. The Motion to Compel fails to show that the information sought will go to prove a fact of consequence either to the liability or relief sought in this case, and even if it did, the information sought would be privileged.

1. The information requested has no significant probative value on a disputed issue of material fact.

Under 40 C.F.R. § 22.19(e)(1)(iii), the Presiding Officer may order other discovery only if “it seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.” “Probative value” means the tendency of a piece of information to prove a fact that is of consequence in the case. *In re Chautauqua Hardware Corp.*, 3 E.A.D. 616, 622-23 (June 24, 1991). The information that Respondents seek in the Motion to Compel has no probative value on a disputed issue of material fact relevant to liability or the relief sought in this case. Respondents’ purported reason for requesting the information is because they claim to be

very aware that perception in the highly regulated waste industry is in fact reality and for that reason alone drives the need to hear directly from the interviewees what exactly they were either told or directed to read that could possibly cast a negative light on MVP/RSR or Laurence Kelly, thus the reason for this request.

Motion to Compel p. 2. Respondents go on to state that their request goes directly to the issue of Complainant in some way “acting as judge and jury related to erroneous and false accusations.”

Id.

Information from unnamed “interviewees” relating to their perception of Respondents does not have significant probative value on a disputed issue of material fact or the relief sought. What is at issue in this case is whether Respondents were required to have a RCRA permit for their hazardous waste storage and treatment operations. Complaint at 66-110. The relief sought is a compliance order requiring Respondents to, among other things, conduct closure at the Riverdale facility, prohibiting Respondents from operating without obtaining a RCRA permit,

and ordering Respondents to pay an appropriate penalty. Complaint at 111-142. Respondents provide no indication in the Motion to Compel how any of the information requested even remotely relates to a disputed issue of material fact or the relief sought in this case. If anything, the Motion to Compel appears to allege matters potentially relating to “tortious interference with business relationships” principles.³ Even if Complainant could comply with Respondents’ request, it would be a waste of time and resources. Thus, the reasons for requesting the information in the Motion to Compel are outside the scope of this proceeding and the motion should therefore be denied.

The Motion to Compel states a potential intention to call unspecified “interviewees” as witnesses at the hearing scheduled for this matter. Motion to Compel p. 2. From what can be gleaned from the Motion to Compel, such potential testimony would be completely unrelated to whether Respondents were required to have a RCRA permit and whether Respondents should be required to conduct closure and be prohibited from operating without a RCRA permit. With no additional demonstration of relevance, Complainant would object to the introduction of testimony by these unknown witnesses. In summary, the Motion to Compel requests the Presiding Officer to order about as vague a “fishing expedition” as can be imagined. As such, it should be denied.

2. The type of information that Respondents are seeking would be privileged.

In accordance with the Consolidated Rules, Complainant has identified in its Prehearing Exchange the potential witnesses it intends to rely on to prove its prima facie case. Respondents will have the opportunity to question these witnesses at hearing. Should Complainant decide to rely on any additional witnesses, Complainant would move to supplement its Prehearing

³ To the extent Respondents are making such a claim, they are in the wrong forum. Complainant denies that it made any such claimed “off-handed” statements or “erroneous and false accusations” about Respondents or their various businesses.

Exchange within the time limit imposed by the Presiding Officer's November 19, 2011 Order Scheduling Hearing, and if the motion to supplement is granted by the Presiding Officer, Respondents would be put on notice of any such witnesses. Insofar as Respondents are requesting information from interviews that EPA has conducted with Respondents' customers or others during the course of an investigation, any such claimed information is protected under the law enforcement investigatory privilege and not subject to discovery. *See Tuite v. Henry*, 98 F.3d 1411, 1417-18 (D.C. Cir. 1996) (discussing the investigatory privilege and balancing factors).⁴ The purpose of the law enforcement investigatory privilege is to preserve the confidentiality of sources, to protect their identities and safeguard their privacy, to protect information gathered in the course of an enforcement investigation, and to otherwise prevent interference in an investigation. *Doe v. Chicago Housing Auth.*, 175 F.R.D. 511, 514 (1997). Applying the balancing test laid out in *Tuite* to this case, the public's interest in nondisclosure vastly outweighs Respondents' claimed need for such information. This is because the information sought is completely irrelevant to this case, relates to an ongoing investigation, may have an adverse impact upon persons who have given information of having their identities disclosed, and disclosure will discourage citizens from giving the government information. Such information may also be attorney work product and exempt from discovery. *Litton Indus. Inc. v. Lehman Bros. Khun Loeb Inc.*, 125 F.R.D. 51, 54-55 (S.D.N.Y. 1989). Thus, the information sought would be privileged and not subject to discovery.

⁴ *Tuite* lists the factors to be weighed in application of the investigatory privilege as follows: (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the investigation has been completed; (7) whether any interdepartmental disciplinary proceedings have arisen from the investigation; (8) whether the plaintiff's suit is frivolous and brought in good faith; (9) whether the information sought is available through other discovery or other sources; and (10) the importance of the information sought to the plaintiff's case.

IV. Conclusion

Respondents fail to describe with any specificity the information they seek, and their reasons for seeking this broad unspecified information are completely irrelevant to this case. For the reasons set forth above, Complainant respectfully requests that the Presiding Officer deny Respondents' Motion to Compel.

Respectfully submitted,



Kasey Barton
Thomas M. Williams
Office of Regional Counsel
U. S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that this day I filed with the Regional Hearing Clerk, and caused to sent, postage prepaid, copies of the foregoing Opposition to Respondents' Motion to Compel Discovery and Request for the Production of Documents to the following persons by Certified First Class Mail:

Honorable Barbara Gunning
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460-2001

Laurence Kelly
7144 North Harlem Avenue
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Deloris Bryant

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Date: May 18, 2011