

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Robert and Susan Wheeler) **Docket No. CWA-05-2001-0019**
d/b/a/ Wheeler’s Septic Tank Service)
)
Respondent.)

ORDER GRANTING MOTION FOR ADMINISTRATIVE SUBPOENA

On July 8, 2002, United States Environmental Protection Agency (“Complainant”) filed its “Motion for Issuance of a Subpoena to Kathryn Culver Madden.”¹ The Complaint, *inter alia*, seeks penalties for alleged violations of the vector attraction regulations promulgated under Section 405 the Clean Water Act (“CWA”), 33 U.S.C. § 1345. Those vector attraction regulations set rules regarding domestic septage and its placement on agricultural land.

Count I of the Complaint charges that Robert and Susan Wheeler d/b/a/ Wheeler’s Septic Tank Service (“Respondents”) applied domestic septage to agricultural land without following the vector attraction regulations. Count II alleges that Respondents failed to maintain records regarding the application of domestic septage to agricultural land.² Although Respondents agree that there was a discharge, they contend that there was only a discharge of cow manure instead of the domestic septage regulated by the applicable vector attraction requirements.

Complainant’s motion prays for the Court to issue a subpoena to Kathryn Culver Madden, who it describes as an eyewitness who observed Respondents’ dumping of domestic septage.

The administrative law judge is empowered to issue subpoenas in CWA cases, as the Rules of Practice delegate CWA subpoena power.³ Complainant brings its motion for subpoena

¹ Respondents did not file any opposition to Complainant’s motion for issuance of a subpoena.

²A third Count alleges that Respondents failed to provide correct answers to an information request. Thus, all three Counts are connected to the same activity.

³ In particular, the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties” delegates to an ALJ the power to issue subpoenas when the applicable “Act” authorizes subpoenas. 40 C.F.R. §§ 22.4(c)(9); 22.19(e)(4); 22.21(b). Here,

by invoking Section 22.19(e)(4) of the Rules of Practice, concerning prehearing discovery, which provides that the judge “. . . may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act.” Additionally, as to hearings, Section 22.21(b) of the Rules of Practice provides that the judge “may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act, upon an showing of the grounds and necessity therefor, and the materiality and relevancy of the evidence to be adduced.”

Complainant’s Motion calls upon the Court to issue a subpoena to Madden for the purpose of compelling her attendance and testimony at the hearing. *See* Motion for Issuance of Subpoena, at 2, ¶5. Although the Motion cited to Section 22.19(e)(4) as authority for the subpoena, which concerns subpoenas issued to compel prehearing discovery, the Motion clearly expresses that it wants a subpoena in order to compel testimony at the *hearing*.⁴ Therefore, Section 22.21(b) of the Rules of Practice, regarding subpoenas to compel appearance and testimony at the hearing, sets the appropriate standard under which to evaluate the Motion.

As mentioned, regarding hearings, the Rules of Practice provide that the judge “may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act, upon an 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). In the Motion, Complainant avers that Madden is a “key witness” in this matter. It states that although other witnesses observed human septage *after* its disposal at the farm of Robert Wheeler’s brother, Madden is the only EPA witness who actually saw the domestic septage in the process of being dumped from Robert Wheeler’s truck onto the corn field. At that time, Madden was employed by Adams County Health Department, but she now works for the neighboring Ross County Health District, as a Registered Sanitarian. The Motion declares that Madden will be unable to be present at the hearing unless issued an administrative subpoena.

Although Respondents admit that they dumped waste onto the property in question, they deny that they discharged any domestic septage and contend that they only discharged cow manure. The importance of this distinction lies in the vector attraction regulations Respondents are charged with violating. Those regulations only set rules as to “domestic septage,” which is material removed from a septic tank, cesspool, portable toilet, or similar treatment works that

the “Act” is the Clean Water Act. *See* 40 C.F.R. § 22.3(a). The Clean Water Act expressly authorizes the issuance of subpoenas. CWA, § 309(g)(10). *See also* CWA, §§ 309(g)(2)(B), (g)(4)(B).

⁴ The relevant part of the Motion reads as follow: “As Ms. Madden is a key witness in this matter and her testimony will not be available absent the issuance of a subpoena herein, Complainant respectfully requests that the Hon. ALJ issue a subpoena to Ms. Madden *to compel her attendance and testimony at hearing*, pursuant to the authority of 40 C.F.R. § 22.19(e)(4)” Motion at 2, ¶5 (emphasis added).

receives only domestic sewage. *See* 40 C.F.R. § 503.9(f) (definition of “domestic septage”); 40 C.F.R. § 503.15(d) (regulation invoked by Count I); 40 C.F.R. § 503.17(b) (regulation invoked by Count II). Thus, if Complainant cannot prove that the discharged waste was domestic septage, it would appear they will be unable to prevail on any of the Counts.

Although Complainant has other witnesses who are expected to testify that they saw that domestic septage *had been* dumped on Respondents’ agricultural property, they apparently did not witness the actual act of discharging. The presence of a witness, such as Madden, who may have actually seen the discharge would assist the Court in determining whether there was any discharge of domestic septage. Complainant has shown sufficient grounds that it is necessary and appropriate to grant a subpoena to Kathryn Culver Madden. Accordingly, Complainant’s Motion is granted.⁵

So ordered.

William B. Moran
United States Administrative Law Judge

Dated: October 1, 2002
Washington, D.C.

⁵The subpoena will be issued after the hearing dates have been announced.

In the Matter of, Robert and Susan Wheeler d/b/a Wheeler's Septic Tank Service Respondent
Docket No.CWA - 05-2001-0019

CERTIFICATE OF SERVICE

I hereby certify that the following **Order Granting Motion for Administrative Subpoena**, dated October 1, 2002, was sent in the following manner to the addressees listed below.

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