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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

<p>IN THE MATTER OF</p> <p style="text-align: right;">)</p> <p style="text-align: right;">)</p> <p>LAY BROTHERS, INC.,</p> <p>97-067</p> <p style="text-align: right;">)</p> <p style="text-align: right;">)</p> <p style="text-align: center;">RESPONDENT</p> <p style="text-align: right;">)</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>DOCKET NO. EPCRA-IV-</p> <p>97-067</p>
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ORDER ON RESPONDENT'S REQUEST FOR SUBPOENA

This proceeding arises under the authority of Section 325 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11045 (Supp. IV 1986) ("EPCRA"). The proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. Part 22, and the Supplemental Rules of Practice Governing the Administrative Assessment of Administrative Penalties Under Section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 (the "Supplemental Rules of Practice"), 40 C.F.R. § 22.40.

A hearing in the above-cited matter commenced on April 20 and 21, 1999, in Athens, Georgia. At the hearing on April 21, 1999, the parties stated that they had reached a settlement in this matter and that a Consent Agreement and Consent Order ("CACO") would be prepared to memorialize this settlement. Based upon these representations, the parties' request to continue the hearing was granted. The hearing was rescheduled to resume on July 27, 1999, if the fully ratified CACO is not filed with the Regional Hearing Clerk by July 25, 1999.

On July 6, 1999, the Respondent mailed a Request for Subpoena. In its request for subpoenas, the Respondent moves for the issuance of subpoenas for Mr. Randy Sellers of the Georgia Environmental Protection Department, Mr. Robert Billups of the

Athens-Clarke County Fire Department, and Mr. Roger Lane of the Georgia Oilman's Association for the July 27, 1999, hearing. The Complainant, the United States Environmental Protection Agency ("EPA"), opposes the Request for Subpoena.

Section 22.40(b)(1) of the Supplemental Rules of Practice, 40 C.F.R. § 22.40(b)(1), allows, upon request in Section 325 EPCRA proceedings, for issuance of subpoenas by the Administrative Law Judge to require the attendance and testimony of witnesses. This procedural rule specifies criteria for granting a request for a subpoena. Section 22.40(b)(1) provides, in pertinent part:

The Presiding Officer may grant a request for a subpoena upon a showing of (i) the grounds and necessity therefor, and (ii) the materiality and relevancy of the evidence to be adduced.

In support of the Request for Subpoena, the Respondent contends that the "materiality of the testimony is self evident from the evidence previously adduced in this matter." Respondent's Request for Subpoena at 1. Specifically, the Respondent maintains that Mr. Sellers can testify to his advice to the Respondent as well as his activities and knowledge regarding the Respondent's compliance with environmental regulations and the Respondent's attempts to comply with the reporting requirements at issue. According to the Respondent, Mr. Billups can testify to the fire department's knowledge of the presence and quantities of hazardous materials at the Respondent's place of business as a result of periodic inspections by the fire department and the Respondent's provision of information to the fire department. Also, according to the Respondent, Mr. Lane can testify to the absence of any educational effort by the EPA to insure that all covered businesses were adequately informed of the new reporting requirements as well as to the absence of any substantial enforcement by the EPA except in this case.

The EPA counters that the requested subpoenas should be denied because the Respondent has not made the requisite showing to support its request for issuance of a subpoena under Section 22.40(b)(1) of the Supplemental Rules of Practice. The EPA contends that the Respondent has not provided a showing of "the grounds and necessity" for issuance of the subpoenas, nor has the Respondent made a showing of the "materiality and relevancy of the evidence to be adduced." 40 C.F.R. § 22.40(b)(1). Additionally, the EPA contends that the Respondent should not be allowed to file motions for the production of witnesses at this time when the Respondent did not file such motions prior to the hearing as originally scheduled, and that the granting of such motions would result in prejudice to the EPA.

The EPA argues that Section 22.40(b)(1) of the Supplemental Rules of Practice places the burden of showing the materiality and relevancy of the testimony sought on the party requesting issuance of a subpoena and that the Respondent has failed to make this showing. I agree, particularly with respect to the expected testimony of Mr. Billups and Mr. Lane. The testimony of Mr. Billups and Mr. Lane to be adduced at hearing, as characterized by the Respondent in its Request for Subpoena, is not shown to be relevant and/or material to the issue before me at hearing; that is, the appropriate penalty for the Respondent's violation of Section 311 of EPCRA and violation of Section 312 of EPCRA as cited in the Complaint. 42 U.S.C. §§ 11021, 11022, 11045; Interim Final Enforcement Response Policy for Sections 304, 311, and 312 of the Emergency Planning and Community Right-To-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act (January 8, 1998).

Although there may be some relevance of Mr. Seller's expected testimony to the issue of the appropriate penalty, the Respondent has not specified the relevancy or materiality of this testimony to the statutory penalty factors or to the Interim Final Enforcement Response Policy for Sections 304, 311, and 312 of the Emergency Planning and Community Right-To-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act (January 8, 1998). The bald assertion that the "materiality of the testimony [sought] is self evident from the evidence previously adduced in this matter" provides no basis to grant the subpoena request. See Arsenal Associates, Docket No. TSCA-III-725, 1997 EPA ALJ LEXIS 39,*3 (ALJ Oct. 20, 1997). Moreover, in its request for subpoena, the Respondent has

neither alleged nor shown the grounds and necessity for the subpoena. See 40 C.F.R. § 22.40(b)(1).

As set forth above, Section 22.40(b)(1) of the Supplemental Rules of Practice requires, as a condition precedent to granting a request for issuance of a subpoena, a showing of the ground and necessity therefor together with the materiality and relevancy of the evidence to be adduced. See ARCO Chemical Company, Docket No. EPCRA-III-240, CERCLA-III-027, 1999 EPA ALJ LEXIS 14, *3 (ALJ March 8, 1999). As discussed above, the Respondent's Request for Subpoena fails to comply with the requirements of this procedural rule for issuance of a subpoena. Accordingly, the Respondent's Request for Subpoena is **Denied**.

Original signed by undersigned

Barbara A. Gunning
Administrative Law Judge

Dated: 7-21-99
Washington, DC

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