

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

IN THE MATTER OF )  
 )  
LYON COUNTY LANDFILL, ) DOCKET NO. 5-CAA-96-011  
 )  
 )  
RESPONDENT )

**ORDER DENYING RESPONDENT'S MOTION TO COMPEL DISCOVERY**

The Respondent's Motion to Compel Discovery is Denied. In this motion filed with the Regional Hearing Clerk on February 5, 1997, the Respondent moves to compel the Complainant to permit the inspection of the sample materials tested by the Minnesota Pollution Control Agency which have formed the basis of the allegations contained in the Complaint.<sup>(1)</sup> In the Complainant's Opposition to Motion to Compel Discovery filed with the Regional Hearing Clerk on February 13, 1997, the Complainant acknowledges that the samples at issue for discovery were "landfilled" in January 1995 and therefore are not now available.<sup>(2)</sup> Inasmuch as the samples which are the object of the discovery motion are not now available, the motion is denied as moot. Quite simply, I cannot order the discovery or production of information if it does not exist.

Moreover, I note that regardless of the availability of the samples sought on discovery, the motion to compel discovery is deemed premature at this time. The prehearing exchange by the Complainant has not occurred yet and, thus, there is no basis for me to determine the propriety or relevancy of the motion.<sup>(3)</sup> See Section 22.19(f) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Rules of Practice"), 40 C.F.R. § 22.19(f).

original signed by undersigned

---

Barbara A. Gunning

Administrative Law Judge

Dated: July 18, 1997

Washington, DC

1. The Respondent's Motion to Compel Discovery was not received by the Office of Administrative Law Judges until July 17, 1997, and only after the undersigned Administrative Law Judge requested that it be forwarded by the Regional Hearing Clerk. The Answer in the instant matter is dated October 24, 1996, but it was not date stamped as filed with the Regional Hearing Clerk until April 29, 1997.

2. The Complainant's Opposition to Motion to Compel Discovery filed with the Regional Hearing Clerk on February 13, 1997, was not received by the Office of Administrative Law Judges until July 17, 1997, and only after the undersigned Administrative Law Judge requested that it be forwarded by the Regional Hearing Clerk.

3. The Complainant's initial prehearing exchange is due August 8, 1997.