

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

UNITED REFINING COMPANY OF
PENNSYLVANIA, INC.,

EPA Docket No. RCRA-III-9006-43

Respondent

**ORDER GRANTING LEAVE TO AMEND ANSWER AND REQUESTS FOR
DEPOSITIONS AND DENYING REQUESTS FOR DOCUMENTS**
Background

By motion dated April 1, 1997, Respondent, United Refining Company of Pennsylvania, Inc. , filed a motion (1) for leave to file an amended answer, (2) to compel production of documents and (3) for leave to take the deposition of an identified witness. A response in opposition to the motion was submitted by Complainant on April 16, 1997. Complainant also requests, in the alternative, depositions and certain documents, as discussed hereafter. For the reasons set forth below, both parties' requests for depositions shall be granted; Respondent's request to amend its answer shall be granted; and both parties' requests for documents shall be denied.

This case was initiated by a complaint filed on September 5, 1996 by Complainant ¹ alleging that Respondent violated the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. § 6901 et seq.. According to the complaint, this action is based upon two inspections conducted by Complainant on April 4, 1995 and March 6, 1996, at Respondent's facility Kwik Fill, Box 931 Rouseville, Oil City, Pennsylvania 16301.

Respondent initially, in its October 15, 1996 answer to the complaint (Paragraph 12), admitted that an inspection of the referenced Kwik Fill station did in fact take place on March 6, 1996. Respondent states that at the time it filed its answer, it had no reason to challenge Complainant's assertion that the March 6, 1996 inspection took place. However, as a result of a subsequent investigation, Respondent now states that none of the Kwik Fill employees recalls an inspection being completed by an EPA employee at any time in March, 1996, let alone on the specific date of March 6, 1996.

Following a review of the inspection reports completed by the EPA inspector after the alleged April 4, 1995 and March 6, 1996 inspections (Tab A, Respondent's April 1, 1997 motion) , Respondent noted that the EPA inspector failed to identify the contact person with whom the inspector spoke at Kwik Fill, even though the inspector indicated that he obtained access to paperwork kept in the back office. Respondent states further that access to paperwork could only have occurred if the inspector had asked an employee for permission to enter the office. As a result, Respondent now concludes that no on-site inspection by EPA in fact took place on March 6, 1996.

On February 11, 1997, Respondent sent a letter to Complainant (Tab B, Respondent's April 1, 1997 motion) asking Complainant (1) to state the time of day on March 6, 1996 that the EPA inspector supposedly inspected the referenced Kwik Fill; (2) to indicate which Kwik Fill employee the inspector allegedly spoke to on March 6, 1996; and (3) to provide copies of the following documents:

(a) The inspector's expense records for the week of March 6, 1996;

(b) Other inspection reports completed by that same individual during that same week; and

(c) Policies and procedures EPA has adopted to guide inspectors when they are completing inspections like that purportedly completed on March 6, 1996.

In addition, Respondent asked for permission to interview the inspector who allegedly performed the March 6, 1996 inspection "either informally or under oath."

In response to Respondent's February 11, 1997 letter, Complainant sent a letter dated March 26, 1997, prepared and signed by Jennifer A. Lee, Paralegal Specialist, at the request of Ms. Fairchild, Assistant Regional Counsel. In the letter, Complainant states that the case has been reviewed and the evidence discussed with Mr. James Bailey, the EPA inspector. The letter continues as follows:

We are satisfied that the evidence supports the complaint referenced above. Therefore, we fail to see the relevance of the information requested in your letter of February 11. We are satisfied with the validity of the evidence we have already supplied to you, and we have no further information to supply to you at this time. We hereby request the Performance Appraisals for Randy

Lockhart for the years 1995 through 1996. Once we have received this information, we feel that the next step will be the formal deposition of relevant witnesses.

By motion dated April 1, 1997, Respondent requests (1) leave to file an amended answer, (2) production of documents, and (3) leave to take the deposition of James Bailey. The motion requests leave to amend Respondent's answer to state that Respondent asserts that no inspection took place at Kwik Fill on March 6, 1996.

By pleading dated April 15, 1997, Complainant filed an answer to Respondent's motion requesting that all of the requested relief be denied. In the alternative, Complainant requests (1) leave to depose certain of Respondent's employees and (2) production of certain documents. More specifically, Complainant opposes Respondent's motion to amend its answer to the complaint because: (a) no memorandum in support of the motion was filed; (b) there is no evidence to support the motion; and (c) no affidavits by Kwik Fill employees in support of the motion were submitted.

With respect to the motion to compel production of documents and for leave to depose James Bailey, Complainant alleges that Respondent has not satisfied the requirement of 40 C.F.R. § 22.19(f) that the Presiding officer only permit "further discovery" if such discovery shall not in any way delay the proceeding, the information sought cannot be obtained by alternative methods, or there is substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing. More specifically, Complainant states that granting the motion would unduly delay the proceedings and, in any event, Complainant has already given Respondent a number of documents including, but not limited to, the EPA inspection reports of April 5, 1995 and March 6, 1996. Complainant also notes that it has attached to its pleading an affidavit by James Bailey which, Complainant states, affirms the statements alleged in the complaint.

If, however, the undersigned should grant Respondent's motion, Complainant requests that it be permitted to depose William Spoon, Randy Lockhart, and all those employed by United Refining Company of Pennsylvania, Inc. in the spring of 1996 at the above-referenced Kwik Fill station. By fax, received on April 29, 1997, Respondent states that if its motion is granted, it would not oppose Complainant's request to take the identified depositions. With respect to Randy Lockhart's performance appraisals, Respondent states that it would not oppose this request if (a) appropriate measures can be adopted to protect the

confidentiality of these documents and (b) if the performance appraisals of James Bailey are given to Respondent.

Rulings

A. Motion to Amend Complaint

Respondent "may amend the answer to the complaint upon motion granted by the Presiding Officer." 40 C.F.R. § 22.15. Respondent has asserted that, pursuant to subsequent investigation, it now believes that no inspection by the EPA took place on March 6, 1996. Complainant has not presented good cause to deny the request. Respondent's motion to amend its answer is granted.

B. Motion for Depositions

As indicated earlier herein, Respondent has requested leave to depose EPA Inspector James Bailey because it believes, based upon conversations with various Kwik Fill employees, that no EPA inspection took place in March of 1996. If this request is granted, Complainant requests leave to depose "William Spoon, Randy Lockhart, and all those employed by United Refining Company of Pennsylvania, Tnc. in the Spring of 1996 at the above referenced Kwik Fill Station." Complainant's Response at 3.

The allegation that no inspection took place on March 6, 1996 at the above-referenced Kwik Fill station is a serious one. It goes to the heart of the complaint pending against Respondent. Thus, it is clear that good cause, pursuant to 40 C.F.R. § 22.19 (f) (2) , has been shown to allow the deposition of Mr. Bailey, and also of the Kwik Fill employees referenced in Complainant's motion who would have been present on or about March 6, 1996. In addition, this is clearly the only way to develop evidence to determine whether or not the inspection actually took place on March 6, 1996. ² See 40 C.F.R. § 22.19(f) (2). Furthermore, while some delay in this case may occur, it will not be unreasonable, particularly in light of the issue to be resolved. Accordingly, Respondent and Complainant shall arrange for deposition of the above-named parties on the subject of whether or not an inspection of the above referenced Kwik Fill facility occurred on March 6, 1996. The time and place of the depositions shall be agreed upon by counsel but, in any event, shall occur no later than **May 22, 1997**.

C. Motion to Compel Documents

The requests of both parties for performance appraisals of the persons to be deposed is denied. Neither party has demonstrated that these documents have "significant probative value" to the matter at issue.³

Charles E. Bullock

Administrative Law Judge

Dated: May 13, 1997

Washington, D.C.

¹ United States Environmental Protection Agency, Region III.

² See also Hickman v. Taylor, 329 U.S. 495, 500 (1947); U.S. v. Proctor & Gamble Company, 356 U.S. 677, 682-683 (1958).

³ Given the ruling here, there is no prejudice to Complainant's lack of an opportunity to respond to Respondent's request in its April 29, 1997 pleading for Mr. Bailey's performance appraisals.

IN THE MATTER OF UNITED REFINING COMPANY OF PENNSYLVANIA, INC., Respondent

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CERTIFICATE OF SERVICE

I certify that the foregoing Order, dated May 13, 1997, was sent in the following manner to the addressees listed below:

Original by Regular Mail to: Lydia A. Guy

Regional Hearing Clerk

U.S. Environmental Protection

Agency, Region 3

841 Chestnut Building

Philadelphia, PA 19107

Copies by Regular Mail to:

Counsel for Complainant: Samantha Phillips Fairchild, Esq.

Assistant Regional Counsel (3RC33)

U.S. Environmental Protection

Agency, Region 3

841 Chestnut Building

Philadelphia, PA 19107

Counsel for Respondent: David R. Overstreet, Esquire

KIRKPATRICK & LOCKHART, L.L.P.

Payne-Shoemaker Building

240 North Third Street

Harrisburg, PA 17101-1507

Marion Walzel

Legal Assistant

Dated: May 13, 1997