

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY



BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
NORMAN C. MAYES,) DOCKET NO. RCRA-04-2002-0001
)
)
RESPONDENT)

**ORDER ON RESPONDENT'S MOTION IN LIMINE TO SUPPRESS COMPLAINANT'S
EVIDENCE OBTAINED BY AN UNLAWFUL SEARCH AND SEIZURE**

This proceeding arises under the authority of Section 9006 of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as RCRA ("RCRA")), 42 U.S.C. § 6991e, and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-32. A hearing in this matter is scheduled for June 9 through 13, 2003 in Knoxville, Tennessee.

On May 8, 2003, Respondent filed a Motion in Limine to Suppress Certain Evidence Obtained by an Unlawful Search and Seizure ("Motion"). The Motion is opposed by Complainant, the United States Environmental Protection Agency ("EPA"). Respondent seeks to exclude all evidence and information obtained during a site investigation relating to the presence and operation of underground storage tanks ("USTs"), conducted by governmental agency representatives, including five agents of the EPA, on November 28, 2000. Motion at 1. Specifically, Respondent claims that the search of Respondent's barn, two airplane hangers, two sheds, tractors, and farm equipment, and the seizure of fuel from the tanks of Respondent's farm equipment by representatives of the EPA were violations of the Fourth Amendment of the United States Constitution ("the Constitution") and federal law prohibiting unreasonable searches and seizures because they were conducted without a search warrant and without the voluntary consent of Respondent. Motion at 1-2.

In response, the EPA presents several arguments for the admissibility of evidence obtained from the site investigation. The EPA asserts that it had prior voluntary consent for all aspects of the investigation. Complainant's Response To Respondent's Motion In Limine To Suppress Certain Evidence ("Response") at 2. The EPA supports its assertion with affidavits of four individuals participating in the site investigation on November 28, 2000: Mr. Jim Miller ("Miller Aff."), Mr. Steven Burton ("Burton Aff."), Ms. Jane Roach ("Roach Aff."), and Mr. Steven Wilson ("Wilson Aff."). All the affidavits similarly support the EPA's assertion that Respondent had given prior voluntary consent. "All four individuals have sworn that Respondent had advance notice of the site investigation; that Respondent did not object to any aspect of the site investigation; and that Mr. Miller, Respondent's contractor, accompanied the inspectors during all aspects of the site investigation." Response at 2.

The EPA also contends that Respondent's Motion is procedurally defective, claiming that it fails to point to adequate support in any evidentiary material. Response at 1. The EPA argues that a motion is required to be accompanied by evidentiary writing under Section 22.16(a) of the Rules of Practice, 40 C.F.R. § 22.16(a), and that Respondent's Motion fails in this regard. Response at 1.

Additionally, the EPA maintains that it had the authority to conduct all aspects of the site investigation including all the searches performed during the investigation and the seizures of fuel for testing. The EPA argues that it is given "broad inspection, monitoring and testing authority" under Section 9005(a) of RCRA, 42 U.S.C. § 6991d(a), and that an owner of USTs is statutorily required to "furnish information relating to such tanks", and to allow agents of the EPA to "conduct testing" and have "access [to] all relevant records" relating to such tanks. Response at 2-3. The EPA also argues that the consent to the investigation provided consent to collection for sampling, and that any possessory interest in the fuel required to be extracted for the testing procedures was therefore abrogated. Response at 4.

The record before me at this time reflects that the EPA's site investigation of Respondent's property on November 28, 2000 was consensual. Respondent's argument that freely and voluntarily given consent was not given is unavailing. Respondent's own consultant, Mr. Jim Miller, who participated in the site investigation on Respondent's request, states that Respondent "indicated that he would be completely cooperative with [the] inspection" upon arrival of the inspectors, and that after conclusion of the site investigation Respondent "did not indicate

in any way that he did not consent to any aspect of the inspection." Miller Aff., ¶¶ 2,4,6.

The affidavits of three other individuals participating as inspectors in the site investigation support the EPA's assertion that the investigation was performed with the voluntary consent of Respondent. Burton Aff., ¶¶ 5-9; Roach Aff., ¶¶ 3-4; Wilson Aff., ¶ 3. Respondent was given advance notice of the site investigation, including the day and hour of the investigation. Burton Aff., ¶ 6. Respondent raised no objection upon being given notice of the investigation or at any time prior to the arrival of the inspectors, and was expecting the inspectors when they arrived. Burton Aff., ¶¶ 4-6; Wilson Aff., ¶ 2.

The Respondent therefore was not compelled in any manner, upon arrival of the inspectors, to allow the investigation to proceed such that Respondent's consent was involuntarily given. Contra, Bumper v. North Carolina, 391 U.S. 543, 548-549 (1968) (stating that a show of authority that creates a compulsion to submit to lawful authority renders consent involuntary for the purposes of a criminal proceeding). Based on the record now before me, it is apparent that Respondent consented to the search of the property as required for the site investigation and that such consent was voluntary.

While the EPA supports its contention that there was consent by providing sworn affidavits from several individuals participating in the site inspection on November 28, 2000, Respondent has offered no countervailing support for the claim that there was no voluntary consent. Respondent's Motion fails to meet the procedural requirement that it be supported by "any affidavit, certificate, other evidence or legal memorandum relied upon". 40 C.F.R. § 22.16(a)(4). Respondent's Motion makes conclusory assertions without relying on any evidentiary material, and without providing any additional support for Respondent's allegations.

Even if the EPA had violated Respondent's Fourth Amendment rights against unreasonable searches and seizures, suppressing evidence obtained during the EPA's inspection of Respondent's farm would not be an appropriate remedy in this case. See Litton Industrial Automation Systems, Inc., TSCA Appeal No. 93-4, 5 E.A.D. 671, 676 n.9 (EAB, January 27, 1995) (citing Boliden-Metech, Inc., TSCA Appeal No. 89-3, 3 E.A.D. 439, 444 n.5 (EPA CJO, November 21, 1990)). As the Chief Judicial Officer noted in the Boliden-Metech case:

The exclusionary rule was initially created by the federal courts to deter Fourth Amendment violations in

criminal cases and has not necessarily been extended to all administrative proceedings. See United States v. Leon, 468 U.S. 897 (1984); In re Establishment Inspection of Hern Iron Works, Inc. 881 F.2d 722, 729 (9th Cir. 1989). The courts have applied a balancing test in each case, weighing the deterrent effect of suppressing unlawfully obtained evidence against the social cost of depriving the government of the use of the evidence. United States v. Janis, 428 U.S. 433 (1976). [* * *] the Supreme Court has stated, in dictum, that the social cost of applying the exclusionary rule is unacceptably high in situations involving continuing environmental violations. It states, for example, that "[p]resumably no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump if the evidence underlying the order has been improperly obtained * * *." Immigration and Naturalization Service v. Lopez-Mendoza, 468 U.S. 1032, 1046 (1984).

Boliden-Metech, Inc., 3 E.A.D. at 444 n.5. The Chief Judicial Officer's reasoning in Boliden-Metech is similarly applicable to the case at bar. The unacceptably high social cost of depriving the government of the use of the evidence obtained from the site inspection at Respondent's farm would outweigh any deterrent effect on future site inspections performed by representatives of the EPA.

Additionally, any representative of the EPA duly designated by the Administrator has the authority, for the purposes of conducting a study, taking a corrective action, or enforcing the provisions of RCRA, "to enter at reasonable times any establishment or other place where an underground storage tank is located; to inspect and obtain samples from any person of any regulated substances contained in such tank; [and] to conduct monitoring or testing of the tanks, associated equipment, contents, or surrounding soils,

air, surface water or ground water." 42 U.S.C. § 6991d(a). The inspectors, therefore, had statutory authority to enter the premises to perform the site investigation.

Based on the foregoing discussion, Respondent's Motion to suppress all evidence relating to the site inspection of Respondent's farm on November 28, 2000 is **Denied**.

Barbara A. Gunning
Administrative Law Judge

Dated: June 3, 2003
Washington, DC