



**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

**IN THE MATTER OF** )  
 )  
**General Motors Automotive - North America** ) **DOCKET NO. RCRA-05-2004-0001**  
 )  
**RESPONDENT** )

**ORDER ON EPA’S MOTION IN LIMINE**

This civil administrative penalty proceeding arises under the authority of Section 3008(a) of the Solid Waste Disposal Act, as amended, commonly referred to as the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6928(a).<sup>1</sup> On October 17, 2003, the United States Environmental Protection Agency (“Complainant” or “the EPA”) filed a Complaint and proposed Compliance Order against General Motors Corporation (“Respondent” or “GM”), charging Respondent with violating Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), and the regulations found at 40 C.F.R. §§ 265.1064(b), 265.1085(c)(4), and 270.1(c), and Michigan Part 111 Administrative Rule 299.9601, for storing hazardous waste without an operating license or interim status by failing to meet the conditions for regulatory exemption and failing to comply with the interim status requirements at three of its facilities located in Pontiac, Michigan, Lake Orion, Michigan, and Moraine, Ohio.

On April 4, 2005, the EPA filed and served Complainant’s Motion in Limine to Exclude Evidence/Testimony, Motion in Limine to Limit Testimony, and Notice of Request for Voluntary Production of Discoverable Information (“Motion in Limine”). Specifically, the EPA moves that this Tribunal issue an order barring GM from calling attorney Michael Steinberg as an expert witness on “the statutory and regulatory definitions of solid waste, spent material, hazardous waste, and related concepts under the RCRA program, and their applicability to this case,” and other questions of law, and to exclude Mr. Steinberg’s testimony in this matter as irrelevant and improper opinion testimony on a legal conclusion.<sup>2</sup>

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<sup>1</sup> In its pleadings after the Complaint, the EPA cites to the federal regulations instead of the operative state regulations. *See In re Pyramid Chem. Co.*, Docket No. RCRA-HQ-2003-0001, 2004 EPA App. LEXIS 32, slip. op. at 18 n.19 (EAB, Sept. 16, 2004), 11 E.A.D. \_\_\_\_.

<sup>2</sup> The EPA also moved that this Tribunal issue an order limiting the testimony of GM’s in-house legal counsel, attorney Michelle Fisher, and requested that GM voluntarily disclose all documents in its possession relating to Ms. Fisher’s testimony. However, GM has now withdrawn Ms. Fisher as a potential witness in this case, and therefore EPA’s challenge to Ms. Fisher’s testimony is no longer at issue. GM’s Response at 1 n.1 & Ex. A.

In General Motors Corporation's Initial Prehearing Exchange ("GM Prehearing Exchange"), GM lists Mr. Steinberg as an expert witness and its discussion of him reads as follows:

Mr. Steinberg is senior counsel in the Litigation Practice group at Morgan, Lewis & Bockius LLP. His practice focuses exclusively on environmental law matters with special emphasis on hazardous waste issues arising under RCRA. A copy of Mr. Steinberg's CV is attached as Respondent's Ex. 124. Mr. Steinberg may be called upon as an expert witness in this cause. A brief narrative summary of his expected testimony follows.

Mr. Steinberg may testify about his educational background and work experience. Mr. Steinberg may testify about the statutory and regulatory definitions of solid waste, spent material, hazardous waste, and related concepts under the RCRA program at the federal and state levels, and their applicability to this case. Mr. Steinberg may also be asked to testify about how these concepts apply to GM's painting operations. He may testify about the nature of GM's painting operations at its vehicle assembly facilities including the purging process and purge mixture, and provide his opinions as to why the purge mixture is not a solid or hazardous waste, and is not subject to regulation, under federal and state RCRA statutes and regulations. He may also testify about the nature of GM's manufacturing processes and how they qualify for various regulatory exemptions. Mr. Steinberg may also be asked to testify about decisions of the D.C. Circuit Court of Appeals relating to these subjects and why those decisions support his opinion that the purge mixture is not a solid or hazardous waste, and is not subject to regulation. Finally, Mr. Steinberg may also testify in response to testimony and evidence EPA presents in support of its case.

The parties' arguments focus on an order issued by my esteemed colleague, Chief Judge Biro, who was faced with a similar issue in *Strong Steel Products, LLC*, Docket No. RCRA-5-2001-16, CAA-5-2001-0020, & MM-5-2001-0006, 2003 EPA ALJ LEXIS 191 (ALJ, Oct. 27, 2003).<sup>3</sup> Specifically, in the *Strong Steel* order Judge Biro stated,

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<sup>3</sup> As GM correctly observes, the EPA cites to several federal court cases excluding the testimony of legal witnesses but those cases are all jury trials. GM's Response at 15-16. Accordingly, those cases are not directly on point for purposes of the current proceeding.

In administrative enforcement proceedings, each party may submit its interpretation of EPA's regulations, and the Presiding Judge in the decision will independently interpret the relevant regulations and apply them to the findings of fact. The interpretation starts with the plain language of the regulation, and any ambiguities are resolved under principles of statutory (and regulatory) construction and interpretations set forth in applicable case precedent. Testimony, however, by a witness as to what EPA intended or expected the regulation to mean, but did not express so as to provide fair notice, may not be considered by courts or administrative tribunals in interpreting a regulation. Therefore such testimony is not admissible. However, testimony which states the *witness'* own understanding of what the regulation means may assist the Presiding Judge in understanding the witness' factual or expert testimony, and may be admissible. Testimony which simply explains, as a matter of background, the regulatory scheme, or any relevant changes in the regulations, may assist the Presiding Judge at the hearing in understanding the factual testimony, and is admissible.

2003 EPA ALJ LEXIS 191, at \*60-61 (discussing testimony on fair notice).

With additional emphasis added, the EPA points to a passage from Judge Biro's order, stating that "testimony which states the *witness'* own understanding of what the regulation means may assist the Presiding Judge *in understanding the witness' factual or expert testimony*, and may be admissible." Motion in Limine at 5 (quoting *Strong Steel*, 2003 EPA ALJ LEXIS 191, at \*60). The EPA interprets that passage as providing that in such cases the witness will primarily testify to issues of fact, either as a percipient witness of factual matters, or as an expert on a scientific or technical subject that has factual relevance to the case. *Id.* The EPA further contends that the witness' opinion as to what a regulation means is not substantive testimony which the Presiding Judge must accept, but rather it is admissible in the Judge's discretion if the Judge determines that hearing it would assist her in understanding the witness' testimony on technical, scientific, or other factual matters. *Id.* The EPA contends that "unlike the testimony at issue in *Strong Steel Products*, and unlike the expected testimony of the other witnesses identified by both of the parties to this case, attorney Steinberg's proposed testimony consists exclusively of his interpretations of law." *Id.* at 7. In sum, the EPA contends that Mr. Steinberg's opinions on the law are nothing but legal argument and should not be allowed as evidence. *Id.* at 4.

GM responds by contending that motions in limine are disfavored, and GM emphasizes that Mr. Steinberg is a potential witness because "no one knows if Mr. Steinberg will even be called and if so, what his testimony may be," and that the Motion in Limine is premature. GM's Response at 3-6. GM correctly observes that the Consolidated Rules of Practice provide that the Administrative Law Judge ("ALJ") "shall admit all evidence which is not irrelevant, immaterial,

unduly repetitious, unreliable, or of little probative value . . . .” *Id.* at 13 (citing 40 C.F.R. § 22.22(a)(1)). Furthermore, as noted in *Strong Steel*, to which GM cites, “[A] motion in limine ‘should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose.’” *Strong Steel*, 2003 EPA ALJ LEXIS 191, at \*37 (quoting *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000)); accord *In re Julie’s Limousine & Coachworks, Inc.*, Docket No. CAA-04-2002-1508, 2003 EPA ALJ LEXIS 37, at \*31 (ALJ, May 2, 2003).

GM contends that, contrary to EPA’s contentions, Judge Biro’s opinion in *Strong Steel* did not establish the “ancillary-connection-to-fact-or-expert testimony test.” GM’s Response at 8. Rather GM quotes to the entire relevant passage in *Strong Steel* and then GM contends that Judge Biro’s opinion is broader, establishing the following propositions: (1) each party may submit its legal interpretations and the court will then determine what weight and applicability those interpretations have to the facts and the case and make its own independent interpretation; (2) a witness can testify to his or her own understanding of what the regulations mean; (3) a witness can explain “as a matter of background” the regulatory scheme or any relevant changes in the law; and (4) there is not any required level of facts that must be presented before legal opinion can be introduced as testimony. *Id.* Furthermore, GM contends *in arguendo* that even if EPA’s test were correct, then EPA’s Motion in Limine rests upon the false assumption that Mr. Steinberg will not also provide factual testimony. *Id.*

However, GM suggests that Mr. Steinberg is a “legal expert” and contends that if Mr. Steinberg is qualified as an expert on the meaning of the relevant rules then it makes no sense for the EPA to state he can only give his legal opinion testimony as ancillary testimony to his expert opinion testimony. *Id.* at 12. GM further contends that Mr. Steinberg can give legal opinion testimony as his expert testimony. *Id.*

Finally, GM points to language in Judge Biro’s decision in *U.S.A. Remediation Services, Inc.*, 2003 EPA ALJ LEXIS 6, at \*3-4 (ALJ, Feb. 10, 2003), in which Judge Biro further states,

If evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial so questions of foundation, relevancy, and prejudice may be resolved in context. [*Hawthorne Partners*, 831 F. Supp.] at 1401. Thus, denial of a motion in limine does not mean that all evidence contemplated by the motion will be admitted at trial. Rather, denial of the motion in limine means only that without the context of trial the court is unable to determine whether the evidence in question should be excluded. *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989).

In reply, the EPA asserts that GM seeks to call Mr. Steinberg to make legal arguments from the witness stand, as opposed to other witnesses whose reference to laws will be ancillary and only for the purpose of placing their testimony in context. EPA’s Reply (Apr. 26, 2005) at 9. Regarding the witness in *Strong Steel*, the EPA clarifies that at the hearing stage of that case, the witness was qualified as an expert in non-legal scientific or technical subjects, such as used

oil and geology, but that there is no reference to her being qualified as an expert on legal interpretation of applicable regulations. *Id.* at 4 (citing *Strong Steel*, Initial Decision at 33 n.38 (ALJ, Apr. 7, 2005)). Finally, the EPA makes a request that GM voluntarily provide information that would inform the EPA as to the basis for Mr. Steinberg's qualifications to testify to issues of fact. *Id.* at 11.

This Tribunal is confronted with the issue of whether and to what extent an attorney may testify as an expert witness. It is well established "[t]hat the admission of evidence is a matter particularly within the discretion of the administrative law judge." *In re Julie's Limousine & Coachworks, Inc.*, 2004 EPA App. LEXIS 23, CAA Appeal No. 03-06, slip op. at 36 (EAB, July 23, 2004), 11 E.A.D. \_\_\_\_\_. While noting that I am not bound by other ALJs' rulings on other motions as precedent, I may turn to such rulings as persuasive authority.<sup>4</sup> GM is correct that it is premature at this time to rule on the specifics of each and every topic to which Mr. Steinberg may or may not testify.<sup>5</sup> Accordingly, a ruling on EPA's Motion in Limine is DEFERRED until the hearing and will not be ruled upon unless the EPA renews its objections at the hearing.

However, I agree with and would adopt Judge Biro's relevant language expressed in the *Strong Steel* order discussed by the parties and which is quoted in full near the beginning of the instant order. *See Strong Steel*, 2003 EPA ALJ LEXIS 191, at \*60-61.<sup>6</sup> Moreover, I agree with EPA's position that testimony about the law should be ancillary to factual or expert testimony. Significantly, the witness discussed in *Strong Steel* was to testify to explain the regulations at issue in that case but within the context of discussing the reasonableness of the proposed penalty for the alleged violations and her review of the facts supporting the alleged violations. *Id.* at \*57. Furthermore, the EPA correctly observes that she was not admitted as a legal expert. Accordingly, her explanation of the regulations would appear to be ancillary to her factual or technical testimony. *See id.* at \*57, \*60. Testimony concerning only legal principles will not be admissible, but rather should be heard within the confines of the parties' legal briefs and opening and closing statements at the hearing. With regards to "background" testimony, typically such testimony is quite limited in nature, as the testimony should only inform the witness' factual or expert testimony. I emphasize that the parties have had and will have sufficient opportunity to brief the relevant legal principles and the regulatory scheme at issue in this matter.

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<sup>4</sup> Contrary to the assertions in GM's response brief, none of the cases cited by the parties are decisions of the Environmental Appeals Board.

<sup>5</sup> Furthermore, the EPA recently filed a Motion to Strike Respondent's Fair Notice Affirmative Defense (May 6, 2005). I mention this not to indicate how I may rule on such motion, but as an illustration of how the issues in the instant case are not yet crystallized.

<sup>6</sup> Accordingly, I reject other ALJs' orders that may conflict with my interpretation of Judge Biro's order in *Strong Steel*. Therefore, I need not reach the question whether the legal opinion voiced, for instance, in *Motiva Enterprises, LLC*, Docket No. RCRA-3-2000-0004, 2001 EPA ALJ LEXIS 161 (ALJ, Oct. 10, 2004) was ancillary to factual testimony.

Regarding EPA's request for information regarding Mr. Steinberg's qualifications to testify as a fact witness, the EPA characterizes that as a *voluntary* request for information and states that if GM does not provide such information then the EPA will move for discovery. Being that the EPA has made a "voluntary" request for information, and that the EPA has announced the possibility of filing a motion for discovery for the same material, it is premature for me to rule on that matter.

So ordered.

Dated: May 19, 2005  
Washington, D.C.

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Barbara A. Gunning  
Administrative Law Judge