

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
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Lu Vern G. Kienast) Docket No. CAA-5-2001-007
L.G. Kienast Utility) Section 113(d), Clean Air Act
Construction) 42 U.S.C. Section 7413(d)
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Respondent)

ORDER GRANTING RESPONDENT'S MOTION FOR
ADMINISTRATIVE SUBPOENA TO COMPEL PRODUCTION
OF DOCUMENTS AND TESTIMONY

On October 15, 2001, Respondent moved, pursuant to 5 U.S.C. Section 556(c), 42 U.S.C. Section 7607(a) and 40 C.F.R. Section 22.19(c)(sic), for the issuance of an administrative subpoena directing the following individual to produce documents and give testimony under oath:

Witness: Larry Weix, Air Management Specialist
Wisconsin Department of Natural Resources
Northeast Region
1125 N. Military Avenue
Green Bay, Wisconsin 54307-0448

Respondent alleges that Mr. Weix has been designated by EPA as its principal fact witness in this case. According to EPA's Prehearing Exchange, Respondent asserts that EPA expects the witness to testify *inter alia*, that he conducted inspections and inspection activities concerning Respondent's Hudson facility, including the crushing of the suspected asbestos-containing material by hand; finding that the suspected asbestos-containing material was friable; interviewing asbestos abatement contractors; viewing disposal sites; interviewing Respondent and sampling materials found at the Hudson facility and at Respondent's disposal sites at Jackson Avenue; receiving sample analyses; assembling the inspection report; and, providing a copy of the previous state notice of violation (EPA Prehearing Exchange at p. 3).

In its Motion, Respondent asserts that its investigation has shown that Mr. Weix's proposed testimony, as described by EPA's Initial Prehearing Exchange, contains serious errors, inconsistencies and departures from the truth. More importantly however, Respondent states that it has reason to believe that Mr. Weix took numerous photographs of the accused demolition site and may have retained samples of suspected material and other documents. Respondent concludes that none of these documents or items have been provided to EPA, because none have been produced by EPA pursuant to pre-hearing discovery and none listed in EPA's Initial Prehearing Exchange.

Respondent alleges that attempts to interview Mr. Weix and have him produce such documents and items voluntarily, have not been successful. It further asserts that such evidence and testimony is critical to Respondent's ability to prepare its defense to EPA's enforcement action against it.

Complainant, by Response to Respondent's Motion for Administrative Subpoena To Compel Production of Documents and Testimony on October 26, 2001, opposes issuance of said subpoena on the following grounds: 1) that the subpoena request does not comport with the requirements of "other discovery" pursuant to 40 C.F.R. Section 22.19(e); 2) that said request was filed prior to completion of the prehearing exchange, which will not be completed until November 2, 2001; 3) that the basis for the request for deposition is to merely attack Mr. Weix's credibility; and 4) that the Clean Air Act and the rule applicable to this request, 40 C.F.R. Section 22.19(e), do not provide for general administrative subpoena authority and hence the request is not available.

The standard for ruling upon a request for subpoenas or depositions is contained in 40 C.F.R. Sections 22.19(e)1 and (e)(3). In that regard, Rule 22.19(e)(1) sets forth three requirements. First, that the "other discovery" may not unreasonably delay the proceeding, or place an unreasonable burden upon the non-moving party. Second, that the information sought is most reasonably obtained from the non-moving party, and the non-moving party had refused to voluntarily provide the information. Third, that the information sought has significant probative value on a disputed issue of material fact relevant to liability or the relief sought. Rule 22.19(e)(3) requires the additional finding that when a party requests depositions upon oral questions, "[t]he information sought cannot reasonably be obtained by alternative methods of discovery."

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Respondent has satisfied the "other discovery" requirements of Rule 22.19(e)(1) and (e)(3). Respondent has demonstrated that Mr. Weix is likely to have personal knowledge regarding the

circumstances surrounding the inspection activities at the facility, including matters related to the taking of samples and photographs of the area and suspected asbestos-containing material. As such, Respondent's request for subpoena/deposition is not intended to merely attack the credibility of the witness, but is sought for the specific purpose of ascertaining testimony and evidence not previously disclosed. None of the alleged documents or items appear so far to be included in EPA's Initial Prehearing Exchange.¹

As to Complainant's contention that the Clean Air Act does not provide for general administrative subpoena authority, such argument is rejected as a matter of law. 40 C.F.R. Section 22.21(b) provides that "[t]he Presiding Officer may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act, upon a showing of the grounds and necessity therefor, and the materiality and relevancy of the evidence to be adduced."

Complainant's legal position no doubt rests on the fact that Subpart H, Supplemental Rules Governing the Administrative Assessment of Civil Penalties Under the Clean Air Act at 40 C.F.R. Section 22.34 (Revised as of July 1, 2000), do not speak to the issuance of subpoenas to compel the production of testimony or documents. This is an interesting departure from the same Supplemental Rules (Revised as of July 1, 1999), which

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provide at Section 22.34(c) *Subpoenas*. (1) *The attendance of witnesses or the production of documentary evidence may be required by subpoena. 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*

¹As mentioned by Complainant, the undersigned notes that the Prehearing Exchange in this proceeding is not scheduled to be completed until November 2, 2001. It is well-settled that the Rules contemplate a prehearing exchange as the initial step in the disclosure of documents. 40 C.F.R. Section 22.19(b). See ***Arsenal Associates, Docket No. TSCA -III-725, Order Denying Subpoena Duces Tecum (October 20, 1997)***. It may develop that some or all of the information Respondent seeks will be disclosed with completion of the prehearing exchange. Normally, the timing of such request for other discovery might be considered premature. However, given the proximity of the completion of the prehearing exchange with the issuance of this Order, and the fact that Complainant did not include the requested information in its initial Prehearing Exchange, the undersigned will treat the Motion as if the Prehearing Exchange has in fact been completed.

to be adduced. Request for the production of documents shall describe with specificity the documents sought (Emphasis supplied).

Despite the omission of subpoena authority from the Revised 2000 Consolidated Rules, the statute, pursuant to Section 22.21(b), leaves no doubt that the Clean Air Act authorizes the issuance of subpoenas for administrative enforcement proceedings of the type before this Court. Section 307 of the statute, 42 U.S.C. Section 7607(a) provides in pertinent part, that "[i]n connection with any determination...of this title...(including but not limited to section 7413...), the Administrator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents..." (Emphasis supplied). See also, **United States v. Tivian Laboratories, Inc.**, No. 78-1109, 589 F.2d 49, 12 ERC 1568, 9 Env'tl. L. Rep. 20,008 (December 20, 1978), wherein the First Circuit affirmed the validity of the issuance of administrative subpoenas under the Clean Air Act.

Accordingly, Respondent's Motion is **GRANTED**. The deposition of Mr. Weix is to be conducted on November 26, 2001 in Chicago, Illinois, unless the parties otherwise agree. The deposition shall not exceed three hours. The subpoena attached to this Order also sets forth at Attachment A, the documents and items to be produced for the deposition.²

So Ordered.

Stephen J. McGuire
United States Administrative Law Judge

October 31, 2001
Washington, D.C.

²This Order only establishes Respondent's right to depose the named individual. It does not affect whatever privileges and objections that otherwise might be raised at deposition.