

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
GCA Chemical Corp.,)	Docket No. TSCA-4-2000-0130
)	
Respondent)	

**Order Regarding Respondent’s Request for Issuance
of Subpoena**

Before the Court is Respondent’s request (“Request”) for the issuance of a “subpoena for testimony with documents” for the attendance at the hearing of EPA’s Phyllis P. Harris or her designee and Karen V. Brown or her designee. Ms. Harris is the Director of EPA Region 4’s Environmental Accountability Division and Ms. Brown is EPA’s Small Business Ombudsman. EPA filed a Response “strongly object[ing] to Respondent’s Motion for Subpoena and Discovery...”¹

Several aspects of Respondent’s Request may be dealt with summarily.² To the extent that Respondent seeks to demonstrate that EPA enforces *other* environmental laws differently, that *other* environmental laws do not mandate automatic penalties or otherwise to “question the Agency on the fairness of this enforcement action when compared to the Agency’s enforcement practices under other environmental statutes” it is **DENIED**. Such issues are not material to the issue of the appropriate penalty in this TSCA proceeding.

¹While EPA has characterized Respondent’s Request as a “Motion,” the Court does not view that as an appropriate denomination. Under the Consolidate Rules, 40 C.F.R. Part 22, subpoenas are treated separately from motions. Sections 22.4(c)(9), 22.19(e)(4), and 22.21(b) of the Rules speak to the judge’s discretionary authority to issue subpoenas. Section 22.21(b), in particular, provides that this discretionary authority presupposes “a showing of the grounds and necessity therefor, and the materiality and relevancy of the evidence to be adduced.” Therefore, the Court views EPA’s arguments that the *Motion* was not timely filed, nor sent by facsimile, (in addition to the method provided by the procedural rules), as misplaced.

²EPA is also correct in asserting that Respondent’s arguments concerning business size are not relevant, as it is not one of the statutory criteria set forth at Section 16(a) of TSCA.

Regarding Respondent's attempt to question the "fairness and equity" of the proposed penalty and whether the Enforcement Response Policy ("ERP") is unfair, rigid, inflexible rule, the request is **DENIED** to the extent Respondent seeks to "review and compare the level of enforcement between different statutes." Therefore, Respondent's request for the attendance of Ms. Harris or her designee is **DENIED**. However, as the Court has previously explained to Respondent's Counsel during a conference call, Respondent will have the opportunity to show that EPA's application of the ERP was unfairly or inequitably applied in this instance and to show the policy is applied in an unfair or rigid manner in this instance. Respondent will have the opportunity to do this through the cross-examination of the EPA witness(es) who calculated the penalty or those that may be called to justify the calculation performed by others. To guide Respondent, the Court identified cases which have set forth the Environmental Appeals Board's pronouncements regarding the judge's authority to assess a different penalty from that derived using a penalty policy. *See for example: In re: Predex Corporation*, 7 E.A.D. 591, 1998 WL 284965 (May 8, 1998), *Employers Ins. of Wausau*, 6 E.A.D 735 at 758, (EAB 1997), 1997 WL 94743, *Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 1998 WL 214543 (March 13, 1998).

Respondent also seeks to inquire whether the ERP meets "[former] President Clinton's 1995-1996 executive order to all federal agencies addressing equitable enforcement for small businesses and whether it also complies with the subsequently-enacted Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) and ...EPA's... Small Business Policy issued under that statute." (Request at 3). Respondent asserts that EPA's small business office website specifically identifies³ one of its duties as "assist[ing] businesses in the context of enforcement actions taken by the Agency." Request at 5. While Respondent has written to Ms. Brown regarding these issues, it has not received a reply. Specifically, Respondent requests that Ms. Brown or her designee bring a "copy of the SBREFA, the Agency's April 11, 2000 Small Business Policy, and any other documents relevant to the SBO's role in representing the interests of small businesses involved in enforcement actions within the Agency." Request at 5.

In response, EPA objects that Respondent has not provided a legal citation for the SBREFA nor articulated how the ERP could violate that Act. EPA also asserts that, by correspondence dated March 14, 2000, it provided Respondent with a Small Business information sheet which explained that the Small Business Policy does "not apply if an enforcement action has already begun" and that the SBREFA Ombudsman "does not participate in resolving EPA's enforcement actions." EPA Response at 2. This information sheet (which accompanied the Response) supports EPA's assertions. While acknowledging EPA's issuance of a Small Business Policy, EPA asserts that the policy does not provide relief in this case and that Respondent remains able to demonstrate, through legal argument, that either the ERP or the Small Business Policy violates SBREFA.

³Respondent included a copy from EPA's SBO website purporting to specifically identify this duty. However, upon reviewing the attachment, it is the Court's view that it does not clearly apply to disputes that are litigated and that the document addresses other duties of the SBO.

Upon consideration, the Court agrees that Respondent's arguments to the effect that EPA's ERP or its Small Business Policy violates the SBREFA are legal arguments which do not require Ms. Brown's attendance. However, the Court directs that Ms. Brown or her designee provide an affidavit attesting that her office does not, *and has never*, participat(ed) in resolving EPA enforcement actions brought against small businesses. This affidavit is to be provided to the Court, by facsimile or courier, not later than 5 p.m. on Monday, May 14, 2001. If the Small Business Ombudsman is unable to make such an assertion, then either she or her designee is ordered to appear at the hearing. In that event, a subpoena will be issued on Tuesday, May 14, 2001 to Ms. Brown or her identified designee.

So Ordered.

William B. Moran
United States Administrative Law Judge

Dated: May 11, 2001

In the Matter of GCA Chemical Corp., Respondent
Docket No. TSCA-4-2000-0130

I certify that the foregoing **Order Regarding Respondent's Request for Issuance of Subpoena**, dated May 11, 2001, was sent this day in the following manner to the addressees listed below:

Rachele D. Jackson
Legal Staff Assistant

Dated: May 11, 2001

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