IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

In re Search Warrant	:	Misc. Case No. 04-00079-MPT

AMENDED MEMORANDUM

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Dated: June 10, 2004

Wilmington, Delaware

Thynge, U.S. Magistrate Judge

I. Introduction

This motion, initiated by Christiana Town Center ("Christiana"), seeks to quash the administrative warrant obtained by the United States Environmental Protection Agency ("EPA") on April 28, 2004. Christiana also requests the court to exclude inspection evidence obtained pursuant to the executed search warrant.

II. Background

The facts giving rise to this matter arose from contentions by the EPA of possible Clean Water Act ("CWA") violations by Christiana. These violations are alleged against a site known as the Christiana Town Center shopping center (the "Site"). The Site is located at Route 273, Brown's Lane and Main Street, White Creek Hundred, New Castle County, Delaware. The EPA has the authority to enforce the CWA through 33 U.S.C. § 1318.

In September 1998, Christiana was issued a National Pollutant Discharge Elimination System permit (the "Permit"), pursuant to 40 C.F.R. § 122.28. The Permit was issued by the Delaware Department of Natural Resources and Environmental Control. Christiana then filed a Notice of Intent to be subject to the Permit. Christiana submitted an Erosion and Sediment Control Plan (the "Plan"), which was approved by New Castle County (the "County"). The Plan was in accordance with the CWA. Therefore, if Christiana was in compliance with the Plan, it would be in compliance with the Permit and the CWA. Conversely, any violations of the Plan would equate to a violation of both the Permit and CWA.

Christiana claims to have completed its construction activities on the site by October 2003, while the Permit remained in effect until November 12, 2003. Further, Christiana asserts that the Site was in full compliance with the Plan during that time. Therefore, any jurisdictional powers that the EPA may have had based on the Permit, no longer existed after construction finished in October.

The EPA argues that the effective date of the permit is immaterial, since its authority to inspect for construction activity, which causes unpermitted discharges, continues after construction is completed. Further, according to the EPA, the Permit expired on September 14, 2003. Based on Christiana's Notice of Intent, it remained subject to the Permit's terms and conditions for the five year life of the Permit. Moreover, the EPA alleges that it had the authority through Section 308 of the CWA to inspect for possible violations during the life of the Permit.

Through various correspondence between Christiana and the EPA in March 2004, the EPA requested to inspect the Site.[1] Christiana only allowed the EPA to inspect areas that were open to the public, and denied access to any other areas on the premises on the position that such inspection would violate its privacy.

On March 9, 2004, an EPA employee, Charles Schadel, along with a County employee, Doug Hokuf, inspected the public areas. Following this inspection, the EPA

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[1]The first letter, dated March 2, 2004, was Christiana's response to a telephone call from the EPA. That letter rejected the request to inspect, and contended that the EPA had no jurisdiction and no basis to obtain a warrant since the Site was in compliance with the law. The EPA responded on March 4, 2004, claiming authority to enter and inspect. In its response dated March 8, 2004, Christiana again refused the EPA's request, contending that the EPA had neither the jurisdiction nor the requisite probable cause to obtain a search warrant. That letter also requested for the EPA to provide Christiana notice if it sought an administrative search warrant.

sought an administrative warrant to search the entire premises. Evidence from the public area inspection served as probable cause for the warrant. The warrant proceeding was *ex parte*. An administrative search warrant and an order to seal were issued on April 28, 2004.[2] Christiana contends that the *ex parte* proceeding was improper, because it was entitled to a *Franks* hearing to contest the issuance of the warrant.

After the warrant was issued, the EPA conducted an inspection of the entire site. The EPA has not yet completed a report, nor has taken any subsequent action against Christiana based on the inspection.[3] For these reasons, the EPA contends that any motion to quash or to exclude findings would be premature.

Christiana argues that there was insufficient probable cause to obtain the administrative warrant. It further contends that the EPA did not have jurisdiction to inspect the Site. Furthermore, Christiana also alleges that the EPA acted in bad faith by obtaining the warrant *ex parte* and by conspiring against it with the County. For these reasons, Christiana asks the court to quash the administrative warrant and to exclude all findings from the inspection.

III. Discussion

A. Improper Proceeding

The EPA argues that since the warrant had already been executed when the motion to quash was filed, the motion is moot. The EPA relies on *Babcock & Wilcox*

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[2]Although the warrant and related documents were initially sealed, Christiana was provided copies of these documents after the warrant was executed.

[3]A copy of the inspection report was promised to Christiana when completed.

Co. v. Marshall, 610 F.2d 1128 (3rd Cir. 1979). Under *Babcock*, once an inspection has occurred pursuant to a search warrant, the ability to quash the warrant ends. *Id.* at 1133. Thus, since the inspection is completed, Christiana's motion to quash is moot.

Nevertheless, in order to provide Christiana's arguments adequate consideration, its motion will be viewed, in the alternative, as one to suppress. *Id.* at 1135-1141. However, before judicial review of a motion to suppress is proper, the moving party must exhaust all administrative remedies. *Id.* Without utilizing all appropriate remedies before filing, a motion to suppress is premature and should be denied. *Id.*

Christiana has failed to fully exhaust all of its administrative remedies. As the EPA notes, there is an EPA administrative tribunal which is well equipt to review and determine any issues raised by Christiana. D.I. 9 at 2. The tribunal possesses expertise in the applicable statutes and permits at issue. Christiana must utilize such administrative remedies prior to filing a motion with the court. Since Christiana failed to first seek relief from the EPA's administrative tribunal, a motion to suppress is premature and should be denied.

Moreover, as noted by the EPA, the motion to quash/suppress is premature since no action has been taken against Christiana. A motion to quash is improper following an inspection when no enforcement or reimbursement actions have been initiated. *Koppers Indus., Inc. v. EPA*, 902 F.2d 756, 759 (9th Cir. 1990) (declining to act on substantive issues where enforcement action is only speculative). Since the EPA has not taken any action against Christiana as a result of its inspection pursuant to the warrant, the motion is premature. Furthermore, it is possible that no action will ever be taken against Christiana. Adjudicating substantive issues as raised by Christiana is

contrary to judicial economy.

Christiana also argues that the inspection of the Site was done prior to the warrant being served, which is contrary to the terms of the warrant. D.I. 6 at 3. However, Christiana provides no evidence nor any support for this contention. Furthermore, such an issue should first be addressed by the EPA's administrative tribunal.[4] Therefore, on the aforementioned bases alone, Christiana's motion to suppress at this stage is denied.

B. Proper Warrant

For the sake of completeness, the court will also address Christiana's remaining arguments. The EPA submits that the warrant was properly issued, since the necessary evidence was provided to form the requisite probable cause. The EPA further argues that the *ex parte* proceeding was proper, because it was not required to provide notice to Christiana. Furthermore, the EPA asserts that Christiana was not entitled to a *Franks* hearing even if notice had been provided.

Probable Cause

The EPA correctly notes that a lower standard of probable cause is required for administrative warrants, than what is necessary in a criminal proceeding. "Probable cause in the criminal law sense is not required" for an administrative warrant. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 321 (1978). For administrative searches, probable cause, "may be based, not only, on specific evidence of an existing violation, but also,

[4]If there is bad faith in the execution of an administrative warrant, the party subject to the inspection may raise such issues in the course of subsequent administrative proceedings. *Boliden Metech, Inc. v. U.S.*, 695 F. Supp. 77, 83 (D.R.I. 1988).

on a showing that reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." *Id. quoting*, *Camara v. Mun. Court of City and County of San Francisco*, 387 U.S. 523, 538 (1967). Thus, the Supreme Court has established that a lesser showing of probable cause is sufficient to grant an administrative warrant for an inspection.[5]

The EPA argues that it provided sufficient proof of CWA violations to meet the requisite probable cause standard. When applying for the administrative warrant, the EPA outlined specific evidence of various potential CWA violations by Christiana. The evidence presented was obtained through the EPA's prior search of public areas. During that search, various photographs were taken showing potential violations. D.I. 1 at 8-10. Furthermore, Charles Schadel, who inspected the publicly accessible areas, submitted an affidavit describing several potential CWA violations. D.I. 2 at 1-8.

Specifically, the EPA showed that a particular basin was not in accordance with the approved Erosion and Sediment Control Plan. To be consistent with the Permit requirements, the basin must be divided into two bays. However, during Schadel's inspection, only a single bay was evident. Further, specific evidence was presented of ongoing construction which supposedly was finished. Photographs were taken of construction trucks and equipment at the Site long after the date when Christiana alleges to have completed construction. Other photographs showed possible improper storm water damage through the presence of water drainage to adjoining waterways to

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[5] *See also Marshall v. Milwaukee Boilder Mfg. Co.*, 626 F.2d 1339, 1345 (7th Cir. 1980) (a warrant application does not need to be accompanied by all supporting documentation of alleged violations and the court can rely on the verity of the assertions made).

the Site. Such evidence as noted herein was adequate probable cause for an administrative search warrant.

Christiana emphasizes that terms, such as, "appears," "potentially," "may," and "could," in the affidavit in support of the warrant, show that the necessary probable cause was not met. However, in light of the lower standard for probable cause, the evidence was sufficient for the issuance of the warrant. As a result, Christiana has not adequately challenged the issuance of the warrant based on a lack of probable cause.

***Ex Parte* Proceeding**

Christiana argues that the *ex parte* proceeding for the issuance of the warrant was improper. The EPA contends that the *ex parte* proceeding was proper and does not implicate bad faith. *Nat'l Standard Co. v. Adamkus*, 685 F. Supp. 1040, (N.D. Ill. 1988), *aff'd*, 881 F.2d 352, (7th Cir. 1989). According to *Nat'l Standard Co.*, "*ex parte* proceedings are the normal means by which warrants are obtained in both criminal and administrative actions." *Id.* at 1048. Moreover, *ex parte* proceedings, "do not, in and of themselves, evidence bad faith." *Id.*

Accordingly, in the present matter, the *ex parte* proceeding was proper; it does not suggest bad faith by the EPA. If notice of the warrant is provided or is required to be given, as suggested by Christiana, this would enable a potential violator to temporarily stop its prohibited activities, only to restart such conduct after the inspection, and thereby, severely hinder the EPA's enforcement abilities.[6] Not only are *ex parte*

[6] *See Boliden*, 695 F. Supp. at 83 (which recognized that the opportunity to have an adversary hearing before an EPA inspection potentially undermines the EPA's enforcement power).

proceedings proper, but often necessary.[7] Therefore, the EPA did not act in bad faith and was not required to provide Christiana notice of the warrant proceeding.

Franks Hearing

Christiana argues that if notice had been provided, it could have moved for a *Franks* hearing to contest the search warrant. *Franks* hearings are used to challenge the veracity of a sworn statement used to procure a warrant. *Franks v. Delaware*, 438 U.S. 154, 155 (1978). A *Franks* hearing is warranted when a *defendant* makes a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant." *Id.* at 155-156. The burden rests with a defendant to show the statements by the affiant are false.[8] Moreover, *Franks* involved a review of a motion to suppress *after* the execution of a search warrant and *before* the introduction of the questionable evidence against a defendant in a criminal case. *Id.* at 158.

At present, a *Franks* hearing clearly is premature. The EPA has yet to use any of the information or materials obtained through the Site investigation. The possibility remains that no action will be taken against Christiana.

Furthermore, there is no evidence, proof nor facts proffered by Christiana which suggest any untruthfulness in the statements made by the EPA to obtain the warrant. In

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[7]Christiana relies on *Stauffer Chemical Co. v. EPA*, 647 F.2d 1075 (10th Cir. 1981), where a motion to quash an administrative warrant was granted. *Stauffer,* however, is distinguishable. In that case, the focus was on who is a proper representative for an inspection and the possible disclosure of trade secrets and confidential information, neither of which are at issue here.

[8]*See Nat'l Standard Co.*, 685 F. Supp. at 1048 (a *Franks* hearing was denied where the defendant had failed to identify any false statements).

the absence of even a minimal showing of falsity, Christiana failed to meet its burden and is not entitled to a *Franks* hearing.

C. Jurisdiction to Inspect

The EPA argues that Section 308(a) of the CWA, 33 U.S.C. § 1318(a), expressly authorizes its right to enter and inspect based on possible violations. Although the EPA does not have an unfettered right to enter private property, there are certain circumstances where § 1318(a) gives the EPA the right of entry onto such land. *Mobil Oil Corp. v. EPA*, 716 F.2d 1187, 1190 (7th Cir. 1983) (involved a balancing analysis between the property rights of Mobil and the government's need to preserve the CWA). The court in *Mobil* explained that Section 308(a) expressly authorizes the EPA to check when someone, "holding a permit to pollute is complying with the pollution limits set forth in the permit." *Id.* at 1190.[9]

The Permit, under which Christiana operated, remained in effect for five years within which construction activities were to be completed. Section 308(a) of the CWA allows the EPA to enter and inspect for possible violations during the term of the Permit. Christiana's Notice of Intent operated as its consent to the Permit conditions, and thereby, made it subject to the EPA's review and investigation of the Site. When potential violations (e.g., continued construction) of the Permit and the CWA were evident, it sought a warrant to inspect.[10] Christiana contends that the Permit was no

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[9]*Mobil* recognized that the EPA could enter and inspect based upon the authority under § 308(a).

[10]No facts, evidence or law have been presented by Christiana that the initial Site review was improper.

longer effective and that its construction activities allegedly had ended long before the warrant was sought and executed. However, Christiana's focus is misplaced. Regardless of when the Permit expired, under the authority of § 308 of the CWA and the facts presented herein, the EPA had the right to confirm whether there were ongoing construction and associated CWA violations. Under the law and the circumstances in the present matter, the EPA's jurisdiction to inspect clearly exists.[11]

D. Conspiracy Claim

Finally, Christiana alleges that the EPA is working as a "stalking horse" for County authorities. It alleges an inter-government conspiracy. "Complaints containing only conclusory, vague, or general allegations, of a conspiracy to deprive a person of constitutional rights will be dismissed." *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2nd Cir. 1977). Furthermore, allegations which, "fail to specify in detail the factual basis," that is, mere bald assertions, do not suffice to sustain a claim of governmental conspiracy. *Id.*

Christiana has failed to assert any evidence of the alleged conspiracy. Christiana makes only broad statements about the EPA and the County working together. The only "specific" fact alleged in support of the conspiracy is that a County inspector accompanied the EPA during its inspection of the public areas. D.I. 6 at 5. This fact by itself is insufficient to support a conspiracy claim. Therefore, Christiana's claim of a conspiracy is unfounded.

IV. Conclusion

Based on the foregoing, the petitioner's motion to quash is DENIED.

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[11]Christiana's arguments ignore the fact that the Permit authorized it to "pollute" only within the limitations imposed by the Permit and the CWA.