In the

United States Court of Appeals

For the Seventh Circuit

No. 80-2013

THE DOW CHEMICAL COMPANY,

Intervening Petitioner-Appellant,

v.

DR. JAMES R. ALLEN and JOHN VAN MILLER,

Respondents-Appellees,

and

JAMES P. WACHTENDONK, et al.,

Intervening Respondents-Appellees.

Appeal from the United States District Court for the
Western District of Wisconsin.
No. 80 C 133—Barbara B. Crabb, *Judge.*

ARGUED JANUARY 16, 1981—DECIDED FEBRUARY 25, 1982

Before FAIRCHILD, *Senior Circuit Judge,* PELL, *Circuit Judge,* and SPEARS, *Senior District Judge.**

FAIRCHILD, *Senior Circuit Judge.* At issue in this case is whether a private corporation, Dow Chemical Company, threatened with possible government cancellation of certain herbicides it manufactures, may compel

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* The Honorable Adrian A. Spears, Senior District Judge for the Western District of Texas, sitting by designation.

through administrative subpoenas University of Wisconsin researchers to disclose all of the notes, reports, working papers, and raw data relating to on-going, incomplete animal toxicity studies so that it may evaluate that information with a view toward possible use at the cancellation hearings. The administrative law judge, at the request of Dow and over the objection of the Office of General Counsel of the Environmental Protection Agency, issued such subpoenas, but the district court refused to enforce them. We affirm the judgment of the district court and hold that the present facts do not warrant forced disclosure of the university research information.

I. Background

This case arises out of four research studies at the University of Wisconsin involving the dietary ingestion by rhesus monkeys of a chemical compound, 2,3,7,8—tetrachlorodibenzo-p-dioxin (TCDD), at levels of 500 parts per trillion (ppt), 50 ppt, 25 ppt, and 5 ppt, respectively. Relying in part on evidence from the 500 ppt study, the Environmental Protection Agency (EPA) ordered emergency suspension of certain uses of two herbicides Dow manufactures and scheduled cancellation hearings relevant thereto. The subpoenas now at issue relate to information about the 25 ppt and 5 ppt studies.[1] The procedures and objectives of the studies, the parties to the litigation, the proceedings before the EPA, and the ruling of the administrative law judge (ALJ) are set forth in the opinion of the district court, as are the

[1] The ALJ excluded the 500 ppt and 50 ppt studies from the subpoenas based on his understanding of representations by EPA counsel that respondents would voluntarily produce the documents and materials related thereto. *See* Joint Appendix, p. 26. Subsequently, the information relating to the 500 ppt study was turned over, but the materials relating to the 50 ppt study were not disclosed and became the subject of a second enforcement action, *United States v. Barsotti*, Civ. No. 80-C-677 (W.D. Wis. filed Dec. 31, 1980). That action was dismissed on April 27, 1981, after the EPA moved to withdraw the subpoenas relating to the 50 ppt study.

court's reasons for refusing to enforce the subpoenas. *See United States v. Allen*, 494 F.Supp. 107 (W.D. Wis. 1980).[2] We rely on that background and will not recount those matters except as is relevant to our discussion of particular issues.

II. Judicial Enforcement of Administrative Subpoenas

A. Basic Principles

Under section 6d of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136d(d), a district court has jurisdiction to enforce a subpoena issued by an administrative law judge.[3] Leaving enforcement to the courts indicates that Congress intended that judges should not merely rubber-stamp the subpoenas that come before them. *See generally F.T.C. v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 974 (D.C. Cir. 1980); *S.E.C. v. Arthur Young & Co.*, 584 F.2d 1018, 1032-1033 (D.C. Cir. 1978); *N.L.R.B. v. Northern Trust Co.*, 148 F.2d 24, 29 (7th Cir. 1945). But, while a district court's enforcement function is "neither minor nor

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[2] The United States, petitioner in the district court, originally filed an appeal from the order denying enforcement, but later withdrew the same. It has not submitted a brief in the present appeal which was perfected by Dow, intervening petitioner in the district court. The respondents-appellees, Dr. James R. Allen and Mr. John Van Miller, were at times participants in the University of Wisconsin studies and were the parties to whom the subpoenas were issued. James P. Wachtendonk, *et al.*, intervening respondents-appellees, are Vietnam veterans and families of servicemen who were permitted by the district court to enter this litigation because of the relevance of the studies to suits arising out of servicemen exposure to certain tree defoliants used in Southeast Asia between 1962 and 1971. The State of Wisconsin appears before us as *amicus curiae.*

[3] We are unaware of any judicial decisions concerning enforcement of administrative subpoenas issued under FIFRA. Consequently, our discussion is guided by cases dealing with the enforcement of administrative subpoenas issued in other contexts. Case law and the parties before us endorse this ap-

ministerial," *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 217 n. 57 (1946), it is well established that it is a narrowly limited one, *see United States v. Morton Salt Co.*, 338 U.S. 632, 652-653 (1950); *Oklahoma Press*, *supra*, 327 U.S. at 216-218; *F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 871-872 (D.C. Cir. 1977). Under what Dow refers to as the *Morton Salt* test, it is frequently said that in deciding whether to enforce, "it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *Morton Salt*, *supra*, 338 U.S. at 652; *see also, e.g., F.T.C. v. Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1979) (quoting *Morton Salt*). However, this formulation of the rule, standing by itself, is something of an overstatement, for it is also clearly recognized that disclosure may be restricted where it would impose an unreasonable or undue burden on the party from whom production is sought. *See, e.g., F.T.C. v. Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980); *Texaco*, *supra*, 555 F.2d at 881-882. The burdensomeness test finds its genesis in the Fourth Amendment, which prescribes that disclosure shall not be unreasonable. *See Oklahoma Press*, *supra*, 327 U.S. at 208. "What is unduly burdensome depends on the particular facts of each case and no hard and fast rule can be applied to resolve the question." *Shaffner*, *supra*, 626 F.2d at 38. "Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *Texaco*, *supra*, 555 F.2d at 882. "The burden of showing that the request is unreasonable is on the subpoenaed party . . . [and] is not easily met where . . . the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose." *Id.* at 882; *see also United States v. Powell*, 379 U.S. 48, 58 (1964).

A finding by the district court that documents are reasonably relevant to a legitimate agency purpose cannot be overturned absent a showing that the factual determinations on which it is based are clearly erroneous, *see Anderson*, *supra*, 631 F.2d at 746; *F.T.C. v. Lonning*, 539 F.2d 202, 210 n. 14 (D.C. Cir. 1976), or that the ruling itself constitutes an abuse of discretion, *see*

Northern Trust, supra, 148 F.2d at 29. Similarly, court assessments of whether disclosure would be burdensome and of what restrictions might be appropriate are decisions within the sound discretion of the trial court and should only be reversed for abuse of discretion, *see Lonning, supra,* 539 F.2d at 111, save where they are intimately tied to a misunderstanding of law, in which case the ordinary standard of error applies, *see Texaco, supra,* 555 F.2d at 881, 882.

B. The District Court's Analysis

1. Scope of Review

Dow takes exception to the district court's characterization of the application for enforcement as a *de novo* proceeding.[4] It is true, as documented above, that the questions which are presented to a district court by such an application are quite limited. In resolving them, however, the court is not confined to examining the record made before the agency, as is more often the case in judicial review of administrative decisions. The ALJ's decision to issue the subpoenas and his denial of the motion to quash are not binding on the court as to the questions properly presented.[5]

Dow also contends that the district court erroneously failed to apply the *Morton Salt* standard. Indeed, courts have held the *Morton Salt* test applicable to adjudica-

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[4] The case cited by the district court on this point, *E.E.O.C. v. United States Fidelity & Guaranty Co.,* 414 F.Supp. 227, 232 (D. Md. 1976), held that "[a] subpoena enforcement proceeding is a *de novo* proceeding before [the District] Court" and therefore respondent was not barred from raising issues which it failed to raise before the Commission. That decision was affirmed on appeal without published opinion, 538 F.2d 324 (4th Cir. 1976).

[5] The ALJ's decision was made without the benefit of the extensive affidavits submitted to the district court. *See* the discussion in the text, *infra.* It appears, also, that although the EPA made the motion to quash before the ALJ in the names of Allen and Van Miller, they may not have had a full oppor-

tory subpoenas as well as to those issued for purposes of investigation. *See Anderson, supra,* 631 F.2d at 745; *F.T.C. v. Browning,* 435 F.2d 96, 102 (D.C. Cir. 1970). Nonetheless, we do not think it was inappropriate for the district court to have differentiated these two situations. Even if both instances are governed by the *Morton Salt* criterion of reasonable relevance, "[t]here is, of course, a difference in that the relevancy of an investigatory subpoena is measured against the 'general purposes of [the agency's] investigation,' . . . while relevancy of an adjudicative subpoena is measured against the charges specified in the complaint." *Anderson, supra,* 631 F.2d at 746 (brackets in original; citations omitted). The bounds of relevance therefore tend to be broader in the investigatory context.

Thus, the district court properly took cognizance of the fact that the subpoenas were requested in aid of adjudicative discovery. We do not view the *Morton Salt* doctrine as excluding from consideration the question whether the burden of compliance was unreasonable. We reject Dow's argument that the court adhered to an erroneous view of the law.

2. Balancing

The basis for the district court's decision was that the subpoenas were unduly burdensome on the respondents. It stated that from the reference to protective orders in the applicable statutory section[6] it logically follows that a subpoena request can be denied where the burden of compliance is too great. The court wrote:

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[6] 7 U.S.C. § 136d(d) provides in part:

"Upon a showing of relevance and reasonable scope of evidence sought by any party to a public hearing, the [ALJ] shall issue a subpoena to compel testimony or production of documents from any person. The [ALJ] shall be guided by the principles of the Rules of Civil Procedure in making any order for the protection of the witness or the contents of documents produced. . . . On contest, the subpoena may be enforced by an appropriate United States district court in accordance with the principles stated herein."

> "Whether a subpoena duces tecum is unduly burdensome 'is, of course, a matter to be decided in the light of all the circumstances of the case, with an eye to the need for the material on the one hand, and the burden imposed and the possibility of lightening it through a protective order on the other. *See In re Zuchert* (D.D.C. 1961) 28 F.R.D. 29 . . . .' 5A Moore's Federal Practice ¶45.05[q] note 44." 494 F.Supp. at 112.[7]

Addressing Dow's need for the subpoenaed documents, the court stated:

> "There is little question that the information is in fact relevant but that its *probative value at this stage of the study is quite limited. Dow does not dispute* [*Mr. John*] *Van Miller's statement that it is not possible to conclude even tentatively that there is a cumulative no-effect level*[8] *for maternal or reproductive toxicity at this point of the studies.* Absent the ability to infer a no-effect level of TCDD, information that the test animals are showing no effects is not particularly probative." 494 F.Supp. at 113 (emphasis and footnote added).

Noting that Dr. James R. Allen was no longer scheduled to be a witness and that the EPA apparently did not intend to introduce the documents Dow sought to discover, the court decided that Dow's need for the information was not great.

As to the burden of production element, the court stated:

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[7] In a footnote, the district court observed:

> "This passage from Moore's and the case cited therein refer to Rule 45, F.R.C.P. which is not specifically applicable to the issuance of the subpoenas at issue in this case. However, they are 'in pari materia' and are persuasive regarding the meaning of § 136d(d)."

[8] A cumulative no-effect level is a dosage at which a toxin produces no adverse effects on a species regardless of the

> "I take judicial notice that it would be a substantial burden on respondents to force them to produce the information requested from the 5 ppt and 25 ppt studies which are nowhere near completion and which have not been subjected to peer review. In the early stages of any research project there are likely to be false leads or problems which will be resolved in the course of the study with no ultimate adverse effect on the validity of the study. To force production of all information demanded by the subpoenas is likely to jeopardize the study by exposing it to the criticism of those whose interests it may ultimately adversely affect, before there has been an opportunity for the researchers themselves to make sure the study is the result of their best efforts. This is not the kind of burden which can be lightened by a protective order. Putting this study in jeopardy would be a heavy burden not only on those involved in the research, but also on the public which has helped to fund it through tax money and which ultimately stands to gain from knowledge of the final results." *Id.*

Summarizing its reasons for denying enforcement, the court concluded:

> "that the probative value of the information sought by Dow is minimal; that it does not outweigh the substantial burden enforcement of the subpoenas would place on respondents; and that it could not be relieved by a protective order." *Id.*

Dow challenges the district court's analysis primarily on two grounds. It first argues that the court's reliance on the statute's reference to protective orders as justification for inquiring into burdensomeness and denying enforcement is misplaced because the statute contemplates the application of protective measures only once the decision to issue or enforce has already been made. Second, Dow claims that the district court's balancing of need and probative value against burden of compliance far exceeds the limited review permissible in a subpoena enforcement action.

As to the first argument, it may well be unnecessary to rely upon an extrapolation of the statutory authorization of a protective order to justify the court's inquiry into the extent of burden imposed by the subpoenas, and the resulting denial of enforcement.

In any event, the degree of burden is an aspect of reasonableness. Even if consideration of burdensomeness be not required by the Fourth Amendment, courts have not, and should not, lightly construe a statute as requiring a court to enforce compliance without deciding whether the burden is reasonable.[9]

It is well settled that disclosure of subpoenaed information may be restricted where compliance would force an unreasonable burden on the party from whom production is sought.[10] This circuit has recognized that there is no set rule for determining whether a particular

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[9] This is so at least where there are facts sufficient to raise a true question of burdensomeness. *See* note 12, *infra.*

[10] Ordinarily such restrictions take the form of limitations on the scope of discovery, *see Adams v. F.T.C.*, 296 F.2d 861, 870 (8th Cir. 1961), special provisions concerning manner and time of production, *see Shaffner, supra*, 626 F.2d at 38; *S.E.C. v. Savage*, 513 F.2d 188, 189 (7th Cir. 1975), or protective orders forbidding outside disclosure of the information, *Lonning, supra*, 539 F.2d at 211, and cases cited therein. But where such types of protection are impracticable or clearly inadequate in terms of the burden or risk that is threatened, we see no reason why disclosure may not fully be denied. *Cf. United States v. Powell*, 379 U.S. 48, 58 (1964) (subpoena issued not in good faith, but to harass or pressure subject of investigation, need not be enforced). Otherwise enforcement of the subpoena would run afoul of the Fourth Amendment's reasonableness requirement, discussed by the Supreme Court in *Oklahoma Press, supra*, 327 U.S. at 308, and in other cases. *See F.C.C. v. Cohn*, 154 F.Supp. 899, 908 (S.D.N.Y. 1957) ("courts will plainly refuse to enforce an administrative subpoena which is not within the bounds of reasonableness"); *see also Chapman v. Maren Elwood College*, 225 F.2d 230, 231, 232 (9th Cir. 1955) (enforcement denied, notwithstanding fact that "matters . . . sought were subject to jurisdiction of the [Veteran's] Administration," where contested "affidavit . . .

burden is excessive and that reference must be made to the facts of the individual case. *See Shaffner, supra,* 626 F.2d at 38. The assessment of what is *unreasonable* or *unnecessary,* by definition, depends to a large extent on the *reasons* or *needs* underlying the request. Whereas significant need might justify imposition of a very substantial burden,[11] the same cannot easily be said where the information requested, although generally relevant to contested issues in the sense that it is somehow related, is wholly unlikely to resolve the question or dispute. In short, resolution of the issue of reasonableness requires juxtaposition of need and probative value against burden of compliance.[12] *See Cohn, supra,* 154 F.Supp. at 908 (In ascertaining reasonableness "[t]here is a delicate balance between the necessity of obtaining information required in the public interest in furtherance of a lawful inquiry, and the onerous burdens which the furnishing of this information may place on [the] respondents.")

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[11] *See, e.g., F.T.C. v. Dresser Industries,* [1977-1] Trade Cases ¶61,400, at pp. 71,492-71,493, (D.D.C. 1977):

> "It may very well be Dresser's burden is greater than that of other subpoenaed companies, but . . . it is Dresser's dominance in the industry which makes the subpoena served upon it critical to Kaiser's defense . . . . [T]he court must find that the burden imposed is not an unreasonable one. . . ."

[12] It is important to distinguish the question of reasonable burden from the question of reasonable relevance. The *Morton Salt* "standard of reasonable relevance does not . . . require a showing of specific need for the information." *United States v. First City Nat. Bank of El Paso,* 598 F.2d 594, 599 (Temp. Emer. Ct. App. 1979); *see also Dresser Industries, Inc., supra,* at p. 71,492 ("strong showing of relevance or need . . . is not the correct standard"). Thus we agree with Dow that in the usual case a court need not inquire into the need or reasons of the party seeking enforcement of the subpoena. Where, however, as here, factually supported affidavits clearly raise a colorable claim of unreasonable burden, it is incumbent upon the court to make such an inquiry. *Cf. S.E.C. v. Brigadoon Scotch Distilling Co.,* 480 F.2d 1047, 1056 (2d Cir. 1973) ("in appropriate circumstances a court may inquire into the reasons for an investigation and into its effects").