

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	Docket No. CAA-07-2006-0165
)	
Able Manufacturing & Assembly, LLC)	
)	COMPLAINANT'S PREHEARING
Respondent.)	INFORMATION EXCHANGE
)	

COMPLAINANT'S PREHEARING INFORMATION EXCHANGE

The United States Environmental Protection Agency, Region VII ("Complainant") respectfully submits the following Prehearing Exchange pursuant to the June 30, 2006, Prehearing Order issued by Administrative Law Judge William B. Moran, and in accordance with Rule 22.19 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (40 C.F.R. Part 22).

I. WITNESSES

A. EXPERT WITNESSES

Complainant intends to call the following expert witness at hearing and expects the witness to testify to that which is summarized below. A resume for this expert witness is attached as Complainant's Ex. 5 to this pre-hearing exchange.

1. Richard Tripp. Richard Tripp is an Environmental Scientist in the Air Permits and Compliance Branch at the U.S. Environmental Protection Agency ("EPA"), Region VII. Mr. Tripp was a participant in the work group that developed the National Emission Standards for Hazardous Air Pollutants ("NESHAPs") for Boat Manufacturing. He has been involved in NESHAP implementation since 1996 and has served as the Regional Air Toxics Coordinator for 10 years. Mr. Tripp is expected to testify to the purpose and importance of the Boat Manufacturing NESHAPs, 40 C.F.R. Part 63, Subpart VVVV. Mr. Tripp's testimony will explain the emission standards and the calculations evidencing the emissions violations at Respondent's facility.

B. OTHER WITNESSES

Complainant intends to call the following witness at hearing and expects the witness to testify to that which is summarized below.

1. Gary Bertram. Gary Bertram is an Environmental Engineer in the Air Permitting and Compliance Branch of the U.S. EPA, Region VII. Gary is expected to testify to the factual basis for Complainant's determination that Respondent is subject to and in violation of the Boat Manufacturing NESHAPs. He will also testify as to how the penalty proposed in the Complaint was calculated, applying the statutory penalty factors set forth within Section 113(e) of the Clean Air Act (CAA), 42 U.S.C. § 7413, as explained by EPA's *Clean Air Act Stationary Source Civil Penalty Policy*, dated October 25, 1991 ("Penalty Policy").

II. DOCUMENTS AND EXHIBITS

A copy of documents and exhibits which Complainant intends to introduce into evidence at the hearing are attached hereto as Complainant's Exhibits, and are numbered sequentially beginning with the phrase "Complainant's Ex." (e.g., Complainant's Ex. 1). The following is a brief description of the documents and exhibits:

Complainant's Ex. 1. Able Manufacturing & Assembly, LLC, letter to Leanne Tippet-Mosby, Missouri Department of Natural Resources, RE: *Notification of Compliance Status with 40 C.F.R. 63 Subpart VVVV*, dated September 19, 2005, and attached *Implementation Plan for Compliance with Title 40, Part 63, Subpart VVVV National Emissions Standards for Boat Manufacturing, Standards for Open Molding Resin and Gel Coat Operations*.

Complainant's Ex. 2. U.S. EPA letter to Mr. Roger Dickey, Able Manufacturing & Assembly, LLC, RE: *Requirement to Provide Information pursuant to Section 114 of the Clean Air Act*, dated December 23, 2005.

Complainant's Ex. 3. Able Manufacturing & Assembly, LLC, letter to Gary Bertram, U.S. EPA, dated January 10, 2006, responding to the EPA's Information Request (Complainant's Ex. 2).

Complainant's Ex. 4. Settlement Agreement between the Missouri Attorney General's Office, Missouri Department of Natural Resources, and Able Manufacturing & Assembly, LLC, signed by each party in August 2002.

Complainant's Ex. 5. Resume for Expert Witness Richard Tripp.

Complainant's Ex. 6. Calculations of the Rolling 12 Month Average HAP Emission Limit and Actual HAP Emissions from the Able Manufacturing & Assembly, LLC's Joplin, Missouri, Facility for the Period of August 2004 through March 2006, created by Richard Tripp, EPA Region VII.

Complainant's Ex. 7. Calculations of the Monthly HAP Emission Limit and the Actual HAP Emissions from the Able Manufacturing & Assembly, LLC's, Joplin, Missouri, Facility for the period of August 2004 through March 2006, created by Richard Tripp, EPA Region VII.

Complainant's Ex. 8. Permit to Operate, Permit No. OP 2004 049 issued to Able Manufacturing & Assembly, LLC, on December 9, 2004, by the Missouri Department of Natural Resources.

Complainant's Ex. 9. *Toxics Release Inventory* ("TRI") for the Able Manufacturing & Assembly, LLC, Facility, printed 8/21/2006.

Complainant's Ex. 10. EPA's *Clean Air Act Stationary Source Civil Penalty Policy*, dated October 25, 1991 (Penalty Policy).

ATTACHMENT A: U.S. EPA Memorandum entitled *Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule (Pursuant to the Debt Collection Improvement Act of 1996, Effective October 1, 2004)*, Thomas V. Skinner, September 21, 2004.

Complainant's Ex. 11. Dunn & Bradstreet Business Information Report: Able Manufacturing & Assembly, LLC, printed January 25, 2006.

Complainant's Ex. 12. Reference USA, Detailed Listing for Able Manufacturing Corp., printed March 15, 2006.

Complainant's Ex. 13. Directory of Corporate Affiliations – U.S. Private Company, for Able Manufacturing and Assembly LLC, Copyright 2006 Reed Elsevier Inc.

Complainant's Ex. 14. EPA's Penalty Calculation Worksheet for Able Manufacturing & Assembly, LLC.

III. PROPOSED PENALTY

Section 22.27(b) of the Rules of Practice provides in pertinent part "[T]he Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.27(b).

A. STATUTORY CIVIL ADMINISTRATIVE PENALTY CRITERIA

Section 113(d) of the Clean Air Act ("CAA"), 42 U.S.C. § 7413(d), provides that the Administrator may issue an administrative order against any person assessing a civil administrative penalty of up to \$25,000, per day for violations of the CAA. Pursuant to the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and 40 C.F.R. Part 19, the EPA may assess penalties under Section 113(d) of the CAA for up to \$32,500, per day of violations. *See* 69 Fed. Reg. 7121 (February 13, 2004); 40 C.F.R. Part 19.

Section 113(e)(1) of the CAA, 42 U.S.C. § 7413(e)(1), directs that in determining the amount of a civil penalty assessed under Section 113(d) of the CAA: “[T]he Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator’s full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence . . . , payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.”

Complainant considered each of these statutory penalty factors in calculating the proposed penalty of \$53,760. The following discussion explains how the statutory factors were applied in determining an appropriate penalty. The next section will explain how EPA used its *Clean Air Act Stationary Source Civil Penalty Policy* as guidance for applying the statutory factors to reach a penalty amount.

1. Size of Business and Economic Impact

For the size of the business, Complainant took into consideration the size of Respondent’s business. Publicly available information indicated that Respondent employs approximately 300 employees at its Joplin, Missouri, facility and annual sales are estimated at \$20,000,000 - \$50,000,000. As discussed below in more detail, Complainant referred to EPA penalty guidance to assess an appropriate penalty based on the size of Respondent’s business and the impact that this penalty would have upon the Respondent.

2. Compliance History and Good Faith Efforts to Comply

The compliance history of Respondent was also considered in determining an appropriate penalty. In this case, Respondent has no history of violations with the EPA for Clean Air Act violations. However, Respondent entered into a settlement agreement with the Missouri Department of Natural Resources (“MDNR”) on September 16, 2002, for air violations. *See* Complainant’s Ex. 4. The settlement agreement resolved multiple alleged violations, including Respondent’s exceedance of the daily styrene emission limit in its construction permit. Styrene is the main hazardous air pollutant at issue in this case, as well.

Further bearing on the good faith efforts to comply, Complainant considers Respondent’s notification of its compliance status under 40 C.F.R. Part 63, Subpart VVVV, and Respondent’s 2004 Missouri Operating Permit indicating that the facility is subject to Subpart VVVV as evidence of Respondent’s awareness of the regulations. *See* Complainant’s Ex. 1 and Complainant’s Ex. 8.

3. Duration of the Violation

As to the duration of the violation, Complainant took into account that Respondent exceeded the emission limits for hazardous air pollutants for six months. An appropriate penalty for six months of violation was calculated using EPA penalty guidance, as discussed in more detail below.

4. Other Penalties for Same Violation

Complainant is not aware of any other penalty amount that Respondent has paid for the same violations alleged in the Complaint.

5. Economic Benefit

Complainant has determined that there was negligible economic benefit to the Respondent by not complying with the emission limit. The cost of complying with the emission limit would have been the cost of resins and gelcoats that meet the HAP standards of the regulations. The cost of purchasing compliant materials versus non-compliant materials is little, if any. Therefore, no economic benefit penalty has been assessed against Respondent.

6. Seriousness of the Violation

Finally, Complainant took into account that the violations at issue are emissions violations for hazardous air pollutants. Thus, the violation is considered serious in nature since hazardous air pollutants endanger both human health and the environment.

The factors enumerated in Section 113(e)(1) of the CAA, 42 U.S.C. § 7413(e)(1), and discussed above are further refined and quantified through use of the EPA's *Clean Air Act Stationary Source Civil Penalty Policy* ("Penalty Policy")(Complainant's Ex. 10). The following section explains how the Penalty Policy ensures consistent application of the statutory factors, including Respondent's size of business, economic impact of the penalty on the Respondent, compliance history, duration of the violation, economic benefit, seriousness of the violation, and other factors as justice may require.

B. EPA'S CAA CIVIL PENALTY POLICY

In October 1991, EPA issued the *Clean Air Act Stationary Source Civil Penalty Policy* ("Penalty Policy")(Complainant's Ex. 10). The Penalty Policy is a guide for consistent application of the statutory factors enumerated in Section 113(d) of the CAA. Penalty Policy at 2. The Penalty Policy contains two components: (1) economic benefit, and (2) gravity. *Id.* at 3.

1. Economic Benefit

\$0

For the economic benefit component, the Penalty Policy assesses a penalty for delayed costs and avoided costs to ensure that the penalty recovers any significant economic benefit of

noncompliance. *Id.* at 4-5. Economic benefit for delayed costs is assessed for violations which may result in a savings to the violator by deferring the action. The economic benefit of permanently avoiding the costs associated with compliance is assessed as avoided cost.

In this case, Respondent violated the Subpart VVVV emission limits by exceeding the rolling-12 month emissions average for the gelcoat and resin materials used in the facility's boat manufacturing operations. The avoided cost of this violation was purchasing gelcoat and resin materials that meet the emission limit for Hazardous Air Pollutants ("HAPs"). Following the Penalty Policy and employing the Methodology for Computing the Economic Benefit of Noncompliance ("BEN"), Complainant determined that the avoided cost was negligible. Thus, the penalty assessed against Respondent does not include a penalty amount to recover economic benefit.

2. Gravity \$42,000

The gravity component of the penalty requires consideration of a variety of objective factors and circumstances to insure that violations of approximately equal seriousness are treated the same way. *Id.* at 8. The gravity portion of the penalty policy takes into account the following objective factors to implement the CAA statutory penalty factors: (1) Actual or possible harm, (2) Importance to the regulatory scheme, and (3) Size of the violator. *Id.* at 9.

a. Actual or Possible Harm

To quantify the actual or possible harm objective, the Penalty Policy assesses a dollar figure for each of the following categories, where applicable: the level of violation (based on percent above standard for emissions violations), the toxicity of the pollutant, the sensitivity of the environment, and the length of time of the violation. *Id.* at 10-12.

i. Level of Violation \$5,000

The level of violation portion of the penalty is to be assessed only for violations of emission standards. *Id.* at 10. In this case, Respondent was approximately 15% above the emission standard of Subpart VVVV. The Penalty Policy directs that for any emissions violation ranging from 1-30% above the standard, a penalty of \$5,000 shall be assessed.

ii. Toxicity of Pollutant \$15,000

The Penalty Policy directs that for violations of NESHAPs emission standards that are not handled by a separate appendix, \$15,000 shall be assessed for each hazardous air pollutant for which there is a violation. *Id.* at 11. Respondent has violated a NESHAPs emission standard; the NESHAPs for Boat Manufacturing limiting HAP emissions is not a standard for which the Penalty Policy has a separate appendix. Thus, Complainant assessed \$15,000 for the toxicity of pollutant portion of the actual or potential harm factor.

iii. Sensitivity of the Environment \$0

The sensitivity of the environment component is only assessed for State Implementation Plan and New Source Performance Standard violations. Complainant does not assert that Respondent violated either of these standards; thus, no penalty was assessed for the sensitivity of the environment.

iv. Length of Time of Violation \$12,000

The Penalty Policy directs that a dollar amount be assessed for each violation based on the length of the violation. The Policy provides a chart that correlates a range of months for which the violation continued with a dollar figure. In this case, Respondent's violation of the Subpart VVVV emission standard continued for six months. The Policy directs that for violations 4-6 months in duration, \$12,000 be assessed.

b. Importance to the Regulatory Scheme \$0

For the second gravity factor, importance to the regulatory scheme, the Penalty Policy lists specific types of violation (e.g., reporting and notification violations, recordkeeping violations, monitoring violations, etc.) and assigns a dollar value or range of values to be assessed for each type of violation. *Id.* at 12-14. None of the listed violations of the regulatory scheme are applicable to the case at hand; therefore, no penalty was assessed for this factor.

c. Size of Violator \$10,000

The third gravity factor, size of violator, is calculated based on the net worth of a corporation. The Penalty Policy provides levels of net worth, in dollar values, and assigns a corresponding penalty amount for that size of business. *Id.* at 14-15. Based on the best available information to Complainant at the time this document is filed, EPA determined Respondent's net worth to fall within the \$1,000,0001 - \$5,000,000 category. A corresponding penalty of \$10,000 for violator size was included in Complainant's penalty calculation.

d. Gravity Adjustments None

After combining the penalties assessed for the three gravity factors, the Penalty Policy provides for adjustments to the gravity component to ensure equitable treatment of the regulated community. *Id.* at 15. The adjustment factors in the Penalty Policy promote flexibility while maintaining national consistency. *Id.* The Penalty Policy directs upward or downward adjustments to the gravity component, based on the following factors: degree of willfulness or negligence, degree of cooperation, history of noncompliance, and environmental damage. *Id.* Based on the best information available to Complainant at this time, no adjustments for these factors are warranted.

i. Degree of Willfulness or Negligence

This factor is used only to raise a penalty. The factors to consider in assessing the degree of willfulness or negligence include:

- The degree of control the violator had over the events constituting the violation.
- The foreseeability of the events constituting the violation.
- The level of sophistication within the industry in dealing with compliance issues or the accessibility of appropriate control technology.
- The extent to which the violator in fact knew of the legal requirement which was violated.

Id. at 16. Complainant did not adjust the gravity portion of the penalty based on Respondent's degree of willfulness or negligence.

ii. Degree of Cooperation

A respondent's degree of cooperation in remedying the violation is to be considered under this factor; this may be either an upward or downward adjustment. Degree of cooperation includes consideration of the prompt reporting of noncompliance, prompt correction of environmental problems, and cooperation during pre-filing investigation. *Id.* at 16-17. At this time, Complainant has not adjusted the penalty, upward or downward, based on Respondent's degree of cooperation.

iii. History of Noncompliance

The Penalty Policy provides that a respondent's history of noncompliance is a consideration for adjusting the gravity portion of the penalty upward only. *Id.* at 17. Complainant has not adjusted the penalty based on history of noncompliance.

iv. Environmental Damage

Finally, the Policy provides that in certain situations, the gravity component may be adjusted upward if severe environmental damage is involved. Although the actual or potential environmental harm is considered in the initial gravity calculation, this adjustment is for cases where the violation is so severe that the gravity component alone is not a sufficient deterrent. *Id.* at 19. Complainant did not adjust the gravity component for environmental damage.

3. Inflation Adjustment to Gravity Component + \$11,760

On September 21, 2004, the EPA issued a memorandum modifying EPA penalty policies to implement the inflation adjustments directed by the Debt Collection Improvement Act ("DCIA"), 31 U.S.C. § 3701, and 40 C.F.R. Part 19. *See* Complainant's Ex. 10, Attachment A. Since the CAA Penalty Policy was issued prior to January 31, 1997, the memorandum directs that for violations occurring after March 15, 2004, the gravity component of the penalty shall be multiplied by 1.28 to reflect the two previous inflation adjustments of 10% and 17.23%.

The violations alleged in the Complaint occurred after March 15, 2004, thus the gravity component calculated under the Penalty Policy must be multiplied by 1.28 to reflect the inflation adjustments pursuant to the DCIA and 40 C.F.R. Part 19. The total gravity for Respondent's violations as calculated under the Penalty Policy is \$42,000. The inflation adjustment, multiplying by 1.28, brings the gravity component to \$53,760.

4. Final Penalty \$53,760

Pursuant to the factors enumerated in Section 113(e)(1) of the CAA, 42 U.S.C. § 7413(e)(1), the Penalty Policy application of the statutory factors, and the inflation adjustment pursuant to the DCIA, the final penalty amount Complainant seeks is \$53,760 (*See* Complainant's Ex. 14 for a summary of the above-described penalty calculations).

IV. APPLICABILITY OF THE PAPERWORK REDUCTION ACT

The Presiding Officer requested Complainant's position regarding the applicability of the Paperwork Reduction Act ("PRA"), 44 U.S.C. § 3501 *et seq.*, to this proceeding, including whether there is a current Office of Management and Budget ("OMB") control number involved and whether the provisions of Section 3512 of the PRA may apply to this case.

Complainant states that there are no PRA requirements for the violation alleged against Respondent in this proceeding. Section 112 of the CAA, 42 U.S.C. § 7412, authorizes the EPA Administrator to regulate hazardous air pollutants. Further, the NESHAPs for Boat Manufacturing, 40 C.F.R. Part 63, Subpart VVVV, sets emission limits for boat manufacturing operations. Complainant asserts that the PRA does not apply to these statutory and regulatory requirements. Thus, it is Complainant's position that the PRA is inapplicable to this proceeding with respect to all counts.

V. PLACE AND TIME FOR HEARING

Complainant recommends that the hearing in this matter be held in or near Kansas City, Kansas, due to the presence of a federal courthouse with courtrooms available for use by the Agency and the proximity to a major airport. However, Complainant would not object to the hearing being held in or near Joplin, Missouri, the place where Respondent conducts its business. Complainant anticipates needing approximately eight (8) hours to present its direct case.

Complainant can be available for a hearing in this matter, as directed by the Presiding Officer. We request that the following dates be avoided, as one or more of the EPA representatives have a previous commitment:

- September 13-14, 2006;
- October 10-12, 2006;
- October 24-26, 2006;
- November 8-10, 2006.

VI. JUDICIAL NOTICE

Pursuant to 40 C.F.R. § 22.22(f), Complainant hereby requests the Presiding Officer to take judicial notice of the following:

1. The Clean Air Act ("CAA"), 42 U.S.C. Section 7401 et seq., and the regulations promulgated thereunder.
2. The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22.

VII. RESERVATION OF RIGHTS

Complainant respectfully reserves the right to call all witnesses called by Respondent; to recall any of its witnesses in rebuttal; and to modify or supplement the names of witnesses and exhibits prior to the hearing, pursuant to 40 C.F.R. Part 22, and upon adequate notice to Respondent and the Presiding Officer.

Respectfully Submitted,



Kristi J. Denney
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region VII
901 N. 5th Street
Kansas City, Kansas 66101

CERTIFICATE OF SERVICE

I hereby certify that the original and one true copy of the foregoing Complainant's Prehearing Information Exchange (re: Docket No. CAA-07-2006-0165) was hand-delivered to Ms. Kathy Robinson, Regional Hearing Clerk, U.S. EPA, Region VII, and that true and correct copies were mailed via Federal Express, Standard Overnight Delivery, to the following persons:

The Hon. William B. Moran
Administrative Law Judge
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Franklin Court, Suite 350
1099 14th St. NW
Washington, DC 20005

AND

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2/31/06
Date

Deanna Smith
Signature