

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the matter of)
)
Aakash Chemicals & Dyestuffs, Inc.) Docket No. 5-TSCA-96-006
)
Respondent)

ORDER ON MOTIONS

Respondent submitted a letter, dated August 15, 1997, to which EPA responded on August 27, 1997. By order dated September 10, 1997, the undersigned denied Respondent's requests to dismiss the complaint and for appointment of counsel. The September 10th order stated that other issues raised by Respondent are matters to be resolved in the hearing to be held in this proceeding. Respondent filed another pleading, dated September 3, 1997, which was received by the undersigned on September 16, 1997. Complainant submitted a response on September 15, 1997.

Respondent's September 3rd pleading again requests dismissal of this action. For the reasons stated in the September 10, 1997 order, this request is **denied**.

Respondent also requests \$6,840,000 in damages and attorneys' fees. This request is **denied** for the reasons stated in the September 10, 1997 order, and because the undersigned does not have the authority to award damages to respondents.

Respondent's request for a jury is also **rejected**. The Supreme Court has held that the Seventh Amendment right to a jury trial does not extend to administrative proceedings. *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442, 454 (1977);

See also, In re Condor Land Company, CWA-404-95-106 (Order Denying Demand for Jury Trial, December 5, 1996).

To the extent that Respondent's September 3rd pleading requests appointment of counsel, the request is **denied** for the reasons stated in the September 10th order. In addition, Respondent cites no legal authority for its proposition that Complainant must "halt the use of counsel" unless Respondent is appointed counsel at public expense. The Toxic Substances Control Act ("TSCA") authorizes EPA to assess civil penalties, after an opportunity for a hearing, against manufacturers and importers of toxic chemicals that are found to have violated the Act. 15 U.S.C. § 2615. Presumably, Congress intended Complainant to employ, at public expense, capable government personnel to implement this provision. Respondent's request that Complainant cease using attorneys is **denied**.

Respondent's allegations of threats, abuse of power, discrimination, and harassment may be sufficient to state an affirmative defense of estoppel or selective enforcement. Complainant asserts that these claims are unsubstantiated and completely false and not supported by any evidence or proposed witness testimony. Respondent must present factual evidence to substantiate these defenses. In order to establish estoppel against the government, Respondent bears a heavy burden of demonstrating the traditional elements of estoppel and some "affirmative misconduct" on the part of the government upon which Respondent reasonably relied to its detriment. *In re B.J. Carney, Inc.*, CWA Appeal, 96-2 (EAB 1997) *citing U.S. v. Hemmen*, 51

F.3d 883, 892 (9th Cir. 1995).⁽¹⁾ To establish estoppel, Respondent must show that the Agency engaged in affirmative conduct beyond mere negligence and that the public's interest will not suffer undue damage as a result of application of the estoppel doctrine. *U.S. v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995)

To establish selective enforcement, Respondent also bears a heavy burden. A selective enforcement defense usually arises as a defense in a criminal prosecution or regulatory enforcement action. *Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 (6th Cir. 1996) (concluding that "personal animosity should not turn an otherwise valid enforcement action into a violation of the Constitution ...the choice of whom to prosecute or cite for a violation of an otherwise valid law or regulation is constitutionally troublesome only when it is blemished by the intent to harm a protected group). Respondent must prove "that the prosecutor or investigator intentionally 'singled him out' for punishment because of membership in a protected group or the exercise of a constitutionally protected right." *Id.*, *citing, U.S. v. Anderson*, 923 F.2d 450 (6th Cir. 1991)(criminal prosecution); *Schiel v. Comm'r of Internal Revenue Serv.*, 855 F.2d 364, 367 (6th Cir. 1988)(civil action for penalties). Respondent must show that: 1) it has been singled out while other similarly

situated violators were left untouched, and 2) that the government selected Respondent for prosecution "invidiously or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of [its] constitutional rights." *U.S. v. Smithfield Foods, Inc.*, 969 F. Supp. 975 (E.D. Va. 1997) (*citations omitted*) (rejecting the defendant's selective enforcement defense because the defendants had not put forth any evidence suggesting that the EPA had failed to pursue enforcement actions against similarly situated violators, nor had they offered any evidence of governmental vindictiveness or intentional discrimination for improper purposes).

To support its belief that an EPA employee "discriminated it uniquely," Respondent states that it "wishes to see how many small businesses [EPA's representative] has investigated, the information he has required from them, and the fines that he has imposed in the past five years." The undersigned may order such discovery if it will not unreasonably delay the proceeding, is not otherwise obtainable, and has significant probative value. 40 CFR § 22.19(f). Respondent's request is **denied** because it is otherwise obtainable and does not have significant probative value. First, Respondent has not explained how his request for information regarding the number of small businesses investigated by a particular individual is probative. Merely showing that few businesses were investigated by one EPA inspector is not sufficient to demonstrate selective enforcement. "A government legitimately could enforce its law against a few persons (even just one) to establish a precedent, ultimately leading to widespread compliance. The prosecutor may conserve resources for more important cases." *Falls v. Dyer*, 875 F. 2d 146, 148 (7th Cir. 1989).

Second, Respondent has not explained how his request for information that the investigator required from other businesses is probative. As the U.S. Court of Appeals for the Eighth Circuit stated in a criminal appeal, "Mere allegations of selective enforcement do not authorize a defendant to engage in a fishing expedition...The defendant must first make a preliminary or threshold showing of the essential elements of the selective prosecution defense." *U.S. v. Aenerud*, 893 F. 2d 956, 960 (8th Cir. 1990) (*citations omitted*); *see also, U.S. v. Fleetwood Enterprises, Inc.*, 702 F. Supp. 1082, n.32 (D.Del. 1988) (stating that the litigant in a proceeding to collect civil penalties had not "shown a 'colorable' basis which would entitle it to discovery under the standard applied to selective enforcement cases") (*citations omitted*). When requesting discovery, therefore, Respondent must provide a basis for its assertion that the government impermissibly selected it for enforcement and must explain how the requested discovery is relevant to that assertion.

Finally, administrative actions brought by EPA to assess penalties for alleged TSCA violations, and the amounts of penalties imposed subsequent to hearing, are publicly available in the offices of the Regional Hearing Clerks. Some of this information is also available via computer on-line information resources. Respondent, therefore, can "otherwise obtain" information related to penalties. To the extent that Respondent requests information related to cases investigated by a specific individual, Respondent has not explained how this information is probative. The investigator is not involved in penalty assessment.

To the extent that Respondent's pleading discusses its efforts to comply with TSCA, these issues address the Respondent's "good faith efforts to comply," may affect the amount of penalty, and are more appropriately raised at hearing.

Charles E. Bullock

Administrative Law Judge

Dated: November 4, 1997

Washington, D.C.

IN THE MATTER OF AAKASH CHEMICALS and DYESTUFFS, INC., Respondent

Docket No. 5-TSCA-96-006

Certificate of Service

I certify that the foregoing Order, dated November 4, 1997, was sent this day in the following manner to the below addressees.

Original by Regular Mail to: Ms. Sonja Brooks

Regional Hearing Clerk

U.S. Environmental Protection

Agency, Region 5

77 West Jackson Boulevard

Chicago, IL 60604

Copy by Regular Mail to:

Attorney for Complainant: John L. Steketee, Esquire

Assistant Regional Counsel (C-29A)

U.S. Environmental Protection

Agency, Region 5

77 West Jackson Boulevard

Chicago, IL 60604

Respondent: Mr. Satish R. Shah

Aakash Chemicals and Dyestuffs, Inc.

561 Mitchell Road Glendale Heights, IL 60139

Marion Walzel

Legal Staff Assistant

Dated: November 4, 1997

1. "The traditional elements of equitable estoppel are that: (1) the party to be estopped knows the facts, (2) he or she intends that his or her conduct will be acted on or must so act that the party invoking estoppel has a right to believe it is so intended, (3) the party invoking estoppel must be ignorant of the true facts, and (4) he or she must detrimentally rely on the former's conducts." *U.S. v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995).