UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	TSCA DOCKET NO. VII-87-T-649
	)	
EDWARD PIVIROTTO AND	)	
JOSEPHINE PIVIROTTO, D/B/A	)	
E & J USED TOOL COMPANY,	)	
	)	
RESPONDENTS	)	

RECOMMENDED DECISION

On July 1, 1988, the Respondents herein filed an Application for Attorney Fees and expenses, pursuant to the Equal Access to Justice Act ("EAJA") as amended, 5 U.S.C., Section 504, and the implementing regulations, 40 C.F.R. Part 17, of the United States Environmental Protection Agency (hereinafter "the Agency", "EPA", or "Complainant").

The applicants, Edward Pivirotto and Josephine Pivirotto (hereinafter "E & J") were Respondents in an adjudicative proceeding under the Toxic Substances Control Act (hereinafter "TSCA"), Section 16(a) 15 U.S.C. 2615(a), for the assessment of civil penalties for alleged violations of TSCA. The Complaint, consisting of three Counts and filed in subject proceeding on October 16, 1987, sought civil penalties in the total sum of $16,500.00. Disposition was concluded on June 10, 1988, by a Consent Agreement and Final Order providing that E & J waived their rights to a hearing on the issues raised by said Complaint; acknowledged their expressed intent to dispose of subject polychlorinated biphenyl (hereinafter "PCB") transformers "as soon as . . . economically feasible . . . and on receipt of disposal cost estimates

previously solicited," and that E & J consented to the issuance of a FINAL ORDER that E & J shall pay a civil penalty in the total sum of $2,000.00.

Said Section 16(a) of TSCA 1/ provides, in pertinent part, that any person who violates (the Act) shall be liable for a civil penalty . . . . Section 16(a)(2) provides:

> (B) In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent and gravity of (the violations) and, with respect to the violator, 2/ ability to pay, effect on ability to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require (emphasis supplied).
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> (C) The Administrator may compromise, modify, or remit, with or without conditions, any civil penalty which may be imposed under this subsection . . .

On February 9, 1988, Counsel for the Complainant and E & J conferred by telephone with the undersigned Administrative Law Judge, advising that they had agreed to the facts pertaining to the violations charged but were unable to reach agreement on the appropriate amount of the civil penalty, if any, to be imposed on account of the admitted violations. It was agreed

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1/ It will be observed that the provision for the assessment of civil penalties under said Section 16(a) does not provide, as an element of said violation, that such violation shall be done "knowingly or willfully" as is provided for a criminal violation under Section 16(b). Therefore, intent to violate, or the lack of such intent, shall be considered only in determining the gravity of the violation and whether such circumstance warrants increase or decrease in the penalty otherwise appropriate. See also 40 C.F.R. 22.27(b) of the Rules, which provides that the Administrative Law Judge (ALJ) shall determine civil penalties to be assessed and, while not bound by them, must consider the civil penalty guidelines.

2/ Following the establishment of a prima facie case by Complainant that the violation occurred and that the penalty proposed is appropriate, the burden of proving mitigating circumstances sufficient to justify a decrease in the proposed penalty and of presenting and of going forward with any defense to the allegations set forth in the Complaint is on the Respondent (40 C.F.R. 22.24).

and confirmed by letters from the parties, that E & J's Counsel would prepare a brief presenting facts concerning the nature and circumstances of the violations as well as the financial condition of E & J; that Complainant would thereafter Respond and an Initial Decision would then be issued. Pursuant to said understanding, Counsel for E & J filed "Respondent's Brief on Mitigation", dated Februry 26, 1988, which was received by me on February 29, 1988. Complainant's Response thereto was due first on March 10, 1988, which date was subsequently extended to March 25, 1988, by agreement of the parties. In said brief, the violations alleged are admitted except for Paragraph 23 of the Complaint, where it is alleged that two transformers were not properly marked, which Complainant Counsel acknowledged to be incorrect (Brief on Mitigation, page 7). Said brief further states that

> "Up to the present time, the EPA has agreed to reduce the total civil penalty from $16,500 to $9,900. Respondents currently owe legal fees, including compliance costs, in excess of $7,000 as a direct result of this Complaint."

E & J's brief contained a "Statement of Facts", apparently unchallenged by Complainant, which stresses that E & J were innocent purchasers of "orphan" transformers. An affidavit of Respondent Edward Pivirotto is attached thereto generally relating his financial condition, including tax returns, and his action to remedy said violations. Also included as attachments to said brief are a copy of the Guidelines for the Assessment of Civil Penalties under TSCA, and copies of Comprehensive Environmental Response, Compensation, and Liability ("CERCLA") 3/ cases alluding to the Innocent Purchaser Defense, 42 U.S.C. Section 9601 (35)(A) under that Act.

On March 21, 1988, Complainant advised by letter that E & J's Brief on Mitigation (page 19) had raised, as an issue, the fact that EPA had not applied

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3/ As stated in Footnote 1, supra, "intent to violate" is not an element of violations charged under TSCA; therefore, CERCLA decisions have no relevance on the issue here contended for.

a portion of the penalty policy dealing with (Respondents') ability to pay and inability to continue in business; that "the policy sets out as a guideline a settlement figure based on 4% of the average of the Respondent's income for the four previous years." Said letter then advised that Complainant agreed to use said guideline and that the parties would enter into a Consent Agreement and settle the case. It was agreed that, because of the settlement, Complainant's response to E & J's Brief was unnecessary (ALJ's letter, dated March 23, 1988).

Said Consent Agreement and Final Order was received by me on June 13, 1988, and provides that E & J consent to issuance of an Order of the Regional Administrator directing payment of $2,000 within 60 days from and after June 3, 1988, and that E & J acknowledges a present intent to dispose of (subject) PCB transformers . . . .

In subject "Application for Attorney Fees," E & J correctly states that, to be entitled to the award sought under EAJA, it must have been the "prevailing party" and that, in order for it to defeat an award to a prevailing party, the government has the burden of showing that its position was "substantially justified" (5 U.S.C. 504(a)(1)).

On this record, E & J are "eligible" to apply for an award under subsection 504(b)(1)(B) of the Act.

The next matter to be considered is whether E & J "prevailed" within the meaning of the EAJA and the regulations to be entitled to reimbursement for expenditures in defending against the charges that culminated in the Consent Agreement.

In CF Industries, Inc. ("CFI"), Docket No. FIFRA-09-0465-C-86-5 (May 1987), Judge Harwood cited Wyoming Wildlife Federation (Plantiff) v. United States, 792 F.2d 98 (10th Cir. 1986), which holds that Complainant does not have to win

a final judgment following a trial on the merits in order to qualify as a prevailing party; that the question is whether the Complainant, through settlement, achieved some of the benefits sought in bringing the suit, and that the courts make this determination by comparing the Complaint with the settlement agreement. Here the Complainant achieved its objective in assessing a civil penalty against E & J in order to deter future violations and facilitated action on the part of E & J to dispose of subject PCB items. The cessation of the admitted violations and deterrence from future violations by payment of the $2,000.00 civil penalty enables Complainant to achieve its purpose in bringing subject proceeding.

E & J contends that it is the prevailing party because the Complaint sought $16,500.00 in civil penalties but settled for $2,000.00. In CFI, supra, it is stated:

> "Respondent overlooks that the penalty named in the Complaint was specifically described as the penalty proposed (under the Act and regulations). It is clear from the Complaint that what is an appropriate penalty is negotiable 4/ for purposes of settlement depending largely upon (Respondent's) financial condition."

E & J sought throughout the negotiations with Complainant to have the case settled without any penalty because of the circumstances of E & J's acquisition of subject property and because of limited financial resources. 5/ It was

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4/ See text of 45 Fed. Reg. 59770, September 10, 1980, Guidelines for the Assessment of Civil Penalties under Section 16 of TSCA. Said document is not a regulation, but a policy statement providing a mechanism whereby Agency personnel, within specified boundaries, may exercise discretion in negotiating Consent Agreements.

5/ Upon examination of E & J's tax returns, this claim of limited resources apparently can be attributed more to penuriousness than to penury, as a capital gain exceeding $218,000.00 is there reported; also, interest income indicates a sizeable reserve. Thus, it is not remarkable that the negotiations which preceded the settlement were genuinely adverserial and protracted.

unsuccessful in this but persuaded the EPA to accept a reduced penalty of $2,000.00.

Throughout the negotiations in question, E & J admitted the violations and I find that the terms of the subject Consent Agreement are sufficiently favorable for Complainant to rebut E & J's contention that it is the prevailing party.

On July 25, 1988, E & J filed its Motion to submit further filings and Complainant has filed its objection thereto for the reason that the Rules of Practice do not provide for a reply and subsequent rejoinders. I agree. The Application and Response filed herein, pursuant to the Rules, present the position of each party and it is unlikely that further argument will add anything of value to the record on the issues here considered and there is, therefore, no reason to prolong this proceeding to permit argument not expressly contemplated by the Rules of Practice (40 C.F.R. 17.22).

In the premises, I find that E & J are not "prevailing parties" within the meaning of the EAJA and the regulations and are, therefore, not entitled to attorney fees and expenses.

The above finding is sufficient to deny the application. Nevertheless, even if it be assumed that E & J did prevail by obtaining a reduction in the proposed penalty, the application should be denied because Complainant has shown it was substantially justified in bringing this action.

In Natural Resources Defense Council (NRDC) v. EPA, the Court discussed the 1985 amendment to EAJA and the legislative history documented in H.R. 99-120, Part I, 99th Cong., 1st Sess. 9, reprinted in 1985 U.S. Code and Cong. News 138. The Legislative History confirmed some lower court

holdings that "substantial justification" means more than mere reasonableness (see also CFI, supra, l.c. 6). Under this standard, it must be here found that EPA's position was clearly reasonable and well founded in law and fact. Position was there defined as referring to the Agency position taken in litigation or the position taken by any agency and any official of the United States acting in his or her official capacity (703 F.2d 706(B)(2)).

The NRDC case was cited in Dougherty v. Lehman, 711 F.2d 555 (1983), l.c. 564, where it is stated:

> Suffice it to say, from these teachings, we are satisfied that for the government to show that its position had a "reasonable basis both in law and fact" it must:
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> First, show that there is a reasonable basis in truth for the facts alleged in the pleadings. If no such basis for the government's factual allegations exist, then the government's position may well be held not to be "substantially justified." (Emphasis supplied.)
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> Second, the government must show that there exists a reasonable basis in law for the theory which it propounds . . . .
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> * * *
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> Finally, the government must show that the facts alleged will reasonably support the legal theory advanced. 6/

On this record, that the facts alleged in the Complaint had a reasonable basis in truth, that there existed a reasonable basis in law for the theory advanced and that the facts alleged support the legal theory advanced is confirmed by the fact that E & J admitted the violations alleged.

6/ Note that the instant case is not one where the government is defending against a claim made against it as in U.S. for Heydt v. Citizens State Bank, 668 F.2d 444, 447(4), cited by Applicant.

Accordingly, I conclude that the position of the EPA in filing and prosecuting subject Complaint was substantially justified 7/

For the reasons above stated, it is recommended that the application of Respondents Edward Pivirotto and Josephine Pivirotto, d/b/a E & J Used Tool Company, for fees and expenses be denied.

DATED: July 28, 1988

Marvin E. Jones
Administrative Law Judge

7/ Keasler v. U.S., 766 F.2d 1227, 1231, states on the facts there considered, that the standard to be adhered to should not be read to raise a presumption that the government position was not substantially justified simply because it lost the case; nor does it require it to establish that its decision to ligigate was based on a substantial probability of prevailing. A judgment on the pleadings or a directed verdict will raise the possibility that the government was unreasonable in pursuing litigation. The EAJA reflects Congress' concern for the deterrent effect that attorney fees may have on unreasonable government action.

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with 40 CFR 22.27(a), I have this date forwarded to Ms. Linda McKenzie, Regional Hearing Clerk, Office of Regional Counsel, United States Environmental Protection Agency, Region VII, 726 Minnesota Avenue, Kansas City, Kansas 66101, the Original of the foregoing RECOMMENDED DECISION of Marvin E. Jones, Administrative Law Judge, and have referred said Regional Hearing Clerk to said Section which further provides that, after preparing and forwarding a copy of said RECOMMENDED DECISION to all parties, she shall forward the Original, along with the record of the proceeding, to the Hearing Clerk (A-110), EPA Headquarters, Washington, D.C., who shall forward a copy of said RECOMMENDED DECISION to the Administrator.

DATE: July 28, 1988

Mary Lou Clifton

Mary Lou Clifton
Secretary to Marvin E. Jones, ALJ

IN THE MATTER OF	
EDWARD PIVIROTTO AND JOSEPHINE PIVIROTTO, d/b/a E & J USED TOOL COMPANY,	Docket No. TSCA VII-87-T-649
Respondents	CERTIFICATE OF SERVICE

In accordance with Section 22.27(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ... (45 Fed. Reg., 24360-24373, April 9, 1980), I hereby certify that the original of the foregoing Recommended Decision issued by Honorable Marvin E. Jones along with the entire record of this proceeding was served on the Hearing Clerk (A-110), Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460 by certified mail, return receipt requested; that a copy was hand-delivered to Counsel for Complainant, Henry F. Rompage, Office of Regional Counsel, Environmental Protection Agency, Region 7, 726 Minnesota Avenue, Kansas City, Kansas 66101; that a copy was served by certified mail, return receipt requested on Respondent's attorney, Joseph G. Nassif, One Mercantile Center, Suite 2900, St. Louis, Missouri 63101.

If no appeals are made (within 20 days after service of this Recommended Decision), and the Administrator does not elect to review it, then 45 days after receipt this will become the Final Decision of the Agency (45 F.R. Section 22.27(c), and Section 22.30).

Dated in Kansas City, Kansas this 29 day of July 1988.

Linda K. McKenzie
Regional Hearing Clerk
Region VII

cc: Honorable Marvin E. Jones
U. S. Environmental Protection Agency
726 Minnesota Avenue
Kansas City, Kansas 66101