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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

<p>In the Matter of</p> <p style="padding-left: 40px;">Chempac Corporation</p> <p>017</p> <p style="padding-left: 100px;">Respondent</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Docket No. 5- IFFRA- 96-</p>
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**ORDER ON DISCOVERY**

Complainant has filed a motion, dated December 10, 1997, to compel Respondent to complete its prehearing exchange, and for further discovery in this matter. Respondent filed its response on December 19, 1997.

Completion of Prehearing Exchange

With respect to completion of Respondent's prehearing exchange, the motion appears largely moot or insubstantial. Respondent has stated that it is supplying the documents missing in its initial prehearing exchange and is willing to stipulate to the accuracy of copies of its financial records.

With respect to the remaining items, I generally allow the parties to freely modify or supplement their prehearing exchanges, without motion, until approximately 30 days before the hearing. Since the hearing is now postponed until March 11, 1998, the date for such supplementation of the exchanges is extended to February 13, 1998. Any party that fails to disclose witnesses or evidentiary materials adequately before the hearing may be precluded from offering that evidence, especially if there is not good cause for the delay, and the opposing party is prejudiced.

At this point no specific order will be issued compelling completion of the prehearing exchanges. Both parties will have until February 13, 1998, to complete or modify their prehearing exchanges. Respondent's motion for sanctions against Complainant is also denied. I expect the parties to mutually cooperate in completing the exchanges and further discovery.

Further Discovery

Complainant has also moved for further discovery of a large number of Respondent's financial documents. Respondent has moved for an extension of time to respond to this portion of the motion. Although Respondent has not yet responded, I will provide some guidelines that might be helpful.

Complainant apparently intends to undertake a detailed financial analysis of Chempace's ability to pay a penalty, for the purposes of this hearing. Respondent has already disclosed five years' of tax returns and financial statements. However, the Region now seeks numerous additional underlying financial documents, such as trial balances, accounts, contracts, and ledgers.

Initially, before any discovery is compelled, it should first be requested voluntarily from the opposing party. I expect the parties to cooperate in mutual discovery to the extent feasible.

Secondly, it may well not be necessary for the Region to pursue this type of detailed analysis of Respondent's finances in order to meet its burden of proof. The risk of failing to disclose or present evidence that could support Respondent's claim of inability to pay falls primarily on Respondent.

The Region can satisfy its burden of showing that it appropriately considered this penalty factor by producing "some evidence regarding the respondent's *general* financial status from which it can be *inferred* that the respondent's ability to pay should not affect the penalty amount." *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 541 (Environmental Appeals Board, TSCA Appeal No. 93-2, October 20, 1994) (italics in original). The burden then shifts to the respondent to present specific evidence that it cannot pay the penalty. While this could require rebuttal from the Region with additional specific evidence, that would only be only necessary in response to respondent's evidence. The tax returns and financial statements already disclosed and included in the Region's prehearing exchange comprise substantial evidence on this issue. The burden of going forward with specific additional evidence on its claimed inability to pay rests with Chempace. To the extent Chempace does not disclose or produce such evidence, it runs the risks of failing to carry its burden and of having adverse inferences drawn against its position on this issue.

This is not to say that the proposed amount of \$200,000 is necessarily shown appropriate by the evidence disclosed thus far. I note that the FIFRA Enforcement Response Policy also provides another method for estimating a respondent's ability to pay -- calculating four percent of a company's (and affiliated corporate entities') gross sales. I suggest the parties use this guideline as a starting point for settlement negotiations.

In the interim, Respondent's motion for an extension of time to respond to Complainant's motion for further discovery is granted. The response will now be due January 27, 1998.

Andrew S. Pearlstein

Administrative Law Judge

Dated: January 12, 1997

Washington, D.C.



Last updated on March 24, 2014